U.S. Customs and Border Protection

Slip Op. 12–1

ESTEE LAUDER, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 07–00217

[On cross motions for summary judgment of classification of cosmetic sets, judgment for the plaintiff.]

Dated: Decided: January 3, 2012

Pisani & Roll, LLP (*Michael E. Roll*, *Robert J. Pisani* and *Brett Ian Harris*), for the plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney-In-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Marcella Powell*), Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (*Yelena Slepak*), of counsel, for the defendant.

OPINION

Musgrave, Senior Judge:

Plaintiff Estée Lauder, Inc. challenges U.S. Customs and Border Protection's ("Customs") classification of its "Blockbuster" cosmetic sets. Proper administrative protest procedure having been undertaken and all liquidated duties, taxes and fees having been paid, *see* 19 U.S.C. §§ 1514, 1515, jurisdiction is proper pursuant to 28 U.S.C. §1581(a).

I. Facts

Plaintiff Estée Lauder is "well known for being a makeup, skin care and fragrance company".[1] Estée Lauder chose the makeup colors in the set at issue herein so as to have an appealing assortment of makeup shades that work well together and to allow a consumer to create different makeup looks. Pl's Material Facts ¶¶ 23–4. The target customer of the "Blockbuster" cosmetic set is the Estée Lauder customer who uses makeup. *Id*. ¶ 16. The sets contain makeup that is designed to be put on by the consumer. *Id*. ¶ 22.

[1] Plaintiff's Statement of Material Facts not in Dispute ("Pl's Material Facts"), ¶ 13. Unless otherwise noted, all facts cited in this opinion are undisputed.

The Blockbuster sets are imported and sold in a glossy metallic gold-colored carton dotted with snowflakes. The sets contain lipstick, lip pencil, lip gloss, eye pencil, mascara, eye shadow, nail lacquer, blush, a cosmetic case[2], a makeup brush case, cosmetic brushes and an applicator. The cosmetic case contains the items listed above except the brushes, which are packed separately in the makeup brush case. Both cases are packed in the gold carton. The cosmetics are either promotional sizes or are contained in promotional packaging. Defendant's Statement of Undisputed Material Facts ("Def's Material Facts"), ¶ 38.

The cosmetic case contains a "vacform" plastic insert into which the makeup products are fitted to protect the goods during shipment, as well as to allow the items to be self-displayed at retail. Pl's Material Facts ¶ 42. The cosmetic case is significantly larger than the cosmetics contained therein, and conceivably could carry anything that is smaller than the case itself. Def's Material Facts ¶¶ 8, 40. The cosmetic case is suited for use on a flat surface, such as a table, vanity, etc. Pl's Material Facts ¶ 54. The case is constructed without gussets and thus is unsuited to be opened like a handbag. *Id*. ¶ 56. The cosmetic case is not a piece of luggage. Def's Material Facts ¶ 39. The case facilitates the storage and use of the cosmetics stored within the case.[3] The makeup brush case contains three brushes, and is designed to be placed in the cosmetic case after purchase. Pl's Material Facts ¶ 50. The makeup brush case is approximately the same size as the brushes contained therein. *Id*. ¶ 64.

The sets were sold as part of the Estée Lauder Blockbuster promotional effort. The sets were displayed in the cosmetic section of department stores. *Id*. ¶ 45. The sets were sold as a "purchase with purchase" promotion, meaning that the consumer must purchase an Estée Lauder full-price fragrance in order to qualify to purchase the Blockbuster set. *Id*. ¶¶ 10–11. The items' packaging all complement each other visually as part of the Estée Lauder "Pure Color" line of products. For example, there are gold accents on each of the items. *Id*. ¶¶ 28–32. None of the items comprising the set were sold separately.

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[2] The parties disagree what to call the zippered case which at the time of importation contained most of the makeup articles. In this court's opinion on the government's motion to dismiss the cases were referred to as "train cases" or "vanity cases". *Estée Lauder, Inc. v. United States*, 35 CIT ___ (2011), Slip Op. 11–23 at 2. Plaintiff contends the cases are "cosmetic" cases. Defendant argues they should be denoted "travel" cases, even though it avers that the cases are "not suitable for the transportation of the imported cosmetic articles". Def's Resp. to Pl's Material Facts ¶ 47. The name applied to the cases is not material. However, for the sake of consistency, the court denotes the cases "cosmetic cases" in this opinion.

[3] Pl's Material Facts ¶ 48. The government's denial of this paragraph falls flat because the sources cited were inapposite and their objections conclusory.

Id. ¶ 8. The set was advertised as the "Makeup Artist Professional Color Collection." *Id*. ¶ 14, Def's Exh. F (Estée Lauder Advertisement). The cost of the makeup components that comprise the set is more than 50% of the material cost of the set. Pl's Material Facts ¶ 68.

II. Applicable Legal Standards

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

Both parties move for judgment pursuant to USCIT Rule 56, which is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT R. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The court will grant a motion for summary judgment "if the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." USCIT R. 56(c); *see Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247–48 (1986).

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

Scott v. Harris, 550 U.S. 372, 380 (2007).

Customs' presumption of correctness, 28 U.S.C. § 2639(a)(1), attaches only to Customs' factual determinations. *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). The proper scope and meaning of a tariff classification term is a question of law, while whether the subject merchandise falls within a particular tariff term as properly construed is a question of fact. *Franklin v. United States*, 289 F.3d 753, 757 (Fed. Cir. 2002) (citations omitted). However, where the nature of the merchandise is undisputed, "'the classification issue collapses entirely into a question of law,' and the court reviews Customs' classification decision *de novo*." *Dell Prods. LP v. United States*, 34 CIT ___, 714 F. Supp. 2d 1252, 1256 (CIT 2010), *aff'd* 642 F.3d 1055 (Fed. Cir. 2011) (quoting *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006)). Customs' statutory presumption of correctness is irrelevant with regard to classification decisions on summary judgment. *Blakley Corp. v. United States*, 22 CIT 635, 639, 15 F. Supp. 2d 865, 869 (1998).

III. Competing Tariff Provisions

As entered, the items were classified separately under several subheadings.[4] Plaintiff contends the cosmetics should be classified as sets, under subheading 3304.20, HTSUS because the eye makeup gives the cosmetic set its essential character. The government contends that the goods should remain classified separately, or if the goods are classifiable as a set, the cosmetic case gives them their essential character and so the sets should be classified under subheading 4202.12.20, HTSUS.

The primary subheadings at issue are as follows:

3304:	Beauty or make-up preparations and preparations for the care of the skin (other than medicaments), including sunscreen or sun tan preparations; manicure or pedicure preparations:		
	3304.10:	Lip make-up preparations	*Free*
	3304.20:	Eye make-up preparations	*Free*
	3304.30:	Manicure or pedicure preparations	*Free*
	3304.91:	Other	
	3304.91.00	Powders, whether or not compressed	*Free*

[4] The various components of the sets were classified upon entry in the following HTSUS subheadings: 3304.10 (lipstick, lip pencil, lip gloss), 3304.20 (eye pencil, mascara, eye shadow), 3304.30 (nail lacquer), 3304.91 (blush), 4202.12.20 (cosmetic case), 4202.92.45 (makeup brush case), 9603.30.60 (cosmetic brush) and 9616.20 (applicator).

4202:	Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper:		
	Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels and similar containers:		
* * *			
4201.12:	With outer surface of plastics or of textile materials:		
4202.12.20:	With outer surface of plastics	20%	*ad valorem*
* * *			
	Other [than trunks, suitcases, etc. or articles of a kind normally carried in the pocket or handbag]:		
4202.92:	With outer surface of sheeting of plastic or of textile materials:		
	Travel, sports and similar bags:		
4202.92.45:	Other	20%	*ad valorem*

IV. Analysis

After considering the parties' motions, the court finds that there are no material facts in dispute and that the matter may be resolved summarily.[5] The imported merchandise is properly classified as a cosmetics set in subheading 3304.20, for the reasons set forth below.

A

The government argues unpersuasively that the sets should be classified as entered, according to the classification of each individual component. "[B]ecause the merchandise at issue is classifiable pursuant to GRI 1, the classification inquiry ends and there is no need to resort to the remaining successive GRI's [*sic*] to classify the merchandise at issue." Def's Mem. in Supp. of Cross-Mot. for S.J. ("Def's Br.") at 7. The government's facile reading of the GRIs would make the terms of GRI 3(b)'s "retail sets" language inapplicable under any situation. If the government's argument prevailed, the court cannot think of any situation where a group of goods put up as a set for retail

[5] The parties' motions for oral argument and reconsideration are therefore denied.

sale could not be required to be classified separately "pursuant to GRI 1". In this case the cosmetic sets cannot be classified pursuant to GRI 1 without doing a GRI 3 analysis because no single heading describes all the products in the cosmetic set. Review of the other GRIs in order reveals that the sets must be analyzed under GRI 3(b). Only should such classification fail would they be classifiable individually.

The GRI 3(b) retail sets rule recognizes that imported retail sets are packaged and sold as a unit but contain multiple components. The rule allows customs authorities and importers to classify such sets as one item rather than as individual components. GRI 3(b) provides:

> When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
> * * *
>
> (b) . . . [G]oods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The first issue to be decided is whether the cosmetics, brushes and associated cases together qualify as "goods put up in sets for retail sale". The Explanatory Notes to GRI 3(b) explain:

> (X) For the purposes of this Rule, the term "goods put up in sets for retail sale" shall be taken to mean goods which:
>
> (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule;
>
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
>
> (c) are put up in a manner suitable for sale directly to users without repacking (*e.g.*, in boxes or cases or on boards).

Explanatory Note (X) to GRI 3(b) (2007). The parties agree that the merchandise satisfies criteria (a) and (c). The court must therefore determine whether the goods "meet a particular need or carry out a specific activity." That task is aided by the following illustrative examples of sets among the Explanatory Notes:

Examples of sets which can be classified by reference to Rule 3 (b) are:

(1) (a) Sets consisting of a sandwich made of beef, with or without cheese, in a bun (heading 16.02), packaged with potato chips (French fries) (heading 20.04):
Classification in heading 16.02.

(b) Sets, the components of which are intended to be used together in the preparation of a spaghetti meal, consisting of a packet of uncooked spaghetti (heading 19.02), a sachet of grated cheese (heading 04.06) and a small tin of tomato sauce (heading 21.03), put up in a carton:
Classification in heading 19.02.

The Rule does not, however, cover selections of products put up together and consisting, for example, of:

- a can of shrimps (heading 16.05), a can of *paté de foie* (heading 16.02), a can of cocktail sausages (heading 16.01); or
- a bottle of spirits of heading 22.08 and a bottle of wine of heading 22.04.

In the case of these two examples and similar selections of products, each item is to be classified separately in its own appropriate heading.

(2) Hairdressing sets consisting of a pair of electric hair clippers (heading 85.10), a comb (heading 96.15), a pair of scissors (heading 82.13), a brush (heading 96.03) and a towel of textile material (heading 63.02), put up in a leather case (heading 42.02):
Classification in heading 85.10.

(3) Drawing kits comprising a ruler (heading 90.17), a disc calculator (heading 90.17), a drawing compass (heading 90.17), a pencil (heading 96.09) and a pencil-sharpener (heading 82.14), put up in a case of plastic sheeting (heading 42.02):
Classification in heading 90.17.

For the sets mentioned above, the classification is made according to the component, or components taken together, which can be regarded as conferring on the set as a whole its essential character.

Id.

For its part, Customs has summarized the particular need/specific activity requirement as requiring "a relationship between the articles contained in a group, and such relationship must establish that the

articles are clearly intended for use together for a single purpose or activity to comprise a set under GRI 3(b)." CBP Informed Compliance Publication, *Classification of Sets* (2004) ("Sets ICP"), at 12. Customs found common themes in the Explanatory Notes examples showing what constitutes a particular need or a specific activity.

> In (1) [EN 3(b)(X)(1), the sandwich in bun packaged with potato chips, and the spaghetti meal] and (2) [EN 3(b)(X)(2), the hairdressing set], the examples referred to as "sets" share a common trait. The individual components in each example *are used together or in conjunction with another for a single purpose or activity*. In the "spaghetti meal" example, each component may be sold separately and used in a variety of recipes. However, sold together they are clearly intended to be used together for the specific purpose of preparing a single dish. Similarly, the "hairdressing set" is comprised of various articles that may be sold individually for many purposes. However, taken together they are designed to be used together for a single activity.
>
> On the other hand, (1) [EN 3(b)(X)(1)] contains two examples where articles put up together are not regarded as 'sets,' despite the fact that they are related to one another and can be used at the same time. In the 'canned goods' example, each can is related by the fact that they all contain food. In addition, it is possible to serve them on the same occasion. One could argue that they meet the specific need of 'eating a meal.' However, they do not interact with one another so as to comprise a single dish. Therefore, they do not comprise a set.
>
> In the 'spirits' example, the two articles are related as they both contain alcohol. Moreover, the wine and liquor may be served together at dinner or at a party. It is possible to argue that they have been packaged together for the specific activity of 'social drinking.' However, they are not used in conjunction with one another so as to be suitable for a single drink or for use on a specific occasion. Hence, they are not classified as a set.

Sets ICP, at 11–12, citing, HQ 953472, dated March 21, 1994 (emphasis added). The Sets ICP summarizes the rule as follows: "for goods put up together to meet the 'particular need' or 'specific activity' requirement and thereby be deemed a set, they must be so related as to be clearly intended for use together or in conjunction with one another for a single purpose or activity." Sets ICP, at 12. This analysis expounds on the meaning of the terms "particular need" or "specific

activity" for purposes of GRI 3(b) based upon inferences drawn from the examples given in the Explanatory Notes and is persuasive.

Indeed, the Explanatory Notes examples and Customs' Sets ICP are helpful and convincing. The parties agree that the components of the Blockbuster set were put together to be sold to customers who would use the makeup in the sets to create different makeup looks. The particular need or specific activity the set is designed for is that of putting on makeup, and the included items are either makeup, tools for applying makeup, or their containers. They are intended for use together or in conjunction with one another for the single purpose or activity of putting on makeup. Each item by itself has an identifiable individual use like the items in the hairdressing and drawing kit examples given in the Explanatory Notes. They are intended to work together to meet the particular need or specific activity of applying makeup. The cosmetic sets are therefore "retail sets" pursuant to GRI 3(b).

B

Having found the merchandise constitutes retail sets covered by GRI 3(b), the court must next determine which item gives the set its essential character. The Explanatory Notes state "[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods." Explanatory Note (VIII) to GRI 3(b) (2007).

Once again, the Explanatory Notes examples provide helpful guidance. "[T]he classification is made according to the . . . components taken together, which can be regarded as conferring on the set as a whole its essential character." Explanatory Note (X) to GRI 3(b). The EN's hairdressing and drawing kit examples each contained a variety of goods which performed the particular need the set was designed to address. The hairdressing kit was classified under the heading appropriate for the included electric hair clippers, while the drawing kit was classified under the heading appropriate to three of the included drawing tools.

Here, it is obvious that the essential character of the Blockbuster cosmetic set derives from the makeup components of the set, no fewer than eight of which are classified in Heading 3304, HTSUS. The role of the makeup components is essential to the use of the goods. Without makeup, a purchaser could not meet the particular need of putting on makeup. The makeup components comprise more than 50% of

the value of the sets, and their nature as well as their role in relation to the overall use of the set confer the essential character of the cosmetic sets.

C

The court must next consider which of the set's makeup items classifiable within Heading 3304 should provide the subheading classification for the entire cosmetic set. Per GRI 6, classification at the subheading level uses the same rules, *mutatis mutandis*, as classification at the heading level. Therefore, we come again to GRI 3(b) to determine which one of the makeup items provides the essential character of the group of makeup items included in the cosmetic sets. Each of the various makeup types (eye, lip, face and nail) could conceivably provide the essential character to the makeup collection. Among those, the eye and lip makeup predominate by number, and as between the two, although there was conflicting evidence on the actual cost of the makeup items, the entry papers show that the eye makeups cost significantly more than the lip makeups. The other cost evidence in the record corroborated this relationship. Therefore, the court concludes that the set should be classified according to the subheading for eye makeup.

D

The parties disagree whether the carrying case, and to a lesser extent the brush case, should affect the classification of the cosmetic set. Plaintiff contends that the cases should not impact the classification of the set because the cosmetic case is suitable for the storage, protection and transportation of the cosmetic components under normal use. "Because the Blockbuster cosmetic case facilitates the transportation, storage and use of the cosmetics and other components contained within and for which it was designed, marketed and sold, it helps carry out the specific activity of applying make-up together with its contents." Pl's Memo in Opp. To Def's Br., at 30–31 (citations omitted).

The government argues against GRI 3(b) sets classification because the items in the set, especially the cosmetic case, do not meet the "particular need or carry out a specific activity" criterion cited in the Explanatory Notes to GRI 3(b). Def's Br. at 10. Assuming *arguendo* that the set is classifiable pursuant to GRI Rule 3(b), defendant argues strenuously that the "travel case" should control the classification, because it gives the set its essential character.

> The travel case predominates in bulk and weight over all other imported components. The travel case is also the largest com-

> ponent and its cost is the component that has the highest cost. The travel case is also the most visual component of the Blockbuster and due to its size, the travel case provides a means for the articles to be self-merchandising. Consequently, the travel case imparts the essential character of the Blockbuster.[6]

Once again, the examples given in the Explanatory Note to GRI 3(b) provide guidance. In the hairdressing example, the set was packaged in a leather case. In the drawing example, the kit was packaged in a case of plastic sheeting. There, as here, the cases were classifiable separately in Heading 4202. But the essential character of the sets were given by the functional items included in the sets. Thus, where the essential character of the cosmetic set is given by the makeup components, the fact that the set is imported in a container that could be separately classifiable does not prevent the classification of the set as such. The cosmetic case's relative weight, bulk, or size does not overcome the fact that its purpose is to facilitate the storage and use of the items that enable the set to fulfill the specific activity (applying makeup) that makes it a set. *See infra*.

E

The government argues that the cosmetic case in this instance "lacks the physical characteristics necessary to allow it to interact with the cosmetic components to carryout the specific activity of applying makeup" and that the goods are not a set because "there are no loops or compartments to hold and organize the items, nor a built-in mirror to use for the purpose of applying makeup." Def's Br. at 11. Further, the government argues, "Customs' interpretation and application of GRI 3(b) and the criteria set forth in Explanatory Note (X) to the merchandise at issue should be accorded weight as they are entirely consistent with Customs' views as expressed in its body of prior rulings." *Id.* at 15.

Customs' position on the issue must be evaluated according to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944):

> The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

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[6] Def's Br. at 26. The costs alleged in the government's argument are not undisputed and the source cited by the government contradicts the values declared upon entry. That source stated that the makeup components together cost 60% more than the case. *Id.*, citing Goulding Decl., ¶ 31 (confidential). The parties agree that the makeup components comprise more than half the overall cost of the set. Pl's Material Facts ¶ 68.

United States v. Mead Corp., 533 US 218, 228 (2001), quoting *Skidmore*, 323 U.S. at 140. Review of the statute in question, along with the Explanatory Notes, reveals fundamental flaws in Customs' analysis of this issue and inconsistent application of it, thus eliminating its persuasiveness. For the reasons set forth below, the court declines the government's invitation to follow Customs' views and accords the Customs rulings on this issue no weight.

Customs' analysis conflates the GRI 3(b) requirements for composite goods (*i.e.*, whether the items are "mutually complementary" or "adapted to one another"), with the requirements for the GRI 3(b) retail sets analysis (do the goods "meet a particular need" or "carry out a specific activity"?). *See* Explanatory Notes (IX) and (X) to GRI 3(b). In HQ 957707, Customs stated that "[t]he case and cosmetic components are not mutually complementary, not adapted to one another, and are not put up to meet a particular need or carry out a specific activity[; t]hus, the goods do not comprise a set." HQ 957707, dated June 26, 1995, cited in Def's Br. at 15. Requiring set goods to be mutually complementary or adapted to one another effectively joins the Explanatory Notes requirements for composite goods to the Explanatory Notes describing retail sets. This conflation of requirements is unsupported in the statute or the Explanatory Notes. Although it is true that courts may follow the "well-reasoned views of the agencies implementing a statute," *Mead*, 533 U.S. at 227, citing *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998), the above rationale is not well reasoned.

This flawed analysis has been bootstrapped into a line of rulings that rely largely on Customs' own reasoning but little on the statute or Explanatory Notes. For example, HQ 966719, dated June 9, 2004, classified a cosmetic set imported in a briefcase made of PVC sheeting. In determining whether the goods constituted a set for purposes of GRI 3(b), Customs stated categorically that "cosmetic products imported in substantial, reusable cosmetics bags, do not form composite goods[;] . . . the cosmetic products and container were not mutually complementary and not adapted to [be] used together." HQ 966719, citing HQ 963593, dated October 15, 2001. The court cannot fathom why an entire line of products should be categorically prevented from being classified as sets simply because their container is reusable.

There are two different classes of GRI 3(b) merchandise, with two separate and distinct requirements. *Cf.*, EN Rule 3(b)(VI)(ii) and (iii) (composite goods consisting of different materials or components) *with* EN Rule 3(b)(VI)(iv) (goods put up in sets for retail sale). GRI 3(b) retail sets are defined as those that "meet a particular need" or

"carry out a specific activity." EN (X) to GRI 3(b). Composite goods are not retail sets, although both are classified according to their essential character. Customs has routinely rejected the GRI 3(b) classification of cosmetic sets like those at issue here based upon a fatally flawed analysis. The government's argument relying on the same flawed "conflation" analysis is rejected.

F

The government argues that the Blockbuster cosmetics set cannot be classified as a GRI 3(b) set because the included case is too large to closely carry all the items in the set. Def's Br. at 11. There is nothing in the statute, however, that requires a set container to be closely fitted to its contents.

Strictly speaking, the statute simply requires that sets be classified according to the heading of the good that gives them their essential character. The Explanatory Notes to GRI 3(b) provide three requirements for sets, described *supra*. The only Explanatory Note requirement that could justify Customs' position on the relative size of set containers requires that a set's contents "meet a particular need" or "carry out a specific activity." Yet, the Sets ICP summarizes Customs' rulings in this area as follows:

> If Customs determines that a holder or container included with other articles is **specifically designed to hold or contain** those articles, such a determination will support the further conclusion that the articles and the holder or container are **intended to be used together**, or in conjunction with one another, to meet a particular need or carry out a specific activity. Characteristics used in determining whether a holder or container is specifically designed to hold or contain the other articles of a claimed set include a comparison between the articles and their holder or container of size, shape, construction, color combination, use, etc. The burden will be on the importer to provide evidence of design characteristics which link the articles to the holder or container. The holder or container need not be form-fitted or otherwise dedicated specifically to holding or carrying the articles imported with it, but it must be a particularly appropriate container and its capacity not appreciably larger than that required to hold or carry the accompanying articles.

CBP, Sets ICP, at 15 (emphasis in original). The Sets ICP thus concludes that a container must be "specifically designed to hold" and "intended to be used together" to form a GRI 3(b) set. These requirements are not based on the statutory text, but appear to be derived from Customs rulings relying on the flawed "conflation" analysis

described above. *See* Explanatory Note (IX) to GRI 3(b) (composite goods must be "adapted to one another" and "mutually complementary").

Customs' restriction of the size of set containers to only those that are "not appreciably larger" than their contents also lacks a rational basis in the language of the statute or the Explanatory Notes. More precisely, Customs' position that a container's sizecannot be "appreciably larger" than its contents has no foundation in the GRI 3(b) requirement, as illuminated by the Explanatory Notes, that sets meet a particular need or carryout a specific activity. Further, Customs' disapproval of containers that are "appreciably" larger than the set items they are intended to hold provides no practical guidance. "Appreciable" is defined as something that is "capable of being estimated, weighed, judged of, or recognized by the mind," or "capable of being recognized by the senses, perceptible, sensible." Oxford English Dictionary (2nd ed. 1989). It is something that is "possible to estimate, measure, or perceive." American Heritage Dictionary of the English Language (4th ed. 2000). *Any* container may be found "appreciably" larger than its contents otherwise the contents would not fit. Thus the persuasiveness of Customs' position that there should be a *per se* size restriction on set containers is eliminated.

The statute itself provides the reasonable solution to the set-container conundrum. GRI 3(b) provides that a set is classified according to the heading of the good that provides its essential character. If a set container provides the set with its essential character, then the entire set should be classified under the heading for the container. If not, then the set should be classified according to that other item that provides the essential character. Employing the traditional essential character analysis, *i.e.*, reviewing "the nature of the [good], its bulk, quantity, weight or value, or by the role of a constituent [good] in relation to the use of the goods," resolves the issue. *See* Explanatory Note (VIII) to GRI 3(b). For example, in the instant action the essential character of the set is given by the makeup components rather than the cosmetic case.[7]

This analysis is supported by a review of the Explanatory Notes to GRI 3(b). Explanatory Note (X) provides two illustrative examples that include containers classifiable in Heading 4202. One container is described as a leather case, the other is a case of plastic sheeting. There is no indication from the examples that the size of the container

[7] The opposite result could hypothetically occur should a high-value cosmetic case be imported with only one or two inexpensive makeup items. In that case, the set could have the purpose of putting on makeup but the case would provide the essential character of the set.

relative to its contents should be a determining factor in determining whether a set exists. The Note simply explains that the sets should be classified according to the component that provides the essential character to the set.

Customs' restrictive interpretation has resulted in the arbitrary application of what could (or should) be a relatively simple rule. Two examples cited in the Sets ICP demonstrate the inconsistency of Customs' analysis. In HQ 084717, dated September 13, 1989, Customs found that assorted tools and electrical items imported in a steel tool box formed a set under GRI 3(b), even where the tool box included additional space for storage of tools not included with the set. Customs stated:

> The tool box/cabinet provides convenient storage for the electrician/mechanic. The latching feature and the handle[ ] allow an individual to carry the tool box anywhere he or she may require the use of its contents, whether it be within the home or elsewhere. It is apparent that the subject articles are put up together to meet a particular need and carry out a specific activity. That activity consists of electrical/mechanical work.

However, shortly thereafter in HQ 082213, dated February 13, 1990, Customs held that a drain cleaning system stored in a tool box was not classifiable as a set. Customs reasoned:

> The components packed inside the tool box are put together to carry out a specific activity, *i.e.*, to use water pressure from the faucet to clear sink drains that are blocked. However, the tool box does not contribute to this activity. While the tool box functions as a container for the drain cleaning system, it can also be used for holding other items. This is so because the size of the tool box is larger than would be necessary to serve only as a holder for the drain cleaning system.

Customs' Sets ICP fails to explain why the extra room in the electrical tool box was not excessive but the extra room in the drain cleaning tool box was. The arbitrary application of Customs' size rationale to what are apparently similar items without explanation detracts from the rulings' and the Sets ICP's power to persuade. It certainly does appear however, as plaintiff contends, that "Customs' analysis of GRI 3(b) sets has hardly been a model of consistency or clarity." Pl's Memo in Opposition to Def's Br., at 25.

The court therefore declines to adopt Customs' position that the size of a set container can by itself negate a set's qualification under GRI

3(b), especially where that position arises from a flawed analysis and application of the "rule" therefrom has been inconsistent and arbitrary.

V. Conclusion

By application of GRI 1 and 3, the court finds that the Blockbuster cosmetic set is "put up . . . for retail sale" as those terms are used in GRI 3(b) because the items packaged in the set meet the particular need of putting on makeup. The court finds that the makeup contained in the set gives it its essential character. Under GRIs 1, 3(b) and 6, the court concludes that classification of the entire set is proper under subheading 3304.20.00.

Judgment will therefore enter in favor of the plaintiff.

Dated: January 3, 2012
New York, New York

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

Slip Op. 12–2

NEW HAMPSHIRE BALL BEARING, INC., Plaintiff, v. UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, AND UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants, and THE TIMKEN COMPANY AND MPB CORPORATION, Defendant-Intervenors.

Before: Gregory W. Carman, Judge
Timothy C. Stanceu, Judge
Leo M. Gordon, Judge
Court No. 08–00398

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

Dated: January 3, 2012

Frank H. Morgan, White & Case, LLP, of Washington, DC, for Plaintiff.

David S. Silverbrand, and *Courtney S. McNamara*, Trial Attorneys, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for Defendant United States Customs and Border Protection. With them on the briefs were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director.

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.

Geert De Prest, Stewart and Stewart, of Washington, DC, for defendant-intervenors. With him on the briefs were *Terrence P. Stewart, Amy S. Dwyer,* and *Patrick J. McDonough*.

OPINION

CARMAN, JUDGE:

Plaintiff New Hampshire Ball Bearing, Inc. ("NHBB") challenges the constitutionality of the Continued Dumping and Subsidy Offset Act of 2000[1] ("CDSOA" or"Byrd Amendment") and the administration of the statute by Defendants. Plaintiff claims that it unlawfully was denied "affected domestic producer" ("ADP") status, which would have qualified it to receive distributions under the CDSOA. The case is now before the court on dispositive motions. Defendants United States Customs and Border Protection ("Customs" or "CBP") and the United States International Trade Commission (the "ITC") each moved pursuant to USCIT Rule 12(b)(5) to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted. (Def.'s, United States Customs and Border Protection's Mot. To Dismiss ("CBP Mot."), ECF No. 47); (Def. United States International Trade Commission's Mot. to Dismiss ("ITC Mot."), ECF No. 46). Defendant-Intervenors Timken Company and MBP Corp. (collectively, "Timken") moved under USCIT Rule 12(c) for judgment on the pleadings. (Timken's Mot. For J. on the Pleadings ("Timken Mot."), ECF No. 49). For the reasons set forth below, this action will be dismissed for failure to state a claim upon which relief can be granted.

Background

Plaintiff, a U.S. producer of ball bearings and spherical plain bearings, participated in a 1988 investigation conducted by the ITC that culminated in the issuance of antidumping duty orders on ball bearings and spherical plain bearings from Germany, France, Italy, Japan, Singapore, Sweden, and the United Kingdom. (First Am. Compl. ¶¶ 1, 8 (Feb. 11, 2011), ECF No. 27); *Antidumping Duty Orders: Ball Bearings,*, . . . , 54 Fed. Reg. 20,900, 20,900–20,910 (May 15, 1989). During those proceedings, NHBB responded to the ITC's questionnaires but declined to indicate to the ITC that it supported the antidumping petition. (First Am. Compl. ¶ 8). Consequently, the ITC has never included NHBB on a published list of ADPs, and, as a result, NHBB has never received a CDSOA distribution from CBP. (*Id.* ¶ 18).

Plaintiff brought this case in November 2008 to challenge the government's refusal to provide it CDSOA distributions for fiscal years

[1] Pub. L. No. 106–387, §§ 1001–03, 114 Stat. 1549, 1549A-72–75 (codified at 19 U.S.C. § 1675c (2000)), *repealed by* Deficit Reduction Act of 2005, Pub. L. 109–171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006, effective Oct. 1, 2007).

2006 through 2008. (Compl. ¶ 26 (Nov. 13, 2008), ECF No. 4). Shortly thereafter, the court stayed this action pending a final resolution of other litigation raising the same or similar issues.[2] 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 USA II*"), the court ordered Plaintiff to show cause why this action should not be dismissed. (Order (Jan. 3, 2011), ECF No. 21). After Plaintiff responded to the court's order, the court lifted its stay on this action for all purposes. (Order (Feb. 9, 2011), ECF No. 25); (Pl. NHBB's Resp. to the Court's Jan. 3, 2011 Order to Show Cause (Feb. 1, 2011), ECF No. 22).[3] Plaintiff filed a notice of an amended complaint under USCIT Rule 15(a) on February 11, 2011 (Notice of First Am. Compl., First Am. Compl., ECF No. 27), and on the same day Timken filed an unopposed moved to intervene and answer (Unopposed Mot. to Intervene, Answer of the Timken Co. and MPB Corp., ECF No. 28). The instant motions to dismiss and motion for judgment on the pleadings were filed on May 2, 2011. (ITC Mot., ECF No. 46; CBP Mot., ECF No. 47; Timken Mot., ECF No. 49).[4]

Jurisdiction

The court exercises subject matter jurisdiction over this action pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(4), which grants the Court of International Trade exclusive jurisdiction of any civil action commenced against the United States that arises out of any law providing for administration and enforcement with respect to, *inter alia*, the matters referred to in § 1581(i)(2), which are "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." The CDSOA, under which this action arises, is such a law. *See Furniture Brands Int'l, Inc. v. United States*, 35 CIT __, Ct. No. 07–00026, Slip Op. 11–132 at 9–15.

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[2] The court's order stayed the action "until final resolution of *Pat Huval Restaurant & Oyster Bar, Inc. v. United States*, Consol. Ct. No. 06–0290, that is, when all appeals have been exhausted." Order (Dec. 24, 2008), ECF No. 15.

[3] CBP has not made any CDSOA distributions affecting this case and indicates that it will refrain from doing so until January 31, 2012 at the earliest. (Def. U.S. Customs & Border Protection's Resp. to the Ct.'s Feb. 14, 2011 Request (Feb. 28, 2011), ECF No. 36).

[4] Defendant-intervenors' motion under USCIT Rule 12(c) for judgment on the pleadings was filed without answers having been filed by the government defendants. (Timken's Mot. For J. on the Pleadings, ECF No. 49). Defendant-intervenors filed an answer on February 11, 2011 (Answer of the Timken Co. and MPB Corp., ECF No. 28 ("Timken's Answer")) and an amended answer on March 4, 2011 (Am. Answer of the Timken Co. And MPB Corp., ECF No. 40 ("Timken's Amended Answer").

Discussion

The CDSOA amended the Tariff Act of 1930 to provide for an annual distribution (a "continuing dumping and subsidy offset") of duties assessed pursuant to an antidumping duty or countervailing duty order to affected domestic producers as reimbursements for qualifying expenditures.[5] 19 U.S.C. § 1675c(a)-(d). ADP status is limited to petitioners, and interested parties in support of petitions, with respect to which antidumping duty and countervailing duty orders are entered, and who remain in operation. *Id.* § 1675c(b)(1). The CDSOA directed the ITC to forward to Customs, within sixty days after an antidumping or countervailing duty order is issued, lists of persons with ADP status, *i.e.*, "petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response." *Id.* § 1675c(d)(1). The CDSOA also provided for distributions of antidumping and countervailing duties assessed pursuant to existing antidumping duty and countervailing duty orders and for this purpose directed the ITC to forward to CBP a list identifying ADPs "within 60 days after the effective date of this section in the case of orders or findings in effect on January 1, 1999 or thereafter . . . ." *Id.* The CDSOA directed CBP to publish in the Federal Register, prior to each distribution, lists of ADPs potentially eligible for distributions based on the lists obtained from the ITC, *id.* § 1675c(d)(2), and to distribute annually all funds, including accrued interest, from antidumping and countervailing duties received in the preceding fiscal year. *Id.* § 1675c(d)(3), (e).

After this case was brought, the Court of Appeals, in *SKF USA II*, upheld the CDSOA against constitutional challenges brought on First Amendment and equal protection grounds. 556 F.3d at 1360 ("[T]he Byrd Amendment is within the constitutional power of Congress to enact, furthers the government's substantial interest in enforcing the trade laws, and is not overly broad. We hold that the Byrd Amendment is valid under the First Amendment."); *id.* ("Because it serves a substantial government interest, the Byrd Amendment is also clearly not violative of equal protection under the rational basis standard.").[6]

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[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] *SKF USA Inc. v. United States*, 556 F.3d 1337 (2009) ("*SKF USA II*") reversed the decision

We address below the four claims that are stated in Plaintiff's First Amended Complaint.[7] In Claims one and two, Plaintiff challenges the "in support of the petition" requirement of the CDSOA ("petition support requirement"), both facially and as applied to NHBB, on constitutional First Amendment (First Am. Compl. ¶¶ 20–22) and Fifth Amendment equal protection grounds (*Id.* ¶¶ 23–25). In Claim three, Plaintiff claims that the petition support requirement violates the Fifth Amendment due process clause, both facially and as applied, in basing NHBB's eligibility for disbursements on past conduct, *i.e.*, support for a petition. (*Id.* ¶¶ 26–28). Finally, Plaintiff claims that Defendants' actions violate the Administrative Procedure Act, 5 U.S.C. §§ 701–706 ("APA") (*Id.* ¶¶ 29–31).

I. *Plaintiff's Facial and As Applied Challenges under the First Amendment and the Equal Protection Clause Are Foreclosed by Binding Precedent*

Plaintiff's claims facially challenging the constitutionality of the CDSOA's petition support requirement under the First Amendment (First Am. Compl. ¶¶ 20–22) and the Due Process clause of the Fifth Amendment (*Id.* ¶¶ 23–25) are precluded by the holding in *SKF USA II*. A claim that a statute is facially unconstitutional is rebutted by even a single constitutional application of the statute. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (citing *United States v. Salerno*, 481 U.S. 739, 475 (1987)) ("a Plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.,* that the law is unconstitutional in all of its applications."). In *SKF USA II*, the Court of Appeals held that the CDSOA did not violate constitutional First Amendment or equal protection principles

of the Court of International Trade in *SKF USA Inc. v. United States*, 20 CIT 1433, 451 F. Supp. 2d 1355 (2006) ("*SKF USA I*"), which held the petition support requirement of the CDSOA unconstitutional on Fifth Amendment equal protection grounds.

[7] In filing its notice of an amended complaint on February 11, 2011, Plaintiff asserted a right to amend as of course because "a responsive pleading has not yet been served." (Notice of First Am. Compl., ECF. No. 27). However, a December 7, 2010 amendment to the Rules of this Court, effective as of January 1, 2011, altered the rules for amending pleadings as a matter of course. As amended, USCIT Rule 15(a) provides that one amendment to a pleading may be made as a matter of course: "within: (A) 21 days after serving [the pleading], or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." (USCIT R. 15(a)). We consider it appropriate to apply the amended Rule 15(a) to Plaintiff's February 11, 2011 notice of an amended complaint. Doing so is not infeasible and would not work an injustice. *See* USCIT R. 89. Applying the amended rule, we consider the First Amended Complaint to be before us, noting that Plaintiff filed its notice of an amended complaint on the same day that Timken Company and MBP Corp. served its answer. (*See* Notice of First Am. Compl.; Unopposed Mot. to Intervene, Timken's Answer, ECF No. 28.)

as applied to Plaintiff SKF USA, Inc. ("SKF"). This ruling forecloses any possibility that the statute is facially unconstitutional on the First Amendment and Equal Protection grounds asserted by SKF in *SKF USA II*. Plaintiff's claims to the same effect therefore must be dismissed pursuant to USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted.

Plaintiff fails to plead facts allowing the court to conclude that the as-applied First Amendment and equal protection challenges to the CDSOA are distinguishable from claims brought, and rejected, in *SKF USA II*. The Complaint contains no assertions that the CDSOA was applied to NHBB in a different manner than the statute was applied to other parties who did not support a petition. NHBB "participated in the underlying ITC investigation . . . and was included within the domestic industry." (First Am. Compl. ¶ 8). NHBB filled out an ITC questionnaire but did not support the petition. (*Id.*). The facts as pled place Plaintiff on the same footing as other potential claimants who did not support the petition, such as SKF. *See SKF USA II*, 556 F.3d at 1343 ("Since it was a domestic producer, SKF also responded to the ITC's questionnaire, but stated that it opposed the antidumping petition."). Consequently, Plaintiff's as-applied First Amendment and equal protection challenges are also foreclosed by the holding in *SKF USA II* and must be dismissed pursuant to USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted.

II. *The Petition Support Requirement Does Not Violate the Due Process Clause Due to Retroactivity*

Plaintiff claims that the petition support requirement "violates the Due Process Clause of the United States Constitution, both facially and as applied to NHBB, because it impermissibly bases NHBB's eligibility for disbursements on past conduct" and because "[t]he Due Process Clause disfavors retroactive legislation." (First Am. Compl. ¶ 27). We do not find merit in this claim.

The CDSOA's petition support requirement has a retroactive aspect in that it conditions the receipt of distributions on support decisions including support decisions that were made before the statute was passed. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (a retroactive statute attaches "new legal consequences to events completed before its enactment."). Plaintiff objects on constitutionality grounds to the retroactive reach of the CDSOA. According to the facts stated in the complaint, NHBB was denied ADP status and distributions because of its decision, made nearly twelve years before the enactment of the CDSOA, not to support the petition in the ball bearing antidumping investigation. (First Am. Compl. ¶¶ 16–18).

A statute that benefits or prejudices competing interests according to pre-enactment conduct is not, on that basis alone, violative of constitutionally-protected due process rights. In addressing generally the subject of due process challenges to retrospective legislation, the Supreme Court summarized an established principle, stating that "[i]t is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (citations omitted). The Supreme Court further instructed in *Turner Elkhorn* that "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Id.* at 16 (citations omitted).

Later referring to its decision in *Turner Elkhorn*, the Supreme Court stated that "the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). The Supreme Court added that "[t]o be sure, we went on to recognize [in *Turner Elkhorn*] that retroactive legislation does have to meet a burden not faced by legislation that has only future effects" and that, as to due process, this "burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id.* at 730. *Pension Benefit* further explained that "[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Id.* at 729 (quotation omitted).

In *Turner Elkhorn*, the Supreme Court upheld an act of Congress requiring that a coal mine operator provide compensation for a former employee's death or disability due to pneumoconiosis (black lung disease) "arising out of employment in its mines, even if the former employee terminated his employment in its mines before the act was passed." *Turner Elkhorn*, 428 U.S. at 20. The Supreme Court reasoned that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor the operators and the coal consumers." *Id.* at 18.

In *Pension Benefit*, 467 U.S. at 730–31, the Supreme Court found no constitutional due process infirmity in a September 26, 1980 enact-

ment of an amendment to the Employee Retirement Income Security Act (ERISA) that required an employer withdrawing from a multiemployer pension plan to pay a fixed sum to the pension plan if the employer withdrew from the plan on or after April 29, 1980. The Supreme Court concluded that it was "eminently rational" for Congress to conclude that correction of a problem that had emerged under the then-existing ERISA, the encouragement of employer withdrawals from multiemployer plans, would be "more fully effectuated" if the withdrawal liability provision contained in the amendment were imposed retroactively. *Id.* at 730. As the Supreme Court stated, "Congress was properly concerned that employers would have an even greater incentive to withdraw if they knew that legislation to impose more burdensome liability on withdrawing employers was being considered." Id. at 730–31.

The Court of Appeals applied the test articulated in *Turner Elkhorn* and *Pension Benefit* in rejecting a due process retroactivity challenge to a statute imposing a portion of the costs of decontaminating government-operated uranium enrichment facilities on electric utilities who operated nuclear power plants. *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1338–57 (Fed. Cir. 2001) (*en banc*). The Court of Appeals viewed the statute, which burdened a utility with a portion of decontamination costs based on the utility's consumption of enriched uranium over a long period prior to enactment, as "severely retroactive and costly." *Id.* at 1345–46. Considering the length of the retroactivity period and the extent of the burden to be appropriate factors in its analysis, the Court of Appeals still found the retroactivity of the statute to be rational, concluding that a utility subjected to the obligation to pay compensation for acts prior to enactment "benefited from activity that contributed to a societal problem," that the "liability is not disproportionately imposed on that party," and that "imposition of retroactive liability would not be contrary that party's reasonable expectations." *Id.* at 1346.

As a threshold consideration, we consider it relevant to our analysis that the CDSOA, even though retroactive with respect to an extended period of time, does not directly "burden" a domestic producer such as NHBB, who, long prior to enactment, decided not to support a certain antidumping petition. A domestic producer failing to qualify as an ADP because of its past decision not to support a petition does not incur a direct cost or a regulatory burden as a result of the CDSOA. Still, the CDSOA can be described generally, in terms the Supreme Court used in *Turner Elkhorn*, as a statute that adjusts "rights and burdens" of "economic life" and "upsets otherwise settled expectations." 428 U.S. at 15–16 (citations omitted). When NHBB and simi-

larly situated domestic bearing producers decided not to support the petition, they presumably had expectations as to the consequences of their decisions that were grounded in then-existing antidumping law. Yet, upon enactment of the CDSOA in 2000, they were placed at a competitive disadvantage by the CDSOA's retrospective reach in being denied distributions that directly benefit their domestic competitors, *i.e.*, the domestic producers who supported the petition. Plaintiff understandably objects that the CDSOA unexpectedly attached an adverse consequence (albeit not a direct monetary or regulatory burden) to a choice it made long before enactment of the statute. (*See* Pl.'s Mem. in Opp. to Defs' Mots. to Dismiss and Def.-Int.'s Mot. for J. on the Pleadings ("Pl.'s Resp.") 6.)

Nevertheless, as stated in *Turner Elkhorn*, 428 U.S. at 16, "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." Plaintiff cannot meet the burden of showing that Congress acted arbitrarily and without a rational legislative purpose in retroactively applying the petition support requirement in the CDSOA. When viewed in the context of how Congress, in enacting the CDSOA, treated the competing economic interests of those who supported past petitions and those who did not, that objection falls short of showing "that the legislature has acted in an arbitrary and irrational way." *Id.* at 15.

The Court of Appeals previously concluded that "the purpose of the Byrd Amendment's limitation of eligible recipients was to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings," *SKF USA II*, 556 F.3d at 1352, and that "the Byrd Amendment is rationally related to the government's legitimate purpose of rewarding parties who promote the government's policy against dumping," *id.* at 1360. *SKF USA II*, which involved a challenge to the CDSOA on First Amendment and equal protection grounds, did not address separately the issue of retroactivity, even though the CDSOA was applied retroactively in that case. *See id.*, 556 F.3d at 1342–43 (describing SKF's pre-enactment opposition to the 1988 petition). Because Plaintiff specifically attacks the CDSOA on due process retroactivity grounds, we consider whether "the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit*, 467 U.S. at 730. We conclude that it is.

It was not arbitrary or irrational for Congress to conclude that the legislative purpose of rewarding domestic producers who supported antidumping petitions, *i.e.*, the very legislative purpose the Court of Appeals recognized, would be "more fully effectuated" if the petition support requirement were applied both prospectively and retroac-

tively. *See Pension Benefit*, 467 U.S. at 730–31. By doing so, Congress provided monetary rewards, in the form of reimbursed expenses, not only to domestic producers expressing support for petitions in future antidumping investigations but also to those domestic producers who supported past antidumping petitions that ripened into antidumping duty orders and who continue to produce goods competing with imported merchandise subject to those orders. By applying the CDSOA to the approximately 350 antidumping and countervailing duty orders in effect before CDSOA enactment, rather than only to those orders issued afterwards, Congress provided a reward mechanism that was considerably more comprehensive than one based only on a prospective scheme. *See SKF USA II* at 1350 n.21 (citing *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1380 (Fed-.Cir. 2003) ("noting that under the Byrd Amendment antidumping duties 'bear less resemblance to a fine payable to the government, and look more like compensation to victims of anticompetitive behaviors.'").

The court concludes that the retroactive reach of the petition support requirement in the CDSOA is justified by a rational legislative purpose and therefore is not vulnerable to attack on constitutional due process grounds. In light of this conclusion, we are unable to agree with the argument that Plaintiff's due process retroactivity claim raises "novel questions that should not be resolved on the basis of a motion to dismiss or for judgment on the pleadings." (Pl.'s Resp. 9). We conclude that no relief can be granted on this claim, which the court will dismiss.

III. *Defendants' Actions Were Not Unlawful Under the APA*

Plaintiff claims that the actions of the ITC, which refused to include NHBB on the list of affected domestic producers, and of CBP, which refused to pay CDSOA distributions to NHBB, must be set aside as unlawful under the APA. (First Am. Compl. ¶¶ 29–31). Plaintiff argues that "by treating similarly situated domestic producers differently, Defendants act[ed] in a manner that is arbitrary, capricious, an abuse of agency discretion, not supported by substantial evidence, and contrary to law." (*Id.*).

Plaintiff's complaint alleges no facts from which we could conclude that the ITC acted inconsistently with the CDSOA in denying NHBB status as an affected domestic producer or that CBP unlawfully refused to pay CDSOA distributions to NHBB. Instead, the complaint admits facts from which the court must conclude that it would have been unlawful for these agencies to have done otherwise in their administration of the CDSOA. Plaintiff states that it "participated in

the underlying ITC investigation from the outset" (*Id.* ¶ 8), but this allegation does not satisfy the petition support requirement in the CDSOA. Plaintiff candidly acknowledges that "because NHBB did not support the petition, NHBB was not on the list of affected domestic producers" and recognizes that the ITC refused to add NHBB to the list of ADPs "because there is no evidence [i]n the record of the original investigations that [NHBB] supported the petition." (*Id.* ¶¶ 16, 18). Under these facts, the CDSOA *required* that Plaintiff be treated differently than domestic producers that supported the petition.

Thus, Plaintiff's APA claim is premised on an incorrect CDSOA construction under which a domestic producer who did not express support for the petition still could qualify for ADP status. Acceptance of Plaintiff's construction erroneously would equate participation in an ITC investigation with support for an antidumping petition. Because of this error of law, and in the absence of any factual allegation from which we otherwise could conclude that either agency's actions were violative of the APA, we conclude that Plaintiff's APA claim must be dismissed. As to this claim, the complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Conclusion

The First Amended Complaint fails to state a claim upon which relief can be granted. Plaintiff already has taken the opportunity to amend its original complaint. Judgment dismissing this action shall be entered accordingly.

Dated: January 3, 2012
New York, New York

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

Slip Op. 12–3

EPOCH DESIGN LLC, Plaintiff, v. UNITED STATES, Defendant.

Court No. 09–00463

[Defendant's Motion to Dismiss granted]

Dated: January 3, 2012

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OPINION

RIDGWAY, Judge:

Plaintiff Epoch Design LLC commenced this action to challenge the Bureau of Customs and Border Protection's liquidation of one entry of wooden bedroom furniture from the People's Republic of China ("PRC"), on which Customs assessed antidumping duties at the rate of 198.08% *ad valorem*. Complaint ¶¶ 13–14.[1] Epoch does not dispute that the merchandise at issue is subject to antidumping duties pursuant to Antidumping Duty Order A-570–890. *Id*. ¶ 3. However, Epoch contends that such duties should have been assessed at the rate of 6.65% *ad valorem*, and requests that the subject entry of merchandise be reliquidated at that rate. *Id*. ¶¶ 11–12.

Pending before the Court is the Government's Motion to Dismiss, in which the Government argues that "[the] Court lacks jurisdiction over plaintiff's claims, and plaintiff's claims and allegations fail to state a claim upon which relief may be granted." Defendant's Motion to Dismiss for Lack of Jurisdiction; *see also* Defendant's Memorandum in Support of Defendant's Motion to Dismiss for Lack of Jurisdiction ("Def.'s Brief").[2]

As set forth more fully below, Defendant's motion must be granted, and this action must be dismissed.

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[1] The Bureau of Customs and Border Protection – part of the U.S. Department of Homeland Security – is commonly known as U.S. Customs and Border Protection. The agency is referred to as "Customs" herein.

[2] Epoch has filed no response to the Government's Motion to Dismiss.

I. *Background*

At issue in this action is Customs' liquidation of a single July 2004 entry of wooden bedroom furniture from the People's Republic of China, exported by Changshu HTC Import & Export Co., Ltd. ("Changshu HTC"), and imported by plaintiff Epoch Design LLC. *See* Complaint ¶¶ 3, 9; Summons (listing only one entry, Entry No. NV5–0106299–0, and specifying July 2, 2004 as "Date of Entry"); Def.'s Brief at 1.

The U.S. Department of Commerce's Preliminary Determination in the underlying antidumping duty investigation mistakenly failed to list Changshu HTC. *See* Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Wooden Bedroom Furniture From the People's Republic of China, 69 Fed. Reg. 35,312, 35,327–28 (June 24, 2004); Complaint ¶ 9. Commerce corrected that error in the agency's Second Amended Preliminary Determination, which specified that Changshu HTC's exports of wooden bedroom furniture were subject to an antidumping duty deposit rate of 12.91% *ad valorem*. *See* Notice of Amended Preliminary Antidumping Duty Determination of Sales at Less Than Fair Value and Amendment to the Scope: Wooden Bedroom Furniture From the People's Republic of China, 69 Fed. Reg. 54,643, 54,645 (Sept. 9, 2004) ("Second Amended Preliminary Determination"); Complaint ¶ 10.

At the Final Determination stage, Commerce concluded in its Amended Final Determination that Changshu HTC's exports were subject to antidumping duties at the rate of 6.65%. *See* Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People's Republic of China, 69 Fed. Reg. 67,313, 67,317 (Nov. 17, 2004) ("Final Determination") (indicating that Changshu HTC's exports were subject to antidumping duties at rate of 8.64%), *as amended by* Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China, 70 Fed. Reg. 329, 330 (Jan. 4, 2005) ("Amended Final Determination") (correcting Changshu HTC's antidumping duty rate to 6.65%); Complaint ¶ 11.

Although Epoch states that it is not privy to the liquidation instructions that Commerce provided to Customs, the Government notes that "corrected and amended liquidation instructions" were issued. *See* Def.'s Brief at 7; Complaint ¶ 12. In any event, when Customs liquidated the subject entry of merchandise on March 28, 2008, Customs assessed antidumping duties at the "PRC-Wide" rate of

198.08%, rather than at the 6.65% rate. *See* Complaint ¶¶ 13–14; Summons (specifying March 28, 2008 as "Date of Liquidation"); Amended Final Determination, 70 Fed. Reg. at 330; Def.'s Brief at 5.[3]

Epoch asserts that its protest, filed on September 24, 2008, was "timely filed." *See* Complaint ¶ 7; Protest No. 2704–08–103278; Summons (specifying September 24, 2008 as "Date Protest Filed"); Def.'s Brief at 5. Customs subsequently denied the protest. *See* Summons (specifying May 7, 2009 as "Date Protest Denied"); Complaint ¶¶ 1–2, 4. Epoch commenced this action on October 29, 2009, with the filing of its Summons and Complaint. *See* Summons (Oct. 29, 2009); Def.'s Brief at 6; *see also* Complaint (Oct. 29, 2009). Thereafter, Epoch paid the assessed antidumping duties, together with the interest that had accrued due to late payment – although its Complaint asserts that the duties were paid before this action was commenced. *See* Complaint ¶ 5. Epoch made partial payment of the duties and accrued interest on February 5, 2010, and paid the remaining balance on March 3, 2010. *See* Def.'s Brief at 6.

In its Complaint, Epoch asserts that it is "contest[ing] the denial of a protest by Customs" and that Customs "incorrectly implemented a final decision by the Department of Commerce." *See* Complaint ¶ 1. The Complaint further states that jurisdiction lies "under 28 U.S.C. §§ 1581(a) or 1581(i) because [the case] involves the denial of a protest and the improper administration and enforcement of the antidumping law." *See* Complaint ¶ 2; *see also id*. ¶ 4. Among other things, Epoch requests that this matter "be remanded for . . . appropriate action by Customs and Border Protection to reliquidate the entry in accordance with law and implement the determination of the Commerce Department . . . whereby . . . exports of Changshu HTC . . . are to be liquidated at the rate of 6.65%." *See* Complaint, Prayer for Relief.

II. *Analysis*

The existence of subject matter jurisdiction is a threshold inquiry. *See*, *e.g.*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94–95 (1998). Where subject matter jurisdiction is challenged, "'the burden rests on plaintiff to prove that jurisdiction exists.'" *Pentax Corp. v. Robison*, 125 F.3d 1457, 1462 (Fed. Cir. 1997) (*quoting Lowa, Ltd. v. United States*, 5 CIT 81, 83, 561 F. Supp. 441, 443 (1983), *aff'd*,

[3] In determining antidumping duty rates in its investigation of Wooden Bedroom Furniture, Commerce assigned individual rates to mandatory respondents, an all-others separate rate to companies that demonstrated both *de facto* and *de jure* independence from government control, and a "PRC-Wide" rate of 198.08% to companies that did not demonstrate sufficient independence from the government of the PRC. *See* Final Determination, 69 Fed. Reg. at 67,317–19, *as amended by* Amended Final Determination, 70 Fed. Reg. at 330–32.

724 F.2d 121 (Fed. Cir. 1984)), *modified in part*, 135 F.3d 760 (1998); *see also McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006).

Moreover, where – as here – a waiver of sovereign immunity is at issue, the language of the statute must be strictly construed, and any ambiguities resolved in favor of immunity. *See United States v. Williams*, 514 U.S. 527, 531 (1995); *Blueport Co., LLC v. United States*, 533 F.3d 1374, 1378 (Fed. Cir. 2008) ("'[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.'") (*quoting Lane v. Pena*, 518 U.S. 187, 192 (1996)). The limits of a waiver of sovereign immunity define a court's jurisdiction to entertain suit. *See Hercules, Inc. v. United States*, 516 U.S. 417, 422–23 (1996); *United States v. Boe*, 543 F.2d 151, 154–55 (C.C.P.A. 1976).

Pursuant to 19 U.S.C. §§ 1514(a) and (c) (2000),[4] the enumerated Customs determinations (including decisions such as the one at issue here) are deemed "final and conclusive" if they are not properly protested within 90 days, and if denied protests are not challenged in accordance with the terms of 28 U.S.C. §§ 2636 and 2637. *See* 19 U.S.C. § 1514(a) (providing that Customs decisions are "final and conclusive" absent properly filed protest, or properly filed civil action contesting denial of protest); 19 U.S.C. § 1514(c)(3) (specifying 90-day period for filing of protests); 28 U.S.C. § 2636(a) (requiring civil action challenging denial of protest to be filed within 180 days); 28 U.S.C. § 2637(a) (requiring payment of "all liquidated duties, charges, or exactions" prior to filing civil action challenging denial of protest); *see also United States v. Boe*, 543 F.2d at 154–55 (explaining that jurisdiction over an action challenging a denied protest lies only where a proper protest has been timely filed, the protest has been denied, and all required payments have been made, and emphasizing the "mandatory" nature of "[t]hose jurisdiction-conferring terms").

The proper, timely filing of a protest is thus a jurisdictional requirement; and, further, the denial, in whole or in part, of a protest is a precondition to the commencement of an action under 28 U.S.C. § 1581(a). *See DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1319 (Fed. Cir. 2006). Similarly, "[a] civil action contesting the denial of a protest . . . may be commenced . . . only if all liquidated duties, charges, or exactions have been paid at the time the action is com-

[4] Except as otherwise indicated, all statutory citations herein are to the 2000 edition of the United States Code.

menced." *See* 28 U.S.C. § 2637(a). As such, like the timely filing of a protest, a plaintiff's payment in full of all duties and other charges and exactions is also a precondition to jurisdiction under 28 U.S.C. § 1581(a). *See Heartland By-Products, Inc. v. United States*, 568 F.3d 1360, 1363 n.3 (Fed. Cir. 2009); *United States v. Boe*, 543 F.2d at 155.

A. *Jurisdiction Under 28 U.S.C. § 1581(a)*

In the case at bar, a review of the underlying protest and the Summons indicates that Epoch filed its protest on September 24, 2008 – approximately six months after Customs liquidated the entry at issue, on March 28, 2008. Because the protest was not filed within the 90-day period following liquidation (as 19 U.S.C. § 1514(c)(3) then required),[5] Epoch's protest was not timely. As discussed above, the timely filing of a protest is a prerequisite for jurisdiction under 28 U.S.C. § 1581(a). Accordingly, jurisdiction under that provision of the statute does not lie here.

Moreover, even if Epoch had timely filed its protest (which it did not), jurisdiction under 28 U.S.C. § 1581(a) nevertheless still would not lie, for a second, wholly independent reason. As explained above, 28 U.S.C. § 2637(a) authorizes the filing of a civil action contesting the denial of a protest "only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced." *See* 28 U.S.C. § 2637(a). In the instant case, however, Epoch did not pay the assessed antidumping duties and accrued interest until March 3, 2010 – more than four months after instituting this action. Payment in full was a mandatory condition precedent to suit. Epoch's failure to make such payment prior to filing this action therefore precludes jurisdiction.

B. *Jurisdiction Under 28 U.S.C. § 1581(i)*

Finally, a review of Epoch's Complaint indicates that Epoch is challenging the actual liquidation of the subject entry – specifically, Customs' alleged failure to liquidate the entry at issue in accordance with Commerce's Amended Final Determination and "the corrected and amended liquidation instructions" that Commerce issued. *See* Complaint ¶¶ 1, 13–14; Def.'s Brief at 7.[6] The right to contest the correctness of a liquidation is governed by the terms of 19 U.S.C. §

[5] In 2004, 19 U.S.C. § 1514(c)(3) was amended to extend the protest period from 90 days to 180 days as to entries filed on or after December 18, 2004. *See* 19 U.S.C. § 1514(c)(3) (Supp. IV 2004). However, the entry at issue in this action was filed in July 2004. The 90-day protest period therefore applies here.

[6] Significantly, Epoch's Complaint does not allege that Commerce's liquidation instructions were erroneous. Instead, the Complaint contests Customs' denial of Epoch's protest, and contends that Customs "incorrectly implemented" Commerce's Amended Final

1514(a) and 1514(c). As discussed above, those provisions state, *inter alia*, that Customs decisions – including decisions concerning the liquidation of entries of merchandise (*see* 19 U.S.C. § 1514(a)(5)) – "shall be final and conclusive upon all persons" unless a protest is filed within 90 days after the notice of liquidation. *See* 19 U.S.C. §§ 1514(a) & (c)(3).

As set forth above, however, Epoch failed to comply with the mandatory requirement of 19 U.S.C. § 1514(c)(3), governing the time for filing of its protest. Nor did Epoch comply with other jurisdictional requirements for instituting an action in this court. *See* 28 U.S.C. §§ 1581(a), 2636(a), & 2637(a). Although Epoch could have timely protested Customs' liquidation, paid the assessed duties and accrued interest in a timely fashion, and then commenced its action in this court to contest the denial of its protest, Epoch failed to do so. Because Epoch failed to take the actions necessary in order to preserve its rights, Customs' liquidation became "final and conclusive upon all persons," including both Epoch and the Government, by virtue of the plain and unambiguous language of 19 U.S.C. §§ 1514(a).

Thus, because the gravamen of Epoch's Complaint is the correctness of Customs' liquidation of the entry at issue, jurisdiction also cannot lie under the other statutory provision that Epoch cites – 28 U.S.C. § 1581(i), the provision governing the court's "residual jurisdiction." *See Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). It is well-established that jurisdiction under § 1581(i) is "strictly limited." *See Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992). A plaintiff may not invoke § 1581(i) as a basis for jurisdiction where – as here – an adequate remedy was (or could have been) available under the straightforward protest and judicial review procedures established by Congress and set forth in 19

Determination. *See* Complaint ¶ 1; *see also id*. ¶ 14 (asserting that "the collection of antidumping duties by Customs at the rate of 198.08% was contrary to the preliminary and final determinations by Commerce"). Thus, this case is readily distinguishable from cases in which the U.S. Court of Appeals for the Federal Circuit has held that jurisdiction under 28 U.S.C. § 1581(i) may be available to challenge Commerce's liquidation instructions, and that such challenges may not be brought under 28 U.S.C. § 1581(a) or (c). *See, e.g., Shinyei Corp. of Am. v. United States*, 355 F.3d 1297 (Fed. Cir. 2004) (finding jurisdiction under § 1581(i) appropriate when the liquidation instructions issued by Commerce were alleged to be non-conforming with the final results of administrative review); *Consol. Bearings Co. v. United States*, 348 F.3d 997 (Fed. Cir. 2003) (finding that, because plaintiff did not challenge Commerce's final determination, § 1581(c) was not, and could not have been, a source of jurisdiction in that case); *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973 (Fed. Cir. 1994) (finding that challenge to Commerce's automatic assessment policies was properly brought under § 1581(i), when a party failed to avail itself of the opportunity for administrative review, but concluding that action was barred under two-year statute of limitations).

U.S.C. § 1514(a) and 28 U.S.C. § 1581(a). *See, e.g., International Customs Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006) (and cases cited there).

In this case, Epoch has not even attempted to argue that the typical avenue leading to review in this forum was in any sense "'manifestly inadequate.'" *See Norcal/Crosetti Foods*, 963 F.2d at 359 (*quoting Miller & Co.*, 824 F.2d at 963; *citing Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1557 (Fed. Cir. 1988)). Nor could Epoch reasonably have done so. Simply stated, Epoch may not rely on § 1581(i) to "circumvent" the established, otherwise applicable prerequisites to the commencement of an action in this court. *See Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1549 (Fed. Cir. 1983).

III. *Conclusion*

For all the foregoing reasons, jurisdiction over this challenge to Customs' denial of Epoch's protest and Customs' liquidation of the subject entry of merchandise will not lie under either 28 U.S.C. § 1581(a) or 28 U.S.C. § 1581(i). The Government's Motion to Dismiss therefore must be granted, and this action dismissed for lack of subject matter jurisdiction.

A separate order will enter accordingly.

Dated: January 3, 2012
New York, New York

/*s*/ *Delissa A. Ridgway*
DELISSA A. RIDGWAY
JUDGE