U.S. Court of International Trade

Slip Op. 17–130

COOPER TIRE & RUBBER COMPANY, COOPER (KUNSHAN) TIRE CO., LTD., and COOPER CHENGSHAN (SHANDONG) TIRE CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and the UNITED STEEL, PAPER and FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL and SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 15–00251

[Sustaining a decision in response to court order in litigation contesting a determination issued in an investigation of sales at less than fair value of certain passenger car and light truck tires from the People's Republic of China]

Dated: September 25, 2017

Gregory C. Dorris, Pepper Hamilton LLP, of Washington, D.C., for plaintiffs.

John J. Todor, Senior Trial Counsel, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel was *Mercedes C. Morno*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Geert De Prest, Stewart and Stewart, of Washington, D.C., for defendant-intervenor. With him on the brief were *Terence P. Stewart, Phillip A. Butler*, and *Nicholas J. Birch*.

OPINION

Stanceu, Chief Judge:

In this action, plaintiffs challenged the antidumping duty cash deposit rate that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") applied to imports of passenger car and light truck tires that they produced and exported from the People's Republic of China.

Before the court is the decision (the "Remand Redetermination") Commerce issued in response to the court's opinion and order in *Cooper Tire & Rubber Co. v. United States*, 41 CIT __, 217 F. Supp. 3d 1373 (2017) ("*Cooper Tire*"). The Remand Redetermination announces the Department's intention, expressed under protest, to recalculate plaintiffs' antidumping duty cash deposit rate. *Results of Redetermination Pursuant to Remand* (Apr. 17, 2017), ECF No. 43 ("*Remand Redetermination*"). For the reasons set forth below, the court sustains the Remand Redetermination.

I. BACKGROUND

Background in this case is set forth in *Cooper Tire*, which is summarized and supplemented, as necessary, herein. *See Cooper Tire*, 41 CIT at __, 217 F. Supp. 3d 1374–77.

A. The Parties to this Litigation

Plaintiffs Cooper (Kunshan) Tire Co., Ltd. and Cooper Chengshan (Shandong) Tire Co., Ltd. are affiliated Chinese producers and exporters of tires for passenger cars and light trucks. Plaintiff Cooper Tire & Rubber Company is an affiliated exporter of the subject merchandise of these producers. The court refers to plaintiffs collectively as "Cooper."

Cooper was a respondent in parallel antidumping duty ("AD") and countervailing duty ("CVD") investigations. The petitioner in both the AD and CVD investigations was the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (the "USW"). The USW is the defendant-intervenor in this action.

B. The Contested Determination

In June 2015, Commerce determined that imports of certain passenger vehicle and light truck tires are being, or are likely to be, sold in the United States at less than fair value. *See Antidumping Duty Investigation of Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, In Part*, 80 Fed. Reg. 34,893 (Int'l Trade Admin. June 18, 2015) ("*Final AD Determination*"). Commerce subsequently issued an "Amended Final Determination" accompanied by AD and CVD orders. *See Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Order; and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 80 Fed. Reg. 47,902 (Int'l Trade Admin. Aug. 10, 2015) ("*Amended Final Determination*").

In the Amended Final Determination, Commerce assigned Cooper an estimated weighted-average dumping margin of 25.84%. *Amended Final Determination*, 80 Fed. Reg. at 47,905. Commerce nominally set the cash deposit rate at the same rate as the estimated dumping margin but made two downward adjustments resulting in an applied cash deposit rate of 11.12% for subject merchandise Cooper exported to the United States. *Id.*, 80 Fed. Reg. at 47,904 n.19; *see also Final AD Determination*, 80 Fed. Reg. at 34,897. For the first of these two

adjustments, Commerce explained that it would subtract from the estimated dumping margin the "export subsidy rate" of 11.13%, which Commerce determined individually for Cooper in the course of the companion CVD investigation. *Final AD Determination*, 80 Fed. Reg. at 34,897. Meanwhile, the other separate rate respondents in the AD investigation received an "all-others" export subsidy adjustment of 13.53% to their cash deposit rate. *Id.* For the second adjustment, Commerce made a further reduction in Cooper's cash deposit rate, as well as for the other separate rate respondents, of 3.59% "to account for estimated domestic subsidy pass-through." *Id*. (footnote omitted).

The two downward adjustments made to Cooper's amended final dumping margin and nominal cash deposit rate of 25.84% resulted in an applied cash deposit rate of 11.12%. *Amended Final Determination*, 80 Fed. Reg. at 47,904 n.19.

C. Commencement of this Action

Cooper commenced this action to challenge the 11.12% cash deposit rate established in the Amended Final Determination. *See* Summons (Sept. 8, 2015), ECF No. 1; Complaint (Oct. 7, 2015), ECF No. 9. Before the court, Cooper claimed that the downward adjustment made by Commerce in setting Cooper's cash deposit rate was improperly calculated. *See Cooper Tire*, 41 CIT at __, __, 217 F. Supp. 3d at 1375, 1379–80.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to section 201 of the Customs Court Act of 1980, 28 U.S.C. § 1581(c). In reviewing a determination in an antidumping duty investigation, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

B. The Court's Decision in Cooper Tire

In *Cooper Tire*, the court determined that Commerce acted arbitrarily and capriciously in subjecting Cooper's merchandise to a cash deposit rate different than the cash deposit rate applied to all other separate rate respondents in the AD investigation. *Cooper Tire*, 41 CIT at __, 217 F. Supp. 3d at 1382–83. Specifically, the court held that Commerce lacked a rational basis for treating Cooper differently than other separate rate respondents when the Department limited Cooper's export subsidy adjustment to 11.13% compared to the 13.53% export subsidy adjustment received by the other separate rate respondents in the AD investigation. *Id.*, 41 CIT at __, 217 F. Supp. 3d at 1380–83. Accordingly, the court set aside as unlawful the Depart-

ment's determination of Cooper's cash deposit rate and ordered a redetermination. *Id*., 41 CIT at __, 217 F. Supp. 3d at 1384.

C. The Department's Remand Redetermination

In the Remand Redetermination, Commerce, under protest, recalculated Cooper's cash deposit rate. *Remand Redetermination* 3. Commerce recalculated Cooper's rate using the weighted average of the export subsidies received by the mandatory respondents in the CVD investigation (i.e., 13.53%), rather than the export subsidy calculated specifically for Cooper (i.e., 11.13%). *Id.* at 2–3. Commerce determined Cooper's recalculated cash deposit rate to be 8.72%, consistent with that received by all the other separate rate respondents. *Id.* at 3.

Commerce included draft amended cash deposit instructions in the Remand Redetermination. *See* Attach. 1 to *Remand Redetermination* (Apr. 17, 2017), ECF No. 43–1. In the draft amended cash deposit instructions, Commerce stated its intent to instruct U.S. Customs and Border Protection ("CBP") to apply Cooper's recalculated cash deposit rate of 8.72% to all entries of subject merchandise made by Cooper beginning the tenth day from the date on which the court issues a final judgment. *Id*; *see also Remand Redetermination* 3–4. The draft amended cash deposit instructions made no mention of applying the recalculated cash deposit rate of 8.72% retroactively to August 6, 2015, the date Cooper began paying the 11.12% cash deposit rate determined by the court to be unlawful.

D. Proceedings following the Remand Redetermination

Cooper and the USW filed comments on the Remand Redetermination. *See generally* Pls.' Comments on Results of Redetermination Pursuant to Remand (Apr. 27, 2017), ECF No. 45 ("Cooper's Comments"); Def.-Int.'s Comments on Remand Redetermination (Apr. 27, 2017), ECF No. 46. Defendant filed a response to the comments submitted by Cooper and the USW on May 8, 2017. Def.'s Resp. to Comments on Remand Redetermination, ECF No. 47 ("Def.'s Reply").

Cooper moved for an injunction following Defendant's reply to Cooper's comments on the Remand Redetermination. Pls.' Mot. for Prelim. Inj. (May 10, 2017), ECF. No. 49. The parties reached an agreement as to the terms of the injunction, which the court subsequently entered. Order (June 1, 2017), ECF No. 53. The injunction prohibits defendant from "making or permitting liquidation of any unliquidated entries of certain passenger vehicle and light truck tires" that "were entered on or after August 6, 2015 and through and including the date of publication in the Federal Register of the Notice not in

Harmony with the Court's Decision[.]" *Id*. at 1–2. The injunction also requires Commerce to instruct CBP to refund excess cash deposits for entries covered by the injunction upon entry of judgment sustaining the Remand Redetermination. *Id*. at 3.

E. The Court Sustains Cooper's Redetermined Cash Deposit Rate

In their comment submission, Cooper asserted that Commerce complied only partly with the court's order in *Cooper Tire*. Cooper's Comments 2–3. While Cooper agreed with the Department's recalculation of its cash deposit rate to 8.72%, Cooper took issue with the draft amended cash deposit instructions that Commerce intended to issue once the court entered judgment sustaining the Remand Redetermination. *Id*. Cooper asserted that because the draft amended cash deposit instructions would apply only prospectively, the Remand Redetermination "fail[s] to fully effectuate the [c]ourt's order to determine Cooper's cash deposit rate the same as all other separate rate respondents[.]" *Id*. at 2. Cooper maintained that it is entitled to the "full benefit" of its successful appeal in *Cooper Tire* and that the retroactive application of the amended cash deposit rate is "absolutely necessary" to fully effectuate the court's remand order. *Id*. at 5.

In response to Cooper's comments on the Remand Redetermination, defendant argued that the retroactive application of the amended cash deposit rate is not appropriate without an injunction enjoining liquidation of these entries. Def.'s Reply 5–10. Without an injunction, defendant asserted that, in accordance with 19 U.S.C. § 1516a(c)(1) (2012), all entries that were entered on or before the date of publication in the Federal Register of a notice of a decision of this Court not in harmony with that determination ("Timken Notice") must be liquidated in accordance with the contested determination. *See* 19 U.S.C. § 1516a(c)(1).[1]

The injunction Cooper obtained addressed defendant's objection as to the effect of 19 U.S.C. § 1516a(c)(1) and also addressed Cooper's concerns regarding the refund of excess cash deposits by ordering Commerce to instruct CBP to refund excess cash deposits for entries that were entered on or after August 6, 2015 through the date of the as-yet-unpublished Timken Notice. *See* Order (June 1, 2017), ECF No. 53. Additionally, during a telephone conference with the court,

[1] The relevant portion of that statute provides that:

> Unless such liquidation is enjoined by the court . . . entries of merchandise of the character covered by a determination of the Secretary, . . . shall be liquidated in accordance with the determination of the Secretary, . . . if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary . . . of a notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with that determination.

19 U.S.C. § 1516a(c)(1).

the parties agreed to CBP's payment of interest on the refund of excess cash deposits at the time of liquidation, rather than when refund of the excess cash deposits is made. *See* Attach. 1 to Joint Status Report on Consultations Regarding Draft Judgment Language ¶ 5 (Aug. 24, 2017), ECF No. 59.

III. CONCLUSION

The court concludes that all the issues pertaining to implementation of the Remand Redetermination have been resolved. The court concludes, further, that by correcting the erroneous calculation of the antidumping duty cash deposit rate the Remand Redetermination, as effectuated according to the agreed-upon terms of the injunction, complies with the court's opinion and order in *Cooper Tire*.

The court, therefore, will enter judgment sustaining the Remand Redetermination.

Dated: September 25, 2017
New York, New York

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

Slip Op. 17–131

NANTONG UNIPHOS CHEMICALS CO., LTD., et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 17–00151

[Defendant's motion for a more definite statement and plaintiffs' consent motion for an extension of time are granted.]

Dated: September 26, 2017

David J. Craven, Sandler, Travis & Rosenberg, PA, of Chicago, IL, for plaintiffs.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of Counsel on the brief was *Emma Thomson Hunter*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

MEMORANDUM OPINION AND ORDER

Eaton, Judge:

Before the court are the motion for a more definite statement of defendant the United States, ECF No. 17 ("Def.'s Mot."), the response of plaintiffs Nantong Uniphos Chemicals Co., Ltd., Nanjing Univer-

sity of Chemical Technology Changzhou Wujin Water Quality Sabilizer Factory, and Uniphos, Ltd. (collectively, "plaintiffs"), ECF No. 18 ("Pls.' Resp."), and plaintiffs' consent motion for an extension of time to file a joint status report, proposed scheduling order, and statement of issues, ECF No. 19.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2012). For the following reasons, the court grants defendant's motion for a more definite statement. Plaintiffs' consent motion for an extension of time is also granted.[1]

BACKGROUND

Plaintiffs filed their complaint on June 30, 2017, ECF No. 6, "to contest the Antidumping Duty Order and the underlying determinations issued by the United States Department of Commerce, International Trade Administration . . . [("Commerce" or the "Department")] in the investigation of 1-Hydoxythylidene-1, 1-Disphosphonic Acid from the People's Republic of China . . . ." Compl. ¶ 1 (citing *1-Hydoxythylidene-1, 1-Disphosphonic Acid From the People's Republic of China*, 82 Fed. Reg. 14,876 (Dep't Commerce Mar. 23, 2017) (final affirmative dumping determination), as amended by *1-Hydoxythylidene-1, 1-Disphosphonic Acid From the People's Republic of China*, 82 Fed. Reg. 22,807 (Dep't Commerce May 18, 2017) (amended final affirmative dumping determination), and accompanying memoranda). Subsequently, defendant filed its motion for a more definite statement pursuant to Rule 12(e) with respect to Counts Three, Five, and Six, asking the court to direct plaintiffs to revise these counts to identify the particular findings or conclusions in Commerce's determination that are being challenged, or, alternatively, file an amended complaint without them. *See* Def.'s Mot. (proposed order). The challenged counts make the following assertions:

> COUNT THREE
>
> 33. The allegations of paragraphs 1 through 22 are incorporated by reference and restated as if fully set forth herein.
>
> 34. The Department, in calculating final surrogate values, appl[ied] excessive and improper adjustments to the raw surrogate data resulting in an overstatement of the surrogate values.
>
> . . .
>
> COUNT FIVE
>
> 37. The allegations of paragraphs 1 through 22 are incorporated by reference and restated as if fully set forth herein.

[1] By their consent motion, plaintiffs requested an extension of time until September 27, 2017. On September 25, 2017, plaintiffs timely filed a joint status report, a proposed briefing schedule, and a statement of issues, ECF No. 20.

38. The Department, in making its determination, misread the record and mis-apprehended certain key facts.
39. Had the Department not mis-apprehended certain key facts, it would not have made certain decisions contrary to the actual facts of record.
40. The Department must take into account the actual facts of record in making its determination and any determination not based on the actual facts of record is inherently flawed.

COUNT SIX

41. The allegations of paragraphs 1 through 22 are incorporated by reference and restated as if fully set forth herein.
42. The Department's calculation of the Antidumping Duty deposit rate was not in accordance with law.
43. The Department erred when it calculated the Antidumping Duty deposit rate. The Department's calculation determination was not based on substantial evidence and was arbitrary and capricious, and an abuse of discretion.

Compl. ¶¶ 33–34, 37–43.

DISCUSSION

Rule 12(e) provides that a party may move for a definite statement where a pleading "is so vague or ambiguous that the party cannot reasonably prepare a response." USCIT Rule 12(e). The standard for pleadings is set out in Rule 8(a)(2): "A pleading that states a claim for relief must contain: . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." USCIT Rule 8(a)(2). As explained in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), this standard

> does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."

Iqbal, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007) (bracketing in original)). The pleading must "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "The 'factual allegations must be enough to raise a right to relief above the speculative level.'" *Sioux Honey Ass'n v. United States*, 672 F.3d 1041, 1062 (Fed. Cir. 2012) (quoting *Twombly*, 550 U.S. at 555).

The crux of defendant's argument is that plaintiffs' "naked assertions" have failed to give "fair notice" of the claims stated in Counts Three, Five, and Six, and that a more definite statement of the claims raised in those counts is needed so that defendant can formulate a response. Def.'s Mot. 3 (citing *Iqbal*, 556 U.S. at 678 and *Twombly*, 550 U.S. at 555). According to defendant, a more definite statement of the challenged counts would allow defendant "to determine whether a basis exists for a motion to dismiss, and to ensure that parties do not raise entirely new claims in their motions for judgment on the agency record." Def.'s Mot. 3. Moreover, a more definite statement is important for preparation of the joint status report, "which requires the parties to identify whether the case should be consolidated, or severed, and whether the Court possesses jurisdiction, and to propose a briefing schedule." Def.'s Mot. 3.

The court agrees that a more definite statement is needed with respect to the claims asserted in Counts Three, Five, and Six. Plaintiffs' arguments to the contrary are unconvincing.

Plaintiffs dispute that any additional factual detail supporting Counts Three, Five, or Six is required. First, noting that defendant does not challenge Counts One, Two, Four, or Seven of the complaint, plaintiffs contend that the challenged counts "are sufficient when read as a totality with the complaint as a whole." Pls.' Resp. 1; *see* Def.'s Mot. 2 ("Counts 1, 2, and 4 of the complaint raise discernible challenges to Commerce's determination. . . . Count 7 simply seeks fees and expenses under the Equal Access to Justice Act."). The factual sufficiency of some claims in the complaint, however, does not satisfy the pleading requirement for all of the claims in the complaint. Under Rule 8(a)(2), for each claim, plaintiffs must make a sufficiently detailed "short and plain statement of the claim" showing that plaintiffs are "entitled to relief." USCIT Rule 8(a)(2). Plaintiffs drafted their complaint to include seven distinct counts, raising seven distinct claims, and must support each of these claims "enough to raise a right to relief above the speculative level." *Sioux Honey Ass'n*, 672 F.3d at 1062 (quotation and citation omitted). Not only does Rule 8(a)(a) require as much, but it is particularly reasonable in light of the fact that this is a § 1581(c) case. That is, unlike in cases where a plaintiff does not have all of the facts at its disposal at the pleading stage, but will obtain more during discovery, plaintiffs know all of the facts that will be at issue in the case from having participated in the development of the agency record that is the subject of the appeal.

When examined individually, each of the challenged counts falls short of the pleading standard required by Rule 8(a)(2). Count Three merely hints at the nature of plaintiffs' claim. It alleges certain

unspecified "adjustments" to surrogate data, stating only that these adjustments were "excessive" and "improper" and resulted in "an overstatement of the surrogate values." Compl. ¶ 34. Plaintiffs identify neither the adjustments they challenge nor which surrogate values allegedly were overstated. In Count Five, plaintiffs suggest the existence of a claim in the barest of terms, alleging that had the Department not "mis-apprehended" "certain key facts," it would not have made "certain decisions contrary to the actual facts of record." Compl. ¶ 39. Plaintiffs do not elaborate at all on which "key" facts and decisions they take issue with. Count Six mentions Commerce's determination of an antidumping duty deposit rate, and only alleges in conclusory fashion that it fails to satisfy the applicable standard of review, *i.e.*, that it is not in accordance with law and supported by substantial record evidence. Compl. ¶¶ 42–43. Plaintiffs' argument that "[a] recitation of the factual errors made by the Department would require a 'detailed factual allegation'" that exceeds the pleading requirement under *Iqbal* is not persuasive. Pls.' Resp. 3. Although detailed factual allegations are not required, bald assertions are not enough; plaintiffs must provide "factual enhancement" of their assertions. *Iqbal*, 556 U.S. at 678. This plaintiffs have not done with respect to the challenged counts. Accordingly, defendant's motion for a more definite statement is granted.

CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that defendant's motion for a more definite statement is granted; it is further

ORDERED that plaintiffs' consent motion for an extension of time is granted; it is further

ORDERED that, on or before October 10, 2017, plaintiffs shall file either a more definite statement or an amended complaint in which plaintiffs (a) with respect to Count Three, identify the surrogate values that they are contesting and specify the adjustments they believe are excessive and improper; (b) with respect to Count Five, identify the key facts that Commerce allegedly misapprehended; and (c) with respect to Count Six, state with specificity why they believe the antidumping duty deposit rate is not in accordance with law; and it is further

ORDERED that, on or before October 31, 2017, the parties shall confer and jointly submit a revised joint status report, proposed scheduling order, and statement of issues.

Dated: September 26, 2017
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON, JUDGE