Slip Op. 06–56

CRICKET HOSIERY, INC., THE WILLIAM CARTER CO., and ARTEX INTERNATIONAL, INC., and on behalf of all others similarly situated, Plaintiffs, v. UNITED STATES, Defendant, and F.T.B. FARMS, WILLIAM LOVELADY, ROBERT E. MCLENDON FARMS LLC, A-TUMBLIN-T RANCHES, CALIFORNIA COTTON GROWERS ASSOCIATION, DELTA COUNCIL, SOUTHERN COTTON GROWERS, INC., and TEXAS COTTON PRODUCERS, INC., Defendant-Intervenors.

Before: MUSGRAVE, Judge
Court No. 03–00553

[Plaintiffs commenced action alleging that the Cotton Research and Promotion Act of 1966 ("Act") violated their constitutional Free Speech, Free Association, and Due Process rights. The Court held that plaintiffs: (1) did not state a claim upon which relief could be granted as to their facial First Amendment challenge to the Act because the Court was constrained to follow the Supreme Court's reasoning in *Livestock Marketing*; (2) did not state a claim upon which relief could be granted as to their as-applied Free Speech challenge to the Act because, while the Supreme Court in *Livestock Marketing* left open the possibility that an individual might be able to prove that a "generic promotional message" created pursuant to an agricultural marketing program could be attributed to that individual, in the case at bar no such claim was specifically asserted; (3) did not state a claim upon which relief could be granted as to their facial Free Association challenge to the Act as neither the Act nor the Cotton Order required plaintiffs to associate with their "competitors"; (4) did not state a claim upon which relief could be granted as to their Due Process challenge to the Act as that claim was time-barred.]

Decided: April 24, 2006

The Cullen Law Firm PLLC (*Paul D. Cullen, Sr.* and *Joseph A. Black*); *James A. Moody*, of counsel; and *Greenburg Traurig LLP* (*Teresa M. Polino*), for the plaintiffs.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Aimee Lee*); Office of the General Counsel, United States Department of Agriculture (*Frank Martin*), of counsel; Office of the Assistant Chief Counsel, International Trade Litigation, United States Bureau of Customs and Border Protection (*Yelena Slepak*), of counsel, for the defendant.

Wilmer Cutler Pickering Hale and Dorr LLP (*Randolph D. Moss, David W. Ogden, Brian M. Boynton,* and *Leondra R. Kruger*), for the defendant-intervenors.

OPINION

Before the Court are defendant's Motion to Dismiss and Motion for Judgment on the Agency Record and defendant-intervenors' Motion to Dismiss or, in the Alternative, for Judgment on the Agency Record. By their motions these parties seek the dismissal of plaintiffs' Amended Class Action Complaint ("Amended Complaint") in its entirety. The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1581(i) (2000). *See Cricket Hosiery, Inc. v. United States*, 26 CIT ___, Slip Op. 04–72 (2004) ("*Cricket I*") (denying defendant's motion to dismiss for lack of subject matter jurisdiction); *Orleans Int'l, Inc. v. United States*, 334 F.3d 1375 (Fed. Cir. 2003) ("*Orleans*") (finding that the United States Court of International Trade had exclusive jurisdiction over domestic producers' challenge to the constitutionality of the collection of assessments pursuant to the Beef Marketing and Promotion Act).

Background

On August 18, 2003, plaintiffs, domestic importers of cotton and cotton products, commenced this action alleging that the Cotton Research and Promotion Act of 1966, *as amended*, 7 U.S.C. § 2101 *et seq*. (2000) ("Cotton Act"), and the regulations implementing the Cotton Act, 7 C.F.R. § 1205 *et seq*. (2003) ("Cotton Order"), violated their constitutional rights. Specifically, plaintiffs alleged that the Cotton Act violated their rights of Free Speech and Free Association. *See* Compl. at paras. 28, 30. In May 2004 the Court stayed this action pending the Supreme Court's resolution of *Johanns v. Livestock Marketing Association*. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (2005) ("*Livestock Mktg. III*"). That action, which was initially commenced in the Northern District of South Dakota, was brought by several members of the domestic beef and cattle industries who challenged, on constitutional grounds, the Beef Promotion and Research Act of 1985, *as amended*, 7 U.S.C. § 2901 *et seq*. (2000) (the "Beef Act"). *See Livestock Mktg. Ass'n v. United States Dep't of Agric.*, 207 F. Supp. 2d 992, 996–997 (N.D.S.D. 2002) ("*Livestock Mktg. I*"), *vacated by*, 544 U.S. 550. The plaintiffs in *Livestock Marketing I* raised constitutional challenges to the Beef Act, arguing that the promotional messages created pursuant to that Act violated their rights of Free Speech and Free Association. The plaintiffs found the promotional messages to be objectionable for various reasons including that "generic promotion of beef serves to promote imported beef," that "generic advertising increases foreign imports which hurts . . . business," that "generic advertising . . . implies beef is all the same," and that any messages of the Beef Act should promote only American beef. *See id*. at 997. The district court, relying on the Supreme Court's Free Speech jurisprudence, found that the assessments paid by the plaintiffs to fund

the Beef Board were akin to "dues" paid to a union shop or a state bar association. *See id.* at 997–98 (citing *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 233 (1977) ("*Abood*"); *Keller v. State Bar of Ca.*, 496 U.S. 1, 13 (1990) ("*Keller*")). The district court reasoned, that

> the use of compelled "dues" for advancing ideological causes objectionable to any member of the group violates the First Amendment. Compelling plaintiffs to make contributions for speech to which they object works an infringement of their constitutional rights. *Abood*, 431 U.S. at 234.
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> > If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.
>
> *Abood*, 431 U.S. at 235 (quoting *West Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943)). The First Amendment protects not only the right to engage in or not engage in political speech but also any "expression about philosophical, social, artistic, economic, literary, or ethical matters." *Abood*, 431 U.S. at 231. *See also NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("it is immaterial whether the beliefs sought to be advanced . . . pertain to political, economic, religious or cultural matters").

Livestock Mktg. I, 207 F. Supp. 2d at 998. The district court then reviewed the Supreme Court's decision in *United States v. United Foods*. *See id.* at 1000 (citing *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) ("*United Foods*")). In *United Foods*, the Supreme Court found that the collection of assessments from domestic producers of mushrooms to fund a board that created promotional messages pursuant to the Mushroom Promotion, Research, and Consumer Information Act, *as amended*, 7 U.S.C. § 6101 *et seq.*, which the plaintiffs found to be objectionable, unconstitutionally violated their First Amendment rights. *See United Foods*, 533 U.S. at 415–16. Following the Supreme Court's lead in *United Foods*, the district court found that the collection of assessments from domestic producers of beef and beef products to fund a board that created promotional messages pursuant to the Beef Act, which the plaintiffs found to be objectionable, unconstitutionally violated their First Amendment rights. The district court reasoned that

> [t]he beef checkoff is unconstitutional in violation of the First Amendment because it requires plaintiffs to pay, in part, for speech to which the plaintiffs object. The Constitution requires that expenditures for advertising of beef be financed only from assessments paid by producers who do not object to advancing

> the generic sale of beef and who are not coerced into doing so against their wills.

Livestock Mktg. I, 207 F. Supp. 2d at 1002 (citing *Abood*, 431 U.S. at 236–237). In reaching its conclusion the district court specifically rejected the arguments of the defendant and the defendant-intervenors that the speech did not infringe upon the plaintiffs' First Amendment rights because it was "government speech." *See id.* at 1003–07. The district court, relying on *United States v. Frame*, stated that "[t]he Third Circuit rejected the government's contention that the compelled expressive activities mandated by the Act constitute 'government speech'. . . ." *Id.* at 1004 (citing *United States v. Frame*, 885 F.2d 1119, 1132 (3rd Cir. 1989)).

That action was then appealed to the Court of Appeals for the Eighth Circuit. In contrast to the district court, the court of appeals found that the speech complained of was, indeed, government speech. *See Livestock Mktg. Ass'n v. United States Dep't of Agric.*, 335 F.3d 711, 719–26 (8th Cir. 2003) ("*Livestock Mktg. II*"), *vacated by, remanded by*, 544 U.S. 550 ("The government speech doctrine has firm roots in our system of jurisprudence."). The court of appeals noted that, since the district court had not found that the speech complained of was government speech, the district court had not applied the test set out in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York* to determine whether such speech survived heightened First Amendment scrutiny. *See id.* at 722 (citing *Central Hudson Gas & Elec. Corp. v. Public Svc. Comm'n of NY*, 447 U.S. 557, 570–71 (1980) ("*Central Hudson*"); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470 (1997) ("*Glickman*")). The court of appeals, applying the *Central Hudson* test, found that the speech did not survive heightened scrutiny because

> notwithstanding the reasoned counterpoints advanced by the dissent in *United Foods, see* 533 U.S. at 419–31 (Breyer, J., dissenting), we conclude that the government's interest in protecting the welfare of the beef industry by compelling all beef producers and importers to pay for generic beef advertising is not sufficiently substantial to justify the infringement on appellees' First Amendment free speech right. Accordingly, the district court did not err in holding that the Beef Act and the Beef Order are unconstitutional and unenforceable.

Id. at 725–26.

The matter was again appealed and the Supreme Court granted certiorari. *See Nebraska Cattlemen, Inc., v. Livestock Mktg. Ass'n*, 541 U.S. 1062 (2004). The Supreme Court found that, in general, because the speech complained of was government speech it did not infringe upon the respondents' First Amendment rights. *Livestock Mktg. III*, 544 U.S. at ___ , 125 S. Ct. at 2062, 161 L. Ed. 2d at 906. The Supreme Court reasoned this was so because "[t]he message set

out in the beef promotions is from beginning to end the message established by the Federal Government." *See id.* at ___ , 125 S. Ct. at 2062, 161 L. Ed. 2d at 907. While the Supreme Court found that the speech complained of did not infringe upon the individual respondents' constitutional rights, in *dicta* the Court raised the possibility that such speech might be unconstitutional if, as-applied, "it were established . . . that individual . . . advertisements were attributable to respondents." *Id.* at ___ , 125 S. Ct. at 2065, 161 L. Ed. 2d at 910. The Supreme Court did not reach this issue, however, stating that it was "a question on which the trial record is silent." *Id.*

After the Supreme Court issued its decision in *Livestock Marketing III*, plaintiffs in the case at bar amended their Complaint to include a Due Process claim and a claim that the Cotton Act, as-applied, violated their right to Free Speech. *See* Am. Compl. at paras. 32, 34. Defendant and defendant-intervenors then filed the motions now before the Court.

Standard of Review[1]

As stated by this Court: "On a motion to dismiss for failure to state a claim pursuant to USCIT Rule 12(b)(5), the Defendant is entitled to dismissal where, after accepting Plaintiff's factual allegations in its complaint and drawing all inferences in favor of Plaintiff, it appears beyond doubt that no set of facts can be proven that would entitle Plaintiff to relief." *Nufarm Am.'s, Inc. v. United States*, 29 CIT ___ , ___ , 398 F. Supp. 2d 1338, 1342 (2005) ("*Nufarm*") (citing *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1565 (Fed. Cir. 1988); *United States v. Ford Motor Co.*, 29 CIT ___ , ___ , Slip Op. 05–24 at 5 (Feb. 18, 2005); *Kemet Elecs. Corp. v. Barshefsky*, 21 CIT 912, 929, 976 F. Supp. 1012, 1027 (1997)).

Discussion

I

A

By Count One of their Amended Complaint plaintiffs allege that the collection of assessments pursuant to the Cotton Act is unconstitutional because the activities of the Cotton Board violate their First Amendment right of Free Speech. Specifically, plaintiffs allege that

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[1] Defendant and defendant-intervenors aver that portions of their motions could be treated as for judgment on an agency record. The Court, however, finds its analysis to be better premised on USCIT Rule 12(b)(5) since, as admitted by defendant, there was no administrative proceeding underlying this action. *See* Def.'s Reply Mem. in Supp. of Its Mot. to Dismiss and Mot. for J. on the Agency R. of the Counts in Pls.' First Am. Class Action Compl. at 1 (stating that there was no "administrative proceeding in this case pursuant to section 2111 of the Cotton Act. . . .").

> [t]he speech tax imposed under the Cotton Act ([ ]7 U.S.C. § 2106(e)(4)) and Order (7 C.F.R. § 1205.510) violates the rights of Plaintiffs to free speech guaranteed by the First Amendment to the Constitution. First, there is no substantial or compelling governmental interest in mandating the collective advertising, promotion, research and educational programs funded by mandatory taxes imposed on Plaintiffs. Second, even if the Secretary of Agriculture can establish the legitimacy of the government's interest, there is no [sic] empirical nor hard evidence that the government interest is real, as opposed to imaginary, factually based as opposed to based on special interest lobbying and therefore theoretical, or based upon minor as opposed to major concerns. There is no evidence that the Plaintiffs are ill-equipped privately to promote and advertise their products and services without the forced taxes to support the programs and messages complained of herein. The Act and Order are more restrictive than necessary because no credit is given for the promotion undertaken by individual importers, the taxes of Plaintiffs are used to support products and services not marketed by them and/or to segments of the industry and the consuming public outside their scope. Plaintiffs do not agree with and do not wish to support the programs' messages (and its research), especially the message that cotton products are generic and homogeneous, do not agree with the government's preference for generic promotion over the individual and unique efforts of each firm, and do not agree with the section[2] of the messenger.

Am. Compl. at para. 28. The question for the Court, then, is whether plaintiffs have alleged sufficient facts such that they can be granted the relief requested. *Nufarm*, 29 CIT at ___, 398 F. Supp. 2d at 1342. To answer this question, the Court is constrained to turn to Supreme Court's reasoning in *Livestock Marketing III*.[3]

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[2] Probably "selection"

[3] The Court notes that it has been brought to its attention that the United States District Court for the District of Columbia recently issued an opinion that addresses the issues now before this Court. *See Avocados Plus v. United States*, 2006 U.S. Dist. LEXIS 10144, 2006 WL 637108 (D.D.C. Mar. 15, 2006) ("*Avocados*"). The Court finds that—notwithstanding the district court's thorough analysis in that matter—it cannot rely upon that opinion. The Court finds this to be so because both this Court and the Court of Appeals for the Federal Circuit have found that the Court of International Trade possesses exclusive jurisdiction over matters related to the collection of assessments by Customs pursuant to agricultural marketing programs. *See Cricket I*, 26 CIT ____, Slip Op. 04–72; *Orleans*, 334 F.3d 1375; *see also C.H. Robinson Int'l v. United States*, 64 Fed. Cl. 651, 654–55 (2005) ("The correct approach to determining whether jurisdiction lies in the Court of Federal Claims or the Court of International Trade is to focus on whether the claim falls within the language of 28 U.S.C. § 1581(i). Because the jurisdiction of the Court of International Trade is exclusive in nature, this Court will have jurisdiction *only if the action does not fall within the specific grants in 28 U.S.C. § 1581*." (citation omitted; italics added)). The Avocado Act specifically

In *Livestock Marketing III*, the Supreme Court found that the messages created pursuant to the Beef Act did not, in general, infringe upon the respondents' First Amendment rights. The Supreme Court began its analysis by stating that

> [w]e have sustained First Amendment challenges to allegedly compelled expression in two categories of cases: true "compelled speech" cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government; and "compelled subsidy" cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity. We have not heretofore considered the First Amendment consequences of government-compelled subsidy of the government's own speech.

Livestock Mktg. III, 544 U.S. at ___ , 125 S. Ct. at 2060, 161 L. Ed. 2d at 905. The Court then reviewed its Free Speech jurisprudence. *See id.* at ___–___ , 125 S. Ct. at 2060–2063, 161 L. Ed. 2d at 905–907 (citing *West Va. Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Keller*, 496 U.S. 1; *Abood*, 431 U.S. 209; *United Foods*, 533 U.S. 405; *Glickman*, 521 U.S. 457; *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995)). Finally, the Supreme Court stated:

> In all of the cases invalidating exactions to subsidize speech, the speech was, or was presumed to be, that of an entity other than the government itself. Our compelled-subsidy cases have consistently respected the principle that "compelled support of a private association is fundamentally different from compelled support of government." "Compelled support of government"—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. "The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." We have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns.

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requires Customs to collect assessments from importers of avocados. *See* 7 U.S.C. § 7804(h)(1)(C)(iii) ("The assessment on imported Hass avocados shall be paid by the importer to Customs at the time of entry into the United States. . . ."). Simply stated, because the opinion of the district court may be based on a case of unsettled jurisdiction, this Court can not now rely upon that opinion.

Id., 544 U.S. at ____ , 125 S. Ct. at 2062, 161 L. Ed. 2d at 906 (citations omitted). The Supreme Court, noting that the respondents "do not seriously dispute these principles, nor do they contend that, as a general matter, their First Amendment challenge requires them to show only that their checkoff dollars pay for speech with which they disagree," *id.* at ____ , 125 S. Ct. at 2062, 161 L. Ed. 2d at 906–07, addressed the respondents' arguments "that the challenged promotional campaigns differ dispositively from the type of government speech that, our cases suggest, is not susceptible to First Amendment challenge." *Id.* at ____ , 125 S. Ct. at 2062, 161 L. Ed. 2d at 907. The Supreme Court stated that the respondents "point to the role of the Beef Board and its Operating Committee in designing the promotional campaigns, and to the use of mandatory assessments on beef producers to fund the advertising." *Id.* As to the first part of respondent's argument, the Supreme Court found the status of the Beef Board, which the respondents argued was a "non-governmental" agency, was not relevant to its analysis because "[t]he message of the promotional campaigns is effectively controlled by the Federal Government itself." *Id.* In arriving at this conclusion the Supreme Court examined the Act and found that the speech complained of was government speech because "[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government." *Id.*

The action now before this Court presents a nearly identical situation to that in the *Livestock Marketing* line of cases in that plaintiffs, by Count One of their Amended Complaint, are alleging that the messages created pursuant to the Cotton Act infringe upon their First Amendment rights. *See* Am. Compl. at para. 28. Plaintiffs state that this is a "facial challenge" to the statute. *See* Pls.' Opp'n to Def.'s and Def.-Intervenors' Mots. to Dismiss and Mots. for J. on the Agency R. ("Pls.' Resp.") at 13 (captioning argument section as "The Speech Tax is Unconstitutional on its Face as a Violation of the Right to Free Speech"). As stated by the Supreme Court, "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Rust v. Sullivan*, 500 U.S. 173, 183 (1991) (citing *Salerno*, 481 U.S. at 745, and stating "we are concerned only with the question whether, on their face, the regulations are both authorized by the Act and can be construed in such a manner that they can be applied to *a set of individuals* without infringing upon constitutionally protected rights. Petitioners face a heavy burden in seeking to have the regulations invalidated as facially unconstitutional." (emphasis added)).

Plaintiffs present several arguments in support of their position that the Cotton Act facially infringes upon their First Amendment rights. Plaintiffs argue that "[t]he legality of generic advertising pro-

grams for agricultural commodities is far from settled." Pls.' Mem. at 14. Plaintiffs characterize the Supreme Court's holding in *Livestock Marketing III* as "a last-minute counter-factual contrivance to save the dozen federal programs and dozens of state programs from certain defeat." *Id*.[4] Plaintiffs contend the Supreme Court's decision in *United Foods* "set forth the rule that it is unconstitutional to force dissenters to support a messenger and fund a message with which they disagree or which they simply choose not to support. Adding a layer of government oversight and approval, i.e. censorship, cannot magically transform such a program into one that will pass constitutional muster." *Id*. at 15. Finally, plaintiffs argue that "[t]he assumption underlying the targeted funding mechanism, that the democratic process will properly protect First Amendment concerns, is even more untenable. The reason for the Bill of Rights in the first place was *precisely* to protect these rights from relegation to the democratic process." *Id*. at 16 (footnote omitted, emphasis in original).

The Court is constrained to find that plaintiffs' allegations contained in Count One of their Amended Complaint are precluded by the Supreme Court's holding in *Livestock Marketing III*. As the starting point, it is necessary to determine whether the speech created pursuant to the Cotton Act is, in fact, government speech, and the Court must find that it is, notwithstanding the well-reasoned opinions of both the trial and appellate courts in the *Livestock Marketing* line of cases. A comparison of the Beef Act and the Cotton Act shows that the Cotton Act contains statutory elements that are virtually identical to those the Supreme Court found dispositive of this issue in *Livestock Marketing III*. *See* 544 U.S. at ___ , 125 S. Ct. at 2058–59, 161 L. Ed. 2d at 902–03. First, Congress has directed that there be a "coordinated program of research and promotion" of cotton and cotton products, including "[p]roviding for the establishment, issuance, effectuation, and administration of appropriate plans or projects for the advertising and sales promotion of cotton and its products. . . ." 7 U.S.C. § 2101, 2105(a). Next, the Cotton Act outlines the type of content that may be permissibly included in any promotional messages created pursuant to it, *see* 7 U.S.C. § 2105(a) ("[A]ny such plan or project shall be directed toward increasing the general demand for cotton or its products. . . ."), and the type of content that may not be permissibly included in any such messages. *Id*. ("[B]ut no reference to a private brand or trade name shall be made if the Secretary determines that such reference will result in undue discrimination against the cotton products of other persons. . . ."). Finally, all messages created pursuant to the Cotton Act are subject to

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[4] This is a position with which this Court has no disagreement; the Supreme Court, however, having spoken definitively on this issue, this Court is now compelled to conform its analysis to that in *Livestock Marketing III*.

direct government oversight by the Secretary of Agriculture. *See* 7 U.S.C. § 1206(c) ("[T]he Cotton Board shall . . . develop and submit to the Secretary for his approval any advertising or sales promotion or research and development plans or projects, and that any such plan or project must be approved by the Secretary before becoming effective."). Indeed, as found by the Supreme Court in its examination of the Beef Act, the speech in the Cotton Act "is from beginning to end the message established by the Federal Government." *Livestock Mktg. III*, 544 U.S. at ___ , 125 S. Ct. at 2062, 161 L. Ed. 2d at 907. Therefore, because the Supreme Court has squarely held that, without more, generic messages created pursuant to an agriculture marketing program do not implicate an individual's Free Speech rights (even where an individual disagrees with that speech) because that speech is the government's own, *id.*, and because the speech complained of in this action is government speech (even though the speech is not clearly attributable to that messenger), *see id.*, this Court is constrained to find that plaintiffs have not adequately "establish[ed] that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. Therefore, because plaintiffs' facial challenge to the Cotton Act fails, the Court finds that "it appears beyond doubt that no set of facts can be proven that would entitle Plaintiff to relief," *Nufarm*, 29 CIT at ___ , 398 F. Supp. 2d at 1342, and dismisses Count One of the Amended Complaint.

B

By Count Three of their Amended Complaint, plaintiffs allege an as-applied challenge to the Cotton Act. Plaintiffs allege that

> [t]he Act and regulations, and taxes imposed thereunder as applied to Plaintiffs violates their right to freedom from compelled or subsidized speech protected by the First Amendment to the Constitution. The Cotton Board retains a sole source contractor, Cotton Incorporated, to carry out the research and promotion activities authorized by the Act. Cotton Inc. expressly represents the interests of producers and importers, including Plaintiffs. Cotton, Inc.'s marketing and promotion activities include, *inter alia*, television advertising . . . , retail promotions . . . , newsletters . . . , trade advertising . . . , trade shows, and industry outreach and educational activities. All of Cotton, Inc.'s activities (allegedly on behalf of Plaintiffs) feature the corporate name and the corporate logo, the Seal of Cotton. USDA uses this mechanism to attribute what is allegedly a government message to Plaintiffs. Plaintiffs are also associated with Cotton Inc.'s speech (including research) by virtue of the assessments they pay on imports.

Am. Compl. at para. 32. Plaintiffs argue that they have sufficiently alleged a claim upon which relief may be granted because "Count

Three alleges that the program attributes the alleged message of the Government to Plaintiffs thereby negating the government speech defense." Pls.' Resp. at 6 (citing Am. Comp. at para. 32). Plaintiffs present several arguments in support of their position. First, plaintiffs argue that "further factual development" is needed in this case in order to determine whether messages created pursuant to the Cotton Act "would be associated with" individual cotton importers. *Id*. at 10 (quoting *Livestock Mktg. III*, 544 U.S. at ___ , 125 S. Ct. at 2065–66, 161 L. Ed. 2d at 910.). Next, plaintiffs contend that, while they

> do not claim that the mere existence of Cotton, Inc. and the use of the Seal of Cotton by themselves prove and as-applied challenge . . . these are simply some of the mechanisms by which the Government's speech is associated with and attributed to Plaintiffs. Following discovery, Plaintiffs will be able to demonstrate . . . that the "government" messages are attributed to them. . . .

Id. at 11. Next, plaintiffs argue that "[c]ontrary to the Government's argument . . . there is no requirement that Plaintiffs prove attribution of any specific message to any specific Plaintiff in an as-applied challenge." *Id*. Finally, plaintiffs argue that "[e]ven if the cotton speech tax could be sustained as a permissible means of funding government speech in some theoretical sense, the facts of this case demonstrate that the Government is not identified as the speaker." *Id*. at 13. Plaintiffs contend that "[t]he government should be required to prove that recipients of the cotton messages understand they come from the government." *Id*.

A review of Count Three shows that plaintiffs raise two separate allegations. First, plaintiffs allege that the promotional messages created pursuant to the Cotton Act violate their constitutional rights because those messages can be directly attributed to them. Plaintiffs' second allegation, which is directly related to the first, is that because those promotional messages violate their constitutional rights, the funding of those messages via targeted assessments is unconstitutional. The Court begins its analysis with plaintiffs' first allegation.

The Court understands the first part of plaintiffs' as-applied challenge to be the following: plaintiffs consider certain messages created pursuant to the Cotton Act to be offensive to them; that those offensive messages can be directly attributed to them; and, therefore, that because those offensive messages can be directly attributed to them they are thus compelled to speak those offensive messages in violation of their First Amendment rights. A plain reading of the Amended Complaint shows that the plaintiffs allege that the "messages" they find offensive to them are the existence of Cotton, Inc. and the Seal of Cotton. The Court does not find that plaintiffs

have stated a claim upon which relief may be granted by these allegations. First, the mere existence of Cotton, Inc. is not offensive government speech. In fact, plaintiffs concede that Cotton, Inc. is a "mechanism" and not speech. *See* Am. Compl. at para. 32; Pls.' Resp. at 11. Second, the Seal of Cotton is not a message that can be attributed to plaintiffs such that it impermissibly infringes upon their First Amendment rights. The Seal of Cotton is described as a "cotton boll with the word 'cotton' " on it. *See* Reply Mem. in Supp. of Def.-Intervenors' Mot. to Dismiss or, in the Alternative, for J. on the Agency R. ("Intervenors' Reply") at 8.[5] As pointed out by defendant-intervenors, this message is, "if anything, even less specific than the beef tagline." *Id*. Given the Supreme Court's reasoning in *Livestock Marketing III*, this Court is constrained to find that the Seal of Cotton "is not sufficiently specific to convince a reasonable factfinder" that any particular cotton importer "would be tarred with the content of each trademarked ad." *Livestock Mktg. III*, 544 U.S. at ___, 125 S. Ct. at 2065–66, 161 L. Ed. 2d at 910.

Another way in which the allegations contained in Count Three may be construed in plaintiffs' favor is that they are alleging that there are "some" promotional messages created pursuant to the Cotton Act (other than the Seal of Cotton) that they find offensive, and it is those messages that can be attributed to them. In *Livestock Marketing III* the Supreme Court raised the possibility that an as-applied challenge to an agricultural promotion program might be sustained "if it were established . . . that individual beef advertisements were attributed to respondents." *Livestock Marketing III*, 544 U.S. at ___, 125 S. Ct. at 2065, 161 L. Ed. 2d at 910. The difficulty in the case at bar is simply that plaintiffs have not alleged any facts that "establish" that there are specific cotton advertisements that can be directly attributed to them as individuals. In fact, plaintiffs admit that, even after amending their complaint to include an as-applied challenge to the Cotton Act, they are unaware of whether any infringing promotional messages actually exist. *See* Pls.' Resp. at 10 (stating "[t]he answer to this question requires further factual development. . . ."). Thus, because plaintiffs have not alleged sufficient facts to establish that there are any specific promotional messages created pursuant to the Cotton Act that infringe upon their individual First Amendment rights, plaintiffs do not meet the criteria set out in *Livestock Marketing III* and the Court must, therefore, dismiss Count Three of the Amended Complaint. *Nufarm*, 29 CIT at ___, 398 F. Supp. 2d at 1342.[6]

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[5] According to Cotton, Incorporated the Seal of Cotton is its registered trademark. A graphic representation of the Seal of Cotton may be viewed at www.cottoninc.com (visited 4/24/06).

[6] Because the Court finds that plaintiffs have not alleged a cause of action upon which relief can be granted as to their allegation that the messages created pursuant to the Cot-

II

By Count Two of their Amended Complaint, plaintiffs challenge the constitutionality of the Cotton Act by alleging that it violates their right of Free Association. Plaintiffs allege that

> [t]he Act and regulations, and taxes imposed thereunder violate the right of Plaintiffs to freedom of association guaranteed by the First Amendment to the Constitution. Plaintiffs are forced against their will to associate with others in the industry in a common promotion scheme and message, research and education efforts, and the selection of the messenger. There is no compelling governmental interest justifying infringement upon that right. The government has not shown that the compelled association is necessary to achieve a compelling governmental interest, that the messages are ideologically neutral and that it has used the least restrictive means.

Am. Compl. at para. 30. As with Count One of their Amended Complaint, plaintiffs state that Count Two is a facial challenge to the Act. *See* Pls.' Resp. at 18 (captioning argument section as "The Speech Tax is Unconstitutional on its Face Because it Violates the Right of Free Association."). Thus, again, the question for the Court is whether plaintiffs have established that "no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745.

Plaintiffs present several arguments in support of their position that the Act infringes upon their right of Free Association. Plaintiffs first argue that they have properly stated a claim because "[m]ost government speech is not the product of compelled association among private competitors." Pls.' Resp. at 19. Plaintiffs contend that they "have a right not to associate with their competitors in matters of expression." *Id*. at 21 (citing *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995); *Pacific Gas & Elec. Co. v. Pub. Util. Comm. of Cal.*, 475 U.S. 1 (1986)). Plaintiffs argue that they are compelled "to associate in the development of a common plan of marketing, research, and industry relations." *Id*. at 21. Plaintiffs state that they "must associate with their competitors to influence [various decisions of the Cotton Board] long before [those decisions] ever get to the point of Government approval." *Id*. at 21–22.

The Court does not agree that plaintiffs have adequately stated a claim upon which relief can be granted by Count Two. First, plaintiffs' arguments are not persuasive because, as pointed out by defendant, the collection of assessments pursuant to the Cotton Act "does

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ton Act can be attributed to them as individuals, the Court need not address plaintiffs' related allegation of whether the collection of assessments to fund those messages violates their constitutional rights.

not force plaintiffs to associate with any particular group or organization, and, as the Supreme Court made clear, there is no 'First Amendment right not to fund government speech.' " Def.'s Reply Mem. in Supp. of Its Mot. to Dismiss and Mot. for J. on the Agency R. of the Counts in Pls.' First Am. Class Action Compl. at 6.

Second, plaintiffs' position is not persuasive because the Cotton Act does not compel them to associate with anyone in the creation of promotional messages. The crux of plaintiffs' position is that they are compelled "against their will to associate with others in the industry in a common promotion scheme and message, research and education efforts, and the selection of the messenger." Am. Compl. at 30. Plaintiffs argue that this is so because "[t]he Act and Order unlawfully compel Plaintiffs to associate in the development of a common plan of marketing, research, and industry relations." Pls.'s Resp. at 21. Plaintiffs argue that the cases they cite in support of their position "stand for the proposition that Plaintiffs have a right not to associate with their competitors in matters of expression." *Id*. The Court is not persuaded by plaintiffs' arguments for two reasons. First, a review of the statute and regulations shows that there is nothing in either the Cotton Act or the Cotton Order that compels plaintiffs to associate with their competitors in developing messages or programs. The relevant statutory provision provides that "the Cotton Board shall . . . develop and submit to the Secretary for his approval any advertising or sales promotion or research and development plans or projects." 7 U.S.C. § 2106(c). The Cotton Order further provides that the Cotton Board has the duty "[t]o review and submit to the Secretary any research and promotion plans or projects which have been developed and submitted to it by the contracting organization or association, together with its recommendations with respect to the approval thereof by the Secretary. . . ." 7 C.F.R. § 1205.332(d). Plaintiffs nowhere allege that they are compelled to become members of the Cotton Board or of a "contracting organization" tasked with creating promotional messages. Second, any argument that plaintiffs are compelled to associate with their competitors through membership on the Cotton Board fails.[7] A review of the Cotton Act and Cotton Order shows that plaintiffs are neither required to become members of the Cotton Board nor is the Secretary of Agriculture authorized to seat unwilling cotton importers to that body. Thus, because plaintiffs have not established that they are compelled to associate with their competitors in developing messages and programs pursuant to the Cotton Act they have not established that "no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. The Court, therefore, finds

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[7] The Court understands this to be part of plaintiffs' argument as they cite to several sections of the Code of Federal Regulations that concern the composition, performance, and duties the Cotton Board.

that "it appears beyond doubt that no set of facts can be proven that would entitle Plaintiff to relief," *Nufarm*, 29 CIT at ___, 398 F. Supp. 2d at 1342, and dismisses Count Two of the Amended Complaint.

III

By Count Four of their Amended Complaint, plaintiffs allege that the actions of Congress in setting up the referendum vote and the 1991 referendum vote that vitiated the Cotton Act as to them violated their constitutional Due Process rights. Specifically, plaintiffs allege that "[t]he Act and Regulations, and taxes imposed thereunder violate [the] Due Process rights of Plaintiffs because Congress effectively delegated the decision whether to impose the tax on Plaintiffs to U.S. cotton producers," and the vote itself was improper because there was "a lack of meaningful and effective notice." Am. Compl. at para. 34.

The Court does not agree that, by Count Four, plaintiffs have stated a claim upon which relief can be granted. Specifically, plaintiffs brought this action pursuant to 28 U.S.C. § 1581(i).[8] As noted by defendant-intervenors, the statute of limitations for commencing an action pursuant to subsection 1581(i) is two years from the date of injury. *See* Intervenors' Reply at 15; 28 U.S.C. § 2636(i) ("A civil action of which the Court of International Trade has jurisdiction under 1581 of this title, other than an action specified in subsections (a)–(h) of this section, is barred unless commenced in accordance with the rules of this court within two years after the cause of action first accrues."); *Stone Container Corp. v. United States*, 229 F.3d 1345, 1348 (Fed. Cir. 2000) ("*Stone*"), *cert. denied*, 532 U.S. 971 (2001) ("The limitations period for suits brought under § 1581(i) is specified by 28 U.S.C. § 2636(i). . . ."). Furthermore, statutes of limitations apply to injuries suffered due to unconstitutional acts. *Stone*, 229 F.3d at 1349–50. As stated by the Court of Appeals for the Federal Circuit when examining the constitutionality of section 1581(i) in the context of the Harbor Maintenance Tax cases, "the Supreme Court ruled . . . 'a constitutional claim can become time barred just as any other claim can.' " *Id.* at 1350 (quoting *Block v. N. Dak.*, 461

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[8] Subsection 1581(i) of Title 28 provides, in relevant part:

> [T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for –
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; . . .
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

U.S. 273, 292 (1983)).[9] Here, there is no disagreement that the injuries complained of—the actions of Congress leading up to the referendum vote and the vote itself—occurred no later than July of 1991. *See, e.g.*, Def.'s Mem. at 18 (citing Cotton Research and Promotion Order Amendments; Order Directing That a Referendum Be Conducted; Determination of Representative Period and Voter Eligibility, 56 Fed. Reg. 31,298 (Dep't Agric. July 9, 1991)). Thus, the injuries complained of by Count Four accrued some twelve years prior to the date this action was commenced—well outside the two-year statute of limitations for commencing an action to contest those injuries pursuant to subsection 1581(i). This being the case, plaintiffs are now barred from asserting that their Due Process rights were violated by those alleged injuries. *Stone*, 229 F.3d at 1350. While it may be that plaintiffs now still feel the effects of the actions complained of, they present no argument as to how any alleged violations of their Due Process rights in 1991 can today vest this Court with jurisdiction to consider those matters. Thus, because plaintiffs did not timely commence an action in this Court to contest whether their constitutional Due Process rights were violated, the Court, therefore, finds that "it appears beyond doubt that no set of facts can be proven that would entitle Plaintiff to relief," *Nufarm*, 29 CIT at ___ , 398 F. Supp. 2d at 1342, and dismisses Count Four of their Amended Complaint.

Conclusion

For the reasons stated above, because the Court finds that plaintiffs have failed to state a claim upon which relief can be granted as to all Counts of their Amended Complaint, the Court dismisses this action. Judgment shall enter accordingly.[10]

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[9] This is apparently so even though the Supreme Court provided no constitutional basis for its ruling. *See Block v. N. Dak.*, 461 U.S. at 292 (citing *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Soriano v. United States*, 352 U.S. 270 (1957)). The Supreme Court merely concluded that a constitutional claim could become time barred because "[n]othing in the Constitution requires otherwise." *Id*.

[10] Because the Court dismisses the Amended Complaint in its entirety, plaintiffs' pending motion for class action certification and defendant-intervenors' pending motion for oral argument are rendered moot.

SLIP OP. 06–57

WEST TRAVEL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 98–09–02786

OPINION

[Defendant's motion for summary judgment granted; case dismissed.]

Dated: April 25, 2006

Lane, Powell, Spears, Lubersky, LLP (*Diane M. Butler*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Todd M. Hughes*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Tara K. Hogan*), *Richard McManus*, Office of the Chief Counsel, United States Bureau of Customs and Border Protection, of counsel, for defendant.

Restani, Chief Judge: This matter is before the court on the parties' cross-motions for summary judgment. Plaintiff seeks refund of Harbor Maintenance Tax (26 U.S.C. § 4461 *et seq.* (2000)) ("HMT") payments for various quarters from 1992 through 1996, which were made on account of its Alaska passenger cruises. Plaintiff alleges that Alaska ports at which its cruises stopped are statutorily exempt from the tax. The court finds that the claim plaintiff makes now claim is not properly before the court, and that any amendment to assert such a claim would be futile as the statute of limitations has run and the court lacks jurisdiction for other reasons.

BACKGROUND

Plaintiff commenced this action on September 8, 1998, alleging that the HMT was unconstitutional and asserting jurisdiction under 28 U.S.C. § 1581(i) (2000) (residual jurisdiction). Related litigation has resolved all constitutional challenges, and the HMT has been upheld as constitutional with regard to passenger cruises. *See Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1360 (Fed. Cir. 2000); *Carnival Cruise Lines, Inc. v. United States*, 200 F.3d 1361, 1369 (Fed. Cir. 2000).[1]

In response to defendant's motion for summary judgment, plaintiff concedes that its constitutional claim must fail, but alleges for the first time before the court that its cruises to Alaska were exempt from the tax by virtue of 26 U.S.C. § 4462(b) (exempting Alaska, Hawaii, and possessions from HMT on "cargo" loaded and unloaded at their ports) and, therefore, it is owed a refund of $28,046.05, a much

[1] The tax is unconstitutional as applied to exports, *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 370 (1998), but those provisions are severable. *Princess Cruises*, 201 F.3d at 1358.

reduced claim from that asserted in its original constitutional cause of action. Plaintiff has not filed a motion to amend its complaint to include this statutory claim. Furthermore, plaintiff did not file for an administrative refund under 19 C.F.R. § 24.24(e)(4) (2000), obtain an administrative denial, and protest that denial as prerequisites to a suit under 28 U.S.C. § 1581(a) (protest denial jurisdiction). Because this action was stayed for several years while the constitutional litigation was completed in all respects, the court will not look for procedural niceties, but will consider whether it may or should permit plaintiff to amend its complaint to assert the new cause of action.

DISCUSSION

In *Swisher Int'l, Inc. v. United States*, 205 F.3d 1358, 1364–65 (Fed. Cir. 2000), the court determined that the 19 C.F.R. § 24.24(e) refund procedure was a viable way to challenge the constitutionality of the HMT so that protest jurisdiction would lie under 28 U.S.C. § 1581(a). Prior to that time, there was no established administrative procedure for constitutional challenges to HMT collections. If there was any doubt as to the viability of 19 C.F.R. § 24.24(e) for general HMT assessment issues, it was resolved by *Swisher*. Furthermore, as of early 2000, *Swisher* confirmed that Customs Service refund regulations did not provide a time limit for filing refund claims. 205 F.3d at 1368. Thereafter, on July 2, 2001, after a period of notice and comment, the then United States Customs Service promulgated a regulatory time-limit of one year from the date of payment for requesting refunds thereof. *See* 19 C.F.R. § 24.24(e)(4)(ii) (2002); *see also M.G. Maher & Co., Inc. v. United States*, 26 CIT 1040, 1044 (2002) (upholding regulatory time limit for refund claims.) Thus, for more than a year from the date of the *Swisher* opinion until the regulation became effective, it should have been clear that administrative relief was available for past HMT refund claims.[2]

Plaintiff argues that it did not wish to split its cause of action, but it should have known from early 2000, when the *Carnival Cruise* decision issued, that its constitutional claim would not succeed and, in fact, it seems not to have decided to assert a statutory claim until late 2005 or 2006, when it decided to pursue the current claim. *See infra* next paragraph. Thus, plaintiff had nothing to split in 2000–2001, when it should have acted, as numerous parties did.[3]

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[2] The court notes that until very recently, it maintained a website specific to HMT issues by which all persons easily could stay abreast of legal developments. Of course, as indicated above, legally sufficient notice existed apart from the website.

[3] Apart from the challenges based on the effects on the HMT statute, as a whole, of the successful challenge under the Export Clause, some parties challenged the HMT based on the Port Preference and Uniformity Clauses of the Constitution because of the very exemp-

In 2005, after the court was informed by the Government that the court established administrative claims procedures arising out of *U.S. Shoe*, 523 U.S. 360, had been completed and that collateral litigation relating to interest on export based claims had been resolved, the court determined to lift its general stay originally covering thousands of cases and to dismiss the remaining HMT actions, save for cause shown.[4] Plaintiff's suit was not dismissed, rather, it was permitted to litigate its claim based on its statements that it had constitutional claims remaining and a claim under *Princess Cruises, Inc. v. United States*, 397 F.3d 1358 (Fed. Cir. 2005) (layover claims). *See West Travel, Inc. v. United States*, No. 98–09–02786 (CIT Oct. 13, 2005) (order granting motion to stay dismissal). It asserts neither claim now. (*See* Pl.'s Mot. for Summ. J.)

Given these developments, the court sees no genuine excuse for plaintiff's delay. Nonetheless, assuming arguendo that all of the legal uncertainty surrounding the HMT and the general stay do provide a good reason for seeking an amendment at this time, the court will address whether such an amendment would be futile.

First, it is clear that a suit under 28 U.S.C. § 1581(i) must be brought within two years of claim accrual. *See* 28 U.S.C. § 2636(i)(2000). None of the payments which plaintiff seeks to recover were made after August 8, 1996. (Def.'s App. to Mot. for Summ. J. 1–2.) This suit was filed more than two years later, in September 1998. Thus, 28 U.S.C. § 1581(i) jurisdiction is not an available avenue for recovery of the payments at issue.[5]

Second, plaintiff cannot assert a claim under 28 U.S.C. § 1581(a) because it has not obtained a denial of a protest.[6] Such a jurisdictional prerequisite begins with a refund request under 19 C.F.R. 24.24(e). Plaintiff has not alleged that it has ever begun the process that leads to 28 U.S.C. § 1581(a) jurisdiction. Neither party has opined as to whether such an administrative refund claim is viable at this date, and it would appear to be too late under the current regulation. If, for some reason, it is viable, plaintiff's claim under 28 U.S.C. § 1581(a) is not ripe. In any case, no amendment to the complaint based on this alternative jurisdictional basis is possible at this time.

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tions now relied on by plaintiff. Those challenges failed. *See, e.g., Thomson Multimedia Inc. v. United States*, 340 F.3d 1355, 1363–66 (Fed. Cir. 2003).

[4] *See U.S. Shoe Corp. v. United States*, Slip Op. 05–89, 2005 WL 1767959 (CIT Jul. 27, 2005). The court had over the years lifted the stay at various times to allow action in individual suits.

[5] A companion case, *West Travel, Inc. v. United States*, Court No. 98–09–02785, decided simultaneously herewith, addresses claims that are not time-barred for purposes of 28 U.S.C. § 1581(i).

[6] Date of protest denial controls the statute of limitations under 28 U.S.C. § 1581(a). *See* 28 U.S.C. § 2636(a).

Accordingly, plaintiff may not amend its complaint to allege a statutory claim and this action under 28 U.S.C. § 1581(i) will be dismissed.

SLIP OP. 06–58

WEST TRAVEL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 98–09–02785

OPINION

[Defendant's motion for summary judgment granted; case dismissed.]

Dated: April 25, 2006

Lane, Powell, Spears, Lubersky, LLP (*Diane M. Butler*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Todd M. Hughes*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Tara K. Hogan*), *Richard McManus*, Office of the Chief Counsel, United States Bureau of Customs and Border Protection, of counsel, for defendant.

Restani, Chief Judge: This is a companion case to *West Travel, Inc. v. United States*, No. 98–09–02786, (Slip Op. 06–57) issued simultaneously herewith, and which should be considered herewith. The facts of the two cases are the same, except that the Harbor Maintenance Tax (26 U.S.C. § 4461 *et seq.* (2000)) ("HMT") payments sought to be recovered in this action were made within the two-year statute of limitations for 28 U.S.C. § 1581(i) (2000) jurisdiction cases, and plaintiff has reduced its claim to $30,833.99. The issue before the court is whether plaintiff should be permitted to amend its complaint alleging constitutional infirmity to one alleging a statutory exemption under 26 U.S.C. § 4462(b), for "cargo" loading or unloading at Alaska ports.

As in the companion case, 28 U.S.C. § 1581(a) protest denial jurisdiction was not perfected. Thus, the court asks whether plaintiff could have pursued actions that would have resulted in 28 U.S.C. § 1581(a) jurisdiction, and if so, whether plaintiff, nonetheless, may pursue its statutory exemption claim in this 28 U.S.C. § 1581(i) action.

The general rule is that one may not maintain an action under the residual jurisdiction provision of 28 U.S.C. § 1581(i) if another provision of § 1581 would have been available. *See Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). The Federal Circuit has loosened that principle somewhat. Although it (and the Su-

preme Court, *see U.S. Shoe Corp. v. United States*, 523 U.S. 360, 365–66 (1998)) had permitted constitutional challenges to the HMT statute to go forward under § 1581(i), in *Swisher Int'l, Inc. v. United States*, 205 F.3d 1358, 1365 (Fed. Cir. 2000), the court recognized an administrative refund procedure under 19 C.F.R. § 24.24(e), the results of which could be protested, leading to § 1581(a) jurisdiction. The reasons for allowing these dual paths to jurisdiction were varied. One reason was that any real decision-making by the then United States Customs Service ("Customs") on a constitutional challenge to a statute was impossible, making exhaustion of administrative remedies for § 1581(a) jurisdiction futile. *Swisher*, 205 F.3d at 1363–65. Further, early on, Customs did not endorse the administrative refund denial route for HMT constitutional claims,[1] making § 1581(i) available because of lack of a practical remedy in pre-*U.S. Shoe* days.[2] Nonetheless, under 19 C.F.R. § 24.24(e), Customs did have a refund procedure in place, which provided a path to § 1581(a) jurisdiction for constitutional challenges, but plaintiffs were not penalized by having these claims rejected because of the "availability" of a route to protect jurisdiction. They were permitted to treat that course of action as futile for purposes of constitutional litigation and to rely on § 1581(I) jurisdiction if they so chose.

Plaintiff's claim is not in the same class of futile claims. Plaintiff asserts a statutory exemption, not a constitutional claim. Presumably, Customs could review the facts and apply the exemption if it were warranted.[3] With respect to the controlling legal principle, this case is not unlike *NuFarm America's, Inc. v. United States*, 398 F. Supp. 2d 1338, 1348–52 (CIT 2005), wherein the court held that a plaintiff must administratively exhaust its challenge to a Customs regulation, and that 28 U.S.C. § 1581(a) and (i) do not provide concurrent jurisdiction, except in situations similar to the constitutional challenge in the HMT cases. *See also M.G. Maher & Co., Inc. v. United States*, 26 CIT 1040, 1041 (CIT 2002) (challenge to a Customs HMT regulation must proceed under 28 U.S.C. § 1581(a)). *NuFarm* and *M.G. Maher* nicely summarize the jurisdictional authorities with regard to lack of concurrent jurisdiction under § 1581(a) and (i), and the court will not repeat the survey.

The allegations plaintiff asserts in its motion for summary judgment essentially constitute a new complaint based on a statutory right. There must be appropriate jurisdiction for such a complaint. While plaintiff's refund claims are not time-barred for purposes of 28 U.S.C. § 1581(i), jurisdiction to hear them does not exist under

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[1] Customs took the position, later discredited in *U.S. Shoe*, that parties were required to protest the receipt of HMT payments by Customs. *See U.S. Shoe*, 523 U.S. at 365.

[2] The companion case addresses in detail why the refund remedy was available to plaintiff here, in a practical sense.

[3] The court does not opine as to the merits of plaintiff's claim.

§ 1581(i) because a 28 U.S.C. § 1581(a) remedy was legally and practicably available. Plaintiff has not perfected jurisdiction under 28 U.S.C. § 1581(a). Accordingly, plaintiff is not permitted to amend its complaint and this action will be dismissed.

ERRATA

Please make the following changes to *West Travel, Inc. v. United States*, No. 98–09–02785, Slip. Op. 06–58 (Ct. Int'l Trade April 25, 2006):

• Page 3, line 3: Replace "to protect jurisdiction." to "to protest jurisdiction."

April 25, 2006

Slip Op. 06–59

FORMER EMPLOYEES OF DANA UNDIES, Plaintiffs, v. UNITED STATES, Defendant.

Court No. 04–00615
Before: Timothy C. Stanceu, Judge

JUDGMENT

On August 5, 2004, a petition for Trade Adjustment Assistance ("TAA") and Alternative Trade Adjustment Assistance ("ATAA") benefits was filed with the United States Department of Labor ("Labor") on behalf of the Former Employees of Dana Undies. Plaintiffs are former employees of the Dana Undies facility located in Colquitt, Georgia. Labor's investigation that followed the filing of the petition revealed that the former employees at other facilities of Dana Undies, located in Blakely and Arlington, Georgia, "were adversely affected by imports" and were certified as eligible to apply for TAA and ATAA benefits. *Notice of Revised Remand Determination* at 1. Labor concluded that the former Dana Undies employees of the Colquitt facility, however, were not eligible for certification because they allegedly were separated more than one year prior to the date of the filing of the petition. *See id*. On September 14, 2004, Labor issued a negative determination regarding those plaintiffs. *See Administrative Record* at 41; *Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance*, 69 Fed. Reg. 60,425, 60,427 (Oct. 8, 2004).

On October 7, 2004, plaintiffs requested an administrative reconsideration of Labor's negative determination. *See Administrative Record* at 55. On October 28, 2004, Labor dismissed plaintiffs' application for administrative reconsideration on the basis that it failed to allege substantial new facts. *See id.* at 56. On December 2, 2004, plaintiffs challenged this determination by filing a summons and complaint and appearing *pro se* before the court.

Labor requested a voluntary remand to investigate the allegation in the amended complaint that "the Georgia Department of Labor, acting as agent of the United States in the administration of the TAA program, advised the employees of the Colquitt plant, during the year following their termination, that they could not file a petition for TAA and, thus, prevented the employees from filing a petition during the statutorily required period." *Notice of Revised Determination on Remand* at 2–3; *Am. Compl.* ¶¶ 7, 8, 9, 11. On June 14, 2005, the court granted Labor's consent motion for a voluntary remand. On September 19, 2005, Labor filed its *Notice of Revised Determination on Remand*.

During the course of the remand investigation, Labor found that there existed a "series of miscommunications" between all the parties involved. Specifically, "the Colquitt employees were led to believe they would not be eligible for TAA benefits." *Notice of Revised Determination on Remand* at 4. Therefore, Labor determined that it was appropriate to investigate whether the former employees of the Colquitt facility are eligible for certification to apply for TAA and ATAA benefits. Labor further determined that the Colquitt facility separated a significant number of workers and shifted its production of infant and toddler underwear from the Colquitt facility to China and Thailand. *Id.* at 5. Moreover, Labor determined that "company imports were likely to increase" and did increase upon the closure of the Colquitt facility. *Id.* at 5. In accordance with these determinations, Labor concluded that plaintiffs are eligible to apply for TAA and ATAA benefits. *See id.* at 6. In their comments, plaintiffs stated their satisfaction with the *Notice of Revised Determination on Remand*.

Upon consideration of Labor's *Notice of Revised Determination on Remand*, plaintiffs' comments, and other papers and proceedings filed herein, it is hereby

ORDERED that Labor's determination that plaintiffs are eligible to apply for TAA and ATAA benefits is supported by substantial evidence and is otherwise in accordance with law; and it is further

ORDERED that *Labor's Notice of Revised Determination on Remand* filed on September 19, 2005, is affirmed in its entirety; and it is further

ORDERED that this case is dismissed.