U.S. Customs and Border Protection

Slip Op. 12–12

DIAMOND SAWBLADES MANUFACTURERS COALITION, Plaintiff, v. UNITED STATES, Defendant,

Before: R. Kenton Musgrave, Senior Judge
Court No. 09–00110

[Granting application to recover attorney's fees and other expenses pursuant to the Equal Access to Justice Act.]

Dated: January 26, 2012

Wiley, Rein & Fielding LLP (*Daniel B. Pickard* and *Maureen E. Thorson*), for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White*, *Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Delisa M. Sanchez*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Hardeep K. Josan*), of counsel, for the defendant.

OPINION AND ORDER

Musgrave, Judge:

Introduction

Diamond Sawblades Manufacturers Coalition ("DSMC") petitions for award of $73,466.11 (current estimate) in fees and expenses against The United States pursuant to 28 U.S.C. § 2412 of the Equal Access to Justice Act ("EAJA"). DSMC succeeded in obtaining a writ of mandamus from the underlying litigation, and the following explains why award is appropriate.

Background

The overall unfair trade litigation to which the underlying litigation relates provides context. In 2005, DSMC filed an antidumping petition to obtain relief from imported diamond sawblades from the Republic of Korea and the People's Republic of China. After affirmative preliminary determination before the U.S. Department of Commerce, International Trade Administration ("Commerce" or the "Department") and the U.S. International Trade Commission ("ITC" or "Commission"), the investigation moved into the final determination

phase. Commerce reached a final affirmative determination of sales at less than fair value, and at that point issuance of the antidumping duty order depended upon an affirmative final determination of material injury or threat thereof by the Commission. The Commission subsequently made a final determination of no material injury or threat thereof, which effectively put an end to the administrative aspect of the antidumping investigation.

DSMC then brought several separate judicial challenges here. One matter, not relevant here, contests Commerce's margin calculations in the final less-than-fair-value determination concerning respondents from the Republic of Korea. *See* Court No. 06–00248. The other matter, with which DSMC first proceeded, and which is now at an end, challenged the Commission's negative final determination of no material injury or threat thereof. *See* Court No. 06–00247. The challenge resulted in remand to the Commission and ultimately an affirmative determination on the threat of material injury, which remand results were sustained. Slip Op. 09–5, 33 CIT __, 2009 WL 289606 (Jan. 13, 2009).

By letter dated January 22, 2009, ITC notified Commerce that this court had issued a final decision sustaining its affirmative remand determination and that the court's decision was "'not in harmony with' the Commission's original negative injury determination." Pub. Doc. 3 at 1. DSMC commented to Commerce simultaneously, *see* Pub. Doc. 1, arguing that in addition to suspension of liquidation, Commerce should order U.S. Customs and Border Protection to begin immediate collection of cash deposits on the antidumping duties in accordance with *Decca Hospitality Furnishings, LLC v. United States*, 30 CIT 357, 371, 427 F. Supp. 2d 1249, 1262 (2006) ("*Decca*"), *Timken Co. v. United States*, 893 F.2d 337, 341 (Fed. Cir. 1990) ("*Timken*"), and congressional intent "that cash deposit rates be accurate and current" and that "cash deposit rates are important in providing provisional relief to the domestic industry." *Id*. at 3–4 (quoting *Decca*, 30 CIT at 372, 427 F. Supp. 2d at 1263 (citation omitted), and *Tianjin Magnesium Intern. Co. v. United States*, 32 CIT ___, ___, 533 F. Supp. 2d 1327, 1331 n.12 (2008), respectively). DSMC also pointed out that "general principles of administrative [law] require that both judicial and administrative agency decisions, such as CIT's current [final] decision and the Commission's affirmative [threat of] material injury finding, be executed despite pending judicial review" at the appellate level, and that seeking stay of a judgment is the proper procedural avenue to avoid immediate execution on the court's judgment. *Id*. at 4.

Commerce published notice of the court's decision in the Federal Register on February 10, 2009. *Diamond Sawblades and Parts Thereof from the People's Republic of China and the Republic of Korea: Notice of Court Decision Not In Harmony With Final Determination of the Antidumping Duty Investigations*, 74 Fed. Reg. 6570 (Dep't of Comm. Feb. 10, 2009) ("*Timken Notice* "). *See* 19 U.S.C. § 1516a(c)(1); *see also Timken*, 893 F.2d at 341. Therein, Commerce announced that liquidation of subject import entries would be suspended within ten days of that notice and that an antidumping duty order would be issued if the ITC notified it that slip opinion 09–05 "is not appealed or is affirmed on appeal." *Id*. With respect to DSMC's plea to order collection of cash deposits, Commerce stated that it would not do so until issuance of a final and conclusive court decision, and that it "interprets *Timken* to require suspension of liquidation, but not to direct the Department to require cash deposits on or after the date of the notice." Pub. Doc. 4 at 4 (Dep't of Comm. memorandum to *Timken Notice*). Commerce reasoned as follows:

> As the Federal Circuit explained, "an adverse CIT decision merely suspends liquidation." *Timken*, 893 F.2d at 342. The Federal Circuit made this comment when explaining its desire to avoid the "'yo-yo' effect" of different treatment of entries based upon the latest court decision affecting those entries. Further, the Federal Circuit in *Timken* indicated that suspension of liquidation is sufficient "so that subsequent entries can be liquidated in accordance with {the} conclusive decision." *Id*. We find *Decca* distinguishable on its facts. There, an importer sought mandamus for the Department to lower the cash deposit rate from 198.08% to 6.65% pending appeals and prior to publication of an amended final determination. *Decca*, 427 F. Supp. 2d at 1253–54. Further, we respectfully disagree that the CIT decided *Decca* correctly. Accordingly, we will not order CBP to collect cash deposits until the ITC informs us of a conclusive court decision.

Id.

Familiarity with what further transpired is here presumed (including vindication of *Decca*). The EAJA petition before the court is solely concerned with the fees and costs associated with the underlying litigation petitioning for a writ of mandamus requiring Commerce to publish antidumping duty orders and collect cash deposits on diamond sawblades from the Republic of Korea and the People's Republic of China. *See* Slip Op. 09–107, 33 CIT ___, 650 F. Supp. 2d 1331 (2009), *aff'd* 626 F.3d 1374 (Fed. Cir. 2010).

Argument on the EAJA Petition

Summarizing, DSMC argues (1) it obviously prevailed in the underlying litigation and its net worth and number of employees meets EAJA's eligibility requirements, (2) the government's position throughout was not substantially justified, (3) no special circumstances make an award unjust, and (4) its fee application is timely and supported by an itemized fee statement. *See* 28 U.S.C. §§ 2412(a)(1), 2412(d)(1); *see also Libas, Ltd. v. United States,* 314 F.3d 1362, 1365 (Fed. Cir. 2003) ("*Libas*"). If that provision of EAJA does not provide relief, DSMC also seeks to hold the United States "liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. §2412(b). *Cf. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 n.6 (1986) (courts have authority to enforce their own orders by assessing attorney's fees against a party that willfully violates a court order).

The government agrees DSMC prevailed, *see* Def.'s Resp. at 21, but it argues DSMC's petition fails to establish that DSMC was the party that authorized and incurred the legal fees in the underlying litigation or establish that DSMC was the direct beneficiary of the underlying litigation for which it seeks EAJA fees. Def.'s Resp. at 6–7. More precisely, the government disputes that DSMC is an eligible "party" as described in EAJA and argues that DSMC is merely a "front" for the "real parties in interest" consisting of those who fund the litigation and to whom beneficial interests in the litigation flow; therefore it "would be appropriate to consider, and perhaps aggregate[,] the assets of the individual members of DSMC for purposes of determining EAJA eligibility[,]" assuming such evidence is present. *Id*. at 18. Apart from party eligibility, the government also contends Commerce's position was substantially justified. If not, and the motion is to be granted, the government argues DSMC's requests for a special enhancement to the statutory maximum rate and for paralegal fees and for fees for work on the EAJA application should be denied.

Discussion

I. Whether DSMC Is Eligible For Award Under EAJA

EAJA permits award of attorney's fees and costs to, *inter alia*, an "association . . . the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed[.]" 28 U.S.C. 2412(d)(2)(B)(ii). DSMC's petition therefor includes averment that

DSMC "is an *ad hoc* trade association made up of primarily small, family-owned U.S. producers of diamond sawblades" (Pl.'s Br. at 4); that DSMC was established in 2005 for the purpose of petitioning the government for relief from unfairlypriced imports; that the affiant has served as DSMC's Executive Chairman since 2005; that DSMC obtained relief in 2009; that DSMC has engaged in "several activities in addition to petitioning for relief" including involvement in the several appeals related to the above-described determinations by the Commission and Commerce; that participation in litigation in the federal courts was not the primary purpose in the formation of DSMC; that DSMC has submitted comments to the government on trade-related issues, including the need for effective enforcement of the trade remedy laws; that representatives of DSMC have met with members of Congress regarding trade remedy law issues; that DSMC has "had numerous contacts with the Bureau of Customs and Border Protection and with Immigration and Customs Enforcement in matters not directly connected with the court appeals of decisions made by the Department and the ITC"; and that DSMC has no assets, net worth, or paid employees. *See* Pl.'s Reply at Ex. 1.

A

EAJA's definition of "association" has been addressed only in passing by the Court of Appeals for the Federal Circuit ("CAFC"). *See Fields v. United States*, 64 F.3d 676 (Fed. Cir. 1995) (unpublished decision describing that in order to recover on EAJA a litigant must prove, *inter alia*, that "*[h]e* is a 'party' as defined in the statute by being . . . an association . . . or organization") (italics added). Four other federal appellate courts have construed the definition plain either explicitly or implicitly. *See National Ass'n of Manufacturers v. Dep't of Labor*, 159 F.3d 597, 600 (D.C. Cir. 1998) ("*NAM*") ("plain language of the statute"); *Texas Food Industry Ass'n. v U.S. Dep't of Agriculture*, 81 F.3d 578, 582 (5th Cir. 1996) ("*Texas Food*") ("judicial inquiry into the applicability of § 2414(d)(2)(B) must begin and must end with § 2414(d)(2)(B)'s clear and unambiguous words"); *National Truck Equip. Ass'n v. National Highway Traffic Safety Admin*., 972 F.2d 669, 674 (6th Cir. 1992) ("*National Truck*") ("obvious meaning" of statute discernible from explicit exceptions to net worth provision); *Love v. Reilly*, 924 F.2d 1492, 1494 (9th Cir. 1991) ("*Love*") (association eligibility determined in accordance with language of statute).

The majority of these decisions also concluded that a trade association meeting EAJA's net worth and employee requirements is eligible for EAJA fees and expenses, regardless of the net worth or employ-

ment figures of its members, either individually or jointly. *See NAM*, 159 F.3d at 600 ("[t]he statute thus places its eligibility ceilings on the association itself"); *Texas Food*, 81 F.3d at 582 ("[t]he statute's purpose . . . is to make associations eligible for an award on the basis of each association's independent qualifications – not the qualifications of its constituent members"); *Love*, 924 F.2d at 1494 ("[i]n order to prove its eligibility[,] . . . an association . . . must show that its net worth was less than $7,000,000 at the time this suit began and that it had less than 500 employees"). *See also Dalles Irrigation Dist. v. United States*, 91 Fed. Cl. 689, 701 (2010) (adopting majority view and holding "that the language of 28 U.S.C. § 2412(d)(2)(B)(ii) unambiguously contemplates that it is the association alone that must satisfy the standards for eligibility, not also its constituent members as an aggregate group").

The majority thus, along with the CAFC's earlier observation in *Fields*, construes "association" in 28 U.S.C. 2412(d)(2)(B)(ii) according to the term's traditional meaning, as oft-employed in U.S. law. *See*, *e.g.*, *Hecht v. Malley*, 265 U.S. 144, 157 (1924) ("a term 'used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise'") (citations omitted); *see also*, *e.g.*, *Webster's New International Dictionary of the English Language*, p. 167 (2d ed. 1956). Under U.S. law, an association is legally cognizable as a person with capacity. *See*, *e.g.*, 1 U.S.C. § 1; *see also*, *e.g.*, *Kearney v. Taylor*, 56 U.S. 494 (1853).

This court follows suit and concludes DSMC's petition papers provide *prima facie* that DSMC fits the description of an EAJA-eligible association. *Cf. Allegheny Bradford Corp. v. United States*, 28 CIT 2107 n.2, 350 F. Supp. 2d 1332 n.2 (2004) (finding applicant satisfied EAJA eligibility based on affidavit of applicant's vice president).

B

The government nonetheless urges a "real party in interest" inquiry[1] into who funded the underlying litigation in order to determine "whether DSMC is no more than a 'front' or a 'sham' through which ineligible entities pursued litigation." Def.'s Resp. at 13 (quoting

[1] In an earlier decision considering the government's real-party-in-interest opposition, *Unification Church v. Immigration & Naturalization Service*, 762 F.2d 1077 (D.C. Cir. 1985), upheld denial of a fee award that would have inured to an EAJA-ineligible *association* through its members' EAJA application because the members had been promised by the church association that it would pay their legal fees regardless of the outcome. *See* 762 F.2d at 1082, 1091–92. The government repeatedly raises the doctrine in arguing that EAJA awards would inure to EAJA-ineligible *members* of associations. *See*, *e.g.*, *Love*, 924 F.2d at 1494; *NAM*, 159 F.3d at 599-*passim*.

NAM, 159 F.3d at 603). The argument puts the cart before the horse.

The real party in interest is the person who actually possesses the substantive right being asserted and has a legal right to enforce the claim. *See*, *e.g.*, *Childress v. Emory*, 21 U.S. 642 (1823). In order to "pierce the associational veil" and trigger such an inquiry, the government must first point to evidence in the record that would reasonably lead to the conclusion that DSMC is in fact a sham and not a legitimate trade association. *See NAM*, 159 F.3d at 603 ("*if* an association were no more than a "front" or a "sham" through which ineligible entities pursued litigation and recovered fees, it *would be* appropriate to pierce the associational veil and look to the real parties in interest") (italics added). The fact that an association might consist of a "mix" of eligible and ineligible membership is insufficient, *see id*. at 603–04, the government must specifically point to evidence showing control over DSMC by an EAJA-ineligible entity. This the government has not done.

The government requested and was granted the opportunity to submit a sur-reply in the event DSMC should "attempt to supplement or 'clarify' its EAJA application in its reply brief with facts and/or legal arguments not included in its application and memorandum in support thereof." Def.'s Resp. at 37. As in its response brief, the government's sur-reply implicitly relies on *NAM* and continues to assume that DSMC is required to prove that it is an "independent" entity operated independently of its constituent members by an independent board and independent executive control, *et cetera*. *See* Def's Sur-Reply . . . Pursuant to [EAJA] ("Def.'s Sur-Reply") at 5–6; *see also* Def.'s Resp. at 10–11 (pointing to discussion in *NAM* concerning the record evidence that the NAM association is an independent *corporation* managed by its own officers and executives and retaining complete responsibility and authority to direct the actions of its counsel throughout the litigation).[2] Based on such assumption, the government's sur-reply consists of innuendo, speculation, and straw man argumentation attempting to impugn DSMC's legitimacy.

The attempt fails. The point of that discussion in *NAM* was simply to disprove by way of the evidentiary record "the government's veiled

[2] *See NAM*, 159 F.3d at 604. Noting that the organization was founded in 1895, the *NAM* panel described NAM as "an independent corporation, independently managed by its own officers and executives" and that based on the affidavit of its senior vice president declaring that the association "and not its individual members or affiliates . . . retained complete responsibility and authority to direct the actions of its counsel throughout this litigation" and further observed that the district court "made a specific evidentiary finding that NAM's individual corporate members 'played no part in the legal prosecution or decision-making processes of this case[.]'" *Id.* (quoting *National Ass'n of Mfrs. v. U.S. Dept. of Labor*, 962 F. Supp. 191, 194 (D.D.C. 1997)).

accusation that [EAJA-ineligible] members of NAM *controlled* this litigation and that NAM merely acted as their puppet[.]" *See NAM*, 159 F.3d at 604 (italics added). Cutting to the chase, in *NAM* the appellate panel simply held that the association plaintiff "plainly was not established for the purposes of conducting this law suit." *Id*. (citation omitted). Here, similarly, although the matter at bar does not present the level of evidentiary detail described in *NAM*, DSMC, was clearly not organized for the purposes of generating EAJA fees or for conducting *this* law suit for mandamus.

Obviously DSMC had the capacity to bring suit. It participated in administrative proceedings and subsequent litigation in order to seek unfair trade relief, and it was, in effect, forced to pursue the underlying mandamus litigation in order to deter apparent injustice at the hands of the sovereign. The government offers nothing to bolster its allegation that DSMC is a sham, or its assumption that the burden was on DSMC to demonstrate "independence"[3] in order to "avoid" a real party in interest inquiry, the government apparently having chosen not to engage in further discovery. *Cf. NAM*, 159 F.3d at 605 n.8 ("DOL never sought to discover evidence of such overlap" and "[i]n the face of NAM's declaration to the contrary, . . . there was no reason for the district court to presume an overlap existed"). The fact that DSMC has no assets, net worth or employees is insufficient to impugn

[3] *Cf.*, *e.g.*, Def's Sur-Reply at 5–6 (claiming that the declaration of DSMC's executive director "fails to demonstrate that DSMC is an independent association managed by its own officers and executives, that it directed the actions of its counsel throughout the underlying litigation in this case, or that DSMC is the 'real party in interest' with respect to the EAJA fees sought in this matter" and that the declaration "sheds no light whatsoever upon the structure of DSMC, its relationship with its counsel or its members, or how the association is managed" and that the declaration "does not even state that DSMC incurred any of the legal fees and expenses sought by its counsel in the motion for award of attorney's fees and expenses" and that "[s]urely [DSMC's executive director] . . . would have knowledge of any legal fees and expenses incurred by DSMC if DSMC had in fact incurred those expenses" and that it is "telling that [he] . . . failed to declare that DSMC itself incurred the expenses that are the subject of the EAJA petition" and that "although DSMC presented to the Court five exhibits for the first time with its reply brief, to date it has not submitted any evidence to establish that it had a fee agreement with its counsel making it responsible for the expenses of the litigation" and that "if DSMC were the real party in interest with respect to the motion for fees pursuant to the EAJA, DSMC would have submitted evidence to that effect with its motion and initial brief[,]" *et cetera*). The government further argues that DSMC "concedes" in its reply brief that DSMC did not incur the fees and expenses it seeks in this matter because DSMC stated as follows: "With regard to the payment of its legal fees, Wiley Rein LLP tracks time spent on DSMC under a DSMC-specific billing number. *See* DSMC Application at Exhibit 1. Individual member companies each pay a specified percentage of the monthly bill, however, the client is the DSMC." *Id*. at 7, quoting DSMC Reply at 6. From this statement, the government contends DSMC's counsel "directly" bills DSMC's individual member companies certain "specified percentages of monthly bills[.]" *Id*. The assumption is unwarranted from the statement presented.

its legitimacy. *See*, *e.g. Project Basic Tenants Union v. Rhode Island Housing and Mortg. Finance Corp*., 636 F. Supp. 1453 (D.R.I. 1986). And although it is true, as the government implies, that the declaration of DSMC's "Executive Chairman" does not illuminate whether he is not also involved with an EAJA-ineligible member, assuming *arguendo* that is relevant to this instance, the burden on that question lies with the government. *Cf*. *NAM*, 159 F.3d at 604–05 (expressing doubt that NAM bore the "additional" burden, beyond the language of the statute, of proving that its members are not the real parties in interest, referencing therefor *Love*, 924 F.2d at 1494, and holding that "the government never sought discovery that would have carried the day for it on that question"). Even if he is, his "control" of DSMC's actions would not impugn DSMC's legitimacy as an association in the absence of indicia to the effect that its purpose was for, or subverted to, the exclusive benefit of an EAJA-ineligible member, the latter again being matters for the government to pursue and not DSMC to prove. *Cf. id*. at 605 n.8 (*see supra*) *with United States v. Bestfoods*, 524 U.S. 51, 61 (1998) ("courts generally presume that the directors are wearing their 'subsidiary hats' and not their 'parent hats' when acting for the subsidiary") (citations omitted).

The substantive right over these matters, not only in the initiation of the petition but also in the underlying mandamus litigation (which is a subset of the plaintiff's broader trade litigation), has nominally been held by DSMC, a trade association consisting of, and acting on behalf of, association members. The record of DSMC's litigation indicates DSMC was formed because no single domestic industry producer or manufacturer accounted for most of the production of domestic like product in its own right to support a petition to initiate the investigation into unfair trade practices. *See* Inves. Nos. 731-TA-1092–1093 (Preliminary): Diamond Sawblades from China and Korea – Staff Report, Confidential Document No. 117 (USITC July 5, 2005) at Table III-1. *Cf*. 19 U.S.C. 1671a(c)(4)(A) & 1673a(c)(4)(A) (determination of whether petition is filed "on behalf of" means petition has support from at least those producers or workers accounting for 25 percent of total production of domestic like product and more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for the petition); 19 U.S.C. § 1677(4)(A) ("industry" means "the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product"). In other words, U.S. unfair trade law effectively *required* an association of members of the domestic diamond sawblades industry in order to show sufficient sup-

port for the antidumping petition to trigger the investigation. An individual member of DSMC may have had standing to challenge aspects of ITC's final negative determination to the extent it was an "interested party who was a party to the proceeding[,]" *see* 19 U.S.C. 1516a(a)(1), but none have done so.[4]

DSMC's reply brief and its attachments address the evidentiary formality concerns raised in the government's response brief. Counsel for DSMC avers that it "tracks time spent on DSMC matters under a DSMC-specific billing number. . . . [and i]ndividual member companies each pay a specified percentage of the monthly bill, however, the client is the DSMC." Pl.'s Reply at 6. DSMC offers to submit evidence of "each company's net worth and employee information" if they be deemed necessary, *see* Pl.'s Reply at 4 n.2, but the court considers DSMC's proffer unnecessary as the government has not produced evidence to rebut DSMC's *prima facie* case to warrant a real party-in-interest inquiry.

In the absence of indicia that DSMC is being controlled or subverted by an EAJA-ineligible member, the fact that each member contributes to the cost of litigation of their association is alone not sufficient to justify "piercing the associational veil" via a real-party-in-interest inquiry into DSMC's individual members' net worth and numbers of employees. *Cf. Unification Church*, 762 F.2d at 1079, 1083, 1091–92 (district court record clearly showed that only an EAJA-ineligible church association, and not any of the other three plaintiff members of that association, would have benefitted from award of EAJA); *Love*, 924 F.2d at 1494 (fact that members received benefits of litigation does not make them "real parties in interest").[5]

---

[4] Thus the so-called "free-rider" problem identified in *State of Louisiana, ex. rel. Guste v. Lee*, 853 F.2d 1219, 1225 (5th Cir.1988), where an EAJA-eligible party joins an EAJA-ineligible party in litigation that the EAJA-ineligible party was "fully willing and able to prosecute . . . against the United States[,]" is simply not present in this case. In any event, the "free rider" problem has been limited to suits for EAJA fees consisting of a "mix" of EAJA-eligible and EAJA-ineligible coplaintiffs. *See Texas Food*, 81 F.3d at 582 n.7.

[5] *But see Love*, 924 F.2d at 1494 ("members of the NWFPA would be the real party in interest in the fee litigation only if they were liable for the NWFPA's attorney's fees"); *NAM*, 159 F.3d at 604 ("payment of membership dues does not render a member liable for the costs of a litigation" and "mebership dues clearly have not financed this litigation"). However, a *per se* prohibition against member financing of association litigation would effectively render "association" in EAJA superfluous. An association always acts "on behalf of" if not "for" its members. Unless it has access to outside sources of income (*e.g.*, as would be the case of a for-profit association, in which case it is technically a partnership), association operations are dependant, as necessary, upon membership financing. In other words, "member funding of litigation" is a tautology, and its members can always be deemed "real parties in interest," behind any association litigation, in a general sense.

C

In passing, the court also notes the government's other contention that "it would be appropriate to consider, and perhaps aggregate the assets of the individual members of DSMC for purposes of determining EAJA eligibility" in accordance with *National Truck*. *See* Def.'s Resp. at 17–18. The court disagrees for a variety of reasons. These may be quickly summarized as follows: (1) although *National Truck* held the meaning of "association" plain, the decision construed the term to mean an "aggregation," which is contrary to its traditional treatment in U.S. law as a single person (*see supra*); (2) according to *NAM*, the government expressly disavowed reliance upon that decision (*see NAM*, 159 F.3d at 602); (3) aggregation eviscerates "association" from the statute by requiring consideration of every individual member's eligibility (individuals are EAJA-eligible if their net worth does not exceed $2 million at the time the civil action is filed) (*see id*.); (4) such an inquiry is unwieldy; (5) nothing in the statute suggests that one member's ineligibility should disqualify an entire association's eligibility or convert the association-eligibility inquiry into one of individual-eligibility for each member (*see id*. at 603; *Texas Food*, 81 F.3d at 581; *Love*, 924 F.2d at 1494); and (6) Model Rule 0.104(g) announced at the 1981 Administrative Conference of the United States (*see Equal Access to Justice Act: Agency Implementation*, 46 Fed. Reg. 32900, 32912 (1981); *see also National Truck*, 972 F.2d at 672) similarly emasculates the traditional and obvious meaning of "association" from EAJA, because an association, typically acting in its representational capacity, will literally never be found not to have "participate[d] in a proceeding primarily on behalf of one or more other persons or entities" for which an award of EAJA may be sought. Nonetheless, should DSMC wish to submit evidence of the net worth and employees of its individual members for the record, it will be accepted in addition to the matters ordered *infra*. Any costs involved in the preparation and submission of such shall be borne by DSMC, unless contested by the government.

D

To sum up, DSMC has provided support for finding that it is a legitimate and EAJA-eligible association. To date, it has pursued a matter of interest to all its members as well as the domestic industry as a whole, namely remediation of unfair trade practices. Such remediation is also in the interest of public policy. The benefits DSMC's members derived thereby, and from the underlying litigation, did not and do not flow individually, but collectively, through their concerted action through DSMC, including their bearing of DSMC's costs. The

government's position, apart from innuendo, *et cetera*, does not persuasively impugn DSMC's proof of its legitimacy. Therefore, based on the papers and other indicia from the overall unfair trade litigation, the court finds that DSMC is not a mere "sham" but is in fact a legitimate trade association meeting EAJA's net worth and employee requirements as well as EAJA's purpose on the basis of DSMC's current presentation. *See* Pl.'s Reply at Ex. 1.

II. Whether Commerce was "Substantially Justified"

Having found DSMC an eligible party for purposes of EAJA, the court also finds the government's position not "substantially justified." *See* 28 U.S.C. § 2412(d)(1)(A).

The government has the burden of proving its position was substantially justified. *E.g. Libas*, 314 F.3d at 1366; *Jazz Photo Corp. v. United States*, 31 CIT 1101, 1107, 502 F. Supp. 2d 1277, 1284 (2007). The test is whether the government's pre-litigation conduct as well as the litigation itself (as to which "only one threshold determination for the entire civil action is to be made"; *see Comm'r, Immigration & Naturalization Servs. v. Jean*, 496 U.S. 154, 159 (1990)), was "justified in substance or in the main[,]" *i.e.*, "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). This amounts to a discretionary "judgment call" thereon, *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991), and is distinct from the merits themselves. *See*, *e.g., Cooper v. United States Railroad Retirement Bd.*, 24 F.3d 1414, 1416 (D.C. Cir. 1994) ("substantial justification" for purposes of EAJA may not be collapsed into the merits of the underlying litigation). No presumption arises from the fact that the government lost on the merits. *See* H.R. Rep. 96–1418, 96th Cong., 2d Sess. 5–6, *reprinted in* 1980 U.S.C.C.A.N. 4984, 4989–4990.

On this EAJA matter, the government argues its position in the underlying litigation was substantially justified by "long established practice" of issuing antidumping duty orders and ordering the collection of cash deposits only when there is "a final and conclusive court opinion." Def.'s Resp. at 7. Its full justification may be distilled to the following:

> For many years prior to this Court's grant of DSMC's petition for a writ of mandamus in this case, Commerce had an established practice of action it took upon a final (but not conclusive) court decision that was "not in harmony" with an agency determination. Based upon the guidance issued by the court of appeals in *Timken Co. v. United States*, 893 F.2d 337, 341 (Fed. Cir.

1990) and *Hosiden Corp. v. United States*, 85 F.3d 589 (Fed. Cir. 1996), Commerce's practice was to publish a notice of that final court decision in the Federal Register (known as the *Timken Notice*) and merely suspend (or continue to suspend) liquidation of the subject entries. All other actions necessary to implement the final court decision (such as changing the cash deposit rate or revoking/issuing the order) would only be taken once there was a "final and conclusive" court decision (*i.e.*, after the appeal process had run its course). Notably, Commerce's practice was not challenged for approximately 20 years until the merits litigation for which DSMC now seeks fees under the EAJA.

* * *

In this case, Commerce was substantially justified in defending its practice because, based upon the facts and circumstances of this case, Commerce believed that it was not required, or permitted, to issue antidumping duty orders and order the collection of cash deposits in the absence of a final and conclusive decision affirming the ITC's affirmative injury determination. . . .

* * *

In this case, the . . . Government was not alone in its interpretation of the statute or the legal authority at issue in the underlying litigation; the ITC and five other parties advanced the same arguments advanced by the Government in defending DSMC's application for a writ of mandamus. . . .

. . . . At the time that Commerce issued the Timken Notice, no court had issued a decision criticizing the Government's practice. In *Bowey v. West*, 218 F.3d 1373, 1377 (Fed. Cir. 2000), the court of appeals held that its "holding in [*Owen v. United States*, 861 F.2d 1273, 1275 (Fed. Cir. 1988) (en banc)] stands for the proposition that substantial justification is measured, not against the case law existing at the time the EAJA motion is decided, but rather, against the case law that was prevailing at the time the government adopted its position." . . .

Here, Commerce acted in the same manner that it had acted for over twenty years with respect to the issuance of antidumping duty orders and collection of cash deposits during the pendency of an appeal. DSMC was not singled-out for disparate treatment and the fact that the Court rejected the Government's defense of a twenty year practice does not establish that the Government's position lacked a reasonable basis. Thus, the Court should deny DSMC's application for fees upon the EAJA.

Def's Reply at 21–25.

Considering the foregoing, the court finds that the government has not proven that its position in the underlying litigation was substantially justified. This conclusion does not derive from Commerce's persistence in an unreasonable interpretation of the unfair trade statutes, case law, and its obligations thereunder, but is due to the obvious or pernicious and continuous injury that such persistence effected upon the domestic industry – to which Commerce owes a clear duty to properly administer the law in order "[t]o protect domestic industries from unfair competition by imported products," *e.g. Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1575 (Fed. Cir. 1995) – that also persisted until such time as Commerce acted in accordance with this court's writ. This was not simply a case of justice delayed, it was injury perpetuated. In persisting in an unreasonable interpretation of law, Commerce failed to implement the relief to which DSMC was entitled, exacerbated an identifiable and continuing injury to DSMC, and compounded the waste of resources up through the appellate process.

In an unpublished decision, *Shinyei Corp. of America v. United States*, No. 2010–1178, 2010 WL 4146384 (Fed. Cir. 2010), the CAFC panel reduced "the government's litigation position . . . to the following: we erred when we inadvertently left Shinyei off the orders to liquidate at the reduced rate and then after being notified of this error by the filing of this lawsuit, we nonetheless ordered the liquidation of the entries at the incorrect much higher rate, and this liquidation deprives the court of jurisdiction over this case." *See* 2010 WL 4146384 at *3. The court then held such a position not substantially justified and the failure to recognize that at the trial level an abuse of discretion. *Id*. at *4.

In this matter, Commerce had ample notice in advance of the ITC's affirmative remand determination that should have led it, at the very least, to reconsider its interpretation of the unfair trade laws, however longstanding, with respect to its own obligations and those owed DSMC. There was the plain language of the statutes themselves, as the CAFC held, and the "common sense" apparent therein that suspension of liquidation would have done nothing to preserve the relief to which DSMC was immediately entitled by virtue of prevailing on the merits of its action against ITC's original negative final determination that resulted in the ITC's affirmative remand determination and which relief would be lost on an ongoing basis in the absence of an antidumping duty order and collection of cash deposits. *See generally* 626 F.3d at 1379–82.

There was also no "guidance" in *Timken* that led to the reading of it that the government insisted upon. *See id*. at 1381. There was, how-

ever, among the case law the obvious instance of *Decca*, *supra*, (about which the government's explanation, above, omits any reference), which, in granting mandamus, specifically noted that an agency's "remand determination, as a matter of law, replaces [the agency's] original, final determination." *Decca*, 30 CIT at 363 n.11, 427 F. Supp. 2d at 1256 n.11. Commerce did not appeal that decision, nor, apparently, consider its implications, but instead chose to persist in an unreasonable interpretation of statutory obligations under U.S. trade law, as well as in an unreasonably contorted interpretation of *Timken*.

There was also this court's own intimation in slip opinion 09–5, *supra*, as to the correct course of action Commerce should take. In sustaining the ITC's affirmative remand determination, the court specifically considered DSMC's request for judicial orders requiring "(1) the Commission to notify Commerce of the sustained remand results and to publish them in the Federal Register, (2) Commerce to publish notice of the sustained remand results and "order the suspension of liquidation and collection of cash deposits." *See* Slip Op. 09–5 at 25–26, 2009 WL 289606 at *15. DSMC contended that this additional action was necessary because they are required by law and "the agencies have, in other cases, delayed such actions until all appeals are exhausted." *Id*. This court interpreted the requests in the nature of a petition for a writ of mandamus and concluded the following:

> The court is unable to find that a writ of mandamus is appropriate *at this time.* The plaintiff's request is *based upon speculation that the ITC and Department of Commerce may, in the future, fail to perform duties required by law*. However, *at the present time, the standard operation of the law* provides to the plaintiff an adequate means to attain the desired relief. Accordingly, the plaintiff's request must be denied.

Id. (italics added).

Finally, there was Commerce's own independent duty to preserve the *status quo* and the legally operative effect of this court's decisions thereon, as it subsequently acknowledged (to some extent) in *Diamond Sawblades Mfrs. Coalition v. United States*, 33 CIT ___, ___, 650 F. Supp. 2d 1331, 1356 (2009). Therein, Commerce argued that suspension of liquidation preserves the *status quo* on the case, *id*. at 1338, but it should have been inarguable that suspension of liquidation in no way provides the relief to which DSMC was immediately entitled by virtue of the ITC's affirmative threat-of-material-injury determination on remand, because the relief provided thereby is

prospective only as to entry and which would necessarily be foregone, and injury continued, in the absence of publication of the antidumping duty order and the beginning of cash deposit collection.

Having the reputation of "master" of the unfair trade laws, *e.g.*, *Consumer Products Div., SCM Corp. v. Silver Reed America, Inc.*, 753 F.2d 1033, 1039 (Fed. Cir.1985), Commerce should have been clear as to its administrative obligations at the time of issuance of the ITC's affirmative remand determination. This was likewise confirmed at the appellate level, wherein the CAFC described the government's argument on its position as "frivolous" and "fatuous." 626 F.3d at 1379. The executive branch, including Commerce, may not, consistent with its constitutional obligations, reduce federal judicial review to the status of mere "advisory opinion" with which it is free to agree or disagree at whim. *See*, *e.g.*, *Allegheny Bradford Corporation v. United States*, 28 CIT 2107, 2112, 350 F. Supp. 2d 1332, 1337 (2004) (granting attorney's fees under the EAJA and observing "[o]n several prior occasions, this Court has rejected arguments that its orders require less than full compliance"); *D&M Watch Corp v. United States*, 16 CIT 285, 296, 795 F. Supp. 1160, 1169 (1992) (attempted evasion of effect of Court's judgment by executive agency "tends to diminish the dignity of and respect for judicial review and the resultant process").

The court therefore finds that Commerce's position was not substantially justified. Accordingly, the court need not reach DSMC's alternative ground for an award of fees and costs.

III. "Special Circumstances"

EAJA requires consideration of whether there are "special circumstances" that would make an award unjust. *See* 28 U.S.C. § 2412(d)(1)(A). Generally speaking, the special circumstances provision prevents recovery when the petitioning party has engaged in bad faith behavior and equitable considerations ("unclean hands") indicate an award would be unjust. *See*, *e.g.*, *Lokos v. Equal Employment Opportunity Comm'n*, 940 F.2d 676 (1991); *Devine v. Sutermeister*, 733 F.2d 892, 895–96 (Fed. Cir. 1984). No such circumstances are present in this instance as would preclude a fee award to DSMC.

IV. "Itemized Statement"

EAJA requires that the party seeking an award of attorney fees and expenses submit, among other things, "an itemized statement . . . stating the actual time expended and the rate at which fees and other expenses are computed." 29 U.S.C. § 2412(d)(1)(B) (1982). *Naporano Iron and Metal Co. v. United States*, 825 F.2d 403, 404–05 (Fed. Cir.

1987) observes from this that the prevailing party (1) must provide the Court with information detailing the "exact time spent on the case, by whom, their status and usual billing rates, as well as a breakdown of expenses[,]" and (2) the court or government should not be "forced" to parse invoices to determine which attorney's and paralegal's time and/or expenses are included in an EAJA request or to separate recoverable from non-recoverable costs. DSMC's itemization addresses those requirements by detailing the dates, personnel, hours spent, and the legal matters on which time was expended. *See* Pl.'s Br. at Ex. 1.

The government's expresses concern that DSMC's exhibit does not contain copies of the "actual invoices or bills from DSMC" and therefore the government does "not know to what entity or individual was billed by counsel for DSMC[.]" Def.'s Resp. at 29. In reply, counsel for DSMC avers that "DSMC did not submit the actual invoices it was issued by its attorneys because those invoices contained billing entries for work unrelated to the underlying litigation[.]" Pl.'s Reply at 6, 9. The government did not request further proof nor further address the issue in its sur-reply, if it remained unsatisfied. The court therefore finds the reply of counsel for DSMC satisfactory. Further, based on the averment of counsel for DSMC that it "tracks time spent on DSMC matters under a DSMC-specific billing number" and that "the client is the DSMC[,]" Pl.'s Reply at 6, the court finds the form of DSMC's itemization of attorney's fees and costs sufficient for purposes of EAJA.

Perusing each attorney fee item and the docket of the underlying mandamus litigation, the court finds that each item relates to the underlying mandamus litigation, and that the total amount of attorney's fees requested represents 167 hours of attorney work on the underlying litigation. *See* Pl.'s Br. at Ex. 1. The government apparently "does not challenge as unreasonable the . . . hours for which DSMC seeks attorney fees,"[6] and it also agrees that in the event DSMC merits an EAJA award, DSMC is also entitled to research, copying and telephone costs in the amount of $391.16. *See* Pl.'s Br. at Ex. 3. The court therefore finds the total attorney hours spent plus the itemized cost amounts related to the underlying litigation reasonable and that DSMC is entitled to compensation for them.

[6] The total number of hours is apparently misprinted in the defendant's brief; without further indication of disagreement, it is concluded a clerical mistake. *Cf.* Def.'s Resp. at 29, 31.

V. Fee Award Enhancement Above Statutory Rate

EAJA permits recovery of "fees and other expenses" including reasonable attorney's fees not "in excess of $125 per hour unless the court determines that an increase in the cost of living *or a special factor, such as* the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A) (italics added).

DSMC requests that it be awarded attorney's fees above the statutory rate, *i.e.*, in total $62,127.50. It argues it is entitled to enhancement due to "the distinctive knowledge of antidumping law that was required for the litigation and the limited availability of qualified attorneys for the proceedings involved[,]" Pl.'s Br. at 14, that "[s]pecialized knowledge and experience in antidumping law was essential to the successful litigation of these issues[,]" and that "[p]laintiffs' attorneys possess the requisite knowledge and litigation experience in the field of antidumping law." *Id*. at 15–16. The government disagrees that international trade representation in this matter amounted to a "specialized" skill permitting enhancement.

In *Pierce*, *supra*, the Supreme Court clarified that "limited availability of qualified attorneys for the proceedings involved" in the exemplar "refers to attorneys having some distinctive knowledge or specialized skill *needful for the litigation in question* – as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation." *Pierce*, 487 U.S. at 572 (italics added). Further clarifying that attorneys should be awarded fees above the statutory cap only if they are " 'qualified for the proceedings' in some specialized sense, rather than just in their general legal competence[,]" it provided as examples "patent law, or knowledge of foreign law or language." *Id*. Further, "the other 'special factors' envisioned by the exception must be such as are not of broad and general application" such as the "novelty and difficulty of issues," "the undesirability of the case," the "work and ability of counsel," and "the results obtained." *Id*.

Here, DSMC succeeded in the judicial process that resulted in administrative reversal on remand of the original negative injury determination, albeit only with respect to threat of material injury. When those results were sustained, DSMC's requested judicial orders covering the obligations of Commerce that would have been triggered by those results. At the time, the request was denied without prejudice as premature. *See supra*. Commerce subsequently refused to issue an antidumping duty order and begin the collection of cash deposits, which forced DSMC to file the underlying litigation seeking mandamus, on which DSMC prevailed, and on which this EAJA petition is solely concerned.

The "litigation in question" thus concerned obtaining a writ of mandamus. Seeking mandamus as a general matter is a process well within that which would be considered "the general lawyerly knowledge and ability useful in all litigation." However, obtaining the writ in *this* instance required the "distinctive knowledge or specialized skill" of an international trade law attorney in order to successfully prevail. *See Libas, Ltd. v. United States*, 27 CIT 1193, 1197, 283 F. Supp. 2d 1327, 1332 (2003) (attorney must demonstrate specialized skills were applied in the litigation). As the CAFC remarked, "[t]his case presents a highly technical issue of statutory construction that is of some significance to the administration of the antidumping laws." 626 F.3d at 1378.

Members of the international trade bar are expected to (and do) have a solid understanding of the interrelationship of U.S. and customs laws and administration as applied to international trade. "The court considers customs law to be a specialized practice area, distinct from general and administrative law, for purposes of EAJA." *Jazz Photo Corp. v. United States*, 32 CIT ___, ___, 597 F. Supp. 2d 1364, 1369 (2008) (referencing *Nakamura v. Heinrich*, 17 CIT 119, 121 (1993)). *See also Libas*, 27 CIT at 1197–98, 283 F. Supp. 2d at 1332–33. This court likewise considers international trade practice a "specialized practice" area requiring interdisciplinary knowledge and skill beyond the "extraordinary level of the general lawyerly knowledge and ability useful in all litigation." *See Pierce*, 487 U.S. at 572. The practice regularly calls upon skills acquired from such diverse fields as economics, accounting, business operations, finance, customs, taxation, technical standards, foreign laws, regulations and administrative practices, linguistics and foreign languages, "political astuteness," *et cetera*. DSMC's fee award will therefore be enhanced.

VI. Paralegal Fees

DSMC's itemization for the mandamus litigation also lists a total of 24.5 hours for paralegal assistance at rates ranging from $120 to $170. "[A] prevailing party that satisfies EAJA's other requirements may recover its paralegal fees from the Government at prevailing market rates." *Richlin Sec. Service Co. v. Chertoff*, 553 U.S. 571, 590 (2008). *See* 28 U.S.C. § 2412(d)(2)(A). DSMC's counsel provides as evidence of the prevailing market rates for paralegal services the affidavit of its Chief Human Resources Officer ("CHRO"). Pl.'s Reply at Ex. 4. This person declares that she has served in that capacity since 1986, that counsel charges at or below prevailing market rates for services provided by its paralegals, including project assistants and legal assistants, that counsel conducts market studies annually

to identify the prevailing market rates for paralegal services in the Washington, D.C. metropolitan area at law firms that are reasonably comparable to counsel's firm in terms of skill, experience and reputation, that counsel then sets its rates for paralegal services according to the prevailing market rates, and that in 2009, fees of $120 to $170 per hour for services performed by paralegals fell within the range of prevailing market rates in that metropolitan area. *See id*.

The government, however, argues that "EAJA caselaw and other recent decisions indicate . . . the rates for paralegals are generally at, and often below, $100 per hour." Def.'s Resp. at 35 (referencing *McKay v. Barnhart*, 327 F. Supp. 2d 263, 270 (S.D.N.Y. 2004)). That may be true in nearby social security decisions where "the prevailing rate for paralegal services in the Southern District of New York is $75 per hour" has been repeated therein since at least 1997 (*see*, *e.g.*, *Wilder v.Bernstein*, 975 F. Supp. 276, 282 (S.D.N.Y. 1997)), but in Washington D.C. in 2009, the tale is different. Although the government belittles the utility of CHRO's affidavit as *ipse dixit*, Def's Sur-Reply at 9, the CAFC, at least, appears to have acknowledged the utility of the adjusted Laffey Matrix[7] in the determination of legal and paralegal fees for the Washington D.C. metropolitan area. *See Rodriguez v. Sec'y of Health and Human Services*, 632 F.3d 1381 (Fed. Cir. 2011); *see also*, *e.g.*, *Covington v. District of Columbia*, 57 F.3d 1101, 1107 (D.C. Cir. 1995). The court therefore takes judicial notice of the price of paralegal services in that matrix, which range from $152 to $161 for the period June 1, 2008 to May 31, 2011, and finds that DSMC's range of $120 to $170 reasonable by comparison, but only up to $161. DSMC may therefore recover paralegal fees as itemized but only up to a rate of $161 for any items invoiced at $170 per hour.

VII. Consultant Fee

DSMC's itemization also lists a $105 in fees from a consultant. The item pertaining to this work describes only "read DSB CAFC decision" but it is also juxtaposed on the same date as and against DSMC's counsel's review and analysis of the CAFC decision affirming the CIT's issuance of the mandamus writ. The government has not commented further concerning the item, and it will therefore be allowed.

---

[7] *See Covington v. District of Columbia*, 57 F.3d 1101, 1105–11 (D.C. Cir. 1995) (citing *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *rev'd on other grounds* 746 F.2d 4 (D.C. Cir. 1984)). The adjusted matrix is available at http://www.laffeymatrix.com/see.html (last examined this date).

VIII. EAJA Petition Preparation Fees

At present, DSMC also seeks $6,318.11 and $4,630.00 (estimated) in attorney's fees for 35.25 and 18.25 hours worth of attorney work on its EAJA petition and reply brief respectively. *See* Pl's Br. at Ex. 2; Pl.'s Reply at Ex. 5. Such fees are permissible in principle under EAJA, *see*, *e.g.*, *Fritz v. Principi*, 264 F.3d 1372, 1377 (Fed. Cir. 2001); *Keely v. Merit Systems Protection Bd.*, 793 F.2d 1273, 1275 (Fed. Cir. 1986). The government argues the request is premature, Def.'s Resp. at 29, but DSMC having been found entitled to an award under EAJA, the issue is ripe and the award will be permitted such fees.

Attorney's fees are not entitled to a special factor enhancement for the time spent in preparation of the EAJA petition. *See*, *e.g.*, *Ragan v. Comm'r of Internal Revenue*, 210 F.3d 514, 518–19 (5th Cir. 2000) (citing *Powers v. Comm'r of Internal Revenue*, 43 F.3d 172, 179–80 (5th Cir. 1995)). DSMC therefore requests a cost of living ("COLA") adjustment for such fees, which are specifically permitted to account for inflation. *See* 28 U.S.C. § 2412(d)(2)(A). The Court of Claims, brother tribunal within the ambit of the Federal Circuit with substantial experience considering COLA adjustments in EAJA contexts, has observed that in order "[t]o receive a COLA, the plaintiff does not need to do any 'more than request such an adjustment and present a basis upon which the adjustment should be calculated.'" *Greenhill v. United States*, 96 Fed. Cl. 771, 783 (2011) (quoting *California Marine Cleaning, Inc. v. United States*, 43 Fed. Cl. 724, 733 (1999)). This court will follow suit.

To shorten this discussion, a COLA adjustment for an item of attorney's fees involves taking the statute's current baseline of $125 per hour, multiplying that rate by the appropriate inflation index number[8] corresponding to the "endpoint" month in which services were rendered (using a mid-point calculation for a closer approximation as necessary), and then dividing that figure by 155.70, which is the baseline[9] CPI-U index number for March 1996 when Congress amended EAJA's hourly attorney's fee rate from $75 (*see* Pub.L. 104–121, Title II, § 232, 110 Stat. 863). *See*, *e.g.*, *Chiu*, *supra*, 948 F.2d at 722 n.10. In order to avoid the *Shaw* interest problem resulting

[8] Indice numbers reflect the increase in inflation as of the last day of the month. The consumer price index for all urban consumers ("CPI–U") maintained by the U.S. Department of Labor, Bureau of Labor Statistics is reliable for routine COLA adjustments. *See*, *e.g.*, *Jazz Photo*, *supra*, 32 CIT at ___, 597 F. Supp. 2d at 1371 & n.4.

[9] The effective date of the statutory cap is the baseline date. *See Doty v. United States*, 71 F.3d 384, 387 (Fed. Cir. 1995).

from delayed payment of fees,[10] it is necessary to apply the appropriate COLA to each fee bill, or payment thereof when paid. *Cf.*, *e.g.*, *id.* at 720. DSMC shall submit proof of the dates of either of these (at its option) plus COLA calculations applied thereto, or it may submit COLA calculations applied to each attorney's fee item. For example, for the attorney hours incurred on February 13, 2009, the mid-point CPI-U for that date is approximately 211.668, so $125.00 x 211.668 / 155.70 = $169.93 per hour for mid-February 2009 attorney fees.

IX. Additional Fees

DSMC also requests reimbursement of fees incurred in the preparation of its response to the defendant's September 14, 2011 motion to strike or in the alternative to file a sur-reply. The request is hereby denied. DSMC's reply brief on its petition presented additional factual material, and therefore the defendant had a legitimate reason for moving to submit its sur-reply, which motion would have been obviated had the material been presented in DSMC's petition in the first place, even if it may be concluded that provision of the material was not improper support for rebuttal of aspects of the government's responsive argumentation.

Conclusion

In view of the foregoing, DSMC's motion for attorney's fees and expenses under the EAJA is granted, and the court need not reach DSMC's alternative grounds for relief. DSMC may have 30 days to submit a final itemization of fees for the preparation and briefing of its EAJA petition in accordance with the foregoing, including COLA calculation(s), and a total of the EAJA fees and expenses incurred. Any questions thereon may be directed to the Clerk of the Court.

So ordered.

Dated: January 26, 2012
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

[10] Interest may not be awarded pursuant to EAJA. *See Library of Congress v. Shaw*, 478 U.S. 310 (1986), *superseded on other grounds by* Civil Rights Act of 1991, Pub.L. No. 102–166, 105 Stat. 1071. *Cf. Chiu*, 948 F.2d at 722 n.10 ("court must exclude inflation occurring after all services have been performed" to determine COLA adjustment)

Slip Op. 12–13

ZHEJIANG DUNAN HETIAN METAL COMPANY, LIMITED, Plaintiff, v. UNITED STATES, Defendant, and PARKER-HANNIFIN CORPORATION, Defendant-Intervenor.

Before: Donald C. Pogue,
Chief Judge
Court No. 09 - 00217

JUDGMENT

This matter returns to court following remand in accordance with the Court of Appeals for the Federal Circuit's decision in *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333 (Fed. Cir. 2011), which vacated and remanded our previous judgment in *Zhejiang DunAn Hetian Metal Co. v. United States*, __ CIT __, 707 F. Supp. 2d 1355 (2010). Before the court now are the Department of Commerce's ("the Department" or "Commerce") Final Results of Redetermination Pursuant to Remand, Jan. 5, 2012, ECF No. 68 ("Remand Results").

Both Plaintiff and Defendant Intervenor concur with the Remand Results and have requested expeditious resolution of this Court No. 09–00217 Page 2 matter. Accordingly, the court affirms the Remand Results. *See JTEKT Corp. v. United States*, 780 F. Supp. 2d 1357, 1367 (CIT 2011). Therefore, it is hereby:

ORDERED that Commerce's Remand Results are affirmed.

Dated: January 27, 2012
New York, New York

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

Slip Op. 12–14

ASHLEY FURNITURE INDUSTRIES, INC., Plaintiffs, v. UNITED STATES, 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

[Dismissing the action for failure to state a claim upon which relief can be granted]

Dated: January 31, 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

Stanceu, Judge:

I. INTRODUCTION

Plaintiff Ashley Furniture Industries, Inc. ("Ashley"), a domestic furniture manufacturer, brought three similar actions (now consolidated)[1] during the period of September 4, 2007 through March 4, 2010, all stemming from certain administrative determinations of the U.S. International Trade Commission ("ITC" or the "Commission") and U.S. Customs and Border Protection ("Customs" or "CBP"). The ITC denied Ashley status as an "affected domestic producer" ("ADP") under the Continued Dumping and Subsidy Offset Act of 2000 (the "CDSOA" or "Byrd Amendment"), Pub. L. No. 106–387, §§ 1001–03, 114 Stat. 1549, 1549A-72–75 (codified at 19 U.S.C. § 1675c (2000)),[2] *repealed by* Deficit Reduction Act of 2005, Pub. L. 109–171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007). ADP status potentially would have qualified Ashley for annual monetary distri-

[1] Due to the presence of common issues, the court, on February 15, 2011, consolidated plaintiff's three actions under Consol. Court No. 07–00323. Order (Feb. 15, 2011), ECF No. 51. Consolidated with *Ashley Furniture Industries, Inc. v. United States* under Consol. Court No. 07–00323 are *Ashley Furniture Industries, Inc. v. United States*, Court No. 09–00025 and *Ashley Furniture Industries, Inc. v. United States*, Court No. 10–00081.

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

butions by Customs of antidumping duties collected under an antidumping duty order on imports of wooden bedroom furniture from the People's Republic of China. *Notice of Amended Final Determination of Sales at Less Than Fair Value & Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China*, 70 Fed. Reg. 329 (Jan. 4, 2005) ("*Antidumping Duty Order*"). The ITC construed the "petition support requirement" of the CDSOA, under which distributions are limited to petitioners and parties in support of a petition, to disqualify Ashley from ADP status because Ashley indicated to the ITC that it opposed the antidumping duty petition on Chinese wooden bedroom furniture.

Plaintiff claims that the administrative actions of the two agencies were inconsistent with the CDSOA, were not supported by substantial evidence, and were otherwise not in accordance with law. Plaintiff also brings constitutional challenges grounded in the First Amendment, the Fifth Amendment equal protection guarantee, and the Fifth Amendment due process guarantee.

Before the court is Ashley's motion for a preliminary injunction, filed January 11, 2012. Pl.'s Mot. for Prelim. Inj. (Jan 11, 2012), ECF No. 95. Ashley seeks to halt, pending a final disposition of this litigation, including all appeals and remands, CBP's pending distribution of certain collected antidumping duties to domestic parties recognized as ADPs by the Commission, including the defendant-intervenors in this case. *Id.* at 1. The distribution was scheduled to occur on or after January 31, 2012.[3] Def. U.S. Customs & Border Protection's Resp. to the Ct.'s Feb. 14, 2011 Request (Feb. 28, 2011), ECF No. 60. Customs withheld these funds from distribution pending the resolution of various lawsuits, including plaintiff's, challenging the constitutionality of the CDSOA.

Also before the court are three motions to dismiss under USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. Defendant-intervenors American Furniture Manufacturers Committee for Legal Trade, Kincaid Furniture Co., Inc., L. & J.G. Stickley, Inc., Sandberg Furniture Manufacturing Company, Inc., Stanley Furniture Co., Inc., T. Copeland and Sons, Inc., and Vaughan-Bassett Furniture Company, Inc. moved under Rules 12(b)(5), and also Rule 12(c), on February 23, 2011. Def.-intervenors' Mot. to Dismiss & for J. on the Pleadings (Feb. 23, 2011), ECF No. 55 ("Def.-intervenors' Mot."). Defendants ITC and Customs moved to dismiss under Rule 12(b)(5) on May 2, 2011. Def. U.S. Int'l Trade Comm'n's

[3] Defendants represent that distribution is now scheduled to take place on or after March 9, 2012. Def.'s Mot. for an Extension of Time for all Defs. to File Their Resps. in Opp'n to Pl.'s Mot. for Prelim. Inj. 2 (Jan. 19, 2012), ECF No. 97.

Mot. to Dismiss for Failure to State a Claim (May 2, 2011), ECF No. 80 ("ITC's Mot."); Def. U.S. Customs & Border Protection's Mot. to Dismiss for Failure to State a Claim (May 2, 2011), ECF No. 81 ("Customs' Mot.").

The court rules that plaintiff does not satisfy the standards for obtaining the injunction it seeks. The court concludes that relief is not available on plaintiff's claims challenging the administration of the CDSOA by the two agencies. We also conclude that no relief can be granted on Ashley's claims challenging the CDSOA on First Amendment and Fifth Amendment equal protection grounds. Plaintiff lacks standing to assert the claims it bases on Fifth Amendment due process grounds. The court will enter judgment dismissing this action.

II. BACKGROUND

During a 2003 ITC investigation to determine whether imports of wooden bedroom furniture from China were causing or threatening to cause material injury to the domestic industry, *Initiation of Antidumping Duty Investigation: Wooden Bedroom Furniture from the People's Republic of China*, 68 Fed. Reg. 70,228, 70,231 (Dec. 17, 2003), Ashley responded to the ITC's questionnaires, indicating that it opposed the issuance of an antidumping duty order. *See*, *e.g.*, First Amended Compl. ¶ 19 (Feb. 9, 2011), ECF No. 50. Based on the affirmative ITC injury determination, the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued the antidumping duty order on imports of wooden bedroom furniture from China in 2005. *Antidumping Duty Order*, 70 Fed. Reg. at 329. Determining that Ashley did not qualify for CDSOA benefits, ITC declined to designate Ashley an ADP with respect to this order for Fiscal Years 2007 through 2010. *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 72 Fed. Reg. 29,582, 29,622–23 (May 29, 2007); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 73 Fed. Reg. 31,196, 31,236–37 (May 30, 2008); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 74 Fed. Reg. 25,814, 25,855–56 (May 29, 2009); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 75 Fed. Reg. 30,530, 30,571–72 (June 1, 2010).

Plaintiff filed actions contesting the government's refusal to provide it CDSOA distributions of antidumping duties collected during Fiscal Years 2007 (Court No. 07–00323), 2008 (Court No. 09–00025), and 2009–2010 (Court No. 10–00081). The court stayed the three actions

pending a final resolution of other litigation raising the same or similar issues.[4] *See, e.g.*, Order (Oct. 23, 2007), ECF No. 13.

Following the decision of the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") in *SKF USA Inc. v. United States*, 556 F.3d 1337 (2009) ("*SKF*"), *cert. denied*, 130 S. Ct. 3273 (2010), which addressed legal questions that are also present in this case, the court issued an order directing Ashley to show why these actions should not be dismissed and lifted the stay for the purposes of allowing any brief, response, or reply described in that order. *See*, *e.g.*, Order (Jan. 3, 2011), ECF No. 38. On January 24, 2011, plaintiff responded to the court's order and moved for a partial lift of the stay to allow amendment of the complaints as a matter of course to add an additional count challenging the CDSOA under the First Amendment as applied to Ashley. Mot. for Partial Lifting of Stay (Jan. 24, 2011), ECF No. 39; Mot. for Partial Lifting of Stay (Jan. 24, 2011), ECF No. 23 (Court No. 09–00025); Mot. for Partial Lifting of Stay (Jan. 24, 2011), ECF No. 21 (Court No. 10–00081).

The court lifted the stay for all purposes on February 9, 2011. *See, e.g.*, Order (Feb. 9, 2011), ECF No. 45. The same day, plaintiff filed notices of amended complaints in all three cases. First Amended Compl.; First Amended Compl., ECF No. 32 (Court No. 09–00025); First Amended Compl., ECF No. 30 (Court No. 10–00081). Defendant-intervenors filed their motion to dismiss and for judgment on the pleadings on February 23, 2011. Def.-Intervenors' Mot. The ITC and Customs filed their motions to dismiss on May 2, 2011. ITC's Mot.; Customs' Mot.

In July 2011, plaintiff filed a notice of supplemental authority highlighting recent decisions by the U.S. Supreme Court, which, according to plaintiff, are "relevant to the pending motions to dismiss Ashley's as-applied First Amendment challenge to the government's implementation of the [CDSOA]." Notice of Supp. Authority 1 (July 7, 2011), ECF No. 90 ("Pl.'s Notice of Supp. Authority") (citing *Sorrell v. IMS Health Inc*., 131 S. Ct. 2653 (2011); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2086 (2011); *Citizens United v. Federal Election Comm'n,,* 130 S. Ct. 876 (2010)). Defendants addressed the supplemental authority question in their reply briefs and defendant-intervenors filed a letter in reply. United States & U.S. Customs & Border Protection's Reply in Supp. of their Mot. to Dismiss for Failure to State a Claim (July 14, 2011), ECF No. 92; Def.

[4] The court's order stayed the action "until final resolution of *Pat Huval Restaurant & Oyster Bar, Inc. v. United States International Trade Commission*, Consol. Court No. 06–00290, that is, when all appeals have been exhausted." Order (Oct. 23, 2007), ECF No. 13.

U.S. Int'l Trade Comm'n's Reply to Pl.'s Br. in Opp'n to Mot. to Dismiss for Failure to State a Claim (July 14, 2011), ECF No. 93; Def.-intervenor's Resp. to Pl.'s Notice of Supplemental Authority (July 22, 2011), ECF No. 94.

Ashley filed its motion for a preliminary injunction on January 11, 2012, seeking to prevent the pending CBP distribution. Pl.'s Mot. for Prelim. Inj.; Pl.'s Mem. of Points & Authorities in Supp. of Mot. for Prelim. Inj. (Jan. 11, 2012), ECF No. 95.

III. DISCUSSION

The court exercises jurisdiction over this action according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(4), which provides the Court of International Trade jurisdiction of civil actions arising out of any law of the United States, such as the CDSOA, providing for administration with respect to duties (including antidumping duties) on the importation of merchandise for reasons other than the raising of revenue. *See Furniture Brands Int'l v. United States*, 35 CIT __, __, Slip Op. 11–132, at 9–15 (Oct. 20, 2011) ("*Furniture Brands* ").

The CDSOA amended the Tariff Act of 1930 ("Tariff Act") to provide for the distribution of funds from assessed antidumping and countervailing duties to persons with ADP status, which is limited to petitioners, and interested parties in support of petitions, with respect to which antidumping duty and countervailing duty orders are entered.[5] 19 U.S.C. § 1675c(a)-(d).[6] The statute directed the ITC to forward to Customs, within sixty days after an antidumping or countervailing duty order is issued, lists of "petitioners and persons with respect to each order and finding and a list of persons that indicate support of

[5] Congress repealed the CDSOA in 2006, but the repealing legislation provided that "[a]ll duties on entries of goods made and filed before October 1, 2007, that would [but for the legislation repealing the CDSOA], be distributed under [the CDSOA] . . . shall be distributed as if [the CDSOA] . . . had not been repealed . . . ." Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(b), 120 Stat. 4, 154 (2006). In 2010, Congress further limited CDSOA distributions by prohibiting payments with respect to entries of goods that as of December 8, 2010 were "(1) unliquidated; and (2)(A) not in litigation; or (B) not under an order of liquidation from the Department of Commerce." Claims Resolution Act of 2010, Pub. L. No. 111–291, § 822, 124 Stat. 3064, 3163 (2010).

[6] The CDSOA provided that:

> The term "affected domestic producer" means any manufacturer, producer, farmer, rancher or worker representative (including associations of such persons) that
> (A) was a petitioner *or interested party in support of the petition* with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and
> (B) remains in operation.

19 U.S.C. § 1675c(b)(1) (emphasis added).

the petition by letter or through questionnaire response." *Id.* § 1675c(d)(1).[7] The CDSOA directed Customs to publish in the Federal Register lists of ADPs potentially eligible for distributions of a "continuing dumping and subsidy offset" that are based on the lists obtained from the Commission. *Id.* § 1675c(d)(2). The CDSOA also directed Customs to segregate antidumping and countervailing duties according to the relevant antidumping or countervailing duty order, to maintain these duties in special accounts, and to distribute to an ADP annually, as reimbursement for incurred qualifying expenditures, a ratable share of the funds (including all interest earned) from duties assessed on a specific unfairly traded product that were received in the preceding fiscal year. *Id.* § 1675c(d)(3), (e).

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

We address below plaintiff's motion for an injunction and the motions to dismiss, basing our rulings on the claims stated in plaintiff's First Amended Complaints.[8] In Count 1 of the amended complaints, plaintiff claims that defendants' actions were unlawful under the CDSOA and not supported by substantial evidence. First Amended

[7] Additionally, the CDSOA directed the U.S. International Trade Commission to forward to U.S. Customs and Border Protection a list identifying affected domestic producers "within 60 days after the effective date of this section in the case of orders or findings in effect on January 1, 1999 . . . ." 19 U.S.C. § 1675c(d)(1). The antidumping duty order at issue in this case was not in effect on that date.

[8] In its motions to partially lift the stay on February 1, 2011, plaintiff asserted a right to amend its complaints as a matter of course because "[d]efendant has not yet filed its answer nor has it filed a motion to dismiss under Rule 12(b), (e), or (f)." *See, e.g.*, Mot. For Partial Lifting of Stay (Jan. 24, 2011), ECF No. 39. Under the current Rules of this Court, "a party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." USCIT R. 15(a) (effective Jan. 1, 2011). Under the previous Rule 15(a), a party could amend its pleading "before being served with a responsive pleading." Because plaintiff filed its notices of amended complaints just over one month after the effective date of the change in Rule 15(a), and because the other parties to this case have addressed the complaint in amended form in their dispositive motions, the court exercises its discretion under USCIT Rule 89 to accept plaintiff's First Amended Complaints. USCIT R. 89 ("These rules and any amendments take effect at the time specified by the court. They govern: . . . proceedings after that date in a case then pending unless: (A) the court specifies otherwise").

Compl. ¶¶ 39–40.[9] In Counts 2 and 5, plaintiff challenges the "in support of the petition" requirement of the CDSOA ("petition support requirement") on constitutional First Amendment grounds. *Id*. ¶¶ 41–43, 49–50. In Count 3, plaintiff brings a challenge to the petition support requirement on Fifth Amendment equal protection grounds. *Id*. ¶¶ 44–46. In Count 4, plaintiff challenges the petition support requirement on Fifth Amendment due process grounds, claiming that the CDSOA is impermissibly retroactive. *Id*. ¶¶ 47–48.

A. Plaintiff's Motion for an Injunction Will Be Denied

Plaintiff's January 11, 2012, motion seeks what plaintiff terms a "preliminary injunction" under which defendants would be enjoined from disbursing any funds "that are currently being withheld by CBP for Ashley for FY2007-FY2010 . . . for the pendency of this litigation, including all relevant appeals and remands, until such time as a final court decision is rendered in this case." Pl.'s Mot. for Prelim. Inj. 1. A preliminary injunction normally dissolves upon the entry of judgment. *See Fundicao Tupy S.A. v. United States*, 841 F.2d 1101, 1103 (Fed. Cir. 1988) ("[A]lthough a preliminary injunction is usually not subject to a fixed time limitation, it is *ipso facto* dissolved by a dismissal of the complaint or the entry of a final decree in the cause.") (internal quotation marks omitted); 11A Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure, § 2947 (2d ed. 2010) (the principal purpose of preliminary injunctive relief is to preserve the court's power to render a meaningful decision pursuant to a trial on the merits). Because our decision today will conclude this action, the question of a preliminary injunction to prevent irreparable harm during the pendency of this case is moot.

By attempting to enjoin distribution through all remands and appeals, plaintiff's January 11, 2012 motion seeks equitable relief beyond a preliminary injunction. Additionally, plaintiff seeks as a remedy that the court order the ITC to declare Ashley an ADP and order Customs to "disburse to Ashley pursuant to the CDSOA a pro rata portion of the assessed antidumping duties on wooden bedroom furniture from China . . . ." First Amended Compl. ¶ 51 (Prayer for Relief). In summary, Ashley seeks to prevent Customs from paying to other CDSOA claimants what Ashley claims is its share of the withheld distributions and seeks affirmative injunctions against both agencies so that Ashley will receive those distributions. In these

[9] Plaintiff's three First Amended Complaints are essentially identical but directed to CDSOA distributions for the different Fiscal Years, *i.e.*, 2007, 2008, 2009, and 2010. In its citations to the claims in this consolidated action, the court will cite to the First Amended Complaint as filed in *Ashley Furniture Industries, Inc. v. United States*, Court No. 07–00323.

respects, plaintiff is seeking permanent equitable relief both as a provisional measure pending a possible appeal and as a remedy on its claims. We conclude, however, that Ashley does not qualify for permanent equitable relief.

Ashley is required to show for a permanent injunction that it has suffered an irreparable injury, that the remedies available at law are inadequate to compensate for that injury, that, considering the balance of hardships between the parties, a remedy in equity is warranted, and that the public interest would not be disserved by a permanent injunction. *Ebay Inc. v. Mercexchange, L.L.C.*, 547 U.S. 388, 391 (2006). Here, we conclude that there are no "remedies available at law" and that no "remedy in equity is warranted," based on our analysis of plaintiff's claims. We presume, without deciding, that plaintiff would be irreparably harmed were Customs to distribute to other parties what Ashley claims is its share of the withheld distributions. With respect to the balance of hardships, Ashley would be prejudiced by such a distribution, but defendant-intervenors also will be prejudiced by further delay in obtaining what they claim to be their lawful CDSOA disbursements. The public interest favors an orderly and lawful distribution of the withheld funds. But even if we presume that the factors of irreparable harm, balance of hardships, and public interest are in plaintiff's favor, we still conclude that an injunction is unwarranted. The controlling factor is that neither a remedy at law nor a remedy in equity is appropriate in the circumstances of this case. For the reasons discussed in this opinion, we conclude that the appropriate disposition is the dismissal of this action.

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

In ruling on motions to dismiss made under USCIT Rule 12(b)(5), we dismiss complaints that do not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). For the reasons discussed below, we conclude that plaintiff has failed to plead facts on which we could conclude that it could obtain a remedy on any of the claims asserted in Counts 1, 2, 3, and 5 of the amended complaints. In brief summary, plaintiff's claims that the actions by the two agencies were not supported by substantial evidence and were otherwise not in accordance with law must be dismissed because Ashley admits a fact establishing its disqualification from receiving CDSOA distributions and presents no other facts from which the court reach a conclusion

that those actions must be set aside. Relief on Ashley's constitutional claims under the First Amendment and the equal protection guarantee of the Fifth Amendment is foreclosed by the binding precedent established by *SKF*, which upheld the CDSOA against constitutional challenges brought on First Amendment and equal protection grounds. In the following, we address Counts 1 through 3, and Count 5, in further detail.[10]

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

In Count 1, plaintiff claims that "[t]he Commission's determination not to include Ashley on its list of affected domestic producers for the antidumping order covering wooden bedroom furniture from China and Customs' failure to accept Ashley's . . . CDSOA Certification[s] for distributions, were not supported by substantial evidence and were otherwise not in accordance with law." First Amended Compl. ¶¶ 39–40. We conclude that Count 1 fails to state a claim upon which relief can be granted and, therefore, must be dismissed.

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

In opposing dismissal of Count 1, plaintiff argues that "[in] *SKF*, the Federal Circuit adopted a saving construction of the CDSOA that could otherwise have violated the First Amendment by conditioning receipt of CDSOA payments on the content of a domestic producer's speech." Pl.'s Resp. to Def.'s May 2, 2011 Mot. to Dismiss 9 (Jun. 6, 2011), ECF No. 86 ("Pl.'s Resp."). Plaintiff submits that, due to this saving construction, *SKF* does not support dismissal here but rather "makes clear that Ashley is entitled to disbursements under the

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

statute, constitutionally construed." *Id.* (footnote omitted). Plaintiff views *SKF* to hold "that the CDSOA 'only permit[s] distributions to those who actively supported the petition (i.e., a party that did no more than submit a bare statement that it was a supporter without answering questionnaires or otherwise actively participating would not receive distributions).'" *Id.* at 10 (quoting *SKF*, 556 F.3d at 1353 n.26) (alteration in original). Under this saving construction, plaintiff argues, SKF USA Inc. ("SKF"), the plaintiff in *SKF*, "was ineligible to receive distributions *not* because it opposed the petition in its responses to the ITC questionnaire, but rather because it *actively opposed* the petition in other concrete ways that placed it in 'a role that was nearly indistinguishable from that played by a defendant in a qui tam or attorney's fees award case.'" *Id.* at 11 (quoting *SKF*, 556 F.3d at 1358). According to plaintiff, "[in] light of this substantial opposition, the First Amendment did not bar denying [SKF] a share in antidumping duties" but "compels the opposite result" in this case because, "[by] contrast, Ashley took no similar steps to 'impede the investigation,' nor did it express a 'refus[al] to cooperate' with the Government." *Id.* at 11–12 (quoting *SKF*, 556 F.3d at 1359) (second alteration in original).

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

Defendants' determinations denying benefits to Ashley comported with the CDSOA. Therefore, plaintiff's claims that either or both of the agencies acted unlawfully are meritless.

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

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

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

In support of its as-applied First Amendment claims, Ashley directs the court's attention to the Supreme Court's decisions in *Snyder v. Phelps*, 131 S. Ct. at 1207 (2011), *Citizens United v. Federal Election Comm'n*, 130 S. Ct. at 876, *Sorrell v. IMS Health, Inc.*, 131 S. Ct. at 2653, and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. at 2806. According to plaintiff, these recent decisions

have "rendered [the] conclusion of [*SKF*] utterly untenable . . . Today, it is clear that corporate speech relating to matters such as international trade and law enforcement is entitled to the strictest First Amendment protection." Pl.'s Resp. 21. We disagree.

Snyder v. Phelps held that members of the Westboro Baptist Church who picketed near the funeral of a member of the U.S. Marine Corps killed in the line of duty in Iraq could not be held liable on state-law tort claims alleging intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. 131 S. Ct. at 1213–14, 1220. Concluding that the various messages condemning the United States and its military displayed on the picketer's signs were entitled to "'special protection' under the First Amendment," *id*. at 1219, the Supreme Court held that the jury verdict holding the Westboro picketers liable on the tort claims must be set aside as an impermissible burden on protected speech, even if the picketing caused emotional distress to the mourners, *id.* at 1220. The Supreme Court cautioned that its holding was narrow and limited to the particular facts before it, having emphasized that the picketers carried signs displaying messages that, for the most part, constituted speech addressing matters of public concern, *id.* at 1216–17, and conducted their picketing peacefully, and without interfering with the funeral, at each of three locations the Supreme Court considered to be a public forum, *id.* at 1218–19.

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

In *Citizens United v. Federal Election Commission*, the Supreme Court struck down a federal election law imposing an "outright ban, backed by criminal sanctions" on independent expenditures by a

"corporation," including "nonprofit advocacy corporations" or "unions," during the thirty-day period preceding a primary election or the sixty-day period preceding a general election, for an "electioneering communication" or for advocacy of the election or defeat of a candidate. 130 S. Ct. at 886–87, 897. Reasoning that "political speech must prevail against laws that would suppress it, whether by design or inadvertence," the Supreme Court concluded that "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id*. at 898 (citing *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

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

Citizens United does not hold that any statute affecting speech relating to matters of public concern, whether made by individuals or corporations, is to be subjected to a strict scrutiny standard. The statute struck down in *Citizens United* banned political speech, and the Supreme Court's decision to apply strict scrutiny can only be viewed properly in that context. As the Court of Appeals recognized in *SKF*, the CDSOA "does not prohibit particular speech," that "statutes prohibiting or penalizing speech are rarely sustained," and that "cases addressing the constitutionality of such statutes are of little assistance in determining the constitutionality of the far more limited provisions of the Byrd Amendment." 556 F.3d. at 1350. The Court of Appeals reasoned that "[in] considering limited provisions that do not ban speech entirely, the purpose of the statute is important," and concluded that "[n]either the background of the statute, nor its articulated purpose, nor the sparse legislative history supports a conclusion that the purpose of the Byrd Amendment was to suppress expression." *Id.* at 1350–51. Contrary to this view, Ashley maintains

that "the Supreme Court in *Citizens United* made clear that the degree of First Amendment protection afforded corporate speech on matters of public concern does not vary depending on whether the government directly prohibits speech or instead withholds benefits based on speech." Pl.'s Resp. 24 (citing *Citizens United*, 130 S. Ct. at 905). Thus, plaintiff's argument would have us consider immaterial the distinction between the CDSOA, which does not prohibit speech, and the statute struck down in *Citizens United*, which had as its purpose and effect the suppression of political speech through an "outright ban, backed by criminal sanctions." *Citizens United*, 130 S. Ct. at 897.

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

Plaintiff argues, next, that in the wake of the Supreme Court's decision in *Sorrell*, the conclusion that intermediate scrutiny should be applied to the CDSOA "despite the CDSOA's viewpoint discrimination" is a conclusion that "can no longer stand" and that the CDSOA now must be subjected to "heightened judicial scrutiny." Pl.'s Notice of Supp. Authority 2 (citing *Sorrell*, 131 S. Ct. at 2663–64). As we did recently in ruling on another First Amendment challenge to the CDSOA, we reject the argument that *Sorrell* implicitly over-

turned *SKF*. *Furniture Brands*, 35 CIT __, __, Slip Op. 11–132, at 23–25.

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

The Supreme Court concluded that the Prescription Confidentiality Law "enacts content-and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information." *Id.* at 2663. Under the "heightened scrutiny" the Supreme Court considered to be warranted, "the State must show at least that the statute directly advanced a substantial government interest and that the measure is drawn to achieve that interest." *Id.* at 2667–68. The Court concluded that the State of Vermont failed to make that showing. The Court considered that the stated interest of promoting medical privacy and physician confidentiality did not justify the prohibitions placed on the sale and use of the information. *Id*. at 2668. The Court noted that the law allowed wide dissemination of the information but effectively prohibited use of the information by a class of disfavored speakers ("detailers," who used the prescriber-identifying information to promote brand-name drugs on behalf of pharmaceutical manufacturers) and in effect prohibited a disfavored use, marketing. *Id*. Under the Supreme Court's analysis, the Vermont law "forbids sale" of the information "subject to exceptions based in large part on the content of a purchaser's speech," disfavors "marketing, that is, speech with a particular content," and "disfavors specific speakers, namely, pharmaceutical manufacturers." *Id.* at 2663. Another purpose the State of Vermont advanced in support of the Prescription Confidentiality Law reducing health care costs and promoting public health also failed to justify the burden on speech. *Id*. at 2668, 2670. In restraining certain speech by certain speakers, and specifically, in diminishing the ability of detailers to influence prescription decisions, the statute sought to influence medical decisions by the impermissible means of keeping physicians from receiving the disfavored information. *Id*. 2670–71.

As we observed in our *Furniture Brands* opinion, *Sorrell* and *SKF* analyze dissimilar statutes, which vary considerably in the nature and degree of the effect on expression as well as in purpose. *Furniture Brands*, 35 CIT at __, Slip Op. 11–132, at 23. *SKF* concluded that the CDSOA does not have as a stated purpose, or even an implied purpose, the intentional suppression of expression, *SKF*, 556 F.3d at 1351–52, whereas the Vermont statute authorized civil remedies against those selling or using the prescriber-identifying information that the statute sought to suppress. *See Sorrell*, 131 S. Ct. at 2660. *Sorrell* does not require us to review the CDSOA according to a First Amendment analysis differing from that applied by the Court of Appeals in *SKF*. In analyzing the Vermont statute, the Supreme Court stated in *Sorrell* that "the State must show at least that the statute directly advances a substantial government interest and that the measure is drawn to achieve that interest." 131 S. Ct. at 2667–68 (citing *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480–81 (1989); *Central Hudson*, 447 U.S. at 566). *SKF* concluded that "SKF's opposition to the antidumping petition is protected First Amendment activity," 556 F.3d at 1354, and applied a test to which it referred as the "well established *Central Hudson* test," *id.* at 1355. The Court of Appeals described this test as requiring that regulation of commercial speech be held permissible if the asserted governmental interest is substantial, the regulation directly advances that interest, and the regulation is not more extensive than is necessary to serve that interest. *Id.* (citing *Central Hudson*, 447 U.S. at 566). We reject plaintiff's argument that *Sorrell* requires us to apply to the CDSOA a level of scrutiny different from that applied by the Court of Appeals in *SKF*.

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

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

We do not agree that the Supreme Court's holding in *Arizona Free Enterprise* implicitly invalidates the holding in *SKF*. *Arizona Free Enterprise* is one of a line of Supreme Court cases that struck down laws affecting speech during campaigns for political office. That line of cases includes *Citizens United*, discussed *supra*, and *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008), which invalidated a federal statute under which a new, asymetrical regulatory scheme of limits on campaign donations of individuals in elections for the U.S. House of Representatives was triggered when one candidate in such an election spent more than $350,000 of personal funds on the race. *Arizona Free Enterprise*, 131 S. Ct. at 2818. The Supreme Court grounded its reasoning in *Arizona Free Enterprise* partly on the principle that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Id*. (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989)) (internal quotation marks omitted). Stating in *Arizona Free Enterprise* that "[t]he logic of *Davis* largely controls our approach to this case," the Supreme Court found the burdens the Arizona law imposed on speech uttered during a campaign to impose an even more onerous penalty on the free speech of a privately funded candidate than did the federal statute invalidated in *Davis* and to inflict a penalty on groups making or desiring to make independent expenditures. *Id.* at 2818–20. Under the Arizona law's scheme, "[t]he direct result of the speech of privately financed candidates and independent expenditure groups is a state-provided monetary subsidy to a political rival." *Id.* at 2821. Contrary to plaintiff's argument, the CDSOA does not bear more than a superficial resemblance to the laws invalidated in *Arizona Free Enterprise*, *Davis* (a case decided prior to *SKF*), and similar such cases, which regulated and impermissibly burdened political speech during an election by restricting campaign expenditures. Accordingly, we reject Ashley's contention that *Arizona Free Enterprise* established a new First Amendment principle requiring us to disregard the holding in *SKF* and to apply a strict scrutiny analysis to the CDSOA.

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

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

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

Relief on these claims is foreclosed by the holding in *SKF*. The Court of Appeals held in *SKF* that the CDSOA did not violate equal protection principles as applied to plaintiff SKF. Ashley, like SKF, expressed opposition to the relevant antidumping duty petition and thus failed to satisfy the petition support requirement, 19 U.S.C. § 1675c(d)(1). *Compare* First Amended Compl. ¶ 19 ("In its questionnaire responses, Ashley indicated that it opposed the petition.") *with SKF*, 556 F.3d at 1343 ("SKF also responded to the ITC's questionnaire, but stated that it opposed the antidumping petition."). Plaintiff points out that SKF "did much more than simply express abstract opposition to the petition," Pl.'s Resp. 13, but this fact does not distinguish the holding in *SKF* from the case before us. In ruling on claims that are not distinguishable from Ashley's in any material way, the Court of Appeals held that "[b]ecause it serves a substantial government interest, the Byrd Amendment is . . . clearly not violative of equal protection under the rational basis standard," *SKF*, 556 F.3d at 1360, and that "the Byrd Amendment does not fail the equal protection review applicable to statutes that disadvantage protected speech," *id*. at 1360 n.38.

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

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

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

We construe Ashley's retroactivity claims, which are vaguely stated, to mean that the CDSOA is impermissibly retroactive under the Fifth Amendment due process guarantee because it conditions the receipt of distributions on a decision whether or not to support an antidumping duty petition that was made before the statute went into effect, and thus before the affected party making that decision could have had notice of the consequences. *See* 19 U.S.C. § 1675c(d)(1) (directing the ITC to forward to Customs a list identifying petitioners and parties expressing support for a petition "within 60 days after the effective date of this section in the case of orders or findings in effect on January 1, 1999 . . . . "). Because it applies to petition support decisions made prior to enactment, the CDSOA may be characterized as having a retroactive aspect. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994) (considering a retroactive statute to be one that attaches "new legal consequences to events completed before its enactment"). We previously have concluded that the CDSOA is not violative of the due process guarantee because "the retroactive reach of the petition support requirement in the CDSOA is justified by a rational legislative purpose and therefore is not vulnerable to attack on constitutional due process grounds." *New Hampshire Ball Bearing Co., Inc. v. United States*, 36 CIT __, __, Slip Op. 12–2, at 14 (Jan. 3, 2012); *see also Schaeffler Grp. USA, Inc. v. United States*, 36 CIT __, __, Slip Op. 12–8, at 11–12 (Jan. 17, 2012). We conclude that Ashley's retroactivity claims, when construed in this way, must be dismissed for lack of standing.[11] Because the CDSOA was enacted in 2000, it

[11] It is also possible to construe Ashley's retroactivity claims, when read literally, to mean that the CDSOA is impermissibly retroactive under the due process guarantee simply because it attaches negative consequences to petition support decisions made prior to the determination of eligibility for distributions. We decline to construe the claims in this way because, according to such a construction, the CDSOA would not be "retroactive" as the term has been recognized in case law and would be indistinguishable from any of innumerable statutes attaching a consequence to a past action of a person to whom enactment of the statute provided notice of the consequences. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled

was not applied retroactively to Ashley, which expressed opposition to the wooden bedroom furniture petition in 2003. First Amended Comp. ¶¶ 18–19. Ashley, therefore, had the "opportunity to . . . conform [its] conduct accordingly." *Landgraf*, 511 U.S. at 265. As a consequence, plaintiff's amended complaints fail to allege an injury in fact arising from conduct predating the CDSOA's enactment. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–81 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)) ("To satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical . . .").

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

IV. CONCLUSION

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

Dated: January 31, 2012
New York, New York

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

---

expectations should not be lightly disrupted."). Were we to adopt the alternate construction of plaintiff's retroactivity claims that we pose hypothetically, we would be compelled to dismiss such claims as ones upon which no relief could be granted.

Slip Op. 12–15

UNITED STATES, Plaintiff, v. CALLANISH LTD., Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 03–00658

[Ordering an appraisal to determine the domestic value of the imported merchandise on which plaintiff seeks to recover a civil penalty through a default judgment]

Dated: February 1, 2012

Domenique Kirchner, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for plaintiff. With her on the brief were *Tony West*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Kevin B. Marsh*, Assistant Chief Counsel, U.S. Customs and Border Protection, of Buffalo, NY.

OPINION AND ORDER

Stanceu, Judge:

I. INTRODUCTION

In this action brought under section 592 of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1592 (1988), plaintiff applies for a judgment by default against Callanish Ltd. ("Callanish"), a British corporation, upon a claim that Callanish, by means of fraud, introduced, or aided and abetted the entry or introduction of, certain merchandise into the commerce of the United States. Pl.'s Request for Default J. as to Callanish Ltd. (May 12, 2011), ECF No. 28. The imported merchandise consisted of capsules of "evening primrose oil," a substance that is used as a dietary supplement but that, at the time of importations in question, could not be imported lawfully because it was not recognized as safe for that use by the U.S. Food and Drug Administration. First Amended Compl. ¶¶ 4–5 (July 31, 2009), ECF No. 16. U.S. Customs and Border Protection ("Customs") initiated a penalty action under section 592 of the Tariff Act based on shipments of evening primrose oil imported on fifty-two consumption entries made between September 1988 and March 1992. *Id*. ¶¶ 10–12. Plaintiff seeks to recover a civil penalty "in the amount of $17,734,926," which plaintiff alleges to be the sum of the domestic value of the merchandise on the fifty-two entries. *Id*. ¶ 93.

Contrary to a previous order in this case and contrary to the Court's rules, plaintiff filed an amended complaint ("Second Amended Complaint") without leave of court. The court treats the filing of that complaint as a motion for leave to amend the complaint, which the court grants. Upon review of the new complaint and the instant

motion, the court determines that a lawful judgment by default cannot be entered because the court lacks a sufficient basis to determine *de novo* a fact essential to the court's entering judgment: the domestic value of the merchandise on which plaintiff bases its penalty claim. In addition, the court concludes that the Second Amended Complaint admits a fact that is inconsistent with plaintiff's representation that the claimed domestic value of the merchandise was determined by means of an appraisal that was conducted in accordance with law. The court determines it appropriate to order the conducting of a new appraisal of the merchandise.

II. BACKGROUND

Background information on this case is included in the court's opinions in *United States v. Scotia Pharmaceuticals Ltd.*, 33 CIT __, __, Slip Op. 09–49, 3–6 (May 20, 2009) and *United States v. Callanish Ltd.*, 34 CIT __, __, Slip Op. 10–124, 2–5 (Nov. 2, 2010). Supplementary information is provided herein.

A. Proceedings Conducted upon the Original Complaint

In its opinion and order in *Scotia Pharmaceuticals*, the court denied plaintiff's application for judgment by default against Callanish because plaintiff failed to allege facts sufficient to support a conclusion that Callanish had violated 19 U.S.C. § 1592. *Scotia Pharm.*, 33 CIT at __, Slip Op. 09–49 at 12. The court concluded that the complaint "fails to attribute to Callanish any material and false statement or act, or any material omission . . . such that the court could conclude . . . that Callanish is liable for a civil penalty under 19 U.S.C. § 1592(a)(1)(A)." *Id.* at __, Slip Op. 09–49 at 12. The court noted, further, that "the complaint does not allege, for purposes of § 1592(a)(1)(B), that Callanish, specifically, aided and abetted any person to commit specific acts or omissions that are within the scope of the conduct made unlawful by § 1592(a)(1)(A) . . . ." *Id.* at __, Slip Op. 09–49 at 12. The order issued in *Scotia Pharmaceuticals* allowed plaintiff sixty days to file an amended complaint as a matter of course and informed plaintiff that failure to do so would result in an order to show cause why the case should not be dismissed. *Id.* at __, Slip Op. 09–49 at 14. The order also dismissed the complaint, at plaintiff's request, with respect to two defendants upon which plaintiff had not obtained service of process, Scotia Pharmaceuticals Limited and Quantanova, Canada, Ltd. *Id.* at __, Slip Op. 09–49 at 14.

B. Proceedings Conducted upon the First Amended Complaint

Plaintiff filed its First Amended Complaint on July 31, 2009, seeking to recover a civil penalty from Callanish based on an allegation that "Callanish introduced, or aided or abetted the entry or introduction of the merchandise, or the attempt to enter or introduce the merchandise . . . into the commerce of the United States by means of fraud and in violation of 19 U.S.C. § 1592." First Amended Compl. ¶ 92. Plaintiff sought "a penalty in the amount of $17,734,926, which represents the domestic value of the merchandise imported under cover of the 52 consumption entries . . . ." *Id.* ¶ 93. Plaintiff filed on January 8, 2010 a status report notifying the court that plaintiff was able to obtain service of process by serving the First Amended Complaint on the liquidator of Callanish. Pl.'s Status Report (Jan. 8, 2010), ECF. No. 20. The Clerk of the Court entered Callanish's default on May 17, 2010, after which plaintiff applied, a second time, for a judgment by default. Pl.'s Request for Default J. as to Callanish Ltd. (May 19, 2010), ECF No. 23.

The court denied plaintiff's application for a default judgment in its opinion and order in *Callanish*, 34 CIT at __, Slip Op. 10–124 at 7. The court concluded that plaintiff had failed to set forth in the First Amended Complaint, as a "well-pled fact," the domestic value of the merchandise. *Id.* at __, Slip Op. 10–124 at 7. The court stated in *Callanish* that "the domestic value of the merchandise is a fact essential to the court's *de novo* determination of the amount of any penalty" but that "[t]he complaint lacks any well-pled fact concerning the domestic value of the merchandise or how that value was determined." *Id.* at __, Slip Op. 10–124 at 6–7. The court stated that "[t]he mere allegation of an amount offered as the 'domestic value,' absent anything more, does not constitute a well-pled fact," *id.* at __, Slip Op. 10–124 at 7, and observed that the domestic value of the merchandise as pled in the First Amended Complaint appeared to have been derived "by doubling the amounts for entered value as set forth on entry summaries for the importations that are the subject of this action," *id.* at __, Slip Op. 10–124 at 7 n.3. In denying the application for a default judgment, the court specified that "unless plaintiff moves within sixty (60) days . . . for leave to file an amended complaint, plaintiff, upon entry of a further order, shall be required to show cause why a judgment should not be entered dismissing this action." *Id.* at __, Slip Op. 10–124 at 7.

C. The Instant Application for Judgment by Default against Callanish

Plaintiff filed what it designated the Second Amended Complaint on December 22, 2010. Second Amended Compl. (Dec. 22, 2010), ECF

No. 25. Plaintiff effected service of this document upon the liquidator of Callanish on January 12, 2011. Pl.'s Request for Entry of Default 1 (Mar. 3, 2011), ECF No. 26. On March 24, 2011, the Clerk of the Court entered Callanish's default. Order (Mar. 24, 2011), ECF No. 27. Plaintiff filed the instant application for a default judgment on May 12, 2011. Pl.'s Request for Default J. as to Callanish Ltd. (May 12, 2011), ECF No. 28.

III. DISCUSSION

Section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1582(1) (2006), grants the court jurisdiction over this action to recover a civil penalty under section 592 of the Tariff Act. Under section 592, the court determines all issues *de novo*, including the amount of any penalty. 19 U.S.C. § 1592(e)(1). Section 592(c)(1) limits any penalty recovery to "an amount not to exceed the domestic value of the merchandise." *Id.* § 1592(c)(1).

The court concludes, first, that plaintiff has not complied with the order the court issued in *Callanish*. In denying the application for a default judgment, the court specified in *Callanish* that "unless plaintiff moves within sixty (60) days . . . for leave to file an amended complaint, plaintiff, upon entry of a further order, shall be required to show cause why a judgment should not be entered dismissing this action." 34 CIT at __, Slip Op. 10–124 at 7. Rather than move for leave to file an amended complaint, plaintiff filed the Second Amended Complaint as a matter of course. Under USCIT Rule 15(a) as in effect on that date, plaintiff could amend its complaint as a matter of course only once, and having already done so on July 31, 2009, was not authorized by the Court's rules to do so again.[1]

It is apparent from the circumstances that plaintiff filed its Second Amended Complaint in an attempt to comply with the order in *Callanish* and would have complied but for a misinterpretation of the Court's rules or the court's order. For these reasons, the court, in its discretion, considers the filing of the Second Amended Complaint as a motion submitted under USCIT Rule 15(a) for leave to amend the complaint. The court grants this motion and accepts the Second Amended Complaint as filed.

The court further concludes that the defect identified in *Callanish* has not been cured. As a result, the court remains "unable to determine the correct decision on the basis of the evidence presented." 28

[1] USCIT Rule 15(a) was amended, effective January 1, 2011, in ways not pertinent to the question presented here.

U.S.C. § 2643(b) (2006). In *Callanish*, the court was unable to make a proper determination of the domestic value of the merchandise based on the complaint and the motion for default judgment then before the court. *Callanish*, 34 CIT at __, Slip Op. 10–124 at 7. The court noted that "[t]he amended complaint seeks a penalty of $17,734,926, which plaintiff alleges to be the domestic value of the fifty-two consumption entries of [evening primrose oil] that it alleges to have been fraudulently imported . . . ." *Id.* at __, Slip Op. 10–124 at 6. The First Amended Complaint, however, offered only a "conclusory statement of the domestic value" on which the court could not rely in reaching a decision on the appropriate amount of any civil penalty. *Id.* at __, Slip Op. 10–124 at 7. Any default judgment for a civil penalty under section 592 must be grounded in a determination of domestic value because the domestic value of the merchandise is a statutory limit on any penalty recovery. *See* 19 U.S.C. § 1592(c)(1).

The Second Amended Complaint adds to the First Amended Complaint a single paragraph, paragraph 88, addressing the question of the domestic value of the imported merchandise. Second Amended Compl. ¶ 88. The paragraph states as follows:

> Customs appraised the merchandise referenced in paragraphs 18 through 84 in accordance with law. *See* 19 U.S.C. § 1606; 19 C.F.R. § 162.43(a). The appraisal worksheet signed by the relevant Customs officer is included in the Appendix at A159–164. For each entry, the domestic value of the merchandise was limited by Customs policy to no more than twice the entered value of the merchandise; for each entry, the domestic value was calculated by multiplying the entered value of the merchandise by two. The total domestic value of Entries 1 through 53, excluding Entry 2 for which Plaintiff no longer seeks a penalty, is $17,734,926.

Id. This paragraph concludes by listing, in separate subparagraphs, the alleged domestic value of the merchandise that is the subject of each entry at issue in this case. *Id.* ¶ 88(a)-(aaa).

The Tariff Act does not define the term "domestic value of the merchandise" as used in section 592(c)(1), 19 U.S.C. § 1592(c)(1). The Senate Report accompanying the Customs Procedural Reform and Simplification Act of 1978, which enacted section 592(c)(1) in its current form, provides that "domestic value is generally equivalent to retail value . . . ." S. Rep. No. 95–778, at 19 (1978).

The Tariff Act, in section 606, a provision plaintiff cites in paragraph 88 of the Second Amended Complaint, directs Customs to "determine the domestic value, at the time and place of appraise-

ment, of any vessel, vehicle, aircraft, merchandise, or baggage seized under the customs laws." 19 U.S.C. § 1606 (2006). In § 162.43(a) of the Customs regulations, Customs has defined the term "domestic value" for purposes of section 606 as "the price at which such or similar property is freely offered for sale at the time and place of appraisement, in the same quantity or quantities as seized, and in the ordinary course of trade." 19 C.F.R. § 162.43(a) (2003).[2] Although the definition of "domestic value" in paragraph (a) of § 162.43 governs appraisal of seized property, the Customs regulations apply this definition to property not under seizure, providing that "[t]he basis for a claim for forfeiture value or for an assessment of a penalty relating to the forfeiture value of property not under seizure is the domestic value as defined in paragraph (a) of this section, except that the value shall be fixed as of the date of the violation." *Id.* § 162.43(b). The regulation lends further clarity to the term "date of the violation" by specifying that "[in] the case of entered merchandise, the date of the violation shall be the date of the entry, or the date of the filing of the document, or the commission of the act forming the basis of the claim, whichever is later." *Id.*

The term "assessment of a penalty relating to the forfeiture value of property," as used in § 162.43(b), reasonably can be construed to apply to a determination of domestic value for purposes of administrative penalty assessment under section 592(b) of the Tariff Act, but a narrower reading is also plausible.[3] In paragraph 88 of the Second Amended Complaint, plaintiff, on behalf of Customs, cites § 162.43(a) in support of the representation that "Customs appraised the merchandise referenced in paragraphs 18 through 84 in accordance with law." The court may infer from the Second Amended Complaint that Customs construes 19 C.F.R. § 162.43 to apply to an appraisal to determine domestic value for purposes of penalty assessment under 19 U.S.C. § 1592(c)(1). The court defers to an agency's reasonable construction of its own regulation. *See American Signature, Inc. v. United States*, 598 F.3d 816, 827 (Fed. Cir. 2010) ("In general, '[t]he agency's construction of its own regulations is of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'")

[2] The provision further states that "[i]f there is no market for the seized property at the place of appraisement, such value in the principal market nearest to the place of appraisement shall be reported." 19 C.F.R. § 162.43(a) (2003).

[3] Provisions of the Tariff Act of 1930 other than section 592, most notably section 596, 19 U.S.C. § 1595a (2006), also provide for penalty assessment. Section 596 provides for both penalties and forfeitures relating to imported merchandise. *See* 19 U.S.C. § 1595a(b), (c). Section 592 also provides for seizure and forfeiture, but seizure and forfeiture are available under section 592 only in limited situations. *See* 19 U.S.C. § 1592(c)(11) (2006).

(quoting *Reizenstein v. Shinseki*, 583 F.3d 1331, 1335 (Fed. Cir. 2009) (internal quotation omitted)). The court concludes, therefore, that the definition of "domestic value" as set forth in § 162.43(a) and applied according to § 162.43(b) was binding upon Customs when Customs appraised the imported merchandise for purposes of determining domestic value in the administrative penalty proceeding that Customs conducted under section 592(b) of the Tariff Act. *See* Second Amended Compl. ¶ 89.

The regulation required, *inter alia*, that Customs determine the domestic value of the evening primrose oil in the various entries according to the price at which the merchandise or similar merchandise was freely offered for sale in the ordinary course of trade. 19 C.F.R. § 162.43(a). Paragraph 88 of the Second Amended Complaint does not allege specifically that such a procedure was followed; however, it does contain a conclusion of law, stating that the appraisement "was in accordance with law" and citing as support 19 C.F.R. § 162.43(a). Paragraph 88 alleges only one fact pertaining to the method of appraisal, stating that "the domestic value was *calculated* by multiplying the entered value of the merchandise by two." Second Amended Compl. ¶ 88. (emphasis added). The difficulty facing the court in determining the domestic value from the facts alleged in the Second Amended Complaint is that paragraph 88 describes a method of appraisement inconsistent with that required by § 162.43. Although the paragraph explains that "the domestic value of the merchandise was limited by Customs policy to no more than twice the entered value of the merchandise," this explanation is unavailing. Construed according to the standard established by § 162.43(a), such a policy can be only a limitation on appraisement, not a method of appraisement.

The "appraisal worksheets" to which reference is made in paragraph 88 do not solve the problem facing the court. These documents are not incorporated into the Second Amended Complaint, but even had they been so incorporated, they would not aid the court in making the requisite finding. The worksheets consist of two documents, each titled "Receipt for Merchandise Seized," with attached schedules listing, *inter alia*, the dutiable value and the domestic value of the merchandise on each of the fifty-two entries, set forth in amounts doubling the dutiable values. Pl.'s Request for Default J. as to Callanish Ltd. A159-A164 (May 8, 2008), ECF No. 10. Each document contains a signed certification that "this is a true and correct appraisal." These certifications shed no light on the method of appraisement and, therefore, would not suffice as an allegation that Customs followed the procedure of § 162.43.

In this proceeding to recover a civil penalty by default judgment, the court is not bound by the appraisement Customs conducted on the imported evening primrose oil during the administrative penalty proceeding. *See* 19 U.S.C. § 1592(e)(1) ("Notwithstanding any other provision of law, in any proceeding commenced by the United States in the Court of International Trade for the recovery of any monetary penalty claimed under this section . . . all issues, including the amount of the penalty, shall be tried de novo"); USCIT R. 55(b)(2) ("The court may conduct hearings . . . when to enter or effectuate judgment it needs to . . . determine the amount of damages or other relief"). For the reasons identified, the court is unable to enter judgment based on that appraisement. Because it appears to the court, based on the facts as pled in the Second Amended Complaint, that the only appraisal of the merchandise available at this time was not conducted according to law, the court considers it unlikely that the question of the domestic value of the merchandise will be resolved by further amendment of the complaint. The court considers it appropriate to hold in abeyance any ruling on plaintiff's application for a default judgment pending resolution of the appraisement question. The court will order a further administrative procedure consisting of a new appraisal to determine the domestic value of the merchandise on the fifty-two entries at issue in this case. *See* 28 U.S.C. § 2643(b) (authorizing the court to "order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision."); USCIT R. 55(b)(2).

IV. CONCLUSION AND ORDER

From its review of the Second Amended Complaint and of plaintiff's application for judgment by default, the court concludes that it is unable to enter judgment in this action and that it is appropriate to order further procedures. Therefore, upon consideration of all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that plaintiff's filing of the Second Amended Complaint on December 22, 2010, ECF No. 25, be, and hereby is, deemed to be a motion for leave to amend the complaint; it is further

ORDERED that plaintiff's motion for leave to amend the complaint be, and hereby is, GRANTED, and the Second Amended Complaint is hereby accepted for filing as of December 22, 2010; it is further

ORDERED that plaintiff, as "further administrative or adjudicative procedures" pursuant to 28 U.S.C. § 2643(b), shall arrange for a new appraisal of the merchandise imported on the fifty-two entries that are the subject of this action; it is further

ORDERED that plaintiff shall file with the court a report of the new appraisal no later than sixty (60) days from the date of this Opinion & Order; it is further

ORDERED that plaintiff's application for a judgment by default be, and hereby is, held in abeyance pending further procedures as described herein; and it is further

ORDERED that in that absence of a timely filing of a report of a new appraisal, plaintiff will be required, through a subsequent order, to show cause why this case should not be dismissed pursuant to USCIT Rule 41(b).

Dated: February 1, 2012
New York, New York

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU
JUDGE