

U.S. Customs and Border Protection

Slip Op. 12–26

LA CROSSE TECHNOLOGY, LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 07–00114

[On cross motions for summary judgment of classification of weather measurement devices and clocks, judgment in part for the plaintiff and in part for the defendant.]

Dated: February 29, 2012

Wm. Randolph Rucker, Drinker, Biddle & Reath, LLP, of Chicago, IL for plaintiff.
Amy M. Rubin, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With her on the brief were *Tony West*, Assistant Attorney General, and *Barbara S. Williams*, Attorney-In-Charge. Of counsel on the brief was *Chi S. Choy*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

OPINION

Musgrave, Senior Judge:

I. Introduction

Plaintiff La Crosse Technology, Ltd. (“La Crosse”) challenges U.S. Customs and Border Protection’s (“Customs”) classification of imported weather measurement devices and clocks. Proper administrative protest procedure having been undertaken and all liquidated duties, taxes and fees having been paid, *see* 19 U.S.C. §§ 1514, 1515, jurisdiction is proper pursuant to 28 U.S.C. §1581(a).

II. Facts

Plaintiff La Crosse imports electronic devices which can measure, display and/or record various atmospheric and weather conditions.¹ In addition, the devices at issue function as clocks, displaying time,

¹ Plaintiff’s Statement of Material Facts not in Dispute (“Pl’s Material Facts”), ¶ 2. Unless otherwise noted, all facts cited in this opinion are undisputed. The model numbers involved here are: WS-1610, -2308, -2310, -2315, -2317, -3510, -3512, -3610, -7014, -7042, -7049, -7159, -7211, -7394, -7395, -8025, -8035, -8117, -8157, -8236, -8610, -9013, -9020, -9025, -9031, -9033, -9035, -9043, -9055, -9075, -9096, -9115, -9118, -9119, -9151, -9210, -9520, -9600, -9611, and WT-5120, -5130, -5432, and -5442 (“the Subject Merchandise”). *Id.*

date and other temporal information. *Id.* All the merchandise involved here was classified upon liquidation as clocks, under Heading 9105, Harmonized Tariff Schedule of the U.S. (“HTSUS”). The subject merchandise includes wireless instruments to measure outdoor conditions and a base unit with built-in instruments to measure indoor conditions and analyze the weather data collected. Pl’s Mat. Facts, ¶ 17. All the models include an LCD display and a microprocessor. Pl’s Mat. Facts, ¶ 21. The base unit may contain a thermometer and a hygrometer (to measure humidity). Pl’s Mat. Facts, ¶ 23. All models, save WT-5120, WS-8117, -8236, -8610, -9013 and -9210 contain barometers in the base unit which measure indoor air pressure. Pl’s Mat. Facts, ¶ 30; Def. Exh. C, D.

Using a microprocessor, an algorithm analyzes the barometer’s historical measurements to predict whether the weather will improve or deteriorate. Pl’s Mat. Facts, ¶¶ 31, 35. The forecast is presented as a “tendency” arrow, a series of icons, or an image of a boy (“Oscar outlook”) whose clothes indicate which type of weather is predicted. Pl’s Mat. Facts, ¶¶ 38, 39. Depending on the model, the included outdoor instruments measure temperature, humidity, wind speed, wind direction or rainfall. These measurements are transmitted wirelessly to the microprocessor in the base unit which processes and displays the data. Pl’s Mat. Facts, ¶ 25.

The merchandise can be categorized generally according to the design, features and marketing which distinguish each category. The first category, which the court will identify as “Weather Stations” are characterized by the following features: an indoor display which typically shows time, date, temperature (indoor and/or outdoor), minimum/maximum temperature (in/out), indoor humidity percentage, and weather forecast based upon readings from the device’s internal barometer.² These models are often identified in Plaintiff’s marketing materials as Weather Stations. Def’s Exh. A.

The second category are models advertised in La Crosse’s “Professional” series. *Id.* These include the features of the Weather Stations, but also include wind and/or rain sensors as well as additional data storage and the ability to download weather data to a personal com-

² Defendant’s Exhibit A (La Crosse Tech. 2006 Catalog). Defendant objects to Plaintiff’s use of the term Weather Station to refer generally to the devices at issue herein. Def’s Memo in Support of its Cross-Motion for Summary Judgment (“Def’s Memo”), at 1; Plaintiff’s Response to Defendant’s Motion for Summary Judgment (“Pl’s Resp.”), at 22 (“weather station” encompasses all of the . . . products in this group”). The court uses the term in this opinion because it adequately summarizes the features common to these models. The court’s adoption of the term has no bearing on the substance of this decision. The following 25 model numbers fall in the Weather Station category: WS-7014, -7042, -7049, -7159, -7211, -7394, -8025, -8035, -9013, -9020, -9025, -9031, -9033, -9043, -9055, -9075, -9096, -9115, -9118, -9119, -9151, -9210, -9520, -9600 and -9611.

puter for analysis.³ Most of the models in this category are also referred to in Plaintiff's marketing literature as "weather centers". Pl's Mat. Facts, ¶ 11.

The Clock models are described in La Crosse's literature as "Atomic Clocks" and "Projection Clocks". Pl. Exh. 4; Def. Exh. A. These models include digital clocks some of which project the time and temperature on a wall or ceiling. *Id.* The Clocks also include indoor/outdoor temperature displays and a weather forecast based on an internal barometer.⁴ Plaintiff markets Models WS-8117, -8236 and -8157 as "Atomic Wall Clocks". Pl's Exh. 4; Def. Exh. A. Models WT-5120, -5130, and WT-5432 and -5442 are marketed as "Projection Alarm Clocks". *Id.* The Clocks all display the time in larger size type than the weather-related information. *Id.*

All of the models at issue display time and date. Pl's Mat. Facts, ¶ 14. All but one (WS-3512) display indoor temperature. *Id.* Thirty-three models have a time alarm; twenty-seven show indoor humidity. *Id.*

III. Applicable Legal Standards

Proper tariff classification is determined by the General Rules of Interpretation ("GRIs") of the Harmonized Tariff System of the U.S. ("HTSUS") and the Additional U.S. Rules of Interpretation. *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). The GRIs are applied in numerical order. *BASF Corp. v. United States*, 482 F.3d 1324, 1326 (Fed. Cir. 2007). Classification is a question of law requiring ascertainment of proper meaning of relevant tariff provisions and determining whether the merchandise comes within the description of such terms. *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999). Interpretation of the HTSUS begins with the language of the tariff headings and subheadings of the HTSUS and their section and chapter notes, and may also be aided by the Explanatory Notes published by the World Customs Organization. *Trumpf Med. Sys., Inc. v. United States*, 34 CIT ___, ___, 753 F. Supp. 2d 1297, 1305–1306 n. 20 (2010).

³ Def's Exh. A. The following 11 model numbers fall in the Professional category: WS-1610, -2308, -2310, -2315, -2317, -3510, -3512, -3610, -7395, -9035 and -8610. The government conceded that Professional model numbers WS-2308, -2310, -2315, -2317, -3512 and -3610 are properly classified in Heading 9015, HTSUS, though it did not formally stipulate to that classification for those models. Defendant's Statement of Undisputed Material Facts ("Def's Mat. Facts"), ¶ 10.

⁴ Def's Exh. A. The court notes that Plaintiff has withdrawn its claims regarding Models WS-8117, -8236 and WT-5120, which omit the barometer and which Plaintiff admits are classifiable in Heading 9105, HTSUS. Pl's Mat. Facts, ¶ 68. The remaining model numbers in the Clock category are: WS-8157, WT-5130, -5432 and -5442.

Both parties move for judgment pursuant to USCIT Rule 56, which is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” USCIT R. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The court will grant a motion for summary judgment “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 (1986).

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a “genuine” dispute as to those facts. Fed. Rule Civ. Proc. 56(c). As we have emphasized, “[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–587 (1986) (footnote omitted).

Scott v. Harris, 127 S. Ct. 1769, 1776 (2007).

IV. Competing Tariff Provisions

La Crosse classified the subject merchandise under subheadings 9025.80.10, 9026.10.20, 9105.21.40, and 9105.91.40, HTSUS.⁵ Customs reclassified the merchandise at liquidation under HTSUS subheading 9105.91.40, as “other clocks.” Pl’s Mat. Facts, ¶ 4. Based on its review of the merchandise during this litigation, the government has abandoned the classification under subheading 9105. 21.40 and 9105.91.40, HTSUS, imposed upon liquidation for several models. Def’s Memo, at 5.

⁵ Pl’s Mat. Facts, ¶ 3.

The subheadings at issue are as follows:

| | | |
|------------|--|---|
| 9015: | Surveying (including photogrammetrical surveying), hydrographic, oceanographic, hydrological, meteorological or geophysical instruments and appliances, excluding compasses; rangefinders; parts and accessories thereof: ⁶ | |
| 9015.80 | Other instruments and appliances [than rangefinders, theodolites, tachymeters, levels, and photogrammetrical surveying instruments and appliances]; | |
| | Other [than optical instruments and appliances]; | |
| 9015.80.80 | Other [than seismographs] | Free |
| 9025 | Hydrometers and similar floating instruments, thermometers, pyrometers, barometers, hygrometers and psychrometers, recording or not, and any combination of these instruments; parts and accessories thereof: ⁷ | |
| | Thermometers and pyrometers, not combined with other instruments: | |
| 9025.19 | Other [than liquid filled]: | |
| 9025.19.80 | Other [than pyrometers] | 1.8% |
| 9025.80 | Other instruments: | |
| 9025.80.10 | Electrical | 1.7% |
| 9105 | Other clocks [than wrist watches, pocket watches and other watches, clocks with watch movements, and instrument panel clocks]: | |
| | Wall clocks: | |
| 9105.21 | Electrically operated: | |
| 9105.21.40 | With opto-electronic display only | 3.9% on the movement and case + 5.3% on the battery |
| | Other: | |
| 9105.91 | Electrically operated: | |
| 9105.91.40 | With opto-electronic display only | 3.9% on the movement and case + 5.3% on the battery |

V. Analysis

After considering the parties' motions, the court finds that there are no material facts in dispute and that the matter may be resolved summarily. The Weather Stations are properly classified in subhead-

⁶ The Explanatory Notes to Heading 9025 explain that it includes "combinations of [hydrometers, thermometers, barometers, hygrometers, psychrometers], except when the addition of one or more other devices gives the combination the character of equipment or appliances covered by more specific headings (*e.g.*, **heading 90.15** as meteorological instruments)." (emphasis in original).

⁷ The Explanatory Notes to Heading 9015 exclude "thermometers, barometers, hygrometers and psychrometers [and] combinations of such instruments (**heading 90.25**)."⁷ (Emphasis in original). The notes explain that it does include wind direction indicators, anemometers and rain gauges.

ing 9025.80.10, HTSUS, the Professional models in subheading 9015.80.80, HTSUS, and the Clocks in subheading 9105.91.40, HTSUS. For the following reasons Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment are each granted in part and denied in part.

A. *Parties' Contentions*

Plaintiff argues that the subject merchandise should be classified as meteorological devices in Heading 9015, HTSUS, or as combination devices in Heading 9025, HTSUS.

[T]he Subject Merchandise falls into two categories, forecasting weather stations and other weather stations, which will be classified, in accordance with the General Rules of Interpretation ("GRI"), under one of two HTSUS headings based on (1) a "principal use" analysis pursuant to GRI 1; (2) a rule of relative specificity analysis pursuant to GRI 3(a); or (3) an essential character analysis pursuant to GRI 3(b). Specifically, Plaintiff contends that three of the weather station models are properly classified in HTSUS heading 9025 (model numbers WS-8610, WS-9013, and WS-9210), while the remaining weather models stations [*sic*] belong to a class of articles that are more specifically described as "meteorological appliances" in HTSUS Heading 9015.⁸

Plaintiff argues that Heading 9015 (meteorological instruments) is preferable to Heading 9105 (clocks) because the articles are "more than" clocks. "The forecasting weather stations are much more than clocks as they are not essentially constructed for indicating the time of day." Pl's Memo, at 13, citing *Casio, Inc. v. United States*, 73 F.3d 1095, 1097 (Fed. Cir. 1996). According to Plaintiff, the "unique function" of weather forecasting takes the devices "beyond the scope of

⁸ Pl's Memo in Support of its Motion for Summary Judgment ("Pl's Memo"), at 2-3. Plaintiff argues that classification under Heading 9015 requires proof of principal use. See Additional U.S. Rule of Interpretation 1(a), HTSUS. But Heading 9015 provides for "meteorological instruments," not "instruments used for meteorology". Cf., *Primal Lite, Inc. v. United States*, 182 F. 3d 1362, 1363 (Fed. Cir. 1999) ("Subheading 9405.30.00 is a 'use' provision, because the classification decision turns on whether the imported lighting sets are 'of a kind used for Christmas trees.'"). An anemometer, for example, is listed as a meteorological instrument in the Explanatory Notes to Heading 9015, and thus is classifiable *eo nomine* under Heading 9015. Although the subject merchandise can be used for more than one purpose, that is simply a reflection of each models' multiple features. The merchandise does not consist of a single item subject to multiple uses. See, e.g., *St. Eve International, Inc. v. United States*, 267 F. Supp. 2d 1371, 1374 (CIT, 2003) ("underwear" or "tops" classifications controlled by use). The court finds that Plaintiff failed to prove that Heading 9015 was a "use" provision, and that it also failed to provide enough admissible use-related evidence to prove its case in any event.

devices covered by headings 9025 and 9105.” Pl’s Memo, at 13. Based on two definitions of “meteorology”, Plaintiff argues that Heading 9015 should include all its “weather forecasting instruments and appliances”. Pl’s Memo, at 13–14.

The government counters that GRI 1 is inapplicable because the subject merchandise contain a variety of features and thus are composite goods classified pursuant to GRI 3. “A tariff heading that does not - and can not - describe all features, functions and components of an imported product does not wholly encompass that product and can not provide the correct classification of the product under GRI 1.” Def’s Memo, at 15 (emphasis omitted). “In effect, La Crosse seeks to have the Court classify the bulk of its products based upon only two of many components - a barometer and a microprocessor.” Def’s Memo, at 12. The government argues:

Because no single tariff heading describes all of the features, functions and components of any product at issue, analysis under GRI 1 is not appropriate here. The proper classification of these products can only be determined in accordance with GRI 3 with consideration given to the entire range of components, features and functions possessed by each individual item. La Crosse’s theories, under which its “forecasting” products are all classifiable in Heading 9015 and its “other” products are classifiable in Heading 9025, lack both legal and factual support.

Def’s Memo, at 7.

B. GRI 1 Analysis

Plaintiff argues that the subject merchandise is *prima facie* classifiable using GRI 1. “[I]f a heading describes the forecasting weather stations, they should be classified under that heading.” Pl’s Memo, at 10 (citation omitted). Yet Plaintiff admits that its preferred heading only covers part of the goods involved. *Id.* Under GRI 1, goods are classifiable according to the terms of the headings and applicable section and chapter notes. Where, as here, goods can be classified under more than one heading, GRI 1 is not suitable. Rather, GRI 3 applies because the subject merchandise is *prima facie* classifiable under more than one heading.

C. GRI 3 Analysis

GRI 3 provides:

3. When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

The CAFC has outlined the analytical framework for GRI 3:

The [GRI] of the [HTSUS] help determine which subheading should govern the duty to be assessed on imports of these [subject goods]. According to the GRI 3(a), when ‘goods are, *prima facie*, classifiable under two or more headings,’ the court must choose the heading providing the most specific description. This is the so-called relative specificity test. GRI 3(a) provides an exception to the applicability of this test, however, when two or more headings each refer . . . to only part of the items []. ‘Pursuant to GRI 3(b), goods not classifiable under GRI 3(a) are classified by the ‘component which gives them their essential character.’ This is the so-called essential character test. GRI 3(c) provides a default rule for goods not classifiable after resort to either GRI 3(a) or (b).

Home Depot, USA, Inc. v. United States, 427 F. Supp. 2d 1278, 1292 (CIT 2006), affirmed 491 F.3d 1334 (Fed. Cir. 2007), citing *Better Home Plastics Corp. v. United States*, 119 F.3d 969, 971 (Fed. Cir.1997).

1. GRI 3(a) Relative Specificity Analysis

Plaintiff argues the merchandise is classifiable according to GRI

3(a)'s relative specificity analysis. However, as pointed out in *Toy Biz, Inc. v. United States*, 26 CIT 816, 826, 219 F. Supp. 2d 1289, 1300 (2002), that rule does not apply where the competing headings cover only part of the goods in question.

Toy Biz ignores the express caveat to GRI 3(a)'s rule of 'relative specificity.' That caveat, set forth in the second sentence of the GRI 3(a), provides that where — as here — the competing headings 'each refer to part only' of the composite good, 'those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.' See GRI 3(a).

Toy Biz, 26 CIT at 826, 219 F.Supp.2d at 1300; see also *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246, 1252 (Fed. Cir. 2004). Because the base units could be classified in two combinations of headings (9015/9105 or 9025/9105), under GRI 3(a) the competing headings are deemed equally specific and analysis under GRI 3(b) is appropriate.

2. GRI 3(b) Analysis

The analysis next proceeds to GRI 3(b), which according to the Explanatory Notes to GRI 3 applies only to mixtures, composite goods and goods put up in sets for retail sale. Explanatory Note (VI) to GRI 3(b). The parties assume that the subject merchandise falls under GRI 3 because it consists of composite goods. See Pl's Memo, *passim*, and Def's Memo, at 32 ("[E]ach product at issue is a composite good"). But neither party analyzes whether the subject merchandise satisfies the requirements applicable to composite goods. The Explanatory Notes to GRI 3 explain that composite goods are as follows:

[C]omposite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.⁹

GRI 3 composite goods must be fitted together, physically attached or attachable. The subject merchandise base units qualify as compos-

⁹ Explanatory Note (IX) to GRI 3(b) (emphasis in original). Cf. Explanatory Note (VI) to Section XVI, HTSUS, which explains that for the composite goods of Note 3, Section XVI, "[a]ssemblies of machines should not be taken to be fitted together to form a whole unless the machines are designed to be permanently attached either to each other or to a common base, frame, housing, etc." The court notes that in this case the result would be the same under Rule 3 to Section XVI.

ite goods because they include both clock and weather components. However, almost all models of the subject merchandise include at least one wireless sensor which is designed to be placed outdoors away from the indoor base unit.¹⁰ The applicable rules differ depending on the category of goods involved.

3. The Weather Stations are Composite Goods

The Weather Stations can be classified as GRI 3(b) “composite goods,” despite the inclusion of the wireless components that do not attach to the base unit because the wireless outdoor sensors constitute accessories to the base units. See *Toy Biz*, 26 CIT at 829, 219 F.Supp.2d at 1302 (film cartridges constituted accessories to projectors). Under Chapter 90 Rule 2(a), accessories which are goods included in a Chapter 90 heading “are in all cases to be classified in their respective headings.” Heading 9025, under which the Weather Stations’ outdoor thermometers and hygrometers would be separately classified, provides for “thermometers, . . . barometers, hygrometers and psychrometers, recording or not, and any combination of these instruments ; parts and accessories thereof.” All the Weather Stations contain either thermometers or barometers in the base unit. Therefore, the models including wireless thermometers and hygrometers can be classified together because Heading 9025 provides for “any combination” of instruments covered by that heading.

4. Clocks and Professional Models are Retail Sets

The analysis for Clocks and Professional models under Headings 9105 and 9015 is different. The Explanatory Notes to Heading 9015 (meteorological instruments) provide that the heading includes wind and rain sensors. Under Chapter 90 Note 2(a), those sensors are classifiable with the Professional base units under Heading 9015. However, the Professional models also include wireless temperature sensors classifiable pursuant to Note 2(a) under Heading 9025.¹¹ Because the wireless sensors do not attach to the base units, they cannot be analyzed as composite goods.

Note 2(a) requires that Heading 9025 sensors should be classified separately from the base units. Therefore the court must determine whether the Professional units can be classified under GRI 3(b)’s

¹⁰ Def’s Exh. A. Model 8236, “Atomic Digital Wall Clock” is the only model of the subject merchandise unequipped with an external wireless sensor. Plaintiff has conceded that this model is classifiable as a clock under Heading 9105, HTSUS.

¹¹ Model WS-3512 does not include a temperature sensor classifiable under Heading 9025, only a wireless wind sensor also classifiable in Heading 9015. However the same retail sets analysis described *infra* applies to Model WS-3512 as to the other Professional models.

“retail sets” provision. A GRI 3(b) retail sets analysis is also necessary for the Clocks because they also include wireless sensors otherwise classifiable in Heading 9025.

The Explanatory Notes to GRI 3(b) explain:

(X) For the purposes of this Rule, the term “goods put up in sets for retail sale” shall be taken to mean goods which:

(a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule;

(b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and

(c) are put up in a manner suitable for sale directly to users without repacking (*e.g.*, in boxes or cases or on boards).

Explanatory Note (X) to GRI 3(b) (2007). Criteria (a) is satisfied in this case for the reasons set forth above. Likewise undisputed is the fact that the subject merchandise is sold at retail and therefore satisfies criteria (c). Pl’s Mat. Facts, ¶ 48; Pl. Exh. 5 (retail packaging). The remaining issue is whether the subject merchandise consists “of products or articles put up together to meet a particular need or carry out a specific activity.” Customs has summarized the particular need/specific activity requirement as requiring “a relationship between the articles contained in a group, and such relationship must establish that the articles are clearly intended for use together for a single purpose or activity to comprise a set under GRI 3(b).” CBP Informed Compliance Publication, *Classification of Sets* (2004) (“Sets ICP”), at 12. The Sets ICP summarizes the rule as follows: “for goods put up together to meet the ‘particular need’ or ‘specific activity’ requirement and thereby be deemed a set, they must be so related as to be clearly intended for use together or in conjunction with one another for a single purpose or activity.” Sets ICP, at 12.

The court finds that the base units and wireless sensors are closely related to the specific activity of monitoring weather conditions. The sensors detect weather-related conditions and relay that information to the base units, which display the information to the user. The two items are linked together by wireless signals which transmit the instrument data for processing and display on the base unit. The devices’ ability to connect wirelessly alone demonstrates that the sensors and base units are clearly intended to be used together. That the connection is used to transfer weather data shows that the use is related to the single purpose of weather monitoring. Even where the

essential character of a model is given by the clock component, the relationship between the base unit and weather sensors is sufficient to qualify as a “retail set” under GRI 3(b).

D. Essential Character

Resort to GRI 3’s essential character rule to classify each of the categories of models is required. As Defendant points out, “[w]hether the combination remains classifiable in Heading 9025 or is to be classified in another heading, such as Heading 9015 or Heading 9105 depends on which of the components of the La Crosse product imparts the essential character.” Defendant’s Reply to Plaintiff’s Response to Defendant’s Motion for Summary Judgment, at 8. The Explanatory Notes to GRI 3(b) state “[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.” Explanatory Note (VIII) to GRI 3(b) (2007).

In this case the essential character of the devices can be determined by their primary functionality and marketing. See *The Pillsbury Co. v. United States*, 431 F.3d 1377, 1380 (Fed. Cir. 2005), citing *Mead Corp. v. United States*, 283 F.3d 1342 (Fed. Cir. 2002) (marketing information relevant to essential character inquiry). Although the agreed facts are meager, they are sufficient to answer the question before the court. The models share common essential characteristics among the categories.

1. Weather Station Classification

The Weather Stations are marketed by La Crosse as “Wireless Temperature Stations” or “Wireless Weather Stations”. Def. Exh. A. They have a concentration of weather-related features which predominate in number over the clock functions. For example, Model WS-7394 includes an outdoor temperature sensor, indoor barometer and humidity sensors, a display featuring a barometric pressure arrow, barometric history graph, weather forecast capability, temperature (in/out) readings, and recording of temperature minimums and maximums. *Id.* The clock functions include atomic time/date, time display, update to DST and perpetual calendar. *Id.* The amount of display space devoted to the weather functions predominates over the clock information displayed on the Weather Stations. Def. Exh. A. For these reasons the essential character of the Weather Stations is given by the weather-related functions and marketing, which predominate over their clock-related functions.

Heading 9015, HTSUS, provides for meteorological instruments and appliances. The Explanatory Notes to that Heading explain that it “does not cover thermometers, barometers, hygrometers and psychrometers, nor combinations of such instruments (**heading 90.25**).” Explanatory Note (V) to Heading 9015 (emphasis in original). The Explanatory Notes to the competing Heading 9025 explain that the latter heading includes combination instruments “except when the addition of one or more *other* devices gives the combination the character of equipment or appliances covered by more specific headings (e.g., **heading 90.15** as meteorological equipment).” Explanatory Note to Heading 9025 (italics supplied, other emphasis in original).

Plaintiff argues that the inclusion of the Weather Stations’ forecasting feature, by itself, is sufficient to change their character from a combination instrument of Heading 9025 to meteorological equipment of Heading 9015. PI’s Memo, at 16. Plaintiff also claims that the Weather Stations should be classified in Heading 9015 because their combination of barometers, thermometers, hygrometers and forecasting capabilities make them “more than” the devices restricted to Heading 9025 by the Explanatory Notes. “The forecasting weather stations are more than a simple combination of the named instruments of heading 9025 or a simple clock of heading 9105, they are weather forecasters [which] automatically perform the complex task of measuring, recording, and analyzing specific meteorological data to calculate a forecast of future weather conditions.” PI’s Memo at 13.

The forecasting function is based on measurements by the barometer in the base unit, and not on any measurement by a device of the kind listed in the Explanatory Notes to Heading 9015. The use of a “tendency arrow” or “Oscar outlook” icons show the Weather Stations’ forecasts are imprecise and lack the character of meteorological equipment. The forecasting function touted by Plaintiff is the updated digital equivalent of the arm on an analog barometer dial that marks the barometer’s current position, and which is used to determine air pressure (and thus weather) tendencies by later consultation to determine whether the air pressure is rising or falling. The forecasting capability does not give the Weather Stations the character of Heading 9015’s meteorological equipment.

Plaintiff argues that the Weather Stations’ wireless instruments make them akin to the “radio-sonde” devices described in the Explanatory Notes to Heading 9015 and excluded by those for Heading 9025. PI’s Resp., at 16. A “radiosonde” is “a balloon-borne instrument for the simultaneous measurement and transmission of meteorological data” McGraw-Hill *Dictionary of Scientific and Technical Terms* (4th Ed., 1989), at 1557; see also Def. Ex. N (NIS Radiosonde Fact Sheet). Although a radio-sonde includes many of the same in-

struments as Plaintiff's Weather Stations, Plaintiff's analogy is inapt because the character of an instrument designed to be borne aloft by a weather balloon is different from one designed to be placed in one's living room. The first is of a professional meteorological nature, the second (in this case) is not.

The Weather Stations are combination thermometers/barometers/hygrometers, and are clearly covered by Heading 9025's "combinations" language. They lack the wind or rain sensors of the Professional models.¹² The Explanatory Notes to Heading 9025 reinforce the court's conclusion that the Weather Stations are properly classifiable under subheading 9025.80.10, as other electrical instruments.

2. Professional Models Classification

The essential character of the Professional models is also given by their weather-related functions because they overwhelmingly predominate over the clock functions. What distinguishes them for classification purposes from the Weather Stations is the inclusion of wind and rain sensors, as well as the ability to download weather data to a computer for further analysis.¹³ See Explanatory Note (V) to Heading 9015 (stating Heading 9015 includes anemometers and rain gauges and indicators). For example, Model WS-2315 includes the same weather functions as Model WS7394, but adds outdoor sensors for humidity, rainfall and wind speed and direction. It also adds an outdoor humidity display and history function, as well as dew point-, wind- and rain-related functions not found on the WS-7394. The only additional clock feature is a time alarm compared to the WS-7394. For these reasons, therefore, the essential character of the Professional models is given by their meteorological functions.¹⁴ The additional features give the Professional models the character of meteorological instruments of Heading 9015, and they are properly classified in subheading 9015.80.80, HTSUS.

3. Clocks Classification

The Clocks are distinguished by their numerous and predominant clock-related functions and clock-related marketing. They are sold by

¹² Plaintiff cites to ruling NY 854184, dated July 24, 1990, to support its argument that the Weather Stations should be classified under Heading 9015. Pl's Resp., at 7. However, the device classified in NY 854184 included wind speed and rain sensors, which the Weather Stations lack.

¹³ Models WS-3510 and -8610 lack wind or rain sensors, but retain the character of meteorological instruments because they store large amounts of weather data and transmit that data to a PC for analysis.

¹⁴ The court also notes the concession by the government that many of these models are classifiable in Heading 9015.

Plaintiff as either “Atomic” or “Projection” clocks in Plaintiff’s catalog and on their website. They display time in larger type size than weather information. Most project the time and temperature on the wall in large numbers. The array of time-related features is equal or greater than the weather-related functions. All but Model WS-5130 omit the humidity sensor and related functions.¹⁵ The forecasting function of the Clocks is insufficient to give them the character of Heading 9015 meteorological equipment for the same reasons described above for Weather Stations. The clock features, layout of the displays and marketing information demonstrate that the essential character of the Clocks is given by the clock component. They are properly classified as entered, under subheading 9105.91.40.

VI. Conclusion

For the reasons set forth above, the court finds that the subject merchandise is classifiable in part under subheadings 9025.80.10 (Weather Station models), 9015.80.80 (Professional models) and 9105.91.40 (Clock models). Judgment will therefore enter in part in favor of the Plaintiff and in part in favor of Defendant.

Dated: February 29, 2012

New York, New York

/s/ R. Kenton Musgrave,
SENIOR JUDGE

Slip Op. 12–27

PAT HUVAL RESTAURANT & OYSTER BAR, INC., et al. Plaintiffs, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, et al., Defendants, and THE TIMKEN COMPANY AND MPB CORPORATION, Defendant Intervenors.

Before: Gregory W. Carman, Judge
Timothy C. Stanceu, Judge
Leo M. Gordon, Judge
Consol. Court No. 06–00290

[Dismissing the consolidated action for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction]

¹⁵ Model WS-5130 shares most of the same features with Model WS-9520, though the WS5130 lacks an outdoor humidity sensor and barometric readout. WS-5130 is marketed as a “Projection Alarm Clock with Oscar Outlook Forecaster”, while WS-9520 is marketed as a “Wireless Projection Forecast Station with Oscar Outlook Forecaster”. Because it lacks weather functionality and is marketed as a clock, the essential character of Model WS-5130 is given by its clock-related functions.

Dated: March 1, 2012

Jacques Pierre Soileau, Soileau & Soileau of Breaux Bridge, LA, for Plaintiffs Pat Huval Restaurant & Oyster Bar, Inc., Aqua Farms Crawfish, Inc., Catfish Wholesale, Inc., Charles Bernard (d/b/a/ Charles' Crawfish Pad), Andre Leger (d/b/a/ Chez Francois), Jim Fruge (d/b/a/ Acadiana Fisherman's Co op), J. Bernard Seafood Processing, Inc., and Frank Melancon (d/b/a French's Enterprises Seafood Peeling Plant).

Herbert Carl Shelley, *Alice Alexandra Kipel*, *Laura Rose Ardito*, and *Michael Thomas Gershberg*, Steptoe & Johnson, LLP of Washington, DC, for Plaintiff SKF USA, Inc.

John Marshall Gurley, and *Nancy Aileen Noonan*, Arent Fox, LLP, of Washington, DC, for Plaintiff Koyo Corporation of U.S.A.

David S. Silverbrand, *Courtney S. McNamara*, *Michael J. Dierberg*, and *Todd M. Hughes*, Trial Attorneys, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for Defendant United States Customs and Border Protection. With them on the briefs were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, and *Andrew G. Jones*, Office of Assistant Chief Counsel, United States Customs and Border Protection, of counsel.

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 on the briefs were *James M. Lyons*, General Counsel, and *Neal J. Reynolds*, Assistant General Counsel for Litigation.

Geert De Prest, *Terence P. Stewart*, *Amy S. Dwyer*, and *Patrick J. McDonough*, Stewart and Stewart, of Washington, DC, for Defendant Intervenors.

OPINION

CARMAN, JUDGE:

INTRODUCTION

This action has been consolidated from six cases brought by a group of eight domestic producers of processed crawfish tail meat (collectively, the “Pat Huval Plaintiffs”),¹ Koyo Corporation of U.S.A. (“Koyo”),² and SKF USA, Inc. (“SKF”),³ challenging the constitutionality of the Continued Dumping and Subsidy Offset Act of 2000 (“CDSOA” or “Byrd Amendment”), and the administration of the statute by Defendants.⁴ These cases were consolidated by order of the Court under Consol. Ct. No. 06 00290. (Order (Feb. 23, 2007), ECF No. 91; Order (Mar. 16, 2011), ECF No. 207.) Plaintiffs claim that they

¹ Second Supp. and Am. Compl., Ct. No. 06 00290, Nov. 8, 2006, ECF No. 72 (“Compl. 1”).

² Compl., Ct. No. 06 00324, Sept. 25, 2006, ECF No. 4 (“Compl. 2”); Compl., Ct. No. 08 00340, Sept. 30, 2008, ECF No. 2 (“Compl. 5”); Compl., Ct. No. 10 00001, Jan. 7, 2010, ECF No. 2 (“Compl. 6”).

³ Compl., Ct. No. 06 00328, Sept. 29, 2006, ECF No. 4 (“Compl. 3”); Compl., Ct. No. 07 00035, Feb. 5, 2007, ECF No. 4 (“Compl. 4”).

⁴ Pub. L. No. 106 387, §§ 1001 1003, 114 Stat. 1549, 1549A 72 75 (codified at 19 U.S.C. § 1675c (2000)), repealed by Deficit Reduction Act of 2005, Pub. L. 109 171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007).

unlawfully were denied affected domestic producer (“ADP”) status, which would have qualified them to receive distributions under the CDSOA.

The case is now before the Court on dispositive motions. Defendants United States Customs and Border Protection (“CBP”) and the United States International Trade Commission (“ITC”) each move to dismiss Plaintiff’s complaint for failure to state a claim upon which relief can be granted pursuant to USCIT Rule 12(b)(5), and for judgment on the pleadings under USCIT Rule 12(c). (Def. U.S. Customs and Border Prot.’s Mot. to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted and for J. on the Pleadings (“CBP Mot.”), May 6, 2011, ECF No. 219); (Def. U.S. Int’l Trade Comm’n’s Mot. to Dismiss for Failure To State a Claim and For J. on the Pleadings (“ITC Mot.”), May 2, 2011, ECF No. 215). Defendant Interveners Timken US Corp. and MPB Corp. (collectively, “Timken”) move for judgment on the pleadings pursuant to USCIT Rule 12(c) with respect to the complaints filed by SKF and Koyo. (Timken’s Mot. for J. on the Pleadings with Respect to SKF’s and Koyo’s Compl.’s (“Timken Mot.”), May 2, 2011, ECF No. 217.) For the reasons set forth below, Plaintiffs’ consolidated action will be dismissed under USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted, and under USCIT Rule 12(b)(1) on timeliness and mootness grounds.

BACKGROUND

Certain background information is provided in our earlier opinion in this case, *Pat Huval Restaurant & Oyster Bar, Inc. v. United States*, 32 CIT ___, 547 F. Supp. 2d 1352 (2008), and is supplemented herein.

The Pat Huval Plaintiffs⁵ are domestic producers of crawfish tail meat whose seek to obtain status as affected domestic producers and receive CDSOA disbursements from duties collected on an antidumping duty order on crawfish from China. (Compl. 1 at 10.) The Pat Huval Plaintiffs have not received CDSOA distributions because “they did not indicate ‘support’ of the original 1996 crawfish anti-dumping petition.” (Compl. 1 ¶ 22.)

Plaintiff Koyo is a U.S. producer of tapered roller bearings and ball bearings. (See, e.g., Compl. 2 ¶ 1.) Koyo seeks through this litigation to obtain status as an affected domestic producer and receive CDSOA disbursements for Fiscal Years 2006 2009 from duties collected on 13

⁵ The “Pat Huval Plaintiffs” are Pat Huval Restaurant & Oyster Bar, Inc., Aqua Farms Crawfish, Inc., Catfish Wholesale, Inc., Charles Bernard (d/b/a/ Charles’ Crawfish Pad), Andre Leger (d/b/a Chez Francois), Jim Fruge (d/b/a Acadiana Fisherman’s Co op), J. Bernard Seafood Processing, Inc., and Frank Melancon (d/b/a French’s Enterprises Seafood Peeling Plant). (Compl. 1 ¶¶ 3 10.)

antidumping duty orders on tapered roller and ball bearings. (Compl. 2 ¶ 20; Compl. 5 ¶ 19; Compl. 6 ¶¶ 19-21.) Koyo states that it did not support any of the petitions that culminated in the issuance of those 13 orders. (See, e.g., Compl. 2 ¶¶ 16, 28 (“Koyo USA did not support the underlying antidumping duty investigations for the subject bearings orders”; see also Compl. 5 ¶¶ 15, 29; Compl. 6 ¶¶ 15, 30.) The ITC did not include Koyo on a list that it sent to Customs of producers potentially eligible for ADP status “for any of the fiscal years . . . since the promulgation of the CDSOA.” (Compl. 2 ¶ 17; see also Compl. 5 ¶ 16; Compl. 6 ¶ 16.)

Plaintiff SKF is a U.S. manufacturer of antifriction bearings, including ball bearings. (See, e.g., Compl. 3 ¶ 1.) SKF also seeks to obtain status as an ADP and receive CDSOA disbursements for Fiscal Years 2004 and 2006 from duties collected on various antidumping duty orders on antifriction bearings. (Compl. 3 Prayer for Relief; Compl. 4 Prayer for Relief.) SKF alleges that it was considered “part of the domestic industry for [antifriction bearings]” but does not allege that it supported the petitions that culminated in the issuance of the relevant antidumping duty orders. (See Compl. 3 ¶ 26; Compl. 4 ¶ 37.) Because of its failure to support the petitions, SKF “has been denied status as an ‘affected domestic producer’ and, consequently, has been deemed ineligible to receive disbursements under the CD-SOA.” (Compl. 3 ¶ 38; Compl. 4 ¶ 52.)

In 2008, acting on motions to dismiss pursuant to USCIT Rules 12(b)(1) and 12(b)(5), we limited the relief Plaintiffs could obtain for their facial constitutional challenges, and limited which agency actions the Pat Huval Plaintiffs would be permitted to challenge in their Administrative Procedure Act (APA) claim.⁶ *Pat Huval*, 547 F. Supp. 2d at 1365.

JURISDICTION

The Court exercises subject matter jurisdiction over this action pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(4), which grants the Court of International Trade exclusive jurisdiction of any civil action commenced against the United States that arises out of any law providing for administration and enforce-

⁶ Specifically, we held that “Plaintiffs’ claims bringing facial constitutional challenges to the Byrd Amendment are dismissed to the extent that they seek relief for Byrd distributions that occurred prior to the two year periods ending with commencement of their respective suits,” and that “Count Two of the Crawfish Producers’ complaint is dismissed insofar as the Crawfish Producers challenge agency actions that occurred prior to February 27, 2004.” *Pat Huval*, 547 F. Supp. 2d at 1365.

ment with respect to, *inter alia*, the matters referred to in § 1581(i)(2), which are “tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue.” The CDSOA, under which this action arises, is such a law. *See Furniture Brands Int’l, Inc. v. United States*, 35 CIT __, __ __, 807 F. Supp. 2d 1301, 1307 10 (2011).

DISCUSSION

The CDSOA amended the Tariff Act of 1930 to provide for an annual distribution (a “continuing dumping and subsidy offset”) of duties assessed pursuant to an antidumping duty or countervailing duty order to affected domestic producers as reimbursements for qualifying expenditures.⁷ 19 U.S.C. § 1675c(a) (d). ADP status is limited to petitioners, and interested parties in support of petitions, with respect to which antidumping duty and countervailing duty orders are entered, and who remain in operation. *Id.* § 1675c(b)(1). The CDSOA directed the ITC to forward to Customs, within sixty days after an antidumping or countervailing duty order is issued, lists of persons with potential ADP status, *i.e.*, “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). The CDSOA also provided for distributions of antidumping and countervailing duties assessed pursuant to existing antidumping duty and countervailing duty orders and for this purpose directed the ITC to forward to CBP a list identifying potential ADPs “within 60 days after the effective date of this section in the case of orders or findings in effect on January 1, 1999 or thereafter . . .” *Id.* The CDSOA directed CBP to publish in the Federal Register, prior to each distribution, lists of ADPs potentially eligible for distributions based on the lists obtained from the ITC, *id.* § 1675c(d)(2), and to distribute annually all funds, including accrued interest, from antidumping and countervailing duties received in the preceding fiscal year, *id.* § 1675c(d)(3), (e).

The Court of Appeals, in *SKF USA, Inc. v. U.S. Customs and Border Protection* (“*SKF USA II*”), upheld the CDSOA against constitutional challenges brought on First Amendment and equal protection

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; and (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).

grounds. *SKF USA, Inc. v. U.S. Customs and Border Protection*, 556 F.3d 1337, 1360 (“[T]he Byrd Amendment is within the constitutional power of Congress to enact, furthers the government’s substantial interest in enforcing the trade laws, and is not overly broad. We hold that the Byrd Amendment is valid under the First Amendment.”); *id.* (“Because it serves a substantial government interest, the Byrd Amendment is also clearly not violative of equal protection under the rational basis standard.”).⁸

I. Claims Asserted in This Consolidated Action

A. Claims Common To All Plaintiffs

All Plaintiffs Koyo, SKF, and the Pat Huval Plaintiffs challenge the constitutionality of Defendants’ application of the CDSOA on three grounds. First, they challenge the “in support of the petition” requirement of the CDSOA (“petition support requirement”), as it was applied to each of them, on First Amendment grounds.⁹ (Compl. 1 ¶¶ 38 39, Compl. 2 ¶¶ 53 56, Compl. 3 ¶¶ 44 46, Compl. 4 ¶¶ 58 60, Compl. 5 ¶¶ 59 62, Compl. 6 ¶¶ 58 61.) Second, all Plaintiffs challenge the petition support requirement, as applied, on Fifth Amendment equal protection grounds. (Compl 1 ¶¶ 35 37, Compl. 2 ¶¶ 61 64, Compl. 3 ¶¶ 47 50, Compl. 4 ¶¶ 61 64, Compl. 5 ¶¶ 67 70, Compl. 6 ¶¶ 66 69.) Third, all Plaintiffs claim that the petition support requirement violates the Fifth Amendment due process guarantee in basing their eligibility for disbursements on past conduct, *i.e.*, support for a petition. (Compl. 1 ¶¶ 29 30, Compl. 2 ¶¶ 69 71, Compl. 3 ¶¶ 51 53, Compl. 4 ¶¶ 65 67, Compl. 5 ¶¶ 75 77, Compl. 6 ¶¶ 74 76.)

B. Claims Exclusive to the Pat Huval Plaintiffs

The Pat Huval Plaintiffs bring three claims distinguishable from those brought by SKF or Koyo. First, the Pat Huval Plaintiffs claim that the CDSOA conferred upon them a vested property interest, of which they have been unreasonably deprived without notice or hearing, in violation of the due process clause of the Fifth Amendment.

⁸ *SKF USA II* 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) (“*SKF USA I*”), which held the petition support requirement of the CDSOA unconstitutional on Fifth Amendment equal protection grounds.

⁹ Plaintiffs SKF and Koyo both claim that the CDSOA violated not only their First Amendment right to free speech, but also their right to petition the government for redress of grievances. “Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis.” *Wayte v. United States*, 470 U.S. 598, 611 n.11 (1985) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 915 (1982)). Because SKF and Koyo do not allege that the CDSOA burdened the right to free speech in a different manner than the right to petition, the Court will view these claims as essentially the same. *See id.*

(Compl. 1 ¶¶ 27 28.) Second, the Pat Huval Plaintiffs claim that the actions of the ITC and CBP to adjudicate a right bestowed in 2000 based on a proceeding that took place in 1996 were arbitrary, capricious and an abuse of discretion in violation of the APA. (*Id.* ¶¶ 31 34.) Last, the Pat Huval Plaintiffs claim that the CDSOA is an unconstitutional Bill of Attainder in violation of the Fifth Amendment because it retroactively penalized certain domestic producers for free speech actions taken prior to enactment. (*Id.* ¶¶ 40 42.)

C. Claims Exclusive to Koyo

Koyo brings claims distinguishable from those brought by the other Plaintiffs in this consolidated action. First, Koyo claims that the CDSOA is facially violative of the First Amendment guarantees of freedom of speech and belief and the ability of the citizenry to petition the government for a redress of grievances, and also is facially overbroad because it compels speech.¹⁰ (Compl. 2 ¶¶ 57 60, Compl. 5 ¶¶ 63 66, Compl. 6 ¶¶ 62 65.) Second, Koyo claims that the CDSOA is facially violative of the equal protection guarantees of the Constitution because it creates a classification implicating Koyo's fundamental speech rights, and because it impermissibly discriminates between similarly situated domestic producers. (Compl. 2 ¶¶ 65 68, Compl. 5 ¶¶ 71 74, Compl. 6 ¶¶ 70 73.)¹¹

Koyo has also filed a motion for leave to amend its complaint to assert a claim that Defendant Intervenors have been unjustly enriched by virtue of receiving CDSOA distributions belonging, in part, to Koyo. (Mot. for Leave to Amend Compl. and Mem. in Support, April 11, 2008, ECF No. 146.)

D. Claims Exclusive to SKF

SKF brings one unique claim in this consolidated action. In the wake of *SKF USA Inc. v. United States*, 31 CIT 1163, 502 F. Supp. 2d 1325 (2007), the ITC informed SKF that "a decision by this Court as to SKF USA's status as an 'affected domestic producer' for one fiscal year's disbursements will not be applied to any year but that one fiscal year." (Compl. 4 ¶¶ 69 70.) SKF challenges this agency determination, ostensibly, though not explicitly, via the Administrative Procedure Act. SKF claims that in taking this position, the ITC has

¹⁰ Although *SKF USA II* did not precisely consider whether the CDSOA was facially overbroad because it compels speech, the reasoning by which the Court of Appeals rejected SKF's First Amendment claim applies with equal force to dispose of this claim.

¹¹ In its Complaints, Koyo also asserts that because the CDSOA is unconstitutional, it is void *ab initio*, and that the violating provisions are severable from the CDSOA as a whole. Although it styles these assertions as "Count 6" and "Count 7", they are rather relief sought and the Court so construes them.

injured SKF by forcing it to “file an action each year in order to obtain the relief granted by the Court resulting from the Court’s decision that the CDSOA, as applied to SKF[,], is unconstitutional.” (*Id.* ¶ 71.) SKF claims that “[o]nce determined to be unconstitutional[] as to SKF USA in one case, the CDSOA is equally unconstitutional in all cases affecting SKF USA” and that the ITC’s “refusal thus violates the Constitutional rights granted to SKF USA through the First Amendment, the equal protection guarantees of the U.S. Constitution and the due process guarantees of the U.S. Constitution.” (*Id.* ¶¶ 71 72.)

II. *Statute of Limitations*

Timken argues that three sets of claims in this consolidated action are barred by the two year statute of limitations in 28 U.S.C. § 2636(i) and should be dismissed on jurisdictional grounds. First, Timken argues that the action SKF commenced on September 29, 2006 (Compl. 3; prior to consolidation, Court No. 06 00328) to obtain a CDSOA distribution for Fiscal Year 2004 (“SKF’s 2004 Challenge”) is untimely. (Timken Mot. 25 29.) Second, Timken argues that the action Koyo commenced on September 30, 2008 (Compl. 5; prior to consolidation, Court No. 08 00340), is untimely to the extent Koyo seeks to obtain a CDSOA distribution for Fiscal Year 2006 (“Koyo’s 2006 Challenge”). (*Id.* at 29 30.) Last, Timken argues that all of Koyo’s claims asserting facial challenges to the constitutionality of the CDSOA are barred by the two year statute of limitations. (*Id.* at 30.) The Court determines that only two sets of claims SKF’s 2004 Challenge and Koyo’s 2006 Challenge are barred by the two year statute of limitations.

In *SKF USA II*, the Court of Appeals applied the principle that a cause of action accrues when all events necessary to fix the alleged liability of the defendant have occurred. *SKF USA II*, 556 F.3d at 1348 49 & 1348 n.15 (citations omitted). The Court of Appeals concluded in *SKF USA II* that “the earliest SKF’s claim could have accrued was when Customs published its notice of intent to distribute duties under the Byrd Amendment for fiscal year 2005 and invited potentially eligible producers to file certifications requesting a share of the distributions.” *Id.* at 1349.

In the present case, the claims challenging the constitutionality of the CDSOA brought in SKF’s 2004 Challenge and Koyo’s 2006 Challenge are time barred because they were not brought within two years of the dates on which those claims accrued. *See* 28 U.S.C. § 2636(i). The 2004 notice of intent to distribute was published on June 2, 2004.

Distribution of Continued Dumping and Subsidy Offsets to Affected Domestic Producers, 69 Fed. Reg. 31,162 (June 2, 2004). SKF did not file its lawsuit challenging this distribution until more than two years later, on September 29, 2006. (Compl. 3.) The 2006 notice of intent to distribute was published on June 1, 2006. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 71 Fed. Reg. 31,336 (June 1, 2006). Koyo did not file its lawsuit challenging this distribution until more than two years later, on September 30, 2008. (Compl. 5.) The petition support requirement was applied to each plaintiff by the respective ITC decision to exclude it from the list of potential ADPs, not by any subsequent action by CBP, which does not have discretion to add potential ADPs to the Commission's list based on CBP's own determination of petition support. See 19 U.S.C. § 1675c(d)(2) (providing that the notice of intention to distribute is to include "the list of affected domestic producers potentially eligible for the distribution based on the list obtained from the Commission"). The publication of the notices of intent to distribute placed each plaintiff on notice that Customs would make a distribution for the relevant fiscal year and that the plaintiff would not be participating in that distribution. Each plaintiff could have challenged the ITC decision to exclude it from the list of potential ADPs for the relevant fiscal year as soon as that list was made public in CBP's notice. We conclude, therefore, that SKF's 2004 Challenge and Koyo's 2006 Challenge first accrued on the respective dates of publication of the two notices.

Further, we conclude that the statute of limitations in 28 U.S.C. § 2636(i) is jurisdictional. See *SKF USA II*, 556 F.3d at 1348 (assuming without deciding that the statute is jurisdictional under the test set forth in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008)). Accordingly, the claims comprising SKF's 2004 Challenge and Koyo's 2006 Challenge are not properly before us, and we dismiss these claims for lack of jurisdiction according to USCIT Rule 12(b)(1).

Finally, we reject Defendant Intervenors' argument that Koyo's remaining facial challenges are barred by the two year statute of limitations because these challenges were not brought within two years of enactment. In dicta in *SKF USA II*, the Court of Appeals opined that "SKF could have filed a facial challenge to the Byrd Amendment immediately after its enactment," 556 F.3d at 1348, but the Court of Appeals did not state that causes of action challenging the Byrd Amendment could not accrue after the date of enactment. The Court of Appeals reached a holding as to the earliest date on which a particular cause of action at issue in that case could have

accrued, *i.e.*, the date of publication of the notice of intent to distribute.¹² The date on which a cause of action of a domestic party bringing a constitutional challenge to the Byrd Amendment accrues must be determined according to the specific facts giving rise to that claim. On the particular facts pertinent here, Koyo's facial claims accrued on the date of public notice of a final ITC determination that Koyo had been determined to be ineligible for a distribution related to the particular fiscal year in question.

III. Plaintiffs' Facial and As Applied Challenges Under the First Amendment and the Equal Protection Clause Are Foreclosed by Binding Precedent

A. Koyo's Facial Challenges

The survival of Koyo's facial claims, however, is short lived. Koyo's claims facially challenging the constitutionality of the CDSOA's petition support requirement under the First Amendment (*See, e.g.*, Compl. 2 ¶¶ 57-60) and the equal protection doctrine of the Fifth Amendment (*Id.* ¶¶ 65-68) are precluded by the holding in *SKF USA II*. In *SKF USA II*, the Court of Appeals held that the CDSOA did not violate constitutional First Amendment or equal protection principles as applied to SKF in that case. 556 F.3d at 1360. That ruling forecloses any possibility that the statute is facially unconstitutional on the First Amendment and equal protection grounds asserted by SKF

¹² Our earlier opinion in *Pat Huval Restaurant & Oyster Bar, Inc. v. United States*, 32 CIT __, 547 F. Supp. 2d 1352, 1360 (2008), reached a different conclusion than did the Court of Appeals in *SKF USA II* as to the earliest date on which a cause of action challenging the Byrd Amendment could accrue. The Court of Appeals reasoned that a claim may accrue for a particular fiscal year once it is known that "Byrd Amendment distributions would be available" for that year, *id.* at 1348-49, rather than once a plaintiff suffered the annual "injury caused by the payments made to their direct domestic competitors," as we reasoned in *Pat Huval*, 32 CIT at __, 547 F. Supp. 2d at 1347. Having entered no judgment on the claims that we did not dismiss following our earlier opinion, we consider the statute of limitations questions anew based on the relevant guidance in *SKF USA II*. We reject SKF's argument that our having previously decided that the claims remaining in this action were not time barred and Defendant Intervenors' failing to move for reconsideration of that decision within 30 days make it inappropriate for us to reconsider whether the claims pertaining to fiscal year 2004 were timely filed. SKF's Resp. 28-29. SKF is correct that reconsideration under Rule 59(a) is not available in this case because motions pursuant to Rule 59(a) must be "filed not later than 30 days after the entry of the judgment or order," USCIT Rule 59(b), which was not the case here, SKF's Resp. 28-29. But the inapplicability of Rule 59(a) does not exhaust the court's power to reconsider its non final decisions. Instead, the Court may reconsider its prior decision pursuant to its general authority, which is recognized by USCIT Rule 54, to reconsider a non final order prior to entering final judgment.

in *SKF USA II*. Koyo's claims to the same effect therefore must be dismissed pursuant to USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted.

B. SKF's As-Applied Challenges

Timken argues that SKF's as applied First Amendment and equal protection challenges to the CDSOA are barred either by *res judicata* (claim preclusion) or collateral estoppel (issue preclusion). (Timken Mot. 4 16.) "Under *res judicata*, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Brown v. Felsen*, 442 U.S. 127, 131 (1979) (internal quotation omitted). "Under the doctrine of collateral estoppel, or issue preclusion, a litigant who has litigated an issue in a full and fair proceeding is estopped from relitigating the same issue in a subsequent proceeding." *Sahaviriya Steel Indus. Pub. Co. v. United States*, 34 CIT __, __, 714 F. Supp. 2d 1263, 1273 (2010) (citing *Thomas v. Gen. Servs. Admin.*, 794 F.2d 661, 664 (Fed. Cir. 1986)). The principle of issue preclusion is applicable here.

SKF litigated its First Amendment as applied and equal protection challenges before the Court of Appeals in *SKF USA II* and received a final judgment on the merits of those claims in that case. (SKF did not litigate and receive a final judgment on the merits of its due process retroactivity claim, which we address elsewhere in this opinion.) The Court holds that SKF is barred from relitigating the First Amendment as applied and equal protection issues in the present case, notwithstanding that SKF is pursuing a different cause of action in seeking CDSOA distributions for a different fiscal year than that involved in *SKF USA II*.

SKF argues in response that its as applied First Amendment and equal protection claims should not be barred by collateral estoppel. (Pl. SKF USA Inc.'s Opp. to Def.'s and Def. Ints.' Mots. To Dismiss and for J. on the Pleadings 20 21 ("SKF's Opp."), June 24, 2011, ECF No. 223.) SKF argues that collateral estoppel should not apply in light of the Supreme Court's decision in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), which it believes satisfies an "exception to the preclusion doctrines for new claims brought after 'momentous changes in important, fundamental constitutional rights.'" (SKF's Opp. 20 21) (quoting *Roche Palo Alto v. Apotex, Inc.*, 531 F.3d 1372, 1380 81 (Fed. Cir. 2008) (internal quotation omitted)). *Sorrell* is not an appropriate basis for invoking the exception to issue preclusion, as the Supreme Court's holding in the case does not undermine the validity of *SKF USA II* or

the *Central Hudson* test on which the Court of Appeals relied in analyzing the petition support requirement. As we determined recently in ruling on another as applied First Amendment challenge to the CDSOA, *Sorrell* did not implicitly overturn *SKF USA II* or change the requisite level of scrutiny appropriate for the CDSOA. See *Furniture Brands*, 35 CIT at __, 807 F. Supp. 2d at 1313 15. *Sorrell* and *SKF* analyze dissimilar statutes, which vary considerably in how they affect expression as well as in purpose. *Id.* As the Court of Appeals concluded in *SKF USA II*, the CDSOA does not have as a stated purpose, or even an implied purpose, the intentional suppression of expression, *SKF USA II*, 556 F.3d at 1351 52, whereas the Vermont statute the Supreme Court struck down in *Sorrell* was intended to suppress expression, specifically the use in marketing of identifying information related to prescription drugs, see *Sorrell*, 131 S. Ct. at 2660. Because *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 USA II*, it does not represent a “momentous change[] in important, fundamental constitutional rights” warranting an exception to the issue preclusion doctrine. See *Roche Palo Alto*, 531 F.3d at 1380 81.

C. Koyo’s & the Pat Huval Plaintiffs’ As-Applied Challenges

Koyo and the Pat Huval Plaintiffs fail to plead facts allowing the Court to conclude that their as applied First Amendment and equal protection challenges to the CDSOA are distinguishable from claims brought, and rejected, in *SKF USA II*. The Complaints contain no assertions that the CDSOA was applied to the Pat Huval Plaintiffs or Koyo in a different manner than the statute was applied to other parties who did not support a petition. Neither Koyo nor the Pat Huval Plaintiffs have claimed that they supported any of the antidumping duty petitions at issue in this consolidated case. See generally, *supra*, at 4 5. The facts as pled place Koyo and the Pat Huval Plaintiffs on the same footing as other potential claimants who did not support the petition, such as SKF in *SKF USA II*. See 556 F.3d at 1343 (“Since it was a domestic producer, SKF also responded to the ITC’s questionnaire, but stated that it opposed the antidumping petition.”).

Koyo unsuccessfully attempts to distinguish its as applied First Amendment and equal protection claims from those resolved in *SKF USA II*. (Pl. Koyo Corp. of U.S.A.’s Opp. to Defs.’ and Def. Intervenors’ Mots. to Dismiss and for J. on the Pleadings (“Koyo Opp.”) 10 11, June 24, 2011, ECF No. 224.) While Koyo seeks distributions for different fiscal years and from different antidumping duty orders than SKF

sought in *SKF USA II*, these factual distinctions have no bearing on the applicability of the holding of that case. Neither SKF nor Koyo expressed support for a petition, and thus neither qualified to become an ADP. Consequently, Koyo's and the Pat Huval Plaintiffs' as applied First Amendment and equal protection challenges are also foreclosed by the holding in *SKF USA II* and must be dismissed pursuant to USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted.

IV. The Petition Support Requirement Does Not Violate Due Process

A. Retroactivity

All Plaintiffs claim that the CDSOA is impermissibly retroactive, in violation of the due process guarantee of the Fifth Amendment, because it bases their eligibility for disbursements on past conduct, *i.e.*, support for a petition. In *New Hampshire Ball Bearing v. United States*, 36 CIT __, __ __, Slip Op. 12 2, at 8 14 (Jan. 3, 2012), we considered a claim essentially identical to Plaintiffs' retroactivity claims. We determined then that "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." *Id.* at 14. We reasoned that "[i]t was not arbitrary or irrational for Congress to conclude that the legislative purpose of rewarding domestic producers who supported antidumping petitions . . . would be 'more fully effectuated' if the petition support requirement were applied both prospectively and retroactively." *Id.* at 13 (*quoting Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 31 (1984)). We conclude, therefore, that Congress did not violate Plaintiffs' Fifth Amendment due process rights in basing potential eligibility for CDSOA disbursements on a decision on whether to support the petition that Plaintiffs made prior to the enactment of the CDSOA. Accordingly, we will dismiss these claims in Plaintiffs' Complaints for failure to state a claim upon which relief can be granted.

B. Procedural Due Process

The Pat Huval Plaintiffs claim that they were deprived of a vested property interest without notice or hearing in violation of the due process guarantee. (Compl. 1 ¶¶ 27 28.) Having failed to satisfy the petition support requirement of the CDSOA, however, the Pat Huval Plaintiffs never obtained a right to receive distributions under the statute. Therefore, they lack the property interest on which they have

based their procedural due process claim. “The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in ‘property’ or ‘liberty.’” *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) (citations omitted). In the absence of such a property interest, there can have been no violation of procedural due process. This claim has no merit because the Pat Huval Plaintiffs, having failed to support the relevant antidumping duty petition, have no cognizable property interest in CDSOA distributions. (See Compl. 1 ¶ 22.) Accordingly, the Pat Huval Plaintiff’s procedural due process claim is dismissed for failure to state a claim upon which relief can be granted.

C. Bill of Attainder

The Pat Huval Plaintiffs alone assert a claim that the CDSOA constitutes a Bill of Attainder in violation of their Fifth Amendment rights, arguing that the statute retroactively penalizes certain domestic producers for past actions. (Compl. 1 ¶¶ 40 42.) The Supreme Court has stated that

[a] bill of attainder is a legislative act which inflicts **punishment** without a judicial trial. . . . [L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.

United States v. Lovett, 328 U. S. 303, 315 316 (1946) (internal quotation marks omitted) (emphasis added). On its face, the CDSOA does not contain any provision that “inflicts punishment” on those who did not support a petition. Moreover, as the Court of Appeals concluded in *SKF USA II*, the purpose of the CDSOA is not to punish a particular class of persons; instead, the Court of Appeals concluded that a purpose of the CDSOA was to reward with monetary benefits those entities who supported government enforcement of the antidumping law by bringing or supporting an antidumping petition. *SKF USA II*, 556 F.3d at 1351 52. The Court of Appeals concluded that this goal is rationally related to a substantial government interest, namely, enforcement of the trade laws, and reasoned that it is not unfair to deny benefits to non supporters of antidumping petitions. *Id.* at 1359 60. Because the CDSOA is not a bill of attainder, the Pat Huval Plaintiffs’ claim to that effect adds nothing beyond their claim that the CDSOA is impermissibly retroactive in violation of the due process guarantee of the Fifth Amendment, a claim we rejected *supra*. Therefore, we will dismiss the Bill of Attainder claim as one on which no relief can be granted.

V. SKF's and the Pat Huval Plaintiffs' APA Claims Are Without Merit

A. The Pat Huval Plaintiffs' APA Claim

The Pat Huval Plaintiffs claim that the actions of the ITC, which refused to include the Pat Huval Plaintiffs on the list of affected domestic producers, and of CBP, which refused to pay CDSOA distributions to the Pat Huval Plaintiffs, must be set aside as unlawful under the APA. (Compl. 1 ¶¶ 31-34.) The Pat Huval Plaintiffs claim that Defendants arbitrarily and capriciously “adjudicate[d] a right bestowed by Congress in the year 2000 based on a proceeding that took place in the year 1996,” and also that Defendants made unspecified decisions “regarding Byrd Amendment eligibility” that were “based on wholly arbitrary and capricious standards.” (*Id.* ¶ 33.)

When the ITC based its determination about the Pat Huval Plaintiffs' eligibility to become ADPs on the Pat Huval Plaintiffs' failure to express support for the relevant antidumping petition in 1996, it did not act arbitrarily or capriciously. To the contrary, in the case of orders in place at the time the CDSOA was enacted, the CDSOA required the ITC to base its eligibility determination retroactively on the basis of petition support. 19 U.S.C. § 1675c(b)(1)(A) (an ADP must have been “a petitioner or **interested party in support of the petition** with respect to which an antidumping duty order . . . has been entered.”), (d)(1) (“The Commission shall forward to [CBP] . . . in the case of orders or findings in effect on January 1, 1999 or thereafter . . . a list of persons **that indicate support of the petition** by letter or through questionnaire response.”). Additionally, the Pat Huval Plaintiffs' Complaint alleges no facts from which we could conclude that the ITC and CBP made decisions regarding eligibility for CDSOA distributions in an arbitrary or capricious manner. As to this claim, the Complaint does 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)). In the absence of any factual allegation from which we otherwise could conclude that either agency's actions were violative of the APA, we conclude that the Pat Huval Plaintiffs' APA claim must be dismissed.

B. SKF's APA Claim

The Court construes the claim brought by SKF challenging the ITC's “position that a decision by this Court as to SKF USA's status as an ‘affected domestic producer’ for one fiscal year's disbursements will not be applied to any year but that one fiscal year,” as a challenge to agency action under the Administrative Procedure Act. (Compl. 4 ¶

70; see 5 U.S.C. §§ 702, 704 (authorizing persons aggrieved by certain types of final agency action to seek judicial review thereof.) The Constitution permits a federal court to exercise jurisdiction only over a live case or controversy. U.S. Const. art. III, § 2. In order to satisfy the case or controversy requirement, “a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision.” *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983). If “the issue[] presented [is] no longer ‘live’ or the parties lack a legally cognizable interest in the outcome,” the case is moot. *PPG Industries, Inc. v. United States*, 11 CIT 303, 306, 660 F. Supp. 965, 968 (1987) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). SKF brought this claim subsequent to having obtained a successful judgment in *SKF USA I*, but prior to the reversal of that decision in *SKF USA II*. Because SKF no longer has a decision from this, or any, court that it is entitled to status as an affected domestic producer, it cannot claim injury by virtue of the ITC’s “position,” and therefore this claim is now moot. Consequently, SKF’s APA claim must be dismissed on mootness grounds pursuant to USCIT Rule 12(b)(1).

VI. SKF and Koyo’s Joint Motion for Preliminary Injunction

Plaintiffs SKF and Koyo move for a “preliminary injunction” under which Defendants would be enjoined from disbursing CDSOA funds for fiscal years 2006 through 2010 from the antidumping duty orders covering ball bearings and tapered roller bearings during the pendency of this litigation, including all appeals, petitions for further judicial review, and remands. (Pls.’ Joint Mot. for a Prelim. Inj. (Jan. 6, 2012), ECF No. 235.) 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 Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2947 (2d ed. 2010) (a principal purpose of preliminary injunctive relief is “to preserve the court’s power to render a meaningful decision after a trial on the merits.”). Because we are bringing the entire case to a conclusion at this time, the question of a preliminary injunction to prevent irreparable harm during the pendency of the case before us is now moot.

The injunction sought would extend past the entry of judgment in this case; consequently, it is, in this respect, akin to “permanent” equitable relief. Our conclusion as to the disposition of the injunction motion, however, is no different. We have concluded for the reasons discussed above that no remedy, either at law or in equity, is available

on the claims properly before us, *i.e.*, those not dismissed under USCIT Rule 12(b)(1) for lack of jurisdiction. Moreover, the injunction sought would prejudice Defendant Intervenors, who would experience further delay in obtaining withheld distributions, and it would not serve the public interest, which is furthered by a lawful and orderly administration of the CDSOA. Even when we presume, for the purpose of deciding the motion, that SKF and Koyo would be irreparably harmed by the pending distribution of withheld funds, we still conclude that SKF and Koyo do not qualify for a permanent injunction. *See Ebay Inc. v. Mercexchange, L.L.C.*, 547 U.S. 388, 391 (2006) (requiring for a permanent injunction that a plaintiff have suffered an irreparable injury, that the remedies available at law be inadequate to compensate for that injury, that considering the balance of hardships between the parties, a remedy in equity be warranted, and that the public interest would not be disserved by a permanent injunction). Therefore, we will deny SKF's and Koyo's motion for an injunction.

VII. Koyo's Motion for Leave to Amend Its Complaint Is Denied for Futility

Koyo has moved to amend the complaint to add a claim against Defendant Intervenors for unjust enrichment. (Proposed Am. Compl. ¶ 81, ECF No. 145.) We must deny this motion. Amending the complaint would be futile because the proposed new claim would be outside the Court's subject matter jurisdiction under 28 U.S.C. § 1581(i), which is limited to civil actions against "the United States, its agencies, or its officers." The proposed claim, which is a direct claim by Koyo against Defendant Intervenors, does not fall within the Court's limited jurisdiction over counterclaims, cross claims, or third party actions. *See* 28 U.S.C. § 1583. Nor may we exercise jurisdiction over this proposed claim by invoking supplemental jurisdiction as granted by Congress to the district courts, 28 U.S.C. § 1367, or common law pendant or ancillary jurisdiction. *See Sioux Honey Assoc. v. Hartford Fire Insurance Co.*, No. 2011 1040, 2012 WL 379626, at *6 *9 (Fed. Cir. Feb. 7, 2012).

CONCLUSION

For the foregoing reasons, Koyo's motion for leave to amend its Complaint will be denied; Koyo and SKF's joint motion for injunctive relief will be denied; Koyo's claims with respect to the fiscal year 2006 CDSOA distribution and SKF's claims with respect to the fiscal year 2004 CDSOA distribution are barred by the statute of limitations in 28 U.S.C. § 2636(i) and will be dismissed pursuant to USCIT Rule 12(b)(1); SKF's APA claim will be dismissed as moot pursuant to

USCIT Rule 12(b)(1); and all other claims will be dismissed for failure to state a claim upon which relief may be granted pursuant to USCIT Rule 12(b)(5). We conclude, further, that no valid purpose would be served by allowing any plaintiff a further opportunity to seek leave to amend a complaint and, accordingly, that there is no reason to prolong this action. Consequently, this action will be dismissed. Judgment will be entered accordingly.

Dated: March 1, 2012

New York, New York

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