

U.S. Customs and Border Protection

Slip Op. 12-16

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

Before: Gregory W. Carman, Judge
Timothy C. Stanceu, Judge
Leo M. Gordon, Judge
Consol. Court No. 07-00323

[Denying a motion to shorten the time period for defendants' and defendant-intervenors' responses to plaintiff's motion for an injunction pending appeal]

Dated: February 7, 2012

Kristen H. Mowry, Jeffrey S. Grimson, Jill A. Cramer, Susan E. Lehman, and Sarah Wyss, Mowry & Grimson, PLLC, of Washington, DC and Kevin Russell, Goldstein, Howe & Russell, P.C., of Bethesda, MD, for plaintiff.

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

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

Jeffrey M. Telep, Joseph W. Dorn, Taryn Koball Williams, and Steven R. Keener, King & Spalding LLP, of Washington, DC, for defendant-intervenors the American Furniture Manufacturers Committee for Legal Trade, Kincaid Furniture Co., Inc., L. & J.G. Stickley, Inc., Sandberg Furniture Manufacturing Company, Inc., Stanley Furniture Co., Inc., T. Copeland and Sons, Inc., and Vaughan-Bassett Furniture Company, Inc.

OPINION AND ORDER

Stanceu, Judge:

Introduction

Plaintiff Ashley Furniture Industries, Inc. (“Ashley”) seeks, pursuant to USCIT Rule 62(c), an injunction pending its appeal of the judgment dismissing this action. Pl.’s Mot. for Inj. Pending Appeal & for Expedited Consideration (Feb. 2, 2012), ECF No. 103; *see Ashley Furniture Industries, Inc. v. United States*, 36 CIT __, Slip Op. 12–14 (Jan. 31, 2012) (“Ashley”) (dismissing certain claims for lack of standing and remaining claims for failure to state a claim on which relief can be granted). Before the court is plaintiff’s motion to limit to five days the normal fourteen-day time period during which defendants and defendant-intervenors may respond to the Rule 62(c) motion. Mot. to Shorten the Time Period to Resp. to Pl.’s Mot. for Inj. Pending Appeal & for Expedited Consideration (Feb. 2, 2012), ECF No. 104 (“Pl.’s Mot.”). Defendant United States and defendant-intervenors oppose any shortening of the response period. Defs. United States & U.S. Customs & Border Protection’s Resp. in Opp’n to Pl.’s Mot. for Expedited Consideration of its Mot. for Inj. Pending Appeal (Feb. 3, 2012), ECF No. 106; Def.-Intervenors’ Opp’n to Pl.’s Mot. to Shorten the Time Period to Resp. to Pl.’s Mot. for Inj. Pending Appeal & for Expedited Consideration (Feb. 3, 2012), ECF No. 105. As discussed below, the court will deny the motion, thereby allowing defendants and defendant-intervenors the normal time period to respond to Ashley’s Rule 62(c) motion. *See* USCIT Rule 7(d) (“Unless otherwise prescribed by these rules, or by order of the court, a response to a motion must be served within 14 days after service of such motion . . .”).

In *Ashley*, we upheld administrative determinations of U.S. Customs and Border Protection (“Customs”) and the U.S. International Trade Commission denying Ashley distributions pursuant to the Continued Dumping and Subsidy Offset Act of 2000 (the “CDSOA” or “Byrd Amendment”), Pub. L. No. 106–387, §§ 1001–03, 114 Stat. 1549, 1549A-72–75, 19 U.S.C. § 1675c (2000), *repealed by* Deficit Reduction Act of 2005, Pub. L. 109–171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007). *Ashley*, 36 CIT at __, Slip Op. 12–14 at 29 (Jan. 31, 2012). Ashley’s Rule 62(c) motion seeks to enjoin the government from distributing to other domestic furniture producers Ashley’s potential share of funds now being withheld by Customs, until such time as Ashley’s appeal is finally adjudicated. Pl.’s Mot. 2. In support of its argument that the response time should be shortened, Ashley submits an affidavit from its counsel, Mr. Jeffrey S. Grimson, stating that Customs intends to distribute on March 9, 2012

the CDSOA funds withheld for Ashley. Affidavit of Grimson ¶ 3 (Feb. 2, 2012), ECF No. 104. Mr. Grimson states that, should this Court deny the Rule 62(c) motion, Ashley will seek a similar injunction from the U.S. Court of Appeals for the Federal Circuit (“Court of Appeals”) but, under Rule 8 of the Federal Rules of Appellate Procedure, will be unable to do so until this Court has ruled. *Id.* ¶ 4. According to Mr. Grimson, “expedited briefing is warranted” so that the Court of Appeals has sufficient opportunity to consider a future injunction motion prior to the March 9, 2012 distribution date. *Id.* ¶ 5.

The court determines that the ordinary motion procedures should govern in this instance rather than an abbreviation of the time for defendants and defendant-intervenors to respond to the Rule 62(c) motion. *See* USCIT Rule 7(e) (“No order to show cause to bring on a motion may be granted except on a clear and specific showing by affidavit of good and specific reasons why procedure other than regular motion is necessary or why the time to respond should be shortened.”). We do not discern a need for the expedited briefing identified in Mr. Grimson’s affidavit. The court intends to rule expeditiously on plaintiff’s Rule 62(c) motion. Should we deny that motion, the Court of Appeals still would have an adequate opportunity to consider whether to award injunctive relief and to put such relief in place prior to March 9, 2012.

Upon consideration of plaintiff’s motion and other papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that plaintiff’s Motion to Shorten the Time Period to Respond to Plaintiff’s Motion for Injunction Pending Appeal and for Expedited Consideration (Feb. 2, 2012), ECF No. 104, be, and hereby is, **DENIED**.

Dated: February 7, 2012

New York, New York

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU

Judge

Slip Op. 12–17

UNITED STATES, Plaintiff, v. ROBERT E. LANDWEER & Co., Defendant.

Before: Leo M. Gordon, Judge
Court No. 09–00060

[Defendant’s USCIT Rule 12(b)(1) motion denied; Defendant’s USCIT Rule 12(b)(5) motion granted.]

Dated: February 8, 2012

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Plaintiff United States. On the briefs were *David S. Silverbrand* and *Michael D. Panzera*, Trial Attorneys. With them on the briefs were *Tony West*, Assistant Attorney General, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the briefs was *Leigh Sellari*, Office of Assistant Chief Counsel for U.S. Customs and Border Protection of Seattle, WA.

Joel R. Junker, Joel R. Junker & Associates, of Seattle, WA, for Defendant Robert E. Landweer & Co. With him on the brief was *Emily Lawson*.

OPINION

Gordon, Judge:

Introduction

Defendant Robert E. Landweer & Co. (“Landweer”) moves to dismiss this action pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction and USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1582(1) and therefore denies Defendant’s USCIT Rule 12(b)(1) motion to dismiss. However, Plaintiff has failed to state a claim upon which relief can be granted. Accordingly, Defendant’s USCIT Rule 12(b)(5) motion to dismiss is granted.

Background

In its original complaint Plaintiff alleged that Landweer, a customs broker, violated 19 U.S.C. § 1641(b)(4) and 19 C.F.R. § 111.28(a) as well as 19 U.S.C. § 1641(d) and 19 C.F.R. §§ 111.29 and 143.6, and was liable to the United States for a penalty in the amount of \$30,000 pursuant to 19 U.S.C. §§ 1641(d)(1)(C) and (d)(2)(A). Thereafter Plaintiff filed a motion for leave to amend the complaint to remove the allegations that Landweer failed to exercise responsible supervision and control over its customs business, and therefore, violated 19 U.S.C. § 1641(b)(4) and 19 C.F.R. § 111.28(a). Plaintiff did not seek to add any new allegations. Rather, the sole reason offered in Plaintiff’s motion was an intervening decision of U.S. Court of Appeals for the Federal Circuit, *United States v. UPS Customshouse Brokerage, Inc.*, 575 F.3d 1376, 1383 (Fed. Cir. 2009) (“UPS I”), remanded to, 34 CIT ___, 686 F. Supp. 2d 1337 (2010) (“UPS II”), which held that U.S. Customs and Border Protection (“Customs”) must consider all ten factors listed in 19 C.F.R. § 111.28(a) to establish a violation of 19 U.S.C. § 1641(b)(4). Plaintiff explained that it would have been unable to make this showing and requested leave to remove from the complaint the allegations that referenced 19 U.S.C. § 1641(b)(4) and 19 C.F.R. § 111.28(a). The court then granted the unopposed motion for leave to file an amended complaint. Order on Pl.’s Mot. for Leave to File Amend. Comp., ECF No. 22 (June 9, 2010). Remaining in the

amended complaint were Plaintiff's claims, pursuant to 19 U.S.C. § 1641(d), regarding Defendant's alleged violation of any provision of any law, rule, or regulation enforced by Customs, specifically 19 C.F.R. §§ 111.29 and 143.6. Subsequently, Landweer filed its motion to dismiss.

Standard of Review

In deciding a USCIT Rule 12(b)(1) motion to dismiss that does not challenge the factual basis for the complainant's allegations and a USCIT Rule 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations to be true and draws all reasonable inferences in plaintiff's favor. *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995) (subject matter jurisdiction); *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 & n.13 (Fed. Cir. 1993) (failure to state a claim).

Plaintiff's factual allegations must be "enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[T]o raise a right to relief above the speculative level," a complaint must allege "enough factual matter (taken as true)" by making allegations "plausibly suggesting (not merely consistent with)" a valid claim. *Id.* at 556. The basis of the court's determination is limited to the facts stated on the face of the complaint, documents appended to the complaint, and documents incorporated in the complaint by reference. *See Asahi Seiko Co. v. United States*, 33 CIT ___, ___, (2009), 2009 WL 3824745, at *4 (quoting *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991)).

Discussion

1. Subject Matter Jurisdiction

Subject matter jurisdiction is a threshold inquiry. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94–95 (1998). Plaintiff carries "the burden of demonstrating that jurisdiction exists." *Technabexport, Ltd. v. United States*, 16 CIT 420, 422, 795 F. Supp. 428, 432 (1992) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)).

Pursuant to 28 U.S.C. § 1582, this Court possesses exclusive jurisdiction to entertain "any civil action which arises out of an import transaction and which is commenced by the United States" to recover a civil penalty under the relevant provisions of section 641 of the

Tariff Act of 1930.¹ 28 U.S.C. § 1582 (2006). 19 U.S.C. § 1641(d)(1)(C), in turn, provides that Customs “may impose a monetary penalty . . . if it is shown that the broker . . . has violated any provision of any law enforced by the Customs Service or the rules or regulations issued under any such provision.” Plaintiff’s amended complaint alleges that Landweer is liable for a penalty under 19 U.S.C. §§ 1641(d)(1)(C) and (d)(2)(A) for violating 19 C.F.R. §§ 111.29 and 143.6 by filing 21 entries of Chinese freshwater crawfish with an incorrect dumping duty deposit rate of zero percent *ad valorem*, and incorrectly identifying the supplier of the merchandise as Yantai Haixing Aquatic Products on nine of those 21 entries. It further alleges that the court possesses jurisdiction to entertain this action pursuant to 28 U.S.C. § 1582, that this is an action to collect civil penalties pursuant to 19 U.S.C. § 1641, and that all notices required by 19 U.S.C. § 1641 were issued to Landweer. Am. Compl. ¶¶ 1–9, ECF No. 36.

Landweer argues that the underlying section 1641 administrative proceeding was legally defective because Customs never provided “any notice, allegations, petitions, adjudication or written determination” that Landweer violated 19 C.F.R. §§ 111.29 and 143.6, which Landweer argues is required by 19 U.S.C. § 1641(d)(2)(A) (“The notice shall advise the customs broker of the allegations or complaints against him. . . . [After any 19 U.S.C. § 1618 proceeding], the appropriate customs officer shall provide to the customs broker a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based.”). Mem. in Supp. of Def.’s Mot. to Dismiss at 11–13, ECF No. 28 (“Def.’s Mem.”). Plaintiff responds that Customs sufficiently satisfied its obligations under section 1641 by notifying Landweer that by filing 21 entries of Chinese freshwater crawfish with an incorrect deposit rate of zero percent *ad valorem*, and by incorrectly identifying the supplier of the merchandise as Yantai Haixing Aquatic Products on nine of those 21 entries, Landweer was liable for a penalty under 19 U.S.C. § 1641(d)(1)(C) (for violating “any provision of any law enforced by the Customs Service or the rules or regulations issued under any such provision”). Pl.’s Resp. to Def.’s Mot. to Dismiss at 4, ECF No. 36 (“Pl.’s Resp.”).

In support of the motion to dismiss, Defendant primarily relies on *UPS II* and *United States v. Optrex Am., Inc.*, 29 CIT 1494 (2005), arguing that Customs failed to properly exhaust the statutory procedures of 19 U.S.C. § 1641. Defendant’s exhaustion argument implicates a question of the framework to properly analyze whether sec-

¹ Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

tion 1641 is jurisdictional (a USCIT Rule 12(b)(1) analysis) or non-jurisdictional (a USCIT Rule 12(b)(5) analysis of the sufficiency of Customs' claim).

When reviewing whether the exhaustion of statutory requirements is jurisdictional or non-jurisdictional, the court presumes that exhaustion is non-jurisdictional unless Congress has stated in sweeping and direct language (i.e., in clear and unequivocal terms) that there is no subject matter jurisdiction prior to exhaustion. *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1248 (D.C. Cir. 2004) (internal citations and footnotes omitted). If non-jurisdictional, the exhaustion requirement is treated as an element of the underlying claim. *Id.* To help determine whether statutory prerequisites, such as exhaustion, are jurisdictional limitations or elements of a cause of action, the U.S. Court of Appeals for the Federal Circuit recently explained that

[a] statutory condition that requires a party to take some action before filing a lawsuit is not automatically “a *jurisdictional* prerequisite to suit.” Rather, the jurisdictional analysis must focus on the “legal character” of the requirement, which we discern [] by looking to the condition’s text, context, and relevant historical treatment. We similarly have treated as nonjurisdictional other types of threshold requirements that claimants must complete, or exhaust, before filing a lawsuit.

Ford Motor Co. v. United States, 635 F.3d 550, 555 (Fed. Cir. 2011) (quoting *Reed Elsevier, Inc. v. Muchnick*, ___ U.S. ___, 130 S. Ct. 1237, 1246–47 (2010)).

Turning to an analysis of the “text, context, and relevant historical treatment” of Section 1641(d)(2)(A), that provision sets forth the predicate requirements for obtaining a civil penalty against a customs broker. It provides that Customs first shall serve a customs broker with written notice (“pre-penalty notice”) that the broker may be subject to a monetary penalty for violation of section 1641(d)(1), specifying the allegations or complaints against the broker. Following the issuance of the pre-penalty notice, the customs broker has an opportunity to respond to the allegations and complaints. Thereafter, Customs issues a written penalty decision. Once the penalty issues, the broker then has a reasonable opportunity to seek remission or mitigation of the penalty pursuant to 19 U.S.C. § 1618. Following the section 1618 proceedings Customs issues a final decision on the monetary penalty, including findings of fact and conclusions of law. 19 U.S.C. § 1641(d)(2)(A).

Once Customs has perfected its civil penalty administratively, it may then seek to enforce the civil penalty against the customs broker. Section 1641, however, is silent as to the enforcement of Customs' final penalty determination. *Compare* section 1641(d)(2)(A) *with* section 1641(e) (judicial review of the denial, suspension, or revocation of a custom broker's license or the imposition of a monetary penalty in lieu thereof). To recover a section 1641 civil penalty, the United States must commence an action in the Court of International Trade pursuant to 28 U.S.C. § 1582(1). In authorizing the commencement of an action against a customs broker for a civil penalty, Congress did not enumerate a section 1641 enforcement action within the scope of 28 U.S.C. § 2637(a)-(c), the mandatory statutory exhaustion provisions for actions in the Court of International Trade. These mandatory jurisdictional preconditions exist only for actions commenced under 28 U.S.C. §§ 1581(a), (b), and (h). H.R. Rep. 96-1235, at 57 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 3729, 3768-69.

For example, for an action brought under 28 U.S.C. § 1581(a), an importer must have timely filed a protest under section 515 of the Tariff Act of 1930, and have that protest denied, in whole or in part. *See DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1319 (Fed. Cir. 2006) ("the filing of a protest is a jurisdictional requirement."); *see also United States v. Boe*, 64 CCPA 11, 15-16, 543 F.2d 151, 154-55 (CCPA 1976). In addition, the importer must have paid all liquidated duties, charges, or exactions at the time the action is commenced. *See* 28 U.S.C. § 2637(a). This payment requirement is a mandatory condition precedent for invoking the jurisdiction of the Court of International Trade. If payment is not made, then this Court must dismiss an importer's cause of action for lack of jurisdiction. *See Syva Co. v. United States*, 12 CIT 199, 201 (1988) (citing *Boe*, 64 CCPA at 18, 543 F.2d at 155-56)).

Similarly, for a domestic manufacturer to commence an action in this Court under 28 U.S.C. § 1581(b) challenging the classification, valuation, or rate of duty of imported merchandise, the domestic manufacturer must file a petition with Customs, and have that petition denied. *See* 19 U.S.C. § 1516, 28 U.S.C. § 2637(b) ("A civil action contesting the denial of a petition under section 516 of the Tariff Act of 1930 may be commenced in the Court of International Trade only by a person who has first exhausted the procedures set forth in such section."). Then and only then, upon satisfying the statutory condition precedent, is the domestic manufacturer authorized to commence

an action in the Court of International Trade. *See National Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1557 (Fed. Cir. 1988) (failure to file a section 516 petition renders jurisdiction under 28 U.S.C. § 1581(b) impossible).

In an action brought pursuant to 28 U.S.C. § 1581(h), an importer, prior to importation of subject merchandise, may challenge a ruling or a refusal to issue or change a ruling by Customs only if the importer can show that it would be irreparably harmed if required to exhaust its administrative remedies. *See* 28 U.S.C. § 2637(c). To establish subject matter jurisdiction in a 1581(h) action, the importer must demonstrate that: (1) the review sought must be prior to importation; (2) the review sought must pertain to a Customs ruling; (3) the ruling must relate to certain subject matter; and (4) irreparable harm will result unless judicial review prior to importation is obtained. Where the importer cannot satisfy all of these preconditions, subject matter jurisdiction under 28 U.S.C. § 1581(h) will not attach. *See American Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1551–52 (Fed. Cir. 1983). *See also CPC Int'l, Inc. v. United States*, 19 CIT 978, 979, 896 F. Supp. 1240, 1242 (1995) (“preimportation judicial review should be available only in exceptional cases and where the importer can demonstrate it would be irreparably harmed unless given an opportunity to obtain judicial review prior to importation”).

In all other actions, including those under 28 U.S.C. § 1582(1), the Court of International Trade may exercise its discretion, where appropriate, to require the exhaustion of administrative remedies. 28 U.S.C. § 2637(d); H.R. Rep. 96–1235, at 57, *as reprinted in* 1980 U.S.C.C.A.N. at 3768–69.

A scan of other customs laws - such as liquidated damages upon a bond, and collection of unpaid duties, taxes, or fees - fail to reveal similar preconditions (statutory exhaustion requirements) for the commencement of a civil action in the Court of International Trade. *See* 28 U.S.C. § 1582(2) (liquidated damage claims); 28 U.S.C. § 1582(3) (collection of unpaid duties generally); 19 U.S.C. § 1592(d) (collection of unpaid duties resulting from a violation of 19 U.S.C. § 1592); and 19 U.S.C. § 1553 and 19 C.F.R. § 18.8(c) (collection of duties caused by a failure to make the required transportation, delivery, and report for merchandise transported in bond from port to another in the United States). A review of the statutes that govern the commencement of actions in district court for the administration and enforcement of the customs laws not within the jurisdiction in the Court of International Trade yields a similar result. *See* 28 U.S.C. §

1355 and § 2461 *et seq.* (fines, penalties, and forfeitures); and 28 U.S.C. § 1356 (seizure). Defendant is unable to point to any customs statute that imposes a condition precedent on the commencement of an action other than those identified by the court.

As for the historical treatment of the procedures for perfecting a civil penalty claim similar to those contained in section 1641, Defendant is unable to point to a case in a district court or a circuit court of appeals prior to the creation of the Court of International Trade that addressed the sufficiency of those procedures as a condition precedent to commencing a civil penalty action under the customs laws.

The text of 19 U.S.C. § 1641(d), and 28 U.S.C. §§ 1582(1) and 2637, as well as the legislative history of section 2637, do not support Defendant's position that Congress intended to create a statutory precondition for the Government to invoke this Court's subject matter jurisdiction under 28 U.S.C. § 1582(1) to collect a civil penalty from a customs broker for a violation of 19 U.S.C. § 1641(d)(1). Defendant's argument also fails contextually in comparison to what Congress has imposed as threshold requirements in other provisions of the customs laws for commencing an action in the Court of International Trade. Lastly, the historical treatment of the section 1641 procedures for perfecting a civil penalty does not provide a basis to conclude that the "legal character" of that provision creates a statutory precondition that the Government must satisfy prior to commencing an action under 28 U.S.C. § 1582(1).

Defendant relies heavily on *UPS II*, arguing that the court has spoken "specifically to what it has the jurisdiction to do and what it does not have jurisdiction to do in a § 1641 broker penalty collection action under § 1582." Def.'s Resp. to Court's Order for Further Brg, at 2, ECF No. 41 ("Def.'s First Supplemental Resp."). Defendant's argument focuses on the following language from *UPS II*:

"[The court] has no direct jurisdiction [under § 1582] to independently impose a penalty for violation of the predicate statute . . . The Court's statutory role is not to impose penalties on customs brokers, but rather to decide whether to permit recovery of penalties the government has already imposed. *See* 28 U.S.C. § 1582(1)."

UPS II, 686 F. Supp. 2d at 1346. Defendant though misreads this language as a holding on the question of subject matter jurisdiction. It is not. It is simply the court's observation about the different statutory roles of Customs in imposing a civil penalty (under 19 U.S.C. § 1641) and the court in enforcing that civil penalty against a

customs broker (under 28 U.S.C. § 1582). *UPS II* and its prior judicial opinions (both at the trial and appellate level) did not involve or address subject matter jurisdiction. In fact there was no hint whatsoever from the Federal Circuit that the Court of International Trade lacked subject matter jurisdiction to entertain the action. See *UPS I*, 575 F.3d at 1383.

Defendant also relies on *United States v. Optrex Am., Inc.*, 29 CIT 1494 (2005), contending that the issue of Customs' failure to satisfy the requirements of 19 U.S.C. § 1641 is jurisdictional. *Optrex* involved an action under 28 U.S.C. § 1582 to collect a penalty for a violation of 19 U.S.C. § 1592, in which the Government sought to amend its complaint to add claims for gross negligence and fraud that Customs had not asserted during the administrative civil penalty proceeding. The *Optrex* court ultimately denied the motion to amend, holding that the administrative penalty underlies, and forms the basis of, the section 1582 cause of action, and Customs failure to pursue gross negligence and fraud at the administrative level precluded Customs from asserting them in the section 1582 action. See *Optrex*, 29 CIT at 1499–1500. Although *Optrex* can be read as a jurisdictional decision (a Rule 12(b)(1) perspective), it can also be read as a decision predicated on non-jurisdictional exhaustion considerations (a Rule 12(b)(5) perspective). The court believes that the latter is the better reading.

To explain, *Optrex* did not address subject matter jurisdiction as its own discrete problem; the court was instead preoccupied with the more specific issue of whether to permit Plaintiff (the government) to amend its complaint. The *Optrex* court therefore did not have before it straightforward motions to dismiss for lack of subject matter jurisdiction or failure to state a claim upon which relief may be granted. More important, the *Optrex* court did not have the benefit of the Federal Circuit's guidance in *Ford Motor Co.* on how to analyze whether section 592 civil penalty procedures are jurisdictional or non-jurisdictional. Read through the updated lens of *Ford Motor Co.*, *Optrex* appears to have applied non-jurisdictional exhaustion under 28 U.S.C § 2637(d), with the net effect being a failure of the government to satisfy the required elements of a cause of action to recover penalties for gross negligence and fraud. See *Optrex*, 29 CIT at 1500–01.

In examining the section 1641 procedures against a presumption that exhaustion is non-jurisdictional, the court is unable to discern any "sweeping and direct language" that establishes that those procedures are intended to be preconditions to invoking this Court's subject matter jurisdiction under 28 U.S.C. § 1582(1). Moreover, after considering the text, context, and relevant historical treatment of the

procedures, the court concludes that the “legal character” of section 1641 does not create a condition precedent for the commencement of a civil penalty enforcement action. Accordingly, the court has subject matter jurisdiction over Plaintiff’s amended complaint.

2. Failure to State a Claim upon Which Relief Can Be Granted

Although the requirements of section 1641 may not be jurisdictional, they are nevertheless requirements that must be satisfied as elements of the Government’s section 1582 cause of action. The court next turns to whether the Government has stated a claim upon which relief can be granted. In its complaint the Government alleges that, pursuant to 19 U.S.C. § 1641(d)(1)(C), a monetary penalty may be imposed against a customs broker for violating any provision of any law enforced by Customs or the rules or regulations issued under any such provision. Am. Compl. ¶ 5. The Government also alleges that 19 C.F.R. § 111.29(a) requires a customs broker to exercise due diligence in preparing and filing records involving its customs business, and that 19 C.F.R. § 143.6 requires a broker who uses the Customs Automated Broker Interface (“ABI”) system to adhere to ABI performance requirements and operational standards in the transmission of data and to follow Customs directives and policies as to the proper use of the ABI system. *Id.* ¶¶ 6 and 7. Plaintiff further asserts that Defendant filed 21 entries of Chinese freshwater crawfish with an incorrect dumping duty deposit rate and on nine of those entries Defendant also incorrectly identified the supplier of the subject merchandise. *Id.* ¶¶ 8 and 9. Therefore, the Government claims that the acts and omissions of the Defendant in filing these entries constituted “violations of 19 C.F.R. §§ 111.29, and 143.6,” and as a result, Defendant is liable “pursuant to 19 U.S.C. §§ 1641(d)(1)(C) and (d)(2)(A) for a civil penalty in the amount of \$30,000. *Id.* ¶¶ 11 and 12.

In particular, the Government contends that “[t]he amended complaint contains specific allegations that Landweer is liable for penalties . . . for violating 19 C.F.R. §§ 111.29 and § 143.6 and that ‘[a]ll notices required by 19 U.S.C. § 1641 were transmitted to Landweer’” Pl.’s Resp. at 4–5. Problematically though, as the Government acknowledges, Customs *did not* specifically allege that Defendant violated sections 111.29 and 143.6 during the underlying administrative proceeding. The Government instead maintains that Customs “did allege facts that informed Landweer of a violation of these regulations.” *Id.* at 9.

Customs’ claim in the pre-penalty notice was predicated on Defendant’s failure “to exercise reasonable supervision” over its customs business under 19 C.F.R. § 111.28, and 19 U.S.C. §§ 1641(b)(4) and

1641(d)(1)(C). Def.'s Mem., Ex. 1. The pre-penalty notice identified two claims - (1) Defendant's filing of 21 entries with a false antidumping duty deposit rate and (2) Defendant's failure to correctly identify the supplier on nine of the 21 entries. Landweer acknowledged that it made a clerical error in selecting the code identifying the shipper of the subject merchandise for the nine entries, asserting that it did not intend to circumvent the regulations or mislead Customs. Def.'s Mem., Ex. 2. In response, Customs, however, never raised a claim of a lack of due diligence under section 111.29 or a failure to adhere to the ABI system requirements or standards or follow Customs directives or policies under section 143.6 on the part of Landweer. Rather, Customs continued to center its attention on the sole claim of Landweer's lack of responsible supervision and control over its customs business. *See id.*, Exs. 7 and 8.

While the pre-penalty notice mentions a Customs directive (Administrative Message No. 02-1362) issued to all ABI brokers regarding duty rates in antidumping cases, it does not include any allegation that Defendant failed to exercise due diligence under 19 C.F.R. § 111.29, or to adhere to ABI system requirements or operational standards or follow Customs' directives pursuant to 19 C.F.R. § 143.6. *Id.* Throughout the remainder of the administrative proceeding, Landweer explained that it took reasonable steps, through queries using the ABI system, to identify the applicable dumping duty deposit rate for the subject entries, but claimed that the ABI system was flawed leading to the inclusion of the incorrect deposit rate on the 21 entries. *See id.*, Exs. 4, 5, and 6. Despite references to the Administrative Message in its responses to Defendant, Customs never made an allegation that Defendant violated section 143.6 for failure to follow Customs directives or policies. If anything, Customs continued to address the Administrative Message solely in the context of Landweer's alleged lack of responsible supervision and control.

Given the breadth of section 1641(d)(1)(C) - "any provision of any law enforced by . . . Customs or the rules or regulations issued" thereunder - and the singular focus in Customs' pre-penalty notice, penalty determination, and mitigation petition decisions on Defendant's alleged failure to abide by its duty to exercise "responsible supervision and control over the customs business that it controls" under section 1641(b)(4), it is difficult for the court to conclude that Defendant was made aware during the administrative penalty proceeding that it was potentially liable for a violation of 19 C.F.R. §§ 111.29 or 143.6.

Nevertheless, the Government argues that nothing in section 1641 requires that Customs "identify each and every regulation that Land-

weer's conduct could be deemed to have violated," in contrast to 19 U.S.C. § 1592, which specifically requires that a pre-penalty notice identify "all laws and regulations allegedly violated." Pl.'s Resp. at 5–6. Following the logic of the Government's argument, Customs would only have to assert a violation under the "any law, rule, or regulation" language of section 1641(d)(1)(C) and no more. Consequently, a customs broker would have to divine every possible basis for a claim by Customs of a violation of section 1641 in the administrative proceeding and in a follow-on penalty collection action, even if it was never apprised of the specific violation. Congress provided a great deal of process in section 1641, starting with the pre-penalty notice where Customs is to provide written notice to a customs broker of a potential violation of section 1641 and an opportunity for the broker to respond, followed by the penalty notice, which is Customs' written decision after considering the broker's initial response.

Congress did not stop there, providing an additional layer of process pursuant to 19 U.S.C. § 1618, by authorizing a potential violator to present arguments that Customs should remit or mitigate the monetary penalty. At the conclusion of a section 1618 proceeding, Customs is to provide a customs broker with "a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based." 19 U.S.C. § 1641(d)(2)(A). To require a potential violator, such as Defendant, to speculate as to the basis of Customs' penalty claim would defeat Congress' statutory scheme. Moreover, it runs contrary to the legislative history of section 1641. Prior to 1984, Customs had no authority to assess or collect civil penalties from customs brokers. *See Trade and Tariff Act of 1984, Pub. L. No. 98–573, § 212, 98 Stat. 2948, 2979–81 (1984)*. In granting this new authority, Congress stated (and Customs "agreed") that the regulations governing civil penalty proceedings involving customs brokers would parallel those in place for section 592 civil penalty proceedings. *See H.R. Rep. 98–1015, at 72 (1984), as reprinted in 1984 U.S.C.C.A.N. 4910, 5031*. In fact, the penalty assessment procedures for a violation of section 1641 mirror those for a section 1592 violation. *See 19 C.F.R. Part 171, App. C (Guidelines for the Imposition and Mitigation of Penalties for Violations of 19 U.S.C. 1641)*. Congress therefore intended that a claim in a penalty collection action be the same claim as in the underlying administrative proceeding, regardless of whether the claim arises under section 1592 or section 1641.

While Customs did allege facts that informed Landweer of some violation of section 1641, Customs, by its own acknowledgement, did not specifically allege that those facts gave rise to a violation of

section 111.28 or 143.6. Therefore, Customs did not sufficiently exhaust administrative remedies against Landweer for a violation of 19 C.F.R. § 111.28 for a lack of due diligence nor its claim for violation of 19 C.F.R. § 143.6 for failure to adhere to the performance standards and operational requirements of the ABI system or failure to follow Customs directives or policies.

The role of Customs in a section 1641 civil penalty proceeding is to determine whether a violation occurred and whether that violation supports the imposition of a monetary penalty. It is the “statutory role” of the Court of International Trade “to decide whether to *permit recovery* of penalties the government has already imposed.” *UPS II*, 34 CIT at ___, 686 F. Supp. 2d at 1346. In deciding whether to permit recovery, the court looks at the broker’s violation “only insofar as violation of the statute is a crucial component of the [section 1641] penalty procedure.” *Id.* The Government is required to demonstrate in a collection action that Customs met “all other formal requirements of the [section 1641] procedure.” *Id.* Given this framework and the process (including mitigation) that Congress has built into section 1641, the issues of a potential violation of the statute and the determination of liability for a civil penalty for a customs broker’s violation of section 1641 must first be addressed and resolved administratively. *See Optrex*, 29 CIT at 1500 (“The statute was designed to give an importer the opportunity to *fully resolve* a penalty proceeding before Customs, before any action in this Court”) (emphasis added). Therefore, to announce for the first time in a section 1582 enforcement action the specific laws or regulations violated by Defendant does not comport with the statutory scheme created by Congress. Accordingly, Plaintiff has failed to state a claim upon which relief can be granted.

Conclusion

For the forgoing reasons, the court denies Defendant’s Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, and grants Defendant’s USCIT Rule 12(b)(5) motion to dismiss Plaintiff’s amended complaint for failure to state a claim upon which relief can be granted.

Dated: February 8, 2012
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

