U.S. Customs and Border Protection

Slip Op. 12–28

NSK CORPORATION, Plaintiff, v. UNITED STATES and UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants, and TIMKEN US CORPORATION and MPB CORPORATION, Defendant-Intervenors.

Before: Gregory W. Carman, Judge
Timothy C. Stanceu, Judge
Leo M. Gordon, Judge
Consol. Court No. 07–00223

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

Dated: March 6, 2012

Robert A. Lipstein and *Alexander H. Schaefer*, Crowell & Moring, 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. With them on the briefs were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, and *Andrew G. Jones*, Office of Assistant Chief Counsel, United States Customs and Border Protection, of counsel.

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

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

OPINION

CARMAN, JUDGE:

INTRODUCTION

Plaintiff brought two cases[1] challenging the constitutionality of the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA" or "Byrd Amendment").[2] These cases were consolidated by order of the court under Consol. Ct.No. 07–00223. (Order, Consol. Ct. No.

[1] First Amended Compl., Ct. No. 07–00223, July 13, 2007, ECF No. 5 ("Compl. 1") and Compl., Ct. No. 07–00281, July 30, 2007, ECF No. 4 ("Compl. 2").

[2] Pub. L. No. 106–387, §§ 1001–1003, 114 Stat. 1549, 1549A-72–75 (codified at 19 U.S.C. §

07–00223, Jan. 25, 2012, ECF No. 83.) Plaintiff claims that it unlawfully was denied affected domestic producer ("ADP") status, which would have qualified it to receive distributions for fiscal years 2005–2007 under the CDSOA. The consolidated case is now before the Court on dispositive motions. Defendant United States moves to dismiss each complaint pursuant to USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. (Def.'s Mot. to Dismiss for Failure To State a Claim Upon Which Relief Can Be Granted, Ct. No. 07–00223, May 3, 2011, ECF No. 65 and Ct. No. 07–00281, May 2, 2007, ECF No. 47 ("U.S. Mot.").) The United States International Trade Commission ("ITC") moves for judgment on the pleadings pursuant to USCIT Rule 12(c). (Def. U.S. Int'l Trade Comm'n's Mot. for J. on the Pleadings, Ct. No. 07–00223, May 2, 2011, ECF No. 62 and Ct. No. 07–00281, May 2, 2011, ECF No. 46 ("ITC Mot.").) Defendant-Intervenors Timken US Corp. and MPB Corp. (collectively, "Timken") also move for judgment on the pleadings pursuant to USCIT Rule 12(c). (Def.-Intervenors' Mem. in Supp. of Their Mot. for J. on the Pleadings with Respect to NSK's Compls., Ct. No. 07–00223, May 2, 2011, ECF No. 64 and Ct. No. 07–00281, May 2, 2011, ECF No. 48 ("Timken Mot.").)

Defendant United States also filed a motion to dismiss for lack of ripeness as part of its response to a subsequently-withdrawn application by Plaintiff. (Def. U.S. Customs & Border Prot.'s Mot. to Dismiss & Resp. in Opp'n to Pl.'s App. for Writ of Mandamus 9–12, Court No. 07–00223, Aug. 22, 2007, ECF No. 31 ("U.S.'s Ripeness Mot.").) The government never withdrew this motion, to which Plaintiff responded. (Pl. NSK Corp.'s Resp. to Mots. to Dismiss 5–7, Court No. 07–00223, Apr. 15, 2011, ECF No. 61.)

For the reasons set forth below, Plaintiff's claims related to fiscal year 2005 distributions will be dismissed for lack of jurisdiction, Plaintiff's other claims will be dismissed for failure to state a claim upon which relief can be granted, the government's motion to dismiss for lack of ripeness will be denied, and the consolidated action will be dismissed.

BACKGROUND

Plaintiff NSK Corp. ("NSK") is a domestic producer of ball bearings that 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, Romania, Singapore, Sweden and the United Kingdom. (*See* Compl. 1 ¶¶ 1, 13–14, 16.) During those proceedings, NSK responded

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).

to the ITC's questionnaires. (Compl. 1 ¶ 14, Compl. 2 ¶ 5.) NSK declined to indicate to the ITC that it supported the antidumping petition. (Compl. 2 ¶ 20.) The ITC has never included NSK on a published list of ADPs. (Compl. 1 ¶ 22–24, Compl. 2 ¶ 13.)

Plaintiff brought these cases in 2007 to challenge the government's refusal to add it to the list of entities potentially eligible for distributions for fiscal years 2005–2007. (Compl. 1, Prayer For Relief; Compl. 2, Prayer For Relief.) Shortly after NSK's cases were filed, the court stayed the actions pending final resolution of other litigation raising the same or similar issues.[3] Following the decision of the Court of Appeals for the Federal Circuit in *SKF USA Inc. v. U.S. Customs and Border Protection*, 556 F.3d 1337 (Fed. Cir. 2009) ("*SKF USA II*"), this Court ordered Plaintiff to show cause why its cases should not be dismissed. (Order, Ct. No. 07–00223, Jan. 3, 2011, ECF No. 42; Order, Ct. No. 07–00281, Jan. 3, 2011, ECF No. 24.) After Plaintiff responded to the Court's order, the Court lifted the stay in both of Plaintiff's cases for all purposes. (Order, Ct. No. 07–00223, Feb. 9, 2011, ECF No. 45; Order, Ct. No. 07–00281, Feb. 9, 2011, ECF No. 27.)[4] The motions now before us were filed thereafter.

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, out of which this action arises, is such a law. *See Furniture Brands Int'l, Inc. v. United States*, 35 CIT __, __-__, 807 F. Supp. 2d 1301, 1307–10 (2011).

DISCUSSION

The CDSOA amended the Tariff Act of 1930 to provide for an annual distribution (a "continuing dumping and subsidy offset") of duties assessed pursuant to an antidumping duty or countervailing duty order to affected domestic producers as reimbursements for qualify-

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[3] 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. (*See* Order, Ct. No. 07–00223, Aug. 31, 2007, ECF No. 37.)

[4] Customs has made no CDSOA distributions affecting this case and has indicated that it will not do so until March 9, 2012 at the earliest. (*See Ashley Furniture Industries, Inc. v. United States*, 36 CIT ___, ___, Slip Op. 12–14, at 3 n.3 (Jan. 31, 2012).)

ing 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 potentially eligible for 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 Customs a list identifying potential ADPs "within 60 days after the effective date of this section in the case of orders or findings in effect on January 1, 1999 or thereafter . . . ." *Id.* The CDSOA directed Customs to publish in the Federal Register, prior to each distribution, lists of ADPs potentially eligible for distributions based on the lists obtained from the ITC, *id.* § 1675c(d)(2), and to distribute annually all funds, including accrued interest, from antidumping and countervailing duties received in the preceding fiscal year. *Id.* § 1675c(d)(3), (e).

The Court of Appeals, in *SKF USA 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]

Plaintiff challenges the constitutionality of the CDSOA on three grounds. In Count One of its complaints, Plaintiff challenges the "in support of the petition" requirement of the CDSOA ("petition support

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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 II* reversed the decision of the Court of International Trade in *SKF USA Inc. v. United States*, 30 CIT 1433, 451 F. Supp. 2d 1355 (2006) ("*SKF USA I*"), which held the petition support requirement of the CDSOA unconstitutional on Fifth Amendment equal protection grounds.

requirement”) on Fifth Amendment equal protection grounds. (Compl. 1, ¶¶ 26–29; Compl. 2, ¶¶ 32–35.) In Count Two of its complaints, Plaintiff challenges the petition support requirement on First Amendment grounds. (Compl. 1, ¶¶ 30–33; Compl. 2, ¶¶ 36–39.) In Count Three of its complaints, Plaintiff claims that the petition support requirement violates the Fifth Amendment due process guarantee by basing NSK's eligibility for disbursements on past conduct, *i.e.*, support for a petition. (Compl. 1, ¶¶ 34–37; Compl. 2, ¶¶ 40–43.)

In ruling on motions to dismiss made under USCIT Rule 12(b)(5), we dismiss complaints that do not “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In ruling on motions to dismiss under USCIT Rule 12(b)(1), we must dismiss all claims over which we determine that the Court lacks jurisdiction. *See* USCIT R. 12(h)(3). For the reasons set forth below, we conclude that the Court has no jurisdiction over Plaintiff's claims pertaining to fiscal year 2005 distributions, and that each of Plaintiff's other claims fails to state a claim upon which relief can be granted. The Court will therefore dismiss this consolidated action.

I. *Plaintiff's Claim for Fiscal Year 2005 CDSOA Distributions Is Barred by the Statute of Limitations*

Timken moves to dismiss NSK's claims to the extent that these claims pertain to fiscal year 2005,[7] on statute of limitations grounds. (Timken Mot. 10–13; *see also* FirstAm. Answer ¶ 28, Court No. 07–00281, Mar. 4, 2011, ECF No. 43 (“Further, avers that NSK's action commenced on July 30, 2007, for fiscal year 2005 distributions is barred by the two-year statute of limitations in 28 U.S.C. § 2636(i).”) Timken asserts, without explaining why, that the statute of limitations in § 2636(i) is jurisdictional, and argues that NSK's claims regarding fiscal year 2005 distributions accrued upon Customs' publication on June 1, 2005 of a notice of intent to distribute funds for the 2005 fiscal year. (Timken Mot. 11–13.) Because NSK filed suit on July 30, 2007—more than two years later—Timken argues that the Court should dismiss the fiscal year 2005 portion of NSK's claims for lack of jurisdiction. (*Id.* at 13; *see also* Def.-Int.'s Reply to NSK Corp.'s Opp. to Def.-Int.'s Mot. for J. on the Pleadings 12–14, Ct. No. 07–00223, July 18, 2011, ECF No. 75.) NSK, in response, cites our decision in *Pat Huval Restaurant & Oyster Bar, Inc. v. United States*, 32 CIT ___, ___, 547 F. Supp. 1352, 1362 (2008) for the proposition that the statute of

[7] These claims make up a part of the relief sought with respect to Counts 1–3 of Compl. 2. (*See* Compl. 2, Prayer for Relief ¶¶ 3–5.)

limitations for a CDSOA case like this one is triggered "when distribution payments [are] made." (Pl. NSK Corp.'s Resp. to Mots. to Dismiss and Mots. for J. on the Pleadings 13, Ct. No. 07–00223, June 27, 2011, ECF No. 71 ("Pl.'s Resp.").) Since fiscal year 2005 distributions were "announced on November 29, 2005," NSK claims that its July 30, 2007 complaint fell within the two year limitations period. (*Id.*) For the reasons given below, we determine that NSK's claims regarding fiscal year 2005 distributions are barred by the two-year statute of limitations and will dismiss those portions of NSK's claims for lack of jurisdiction pursuant to USCIT Rule 12(b)(1).

First, according to *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), *SKF USA II*, 556 F.3d at 1348, and 28 U.S.C. § 2636(i), we conclude that § 2636(i) constitutes a limitation on the government's waiver of sovereign immunity and that the statute of limitations is therefore jurisdictional. *See Pat Huval Restaurant & Oyster Bar, Inc. v. United States*, 36 CIT ___, ___, Slip Op. 12–27, at 14–15 (Mar. 1, 2012).

Second, we determine that NSK's claims regarding fiscal year 2005 distributions accrued upon the publication of notice of Customs' intent to distribute CDSOA funds for that fiscal year. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 70 Fed. Reg. 31,566 (June 1, 2005). We base this determination on our reading of *SKF USA II*, where the Court of Appeals determined that "[t]he earliest SKF's claim [challenging the Fiscal Year 2005 distribution] could have accrued was when Customs published its notice of intent to distribute duties under [the] Byrd Amendment for fiscal year 2005," on June 1, 2005. *SKF USA II*, 556 F.3d at 1349; *see also* 36 CIT ___, Slip Op. 12–27 at 13–14. Just as did the plaintiff in *SKF USA II*, NSK knew on this date that Byrd Distributions would be available for fiscal year 2005. NSK also knew that it would not be participating in that distribution. Therefore, upon publication of the June 1, 2005 notice, NSK had a "complete and present cause of action." *See* 556 F. 3d at 1348 (quotation omitted). [8] NSK's subsequent request in 2007 to be added to the ITC list of potential ADPs only applied to fiscal year 2007 distributions and could not have affected the date on which agency action regarding NSK's claim for fiscal year 2005 distributions became final and on which NSK's cause of action for fiscal year 2005 distributions accrued. (*See* Compl. 1 ¶ 22.)

[8] In *Pat Huval Restaurant & Oyster Bar, Inc. v. United States*, 547 F. Supp. 2d at 1361–62, focusing on the date of injury, we concluded that "a new cause of action accrued every time payments were made pursuant to that statutory scheme."

Therefore, we must dismiss the portions of the claims in NSK's second complaint that relate to fiscal year 2005 distributions for lack of jurisdiction, since that complaint was not filed until July 30, 2007, nearly two months after the end of the two year limitations period that commenced on June 1, 2005. 28 U.S.C. § 2636(i); USCIT R. 12(b)(1).

II. *Plaintiff's Equal Protection and First Amendment Challenges to the CDSOA Are Foreclosed by Binding Precedent*

Plaintiff fails to plead facts allowing the Court to conclude that its equal protection and First Amendment challenges to the CDSOA are distinguishable from claims brought, and rejected, in *SKF USA II*. The complaints contain no assertions that the CDSOA was applied to NSK in a different manner than the statute was applied to other parties who did not support a petition. Plaintiff admits that "NSK did not participate as a petitioner, or support the petition, as regards to [sic] the investigations that led to the antidumping duty orders." (Compl. 2 ¶ 20.) The facts as pled place NSK on the same footing as other potential claimants who did not support the petition, such as the plaintiff in *SKF USA II*. *See* 556 F.3d at 1343 ("Since it was a domestic producer, SKF also responded to the ITC's questionnaire, but stated that it opposed the antidumping petition."). Consequently, because Plaintiff does not allege that there was anything unique about the way the CDSOA was applied to it, Plaintiff's equal protection and First Amendment challenges in Counts One and Two of its complaints are 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.

Plaintiff's argument that the recent Supreme Court cases *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), and *Citizens United v. FEC*, 130 S. Ct. 876 (2010), effectively overturn *SKF USA II* is unpersuasive. (*See* Pl.'s Resp. 6–8.) While it is conceivable that intervening Supreme Court precedent could effectively overturn a previous circuit court decision, we are not convinced that such is the case here.

In *Snyder*, the Supreme Court held that the First Amendment provided a valid defense to certain tort liability, because the defendant's speech, while "hurtful," was made in "a public place on a matter of public concern," and was therefore "entitled to 'special protection' under the First Amendment." *Snyder*, 131 S. Ct. at 1218–19. We conclude that *Snyder* has no bearing on the constitutionality of the CDSOA. To conclude otherwise is to ignore the Supreme Court's disclaimer that

> **[o]ur holding today is narrow**. We are required in First Amendment cases to carefully review the record, and **the reach of our opinion here is limited by the particular facts before us**. As we have noted, "the sensitivity and significance of the interests presented in clashes between First Amendment and [state law] rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."

Snyder, 131 S. Ct. at 1220 (*quoting Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989)) (bracket in original) (emphasis added). Because this case does not involve the First Amendment as a defense to tort liability for inflammatory speech, nor a question regarding the clash of First Amendment and state law rights, the Court finds *Snyder* inapplicable.

Citizens United is similarly inapplicable. In that case, the Supreme Court invalidated a law that imposed "an outright ban, backed by criminal sanctions" on corporate spending on "electioneering communications," which the Supreme Court regarded as a ban on political speech. *Citizens United*, 130 S. Ct. at 897 (stating that the prohibitions at issue were "classic examples of censorship."). While "it might be maintained that political speech simply cannot be banned or restricted as a categorical matter," the Supreme Court noted that at a minimum,"[l]aws that burden political speech are 'subject to strict scrutiny,'" and evaluated the challenged law under that framework. *Id.* at 898 (*quoting FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007)). The statute in *Citizens United* thus contrasts sharply with the CDSOA, which "does not prohibit particular speech." *SKF USA II*, 556 F.3d at 1350. We find nothing in *Citizens United* that impliedly overturns the holding of *SKF USA II*. As *SKF USA II* itself noted, "[s]tatutes that are prohibitory in nature are rarely sustained, and **cases addressing the constitutionality of such statutes are of little assistance in determining the constitutionality of the far more limited provisions of the Byrd Amendment.**" *Id.* (emphasis added). This Court agrees; *Citizens United* is of little assistance.

NSK also asserts that *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), requires this Court to "review anew the level of scrutiny applied to the CDSOA's petition support requirement." (Pl.'s Resp. at 8.) We recently considered and rejected a similar argument that *Sorrell* required a different level of scrutiny than that imposed by *SKF USA II* on the CDSOA petition support requirement. *Furniture Brands*, 807 F. Supp. 2d at 1314–15. Noting that the statutes involved in *Sorrell* and *SKF USA II* differed in nature, degree of effect on expression, and purpose, we opined in *Furniture Brands* that "the CDSOA does not have as a stated purpose, or even an implied purpose, the intentional suppression of expression." *Id.* at 1315. As we also discussed in our *Furniture Brands* opinion, the Supreme Court in *Sorrell* concluded that the Vermont statute at issue in that case could not survive under a particular First Amendment analysis that was not at variance with the analysis that the Court of Appeals applied to the CDSOA in *SKF USA II* and identified as the "well-established *Central Hudson* test." *Id.* (*citing SKF USA II*, 556 F.3d at 1355, in turn *citing Central Hudson Gas & Electric v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980)). We conclude here, as we did in *Furniture Brands*, that *Sorrell* does not require us to subject the CDSOA to a new First Amendment analysis departing from that applied by the Court of Appeals in *SKF USA II*.

For the reasons we have discussed, we will dismiss Plaintiff's equal protection and First Amendment claims in Counts One and Two of its complaints for failure to state a claim upon which relief can be granted.

III. *Plaintiff's Claims As to Fiscal Year 2007 Distributions Were Ripe upon Publication of the Notice to Distribute*

The government's motion to dismiss Compl. 1 argues that NSK's fiscal year 2007 claims were not ripe because Customs had yet to make a final determination as to whether NSK would receive a distribution for fiscal year 2007, when NSK initiated its actions in July 2007. (U.S.'s Ripeness Mot. at 9–11.) Contrary to the argument in the government's motion, we conclude that NSK's claim for 2007 CDSOA distributions was ripe at the time NSK brought its actions. We construe NSK's claim for fiscal year 2007 to challenge, on constitutional grounds, the decision by the ITC to deny NSK status as a potential ADP. After NSK requested, on March 12, 2007, that the ITC place it on the list of ADPs for that fiscal year, it received a denial of its request from the ITC on May 18, 2007. (Compl. 1 ¶¶ 22–23.) That denial was confirmed in the list of ADPs included in the notice of intent to distribute CDSOA funds for fiscal year 2007, as published by Customs on May 29, 2007, which list did not include NSK. Compl. 1 ¶ 24 (citing *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 72 Fed. Reg. 29,582 (May 29, 2007)). NSK filed a certification with Customs even though it was not so listed, Compl. 2 ¶ 15, but Customs, on the facts as pled by NSK, had no discretion to add NSK to the list of potential ADPs.[9] *See* 19 U.S.C. § 1675c(d)(2) (providing that the "list of affected domestic producers potentially eligible for the distribution" is to be "based on the list obtained from the Commission . . . ."). Therefore, we find no lack of ripeness in NSK's claim for fiscal year 2007 distributions.

IV. *The Petition Support Requirement Does Not Violate the Due Process Guarantee Due to Retroactivity*

In Count Three of each complaint, Plaintiff claims that the CDSOA is impermissibly retroactive, in violation of the due process guarantee of the Fifth Amendment, because it "determined eligibility for CDSOA offsets based on private speech that occurred in the past" and because "the retroactive application of the CDSOA is not supported by a legislative purpose." (Compl. 1 ¶¶ 35–37; Compl. 2 ¶¶ 41–43.) This claim is not clearly stated, but we construe it as challenging the statutory provisions by which the CDSOA awards distributions based on orders already existing as of enactment and conditions eligibility on expressions of support for a petition occurring prior to enactment. *See* 19 U.S.C. § 1675c(d)(1). In *New Hampshire Ball Bearing v. United States*, 36 CIT __, __-__, Slip Op. 12–2, at 8–14 (Jan. 3, 2012), we recently considered a claim essentially identical to Plaintiff's retroactivity claims and concluded 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." 36 CIT at __, Slip Op. at 14. We reasoned that it would "not [be] arbitrary or irrational for Congress to conclude that the legislative purpose of rewarding domestic producers who supported antidumping petitions . . . would be 'more fully effectuated' if the petition support requirement were applied both prospectively and retroactively." 36 CIT at __, Slip Op. at 13 (quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730–31 (1984)). We conclude, therefore, that Congress' choice to base potential eligibility for CDSOA disbursements on a decision of whether to support the petition made prior to the enactment of the CDSOA did not violate NSK's Fifth Amendment due process rights.

[9] We could take judicial notice that in the May 29, 2007 notice of intent to distribute, Customs announced that "[c]laimants who are not on the USITC list but believe they are nonetheless eligible for a CDSOA distribution under one or more antidumping and/or countervailing duty cases must, as do all claimants that expressly appear on the list, file their certification(s) within 60 days after this notice is published." *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 72 Fed. Reg. 29,582, 29,582 (May 29, 2007). However, our conclusion that NSK is challenging the action of the ITC, not that of Customs, causes us to conclude that this announcement does not affect a determination of ripeness.

Based on this conclusion, the Court will dismiss the due process claims in Count Three of the complaints for failure to state a claim upon which relief can be granted.

For the foregoing reasons, all claims in the complaints in this consolidated action must be dismissed. Timken's motion for judgment on the pleadings will be granted as to claims for fiscal year 2005 funds, over which the Court determines that it lacks jurisdiction because those claims are barred by the statute of limitations. Although the government's motion to dismiss on ripeness grounds will be denied, its motion to dismiss for failure to state a claim upon which relief can be granted pursuant to USCIT Rule 12(b)(5) will be granted and Plaintiff's remaining claims will therefore be dismissed. As Plaintiff's claims will all be dismissed pursuant to other motions, the ITC's motions for judgment on the pleadings will be denied as moot. Plaintiff has not shown, either in responding to the Court's order to show cause or in opposing the motions to dismiss, that there is a plausible basis for Plaintiff to seek leave to amend the complaints, and the Court sees no such basis. Therefore, the Court shall enter judgment dismissing this action.

Dated: March 6, 2012
New York, New York

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

Slip Op. 12–29

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

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

[Denying plaintiff's motion for an injunction pending appeal to prevent distribution of withheld funds]

Dated: March 6, 2012

Kristin H. Mowry, *Jeffrey S. Grimson*, *Jill A. Cramer*, *Susan L. Brooks*, and *Sarah M. Wyss*, Mowry & Grimson, PLLC, of Washington, DC and *Kevin Russell*, Goldstein & Russell, P.C., of Washington, DC for plaintiff.

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

Neal J. Reynolds, Assistant General Counsel for Litigation, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for defendant U.S. International Trade Commission.

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

OPINION AND ORDER

Stanceu, Judge:

I. INTRODUCTION

In this litigation, plaintiff Ashley Furniture Industries, Inc. ("Ashley") challenged administrative decisions by two agencies, the U.S. International Trade Commission ("ITC" or the "Commission") and U.S. Customs and Border Protection ("Customs" or "CBP"), that denied it distributions of funds available under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), Pub. L. No. 106–387, §§ 1001–03, 114 Stat. 1549, 1549A-72–75, 19 U.S.C. § 1675c (2000),[1] *repealed by* Deficit Reduction Act of 2005, Pub. L. 109–171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007). The ITC excluded Ashley from a list of parties eligible for status as an "affected domestic producer" ("ADP") under the CDSOA, which status potentially would have qualified Ashley for distributions of antidumping duties collected under an antidumping duty order on imports of wooden bedroom furniture from the People's Republic of China ("China"). *See, e.g.*, First Amended Compl. ¶ 31 (Feb. 9, 2011), ECF No. 50; *Notice of Amended Final Determination of Sales at Less Than Fair Value & Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China*, 70 Fed. Reg. 329 (Jan. 4, 2005) ("*Antidumping Duty Order*"). Based on the ITC's decision, Customs declined to provide Ashley CDSOA annual distributions for Fiscal Years 2007 through 2010.

Plaintiff brought three similar actions, now consolidated, during the period of September 4, 2007 through March 4, 2010, raising statutory and constitutional (First Amendment, Fifth Amendment

[1] Citations are to the version of the Continued Dumping and Subsidy Offset Act ("CDSOA") found at 19 U.S.C. § 1675c (2000).

equal protection, and Fifth Amendment due process) challenges to the agency actions and the CDSOA. [2] Compl. (Sept. 4, 2007), ECF No. 5; Compl. (Jan. 16, 2009), ECF No. 5 (Court No. 09–00025); Compl. (Mar. 4, 2010), ECF No. 3 (Court No. 10–00081). Plaintiff's actions were opposed by defendant-intervenors American Furniture Manufacturers Committee for Legal Trade, a coalition of domestic wooden bedroom furniture producers that were eligible to receive CDSOA distributions, and Kincaid Furniture Co., Inc., L & G Stickley, Inc., Sandberg Furniture Manufacturing Company, Inc., Stanley Furniture Co., Inc., T. Copeland and Sons, Inc., and Vaughan-Bassett Furniture Company, Inc., domestic wooden bedroom furniture producers eligible to receive CDSOA distributions. Unopposed Renewed Mot. to Intervene 2 (Feb. 2, 2011), ECF No. 41. Ashley filed a motion for a preliminary injunction on January 11, 2012, seeking to enjoin defendants, during the pendency of this case and through all appeals and remands, from distributing to other parties Ashley's potential share of CDSOA funds, which Customs temporarily is withholding from distribution. Pl.'s Mot. for Prelim. Inj. (Jan 11, 2012), ECF No. 95.

In *Ashley Furniture Industries, Inc. v. United States*, the court entered judgment dismissing plaintiff's consolidated action, concluding (1) that plaintiff's motion for a preliminary injunction, which the court construed to also be a motion for permanent equitable relief, should be denied, and (2) that plaintiff's claims must be dismissed, some for lack of standing and the remaining for failure to state a claim upon which relief can be granted. 36 CIT __, __, Slip Op. 12–14, at 4 (Jan. 31, 2012) ("*Ashley Furniture*").

Plaintiff now moves under USCIT Rule 62(c) for an injunction pending appeal of the court's January 31, 2012 opinion and judgment. Pl.'s Mot. for Inj. Pending Appeal & for Expedited Consideration 1 (Feb. 2, 2012), ECF No. 103 ("Pl.'s Mot."); Pl.'s Mem. of Points & Authorities in Supp. of its Mot. for Inj. Pending Appeal & for Expedited Consideration 1 (Feb. 2, 2012), ECF No. 103 ("Pl.'s Mem."). Plaintiff again seeks to enjoin defendants from disbursing funds Customs is withholding from distribution for Ashley "during the pendency of its appeal, including the appeal to the United States Court of

[2] Due to the presence of common issues, the court, on February 15, 2011, consolidated plaintiff's three actions under Consol. Court No. 07–00323. Order (Feb. 15, 2011), ECF No. 51. Consolidated with *Ashley Furniture Industries, Inc. v. United States* under Consol. Court No. 07–00323 are *Ashley Furniture Industries, Inc. v. United States*, Court No. 09–00025 and *Ashley Furniture Industries, Inc. v. United States*, Court No. 10–00081. Plaintiff's First Amended Complaints in each of the three actions are essentially identical but directed to CDSOA distributions for the different Fiscal Years, *i.e.*, 2007, 2008, 2009, and 2010.

Appeals for the Federal Circuit, petitions for certiorari, and any remands." Pl.'s Mem. 1. We deny plaintiff's motion.

II. BACKGROUND

Background on this case is presented in our opinion in *Ashley Furniture*, 36 CIT at __, Slip Op. 12–14, at 4–7, and is supplemented herein.

In 2005, Commerce issued an antidumping duty order on imports of wooden bedroom furniture from China. *Antidumping Duty Order*, 70 Fed. Reg. at 329. During proceedings before the ITC to determine whether such imports were causing or threatening to cause material injury to the domestic industry, Ashley responded to the ITC's questionnaires, expressing opposition to the issuance of an antidumping duty order. First Amended Compl. ¶ 19. Ashley did not appear as a potential ADP for the antidumping duty order on the list prepared by the ITC, as published by Customs for each of the Fiscal Years from 2007 through 2010. *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 72 Fed. Reg. 29,582, 29,622–23 (May 29, 2007); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 73 Fed. Reg. 31,196, 31,236–37 (May 30, 2008); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 74 Fed. Reg. 25,814, 25,855–56 (May 29, 2009); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 75 Fed. Reg. 30,530, 30,571–72 (June 1, 2010).

In this litigation, plaintiff challenged the ITC's decision not to include Ashley on the list of parties potentially eligible for ADP status and CBP's failure to distribute CDSOA funds to Ashley. Plaintiff claimed these agency actions were unlawful under the CDSOA and unsupported by substantial evidence; it claimed, further, that the CDSOA violated the freedom of expression guarantee of the First Amendment, the equal protection guarantee of the Fifth Amendment, and, due to retroactivity, due process. *Ashley Furniture*, 36 CIT at __, Slip Op. 12–14, at 9–10.

Plaintiff filed its preliminary injunction motion on January 11, 2012, seeking to restrain defendants from distributing any funds "that are currently being withheld by CBP for Ashley for FY2007-FY2010 . . . for the pendency of this litigation, including all relevant appeals and remands, until such time as a final court decision is rendered in this case." Pl.'s Mot. for Prelim. Inj. 1.

On January 31, 2012, the court entered judgment dismissing this action. *Ashley Furniture*, 36 CIT at __, Slip Op. 12–14, at 29. We concluded that plaintiff was not entitled to injunctive relief that would delay the pending CBP distribution of CDSOA funds or to an affirmative injunction directing distribution of CDSOA benefits to Ashley. *Id.* at __, Slip Op. 12–14, at 12. We dismissed plaintiff's statutory claims because plaintiff did not satisfy the CDSOA requirements for eligibility to receive distributions. *Id.* at __, Slip Op. 12–14, at 14–15. We dismissed the First Amendment and Fifth Amendment equal protection claims as foreclosed by precedent of the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals"). *Id.* at __, Slip Op. 12–14, at 16–26 (citing *SKF USA*, *Inc. v. United States*, 556 F.3d 1360 (Fed. Cir. 2009) ("*SKF*")). Finally, we dismissed plaintiff's retroactivity claim for lack of standing. *Id.* at __, Slip Op. 12–14, at 26–28.

On February 1, 2012, plaintiff filed its appeal. Notice of Appeal (Feb. 1, 2012), ECF No. 101. The next day, plaintiff filed the instant motion for an injunction pending appeal, also moving to shorten the time period for defendants and defendant-intervenors to respond to the motion. Mot. to Shorten the Time Period to Respond to Pl.'s Mot. for Inj. Pending Appeal & for Expedited Consideration (Feb. 2, 2012), ECF No. 104. In opposing the motion to reduce the response time, Customs indicated that the CDSOA funds withheld on behalf of Ashley will not be distributed to those parties currently designated as ADPs until on or after March 9, 2012. Defs. United States & U.S. Customs & Border Protection's Resp. in Opp'n to Pl.'s Mot. for Expedited Consideration of its Mot. for Inj. Pending Appeal 3 (Feb. 3, 2012), ECF No. 106. On February 7, 2012, the court denied the motion to reduce the time for defendants and defendant intervenors to respond. *Ashley Furniture Industries, Inc. v. United States*, 36 CIT__, __, Slip Op. 12–16, at 4 (Feb. 7, 2012).

III. DISCUSSION

Plaintiff seeks to enjoin CBP and the ITC from making any CDSOA distributions "that are currently being withheld by CBP for Ashley for FY2007-FY2010 . . . for the pendency of its appeal, including the appeal to the United States Court of Appeals for the Federal Circuit, petitions for certiorari, and any remands." Pl.'s Mot. 1. [3] The relief

[3] Plaintiff seeks an order enjoining:

> Defendants, the United States and the United States Customs and Border Protection ("CBP"), together with their delegates, officers, agents and employees, from disbursing, ordering the disbursement of, or causing disbursement of any funds, pursuant to their authority under the Continued Dumping and Subsidy Offset Act of 2000 (the "CDSOA"), 19 U.S.C. § 1675c, that are currently being withheld by CBP for Ashley for FY2007-FY2010 under case no. A-570–890 pertaining to the antidumping order against wooden bedroom furniture from China. Ashley requests that such injunction remain in place for the pendency of its appeal, including the appeal to the United States Court of Appeals for the Federal Circuit, petitions for certiorari, and any remands.

Pl.'s Mot. for Inj. Pending Appeal & for Expedited Consideration 1 (Feb. 2, 2012), ECF No. 103.

plaintiff now seeks was requested and denied in *Ashley Furniture*, 36 CIT at __, Slip Op. 12–14, at 10–12. Under the standards applicable to a post-judgment injunction, we again conclude that the requested relief is not warranted.

USCIT Rule 62(c) governs plaintiff's motion, providing that "[w]hile an appeal is pending from . . . [a] final judgment that grants, dissolves, or denies an injunction, the court may . . . grant an injunction on terms for bond or other terms that secure the opposing party's rights." Equitable relief should not be ordered if plaintiff cannot satisfy the test applicable to requests for a stay of the judgment pending appeal.[4] *See Furniture Brands Int'l, Inc. v. United States*, 36 CIT __, __, Slip Op. 12–20, at 7–8 (Feb. 17, 2012) ("[I]njunctions pending appeal demand a 'significantly higher justification' than do stays . . .") (quoting *Ohio Citizens For Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers)). This test was described by the U.S. Supreme Court in 2009 as requiring a court to consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 129 S. Ct. 1749, 1761 (2009) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The Court instructed that "[t]he first two factors of the traditional standard are the most critical," *id.*, and that "[it] is not enough that the chance of success on the merits be better than negligible," *id.* (internal quotations omitted).

Ashley believes it may satisfy the likelihood of success factor of the test for post-judgment injunctive relief by raising "serious, substantial, difficult and doubtful questions." Pl.'s Mem. 9 (citing *SKF USA, Inc. v. United States*, 28 CIT 170, 176, 316 F. Supp. 2d 1322, 1329 (2004)). This permissive view of the likelihood of success factor does not square with the Supreme Court's statements in *Nken* that an applicant must have "made a strong showing that he is likely to succeed on the merits" and that "[it] is not enough that the chance of success on the merits be better than negligible." 129 S. Ct. at 1761 (internal quotations omitted). *See Furniture Brands Int'l*, 36 CIT at __, Slip Op. 12–20, at 13–14 (rejecting arguments that standards for post-judgment relief are equal to standards for preliminary injunctive

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[4] What plaintiff requests is not a stay, which would merely "operat[e] upon the judicial proceeding itself," but instead is an injunction that is "directed at someone, and governs that party's conduct." *See Nken v. Holder*, 129 S. Ct. 1749, 1757–58 (2009).

relief). Plaintiff also argues that it bears a lower burden of establishing likelihood of success on the merits because the Court of Appeals has greater leeway than has this Court in construing its own precedents and because it is possible that the decision in *SKF* would be overturned or abrogated by the Court of Appeals *en banc*. Pl.'s Mem. 10. We reject this argument as well, concluding that the likelihood of success factor cannot be satisfied by mere speculation that the Court of Appeals will modify current law.

The court determines that plaintiff's motion does not satisfy the test in *Nken.* Although the court presumes the irreparable injury factor to be satisfied, plaintiff has not made a strong showing that it is likely to succeed on appeal. Ashley cannot demonstrate that our granting the injunction will not substantially injure defendant-intervenors, whose receipt of the withheld funds would be further delayed through the progress of plaintiff's appeal. The public interest, which is served by the orderly and proper administration of the CDSOA, would not be advanced by the injunction being sought. We address each of these factors below.

A. Plaintiff Has Not Made a Strong Showing of Likelihood of Succeeding on the Merits of Its Appeal

We dismissed Ashley's First Amendment and equal protection claims according to the holding in *SKF*, which sustained the "petition support requirement" of the CDSOA against challenges brought on First Amendment and equal protection grounds. *Ashley Furniture*, 36 CIT at __, Slip Op. 12–14, at 15–25. As it did prior to the court's entering judgment against it, Ashley argues that *SKF* has been invalidated or substantially undermined by several subsequent Supreme Court decisions applying the First Amendment. Pl.'s Mem. 10–16. We again reject this argument.

Plaintiff argues that in light of *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), we should now conclude that the Court of Appeals in *SKF* misapplied the "commercial speech" test of *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980), when upholding the petition support requirement. Pl.'s Mem. 10. According to Ashley, the Court of Appeals failed to recognize the "substantial mismatch" between the CDSOA's "putative objective" of rewarding parties assisting government enforcement of the antidumping laws and the means chosen, which distinguished between similarly-situated parties "that provided identical practical support" and did so based only on whether a party did or did not express support for an antidumping duty petition. *Id.* (citing *SKF*, 556 F.3d at

1352). Calling into question the reasoning of *SKF*, plaintiff states that "the Federal Circuit believed that the statute was constitutional because Congress had a 'rational' basis for the massive underinclusiveness of the statute." *Id.* at 10–11. We continue to disagree with Ashley's position that *SKF* is no longer precedent controlling on the First Amendment claims plaintiff advanced in this litigation. *See Ashley Furniture*, 36 CIT at __, Slip Op. 12–14, at 21–23.

The Court of Appeals stated in *SKF* that "regulation of lawful and non-misleading commercial speech is permissible if (1) 'the asserted governmental interest is substantial,' (2) 'the regulation directly advances the governmental interest asserted,' and (3) the regulation 'is not more extensive than is necessary to serve that interest.'" *SKF*, 556 F.3d at 1355 (quoting *Central Hudson*, 447 U.S. at 566). We reject plaintiff's conclusion that the CDSOA, when evaluated according to the Supreme Court's holding in *Sorrell*, now should be found to violate the First Amendment because of its "massive underinclusiveness." In the CDSOA, Congress chose to reward only petitioners and interested parties who expressed support for a petition "by letter or through questionnaire response" rather than rewarding all domestic producers that participated as interested parties in an antidumping duty investigation, including those declining to express support for an antidumping duty petition (such as Ashley, which informed the ITC that it opposed the issuance of an antidumping duty order on wooden bedroom furniture from China). 19 U.S.C. § 1675c(d)(1); First Amended Compl. ¶ 19. We find nothing in *Sorrell* establishing a broad First Amendment principle under which the CDSOA could withstand scrutiny under the *Central Hudson* test only by rewarding all such producers.

Plaintiff advances a contrary interpretation of *Sorrell*, viewing it to hold that "a facially discriminatory statute is invalid unless the Government can explain 'why remedies other than content-based rules would be inadequate' to fulfill its interests," and submits that the CDSOA would not be found constitutional under such an inquiry. Pl.'s Mem. 11 (quoting *Sorrell*, 131 S. Ct. at 2669). Plaintiff misconstrues the language it quotes from the Supreme Court's opinion. *Sorrell* struck down a Vermont statute that imposed content- and speaker-based restrictions on the availability and use of information obtained from pharmacies that identified prescribing physicians and had been used in the marketing of prescription drugs by pharmaceutical manufacturers. *Sorrell*, 131 S. Ct. at 2660–61. The quoted language appears in the context of the Supreme Court's explaining why the statute could not be justified by one of the purposes the State of

Vermont advanced for the statute, which was a concern on the part of the State to protect doctors from harassment by representatives of pharmaceutical manufacturers. *Id.* at 2669. In refuting that position, the Supreme Court noted that the State had not explained why that particular concern could not be addressed by remedies other than the content-based restrictions of the statute in question, opining that doctors who did not want to meet with these representatives could simply decline to do so. *Id.* at 2669. Contrary to the implied premise of plaintiff's argument, the Supreme Court, in discussing the claimed purpose of preventing such harassment, was not expanding or modifying the *Central Hudson* inquiry.

Ashley also argues that we erred in distinguishing the petition support requirement from the Vermont statute struck down by *Sorrell*, contending that in *Sorrell* "[t]he Supreme Court explained that an inference of suppressive purpose arose from the State's failure to satisfy the heightened scrutiny the Supreme Court applied, not that heightened scrutiny applied because the Court had already determined that the State had acted with a suppressive purpose." Pl.'s Mem. 12. We do not find merit in this argument. *Sorrell* neither held nor implied that a statute's purpose may be ascertained only by assessing whether the statute fails the relevant First Amendment test.

Also on the basis of *Sorrell*, Ashley argues that we failed to recognize the constitutional infirmity of the CDSOA, stating that "the relevant constitutional test does not vary depending on whether the government bans speech or merely burdens it by imposing a financial consequence for the speech." Pl.'s Mem. 12. Plaintiff also cites *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011), in support of its argument, submitting "that substantial burdens on speech are subject to the same constitutional test (whatever that test might be) as an outright ban on speech." Pl.'s Mem. 13. This argument is also unconvincing. *Sorrell* concluded that the Vermont statute did not survive scrutiny under the *Central Hudson* test, the same test that *SKF* applied in upholding the CDSOA. Neither *Sorrell* nor *Arizona Free Enterprise* provides a basis for us to ignore the holding in *SKF*, which rested on a conclusion that Congress had a substantial purpose in enacting the petition support requirement and that this purpose was not the intentional suppression of expression. *See Ashley Furniture*, 36 CIT at __, Slip Op. 12–14, at 22–23 (citing *SKF*, 556 F.3d at 1351–52).

Plaintiff also cites *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), which set aside as violative of the First Amendment a jury verdict imposing substantial liability on picketers of a military funeral for state tort law claims. Ashley argues that *Snyder* establishes a "constitutional principle," under which "Ashley's opposition to the government's proposed duties constituted speech on a matter of public concern that is afforded the same degree of constitutional protection as political speech, that conflicts with a premise of the Federal Circuit's decision in *SKF*." Pl.'s Mem. 14. Ashley states in its brief that "[c]ontrary to the distinction drawn by this Court, strict scrutiny did apply in *Snyder* not because of the nature of the burden (civil liability)" but because speech on public issues is entitled to special protection. Pl.'s Mem. 14. We do not agree that *Snyder* increased the likelihood that plaintiff will succeed on appeal. The case does not hold that *all* speech addressing matters of public concern, such as a position taken in antidumping litigation, must receive a level of judicial scrutiny higher than that applied in *SKF*.

Finally, plaintiff invokes *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), for the principle that "a statute that discriminates on the basis of viewpoint on issues of public concern is subject to strict scrutiny even if the speaker is a corporation." Pl.'s Mem. 14 (emphasis omitted). Ashley maintains that the Court of Appeals "transgressed" this principle "by applying a lax version of the commercial speech doctrine to a statute that would be subject to strict scrutiny as viewpoint discriminatory if applied to a private individual." *Id.* (citing *SKF*, 556 F.3d at 1361). Again, we are bound by the holding in *SKF*, and we do not consider *SKF* to have been implicitly overturned by *Citizens United*, the holding of which does not require us to apply to the CDSOA a more stringent First Amendment standard than that applied by the Court of Appeals in *SKF*. *See Ashley Furniture*, 36 CIT at __, Slip Op. 12–14, at 18–21.

For the foregoing reasons, the court concludes that plaintiff has not shown that upon appeal it is likely to succeed on the merits of its First Amendment claims.

B. Plaintiff Has Shown a Probability That It Would Be Irreparably Injured Absent an Injunction

As to whether plaintiff will suffer irreparable injury in the absence of an injunction, Ashley argues that denial of its motion would cause it irreparable harm in three ways. First, it argues that were CBP to distribute to other parties what Ashley claims is Ashley's share of the withheld distributions, it would suffer "immediate and irreparable harm because recoupment under the regulations will be inadequate to make Ashley whole and, moreover, the competitive disadvantage to Ashley is irreparable." Pl.'s Mem. 4. Second, plaintiff argues that because its claims involve First Amendment rights, any unlawful loss of those rights, even for short periods of time, may constitute irreparable injury. *Id.* Third, plaintiff argues that given the track record of companies exiting the wooden bedroom furniture industry or seeking creditor protection, it will be impossible to recover disbursed funds. *Id.* at 5. As a result, the regulation for recoupment for overpayments to ADPs by Customs, 19 C.F.R. § 159.64(b)(3) (2011), is unlikely to be a complete remedy. Pl.'s Mem. 5.

The court is willing to presume, based on the circumstances plaintiff identifies, that a distribution of CDSOA funds to furniture producers currently designated as ADPs is likely to prevent Ashley from receiving the funds to which it claims to be entitled. The distribution would render uncertain the prospects of plaintiff's ever receiving those funds in their entirety. Even though irreparable harm may not be a certainty, the court presumes, for purposes of ruling on plaintiff's motion, the irreparable harm requirement to be satisfied by plaintiff's motion for an injunction pending appeal.

C. Plaintiff Has Not Shown that Issuance of an Injunction Would Not Substantially Injure the Other Parties Interested in the Proceeding

On the question of substantial injury to the other interested parties in this proceeding, plaintiff argues that "[t]he balance of equities weighs strongly in Ashley's favor" because "[w]hereas the postponement of Defendant-Intervenor's CDSOA disbursement is at most an inconvenience, the prejudice to Ashley relating to premature CDSOA distributions is imminent and potentially permanent." Pl.'s Mem. 6–7.

To satisfy the third factor described in *Nken*, Ashley must show that defendant-intervenors would not be substantially injured by the court's granting the requested injunction, which is more than a showing that Ashley is favored by the balance of the hardships. The funds at issue have been withheld from defendant-intervenors for upwards of four years. The court is not in a position to presume that further delay, even if only during the course of appellate review, would cause defendant-intervenors nothing more than insubstantial harm.

D. Plaintiff Has Not Shown that the Public Interest Will Be Served by the Injunction

Ashley cites *American Signature, Inc. v. United States*, 598 F.3d 816 (Fed. Cir. 2010), for the proposition that "'[t]he public interest is best served by ensuring that governmental bodies comply with the law, and interpret and apply trade statutes uniformly and fairly.'" Pl.'s

Mem. 7–8 (quoting *Am. Signature*, 598 F.3d at 830). Plaintiff submits that granting the injunction it seeks is the best means of achieving this objective, arguing that "[t]he question of whether or not CBP's refusal to distribute CDSOA funds to Ashley is lawful remains unsettled in light of Ashley's appeal and remains so throughout the pendency of Ashley's appeal." *Id.* at 8. Ashley adds that, if it ultimately prevails, "unknown and immeasurable complications will arise as CBP attempts to recoup the duties from current affected domestic producers who . . . are in precarious financial states." *Id.* This attempted recoupment, according to plaintiff, "would contravene the public interest by costing tax payers untold amounts." *Id.*

We are not persuaded by plaintiff's "public interest" argument, which is grounded in a premise that the issue of whether or not CBP's refusal to distribute CDSOA funds to Ashley is lawful remains an unsettled question of law. That question is unsettled only in the sense that Ashley has appealed the judgment issued in this case. We continue to view the dismissal of Ashley's First Amendment claims as based on the precedent of *SKF*, which we consider to be binding on us. As we discussed above and in *Ashley Furniture*, plaintiff relies on Supreme Court First Amendment cases that do not implicitly overturn *SKF*. Contrary to plaintiff's position, we view *SKF* as a matter of settled law. In this respect, it cannot be said that the injunction would ensure "that governmental bodies comply with the law, and interpret and apply trade statutes uniformly and fairly." *Am. Signature*, 598 F.3d at 830. Plaintiff's argument concerning the cost to the taxpayer of attempting to recoup funds, which relies on the premise that the law is unsettled and will be decided in Ashley's favor, also does not convince us that the injunction being sought is in the public interest.

Rather, the public at large is best served by a lawful and orderly resolution of the issue posed by the continuing withholding of CDSOA funds. Continued delay in their distribution to those who are legally entitled to them is inimical to the public interest. Therefore, we conclude that the public interest factor does not support the grant of an injunction pending appeal.

IV. CONCLUSION AND ORDER

For purposes of ruling on Plaintiff's Motion for Injunction Pending Appeal and for Expedited Consideration, as filed on February 2, 2012, ECF No. 103 ("Plaintiff's Motion"), the court presumes that plaintiff has satisfied the irreparable harm factor. That factor, standing alone, is insufficient to justify the injunction plaintiff seeks, particularly where, as here, there has been no showing of likelihood of success on the merits of plaintiff's claims during the appellate process. Plaintiff has not satisfied the remaining two factors relevant to a determination on Plaintiff's Motion.

Upon consideration of Plaintiff's Motion, the accompanying memorandum of law, all papers and proceedings herein, and after due deliberation, it is hereby

ORDERED that Plaintiff's Motion be, and hereby is, DENIED.

Dated: March 6, 2012
New York, New York

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

Slip Op. 12–30

FISCHER S.A. COMERCIO, INDUSTRIA and AGRICULTURA, AND CITROSUCO NORTH AMERICA, INC, Plaintiffs, v. UNITED STATES, Defendant, and FLORIDA CITRUS MUTUAL, et al., Defendant Intervenors.

Before: Gregory W. Carman, Judge
Court No. 08 00277

MEMORANDUM ORDER

Carman, Judge:

I.
Introduction

The Court has reviewed Plaintiffs' motion for an indicative ruling pursuant to USCIT Rule 62.1, and Defendant's and Defendant Intervenors' responses in opposition thereto. USCIT Rule 62.1 states that

> [i]f a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:
> (1) defer considering the motion;
> (2) deny the motion; or
> (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

USCIT R. 62.1(a). Plaintiffs ask the Court to select option (3) and state that the Court would grant a motion for leave to amend the complaint or that such a motion by Plaintiffs raises a substantial issue. (Pls.' Mot., ECF No. 96.)

According to USCIT Rule 62.1, the Court is only authorized to make an indicative ruling "**[i]f a timely motion is made for relief** that the court lacks authority to grant because of an appeal that has been docketed and is pending." USCIT R. 62.1(a) (emphasis added). Plaintiffs have not filed a motion to amend their complaint, and even if they did, such a motion would not be timely, as final judgment was entered in this case long ago. Consequently, the Court concludes that Plaintiffs have failed to satisfy the prerequisite for obtaining an indicative ruling under USCIT Rule 62.1.

Moreover, even if Plaintiffs had filed a timely motion (such as a motion for relief from final judgment under USCIT Rule 60(b)) that this court lacked authority to grant because of the appeal that has been docketed and is pending, the Court would deny the motion out of respect for the jurisdiction of the Court of Appeals and in the interest of finality of judgment. *See* USCIT R. 62.1(a)(2). For the foregoing reasons, then, it is hereby

ORDERED that Plaintiffs' motion for an indicative ruling pursuant to USCIT Rule 62.1 is denied.

Dated: March 7, 2012
New York, New York

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

Slip Op. 12–31

MID CONTINENT NAIL CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and TARGET CORPORATION, Defendant-Intervenor.

Before: Nicholas Tsoucalas, Senior Judge
Court No.: 10–00247

Held: Redetermination upon remand by the Department of Commerce was not supported by substantial evidence nor in accord with the law.

Dated: March 7, 2012

Wiley Rein, LLP, (*Adam H. Gordon*, *Lori E. Scheetz*, *Robert E. DeFrancesco, III*) for Mid Continent Nail Corporation, Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*David D'Alessandris*); *Brian Soiset*, Office of Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for the United States, Defendant.

Jochum, Shore, & Trossevin, PC, (*Marguerite E. Trossevin* and *James J. Jochum*) for Target Corporation, Defendant-Intervenor.

OPINION

TSOUCALAS, Senior Judge:

INTRODUCTION

This matter comes before the Court upon the Final Results of Redetermination Pursuant to Remand Order ("*Redetermination*") issued by the United States Department of Commerce ("Commerce") on October 17, 2011. Comments in opposition have been filed by Plaintiff, Mid Continent Nail Corporation ("Mid Continent Nail") and in support by Defendant-Intervenor, Target Corporation ("Target"). For the reasons set forth below, the Court concludes that the *Redetermination* is not supported by substantial evidence and is otherwise not in accord with law, and remands this matter for proceedings consistent with this opinion.

BACKGROUND

The Court issued an opinion remanding this matter on May 17, 2011, in which the facts underlying this case are fully set forth. *See Mid Continent Nail Corp. v. United States*, 35 CIT __, 770 F. Supp. 2d 1372 (2011). In sum, Commerce had determined that steel nails otherwise subject to an antidumping order ("*Final Order*")[1] were not within the *Final Order's* scope when imported in household tool kits. *See Final Scope Ruling - Certain Steel Nails from the People's Republic of China ("PRC"), Request by Target Corporation* (Aug. 10, 2010), Public Rec. 27, ("*Final Scope Ruling*"). Before making this ultimate determination, Commerce decided to focus its scope inquiry not on the nails themselves, but on the tool kits within which the nails were imported. *Final Scope Ruling* at 5. After subjecting the tool kits to analysis under 19 C.F.R. § 351.225(k)(2), Commerce concluded that they were not subject to the *Final Order*.

Mid Continent Nail sought review, and the Court concluded that Commerce's determination was unsupported by substantial evidence and otherwise not in accord with law. First, the Court found that Commerce failed to address evidence from the antidumping investigation record indicating that the antidumping Petitioners intended their proposed scope language to include all certain steel nails, whether imported with non-subject merchandise or not. *Mid Continent Nail*, 35 CIT at __, 770 F. Supp. 2d at 1379.

Next, the Court found that Commerce had failed to sufficiently explain its decision to analyze the tool kits rather than the nails. *Id.* The Court concluded that this decision by Commerce was not sup-

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[1] *Notice of Antidumping Duty Order: Certain Steel Nails from the People's Republic of China*, 73 Fed. Reg. 44,961 (Aug. 1, 2008).

ported by the *Final Order*, which unambiguously includes the nails in question and grants no exception based on packaging or manner of importation. *Id.* at 1381. The Court also noted that Commerce has, in the past, employed inconsistent tests in deciding whether to analyze a mixed-media item or set[2] on its own as a unique product or the subject goods it contains. *Id.* at 1382.

Additionally, because it is well-established that Commerce may only interpret, and not change, its antidumping orders during scope inquiries, *Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995), the Court stated that any test leading Commerce to treat a subject good as a separate, unique product when such an approach was not warranted by the antidumping order was possibly unlawful. *Mid Continent Nail*, 35 CIT at __, 770 F. Supp. 2d at 1382. The Court therefore remanded this matter to Commerce so that it could, first, identify the legal authorization for employing such a mixed-media test, and second, clarify the test factors it would apply consistently.

On remand, Commerce stated that its authority to issue scope rulings derives generally from section 731 of the Tariff Act of 1930, which states that Commerce shall impose antidumping duties on "a class or kind of foreign merchandise." *Redetermination* at 2; *see also* 19 U.S.C. § 1673.[3] Commerce also relied on its inherent authority to define the scope of its antidumping orders. *Redetermination* at 2 (*citing Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089–90 (Fed. Cir. 2002)). In exercising this authority, Commerce must fashion scope provisions in "general terms," and it therefore has authority to inquire into whether certain goods are included within the scope, and then issue scope rulings. *Id.* at 3 (*citing* 19 C.F.R. § 351.225(a)). Commerce continued that

> neither [it] nor domestic petitioners can predict every permutation of a product that might be imported into the United States at a future time. . . . If [Commerce] were required to address every possible permutation of a product in an order, and [Commerce] were strictly limited to excluding only those products specifically identified and excluded in an order, then there would be little need for scope proceedings.

Id. at 3.

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[2] As noted in Mid Continent Nail, a mixed-media item is an item containing both subject and non-subject merchandise. *Id.* at 1375.

[3] All further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the United States Code, 2006 edition.

Commerce stated that, in addition to issuing scope rulings, the statutory and regulatory authority set forth above also permits it "to employ an analysis to determine whether its scope analysis should focus on the entire product or only on certain specific components of the imported product." *Id.* at 4. Commerce asserted that this authority has been upheld by a number of federal appellate court decisions. It relied on *Walgreen Co. of Deerfield v. United States*, 620 F.3d 1350, 1355 (Fed. Cir. 2010), for the authority to exercise discretion in focusing its scope inquiries and to determine whether a mixed-media item is a unique product. Additionally, Commerce relied on *Crawfish Processors Alliance v. United States*, 483 F.3d 1358 (Fed. Cir. 2007), in asserting that it has authority to determine when a subject good has been transformed or subsumed into a new, non-subject good prior to importation. *Id.* at 5 (*citing Crawfish*, 483 F.3d at 1363–64).

Its authority thus set forth, Commerce provided a four factor test it would employ to determine the focus of its scope inquiries when faced with a subject good imported as part of a mixed-media item. Specifically, Commerce will consider:

> (1) the practicability of separating the component merchandise for repackaging or resale; (2) the value of the component merchandise as compared to the value of the product as a whole; (3) the ultimate use or function of the component merchandise relative to the ultimate use or function of the mixed-media set as a whole; and (4) any other relevant factors that may arise on a product-specific basis.

Id. at 8.

Upon applying this test to the goods at issue in this case, Commerce determined that the proper focus of its scope inquiry was the tool kits within which the nails are packaged. Commerce then analyzed the tool kits under the factors set forth in 19 C.F.R. § 351.225(k)(1), and concluded that they were outside the scope of the *Final Order*.

JURISDICTION

The Court has jurisdiction over this review pursuant to 19 U.S.C. § 1516a(a)(2)(B)(vi) (2006), and 28 U.S.C. § 1581(c) (2006).

STANDARD OF REVIEW and LEGAL STANDARD

Similar to the Court's review of the *Final Scope Ruling*, the *Redetermination* will be upheld unless it is "unsupported by substantial evidence on the record, or otherwise not in accord with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The court gives significant deference to Commerce's interpretation of its own orders, but a scope determination is not in accordance with the law if it changes the scope of an order or interprets an order in a manner contrary to the order's terms." *Allegheny Bradford Corp. v. United States*, 28 CIT 830, 842, 342 F. Supp. 2d 1172, 1183 (2004).

ANALYSIS

Commerce is correct in its assertions that an antidumping duty can only be imposed on a "class or kind of foreign merchandise," that authority to define the scope of this class or kind of merchandise rests with Commerce, and that general language must be employed to accomplish this end. The law is clear, however, that once a final antidumping order is issued, Commerce's role in defining the scope of that order is finished, and it then becomes the interpreter of the order. The test set forth by Commerce in the *Redetermination* invites analysis of the product in question rather than interpretation of the *Final Order*'s scope, but the law upon which Commerce relies does not support such a variance from the well-established primacy of a final order.

First, as made clear by the *Redetermination*, there is no statute or regulation that squarely addresses the question of when Commerce should analyze a subject good within a mixed media item on its own, and when it should analyze the mixed-media item as a unique product. The statutes cited by Commerce simply authorize it to undertake scope inquiries and issue scope rulings.

This authority, however, must be exercised in light of the controlling case law cited above saying that Commerce is free to interpret its orders, but may not change them. *See Ithaca College v. N.L.R.B.*, 623 F.2d 224, 228 (2d Cir. 1980) ("The position of any administrative tribunal whose hearings, findings, conclusions and orders are subject to direct judicial review is much akin to that of a United States District Court, . . . and as must a district court, an agency is bound to follow the law of the Circuit."). (Internal citation omitted).

Commerce also stretched the holding of the court in *Walgreen* beyond what the facts of that case warranted. In *Walgreen*, the party seeking the scope ruling argued that because its petition identified the item for review as the entire mixed-media set, Commerce did not have the discretion to focus its inquiry on the subject good the set contained. *Walgreen*, 620 F.3d at 1354–55. The Court of Appeals affirmed that Commerce was not bound by the petition, and that it had authority to decide how the scope inquiry would be focused. *Id.* at

1355. However, the court in *Walgreen* never stated that this authority abrogated Commerce's obligation to exercise its authority in light of the final order in question. Indeed, the court reaffirmed that the basis of any scope proceeding is the language of the antidumping order. *See id.* at 1357 ("This court has made clear that it is the language of Commerce's final order that defines the scope of the order . . . .").

The Court also concludes that the *Crawfish* decision does not support the action taken by Commerce here. In *Crawfish*, the court affirmed Commerce's conclusion that subject crawfish tail meat had undergone a substantial transformation as an ingredient of etouffee, and could "no longer be considered freshwater crawfish tail meat." *Crawfish*, 483 F.3d at 1363. This standard for substantial transformation is not met in this case. In *Crawfish*, the subject tail meat was an ingredient in a stew-like etouffee that only needed to be heated to be eaten, and the record supported Commerce's conclusion that the other ingredients in the stew had penetrated the tail meat, permanently altering its flavor. *Id.* The nails in question here were packaged in a tool kit, but they were still nails that were going to be used as nails by the purchasers of the tool kits. The nails simply did not experience a *Crawfish*-like substantial transformation by merit of their inclusion in the tool kits.

Next, in reliance on the statement in 19 C.F.R. § 351.225(a) that antidumping orders must be written in "general terms," Commerce argues that it cannot "predict every permutation of a product that might be imported into the United States at a future time." *Redetermination* at 3. Putting aside for a moment this concern as a general matter, the record in this case indicates that no predictive powers were required to know that subject nails would be imported in mixed-media sets. During the antidumping investigation, i.e., before the *Final Order* was issued, an importer of nail gun sets including subject nails sought a determination that its sets were outside the proposed scope language. *See Mid Continent Nail*, 35 CIT at __, 770 F. Supp. 2d at 1376–77. In response, the Petitioners stated their belief that their proposed scope language, which was incorporated in all relevant parts in to the Final Order, included "nails exhibiting the physical characteristics described in the written scope description, whether imported alone or as part of a set of goods including non-scope merchandise." *Mid Continent Nail*, 35 CIT at __, 770 F. Supp. 2d at 1377. The Petitioners even stated that if Commerce believed clarifying language was necessary, they had no objection to Commerce including it. *Id.* Although Commerce was thereby expressly made aware of the fact that the Petitioners and importers had opposing views on whether the scope language covered subject nails imported in sets, Commerce never addressed the issue in either its preliminary determination or the *Final Order*. *Id.* It may not now rely on the "general terms" provision of 19 C.F.R. § 351.225(a) to attempt a new analysis and import into the *Final Order* language it did not put there initially.

Looking beyond the specific facts of this case, the Court notes that inclusion of subject goods in mixed-media items should come as no surprise to Commerce or petitioners and respondents in antidumping investigations. There is a long history of litigation over whether subject goods imported with non-subject goods remain subject to the final order.[4] Recognizing this possibility, and addressing it in the final order, does not require the ability to predict a product's every permutation, as lamented by Commerce in the *Redetermination*. Rather, it would move the mixed-media item discussion to the investigation, a preferable alternative since this is when Commerce has the greatest freedom to exercise its expertise in properly defining its orders' scopes. While no one expects antidumping orders to address every possible permutation, addressing easily foreseeable areas of dispute like this one provides greater certainty for those subject to the order, and preserves resources not only for those same parties, but for Commerce as well.

CONCLUSION

The law cited in the *Redetermination* does not grant Commerce authority to avoid the well-established principle that after a final antidumping order is issued, that order can be interpreted, but not changed. The factors set forth by Commerce to help it decide how to focus its scope inquiry expand impermissibly beyond interpretation of a final order into new analysis of goods better undertaken during the investigation. The nails in question here are unambiguously subject to the *Final Order*, and there is no support in the law or the record for concluding otherwise.

In accordance with the above, this case is remanded to Commerce for further proceedings consistent with this opinion.

Dated: March 7, 2012
New York, New York

/s/ NICHOLAS TOUCALAS

NICHOLAS TSOUCALAS SENIOR JUDGE

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[4] The Court previously discussed a number of prior scope rulings in which Commerce, dealing with a final order silent on the matter, had to determine whether a subject good remained subject when imported in a mixed-media item or set with non-subject goods. *See* Mid Continent Nail, 35 CIT at __, 770 F. Supp. 2d at 1381–82.