2011-1527

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

UNITED STATES,

Plaintiff-Appellee,

v.

TREK LEATHER, INC.,

Defendant,

and

HARISH SHADADPURI,

Defendant-Appellant.

Appeal from the United States Court of International Trade in case no. 09-CV-0041, Senior Judge Nicholas Tsoucalas.

EN BANC BRIEF OF PLAINTIFF-APPELLEE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE HISTORY

FEDERAL REGISTER NOTICES

MISCELLANEOUS

STATEMENT PURSUANT TO RULE 47.5

In accordance with Rule 47.5 of the Rules of this Court, counsel for defendant-appellee, the United States, makes the following statement:

1. Counsel for plaintiff-appellee is not aware of any other action that was previously before this Court, or any other appellate court, in or from the same civil action or proceeding in the lower court.

2. Counsel for defendant-appellee knows of the following pending cases in this or any other court that will be directly affected by this Court's decision in this appeal:

United States v. American Casualty Co. of Reading, Pennsylvania,
Consol. Ct. No. 10-00119 (Ct. Int'l Trade)

United States v. Chavez,
Ct. No. 12-00104 (Ct. Int'l Trade)

United States v. International Trading Services, LLC,
Ct. No. 12-00135 (Ct. Int'l Trade)

United States v. USA Aisiqi Shoes, Inc.,
Ct. No. 09-00402 (Ct. Int'l Trade)

INTRODUCTION AND ISSUES PRESENTED

Plaintiff-appellee, the United States, respectfully submits this brief in accordance with the Court's order of March 5, 2014. In its order, the Court directed the parties to file new briefs addressing the following issues:

A) 19 U.S.C. § 1592(a) imposes liability on any "person" who "enter[s], introduce[s], or attempt[s] to enter or introduce" merchandise into United States commerce by means of fraud, gross negligence, or negligence by the means described in § 1592(a). What is the meaning of "person" within this statutory provision? How do other statutory provisions of Title 19 affect this inquiry?

B) If corporate officers or shareholders qualify as "persons" under § 1592(a), can they be held personally liable for duties and penalties imposed under § 1592(c)(2) and (3) when, while acting within the course and scope of their employment on behalf of the corporation by which they are employed, they provide inaccurate information relating to the entry or introduction of merchandise into the United States by their corporation? If so, under what circumstances?

C) What is the scope of "gross negligence" and "negligence" in 19 U.S.C. § 1592(a) and what is the relevant duty? How do other statutory provisions in Title 19 affect this inquiry?

STATEMENT OF THE CASE

This appeal involves whether a corporate officer who personally committed grossly negligent violations of section 1592 may be held liable as a "person" pursuant to the terms of the statute.

Harish Shadadpuri, through his corporate importer, submitted false entry documents to CBP which undervalued men's suits imported by importer of record Trek Leather, Inc., resulting in under-collection of customs duties. *United States* v. *Trek Leather, Inc.*, 781 F. Supp. 2d 1306, 1309 (Ct. Int'l Trade 2012) (*Trek I*). Mr. Shadadpuri was Trek's president and sole owner, and also owned 40 percent of Mercantile Electronics, the suits' consignee. *Id.* When confronted by CBP about his statements, which understated the value of the suits by omitting the cost of fabric "assists"[1] used in their manufacture, Mr. Shadadpuri admitted that he knew that the cost of the fabric should have been included on the customs forms. *Id.* at 1309. This was Mr. Shadadpuri's second failure to declare fabric assists on imported suits. CBP had confronted him two years before and instructed him regarding his obligations. *Id.* "[D]efendants conceded it was Mr. Shadadpuri who had the responsibility and obligation to examine all appropriate documents

[1] 19 U.S.C. § 1401a(h)(1)(A) defines "assist" to include "[m]aterials, components, parts, and similar items incorporated in the imported merchandise."

including all assists within the entry documentation and to forward these assists to his customs broker." *Id*. at 1311.

The Government sued Trek and Mr. Shadadpuri in the Court of International Trade, contending that both were liable for fraudulently undervaluing the suits, or, in the alternative, that their violations were grossly negligent or negligent. The trial court granted the Government's motion for summary judgment in part, holding that both defendants had violated section 1592 through gross negligence. The trial court imposed liability on Mr. Shadadpuri personally because "[a]ny 'person' who engages in the behavior prohibited by 19 U.S.C. [§] 1592(a) is liable thereunder regardless of whether that 'person' is the importer of record or not." *Trek I,* 781 F. Supp. 2d at 1311. Over our objection, the trial court dismissed the Government's fraud claim as "moot." *Id.* at 1313. Mr. Shadadpuri appealed from the judgment to the extent that it imposed individual liability against him.

A divided Panel of this Court reversed, holding that only importers of record (and agents authorized in writing to act on their behalf) could be found liable for civil penalties based on *negligence* or *gross negligence* because the only "duties" involved in making customs entries were those imposed on importers of record under 19 U.S.C. §§ 1484 & 1485. *United States* v. *Trek Leather, Inc.*, 724 F.3d 1330, 1336-37 (Fed. Cir. 2013). Judge Dyk dissented, explaining that the

majority's conclusion contravened the text and history of the statute. *Id.* at 1340-43.

The Court granted our petition for rehearing *en banc* and vacated *Trek II*, directing the parties to proffer new briefs on questions related to whether corporate officers of importers of record may be held personally liable under 19 U.S.C. § 1592(a)(1)(A) for their own grossly negligent acts related to import transactions.

ARGUMENT IN RESPONSE TO COURT'S QUESTIONS

I. 19 U.S.C. § 1592(a) imposes liability on any "person" who "enter[s], introduce[s], or attempt[s] to enter or introduce" merchandise into United States commerce by means of fraud, gross negligence, or negligence by the means described in § 1592(a). What is the meaning of "person" within this statutory provision? How do other statutory provisions of Title 19 affect this inquiry?

A. Meaning Of Person Under Section 1592(a)

1. The Plain Language Of Section 1592 Provides That A Person Liable Under The Statute May Be A Corporate Officer Who Personally Committed The Acts Establishing The Violation

First and foremost, the word "person" means "a human being, esp. As distinguished from a thing or lower animal. . . ." WEBSTER'S NEW WORLD DICTIONARY 3D COLLEGE EDITION (1988). Congress has enacted various statutes that expanding on this ordinary definition of "person," including the Tariff Act of 1930, which further increased the scope of the word "person" beyond its ordinary

meaning as a human being, explaining that "[t]he word 'person' includes partnerships, associations, and corporations." 19 U.S.C. § 1401(d); *see also* 1 U.S.C. § 1 ("the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.").

Applying these basic understandings of the word "person," it is clear that any individual, corporation, partnership, or association that committed the acts establishing a violation may be liable under section 1592. The cardinal principle of statutory construction is to give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section. *Bennett v. Spear*, 520 U.S. 154, 173 (1997). The language used in section 1592(a)(1)(A) – "no person" – means exactly what it says. Had Congress intended that *grossly negligent* violators be limited to importers of record or some other subset of the universe of "person[s]" who may make grossly negligent misstatements or omissions to CBP, such a limitation would surely appear in statutory text. It does not. The Supreme Court has "'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *Dept. of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 503 (1994) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)).

In addition, the internal structure of section 1592(a)(1) makes clear that Congress intended that a non-importer of record may be considered a "person" under section 1592(a)(1)(A). In fact, the very next subparagraph provides that no person "may aid or abet *any other person* to violate subparagraph (A)." 19 U.S.C. § 1592(a)(1)(B) (emphasis added). Accordingly, had Congress intended to limit the universe of potential violators of subparagraph (A) to importers of record and to exclude from liability of all other persons unless found to have aided or abetted and importer's violation, it would not have stated in the aiding and abetting subparagraph that "any other person" may "violate subparagraph (A)." *Id*. Neither Mr. Shadadpuri nor the *amicus* attempt to address this (or any other) aspect of section 1592's plain language, despite the fact that Congress very deliberately used the word "person" to mean any individual or business association.

Lastly, given the clear statutory text, the trial court has long held that corporate officers may be held liable if the violation resulted from their own actions, thus making clear the understanding that "person[s]" who make representations to CBP in relation to import transactions have a duty to exercise reasonable care in making those statements. *See United States v. Matthews*, 533 F. Supp. 2d 1307 (Ct. Int'l Trade 2007), *aff'd*, 329 F. App'x 282 (Fed. Cir. 2009). (judgment against corporations and corporate officers for violations of section

1592(a)); *United States v. Golden Ship Trading*, 22 CIT 950, 953 (1998) ("This Court has adjudicated many cases wherein one who is not the importer of record was held liable for penalties when the circumstances warranted."); *United States v. Appendagez, Inc.*, 560 F. Supp. 50, 55 (Ct. Int'l Trade 1983) ("We conclude that there is nothing in the Act nor its legislative history to indicate that the Congress intended to restrict the applicability of the penalties to corporations and to exclude from the applicability of the penalties officers of corporations merely because of a claim that they were acting in their corporate capacities."). Furthermore, this longstanding construction of the word "person" in section 1592 was not limited to fraud claims. *See Golden Ship Trading*, 22 CIT 950 (denying corporate officer's motion to dismiss Government's *negligence* count). In sum, there is no basis to depart from the ordinary meaning of the word "person" in this case.

2. The Legislative History Of Section 1592 Established That "Person" Was Intended To Impose Liability Upon A Broad Category Of Potential Violators

The legislative history of section 1592 demonstrates that Congress intended to impose liability upon a large class of potential violators, including those in Mr. Shadadpuri's position.

First, the legislative history clearly establishes that Congress intended the word "person" in section 1592(a)(1)(A) to extend liability for violations far beyond

"importers of record." The precursor to subparagraph (A) imposed liability for false statements on a wide range of individuals. Specifically, the former section 1592 targeted

> any *consignor, seller, owner, importer, consignee, agent, or other person or persons* [who] enters or introduces, or attempts to enter or introduce . . . any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal . . . .

19 U.S.C. § 1592 (1976) (emphasis added). The legislative history demonstrates that the substitution of the word "person" for the classes of individuals and entities identified in the former statute was merely shorthand. The legislative history stated explicitly that "[t]he persons covered . . . [we]re intended to remain the same as they [we]re under [the previous] law, [and] emphasize[d] that . . . the committee d[id] not change the scope of [the existing law] with respect to the persons potentially liable." S. Rep. No. 95–778, at 18, 20 (1978); *see also* H.R. Rep. No. 95–1517, at 10 (1978) (statement that "the persons covered . . . [we]re intended to remain the same"). Indeed, the liability of any "person" has long been a fixture of the customs penalty statutes. *See, e.g., United States v. 25 Packages of Panama Hats*, 231 U.S. 358, 359-61 (1913) (explaining that 1909 amendments to penalty statute to impose liability on "any consignor, seller, owner, importer, consignee,

agent, or other person or persons . . . changed the law so as to increase the number of persons whose fraud should be punished.").

In sum, there is no doubt that Congress recognized that various parties could commit violations of section 1592 and intended that all violators be subject to 19 U.S.C. § 1592(a)(1)(A) for all levels of culpability, regardless of whether a violator was an importer of record. However, Congress never created a save harbor shielding corporate officers who committed grossly negligent violations of the law. Rather, Congress time and again expanded the scope of the law to ensure that violators like Mr. Shadadpuri would be subject to its reach.

B. Other Statutory Provisions Indicate That "Person" In Section 1592 Should Be Interpreted Broadly

In addition to section 1592, the expansive definition of "person" in 19 U.S.C. § 1401(d) applies to other penalty statutes within the Tariff Act of 1930, including penalties pursuant to 19 U.S.C. § 1595a(b) (importations contrary to law), 19 U.S.C. § 1526 (intellectual property import violations), 19 U.S.C. § 1453 (lading of merchandise), 19 U.S.C. § 1454 (unlading of passengers), 19 U.S.C. § 1584 (improper manifest); 19 U.S.C. § 1590 (aviation smuggling), 19 U.S.C. § 1593a (drawback claims), 19 U.S.C. § 1627a (unlawful importation/exportation of vehicles), and 19 U.S.C. § 1599 (officers not to be interested in vessels or cargo).

Section 1593a is especially telling because it parallels section 1592 with respect to duty drawback claims. Duty drawbacks are refunds of duties previously paid, which parties generally claim when imported merchandise is re-exported, often after further manufacture. *See, e.g.*, *Campbell v. United States*, 107 U.S. 407, 408-09 (1883) (drawback claim for exported linseed oil manufactured from imported linseed); *Int'l Light Metals v. United States*, 194 F.3d 1355, 1366 (Fed. Cir. 1999) (discussing drawback generally). Under section 1593a, "[n]o person, by fraud, or negligence -- (A) may seek, induce or affect, or attempt to seek, induce, or affect, the payment or credit to that person or others of any drawback claim by means of -- (i) any document, written or oral statement, or electronically transmitted data or information, or act which is material and false, or (ii) any omission which is material; or (B) may aid or abet any other person to violate subparagraph (A)." 19 U.S.C. § 1593a.

Section 1593a further sets forth administrative procedures for CBP to follow, including the issuance of prepenalty and penalty notices. It also defines the same standard of review in Court of International Trade penalty proceedings as under section 1592. "As in the case of penalties under section [1]592 . . ., specific procedures and other requirements are set forth in [section 1593a] for prepenalty notices and penalty claims." *Penalties for False Drawback Claims*, 65 Fed. Reg.

3,803 (Dept. of Treas. Jan. 25, 2000). Section 1593a parallels section 1592 in form and procedure, but addresses material false statements and omissions with respect to a different aspect of overall import transactions – fraudulent or negligent attempts to obtain refunds of *overpayment* of duties – as opposed to section 1592, which most often addresses *underpayment* of duties.[2]

In promulgating regulations to implement section 1593a, CBP explained that the definition of "person" in section 1593a is broad and intended to "include any person or company who is involved in providing data on which a drawback claim may be based or who is the drawback claimant":

> Comment: With reference to the use of the term "a person" in the proposed drawback penalty regulations, one commenter requested clarification on when that term refers to a drawback claimant, a drawback broker or a drawback consultant, and when the term refers to a combination of these three persons.
>
> Customs response: For purposes of drawback, a "person" or "party" is considered to include any person or company who is involved in providing data on which a drawback claim may be based or who is the drawback claimant. This would include importers, intermediary parties, drawback claimants, and agents such as

[2] A small minority of section 1592 cases involve no loss of revenue, for example, evasion of quotas through misrepresentation of country of origin. *See* 19 U.S.C. § 1592(c)(2)(B) (maximum gross negligence penalty if "violation did not affect the assessment of duties."). A Westlaw search revealed 16 published decisions by this Court involving section 1592; of those decisions, three involve "marking" duties and the remaining cases involve alleged underpayment of customs duties or fees.

> drawback brokers and drawback consultants. Therefore, any party that provides information or documentation to one who intends to file a drawback claim may be subject to the drawback penalty provisions.

Penalties for False Drawback Claims, 65 Fed. Reg. at 3,807.

Sections 1592 and 1593a are simply different sides of the same coin. In both, violators are penalized and revenue may be recovered due to misrepresentations regarding the amount of duty owed on import transactions. Most 1592 cases involve misrepresentations to CBP about the amount of revenue owed *before importation*, and section 1593a involves misrepresentations to CBP about the amount of revenue owed *after importation*. Accordingly, as section 1593a envisions liability for a wide variety of individuals and entities stemming from drawback claims, section 1592 should possess the same scope when addressing underpayments to the Government.

In addition to section 1593a, as noted above, the False Claims Act also applies to customs transactions, including the evasion of import duties. *See id*. (addressing false claims related to misrepresentation of country of origin on entries of imported mushrooms). We recognize that the False Claims Act is not part of Title 19, but given its applicability to customs matters, we respectfully request that the Court allow us to identify this additional analogous provision. *See United States ex rel. Tamanaha v. Furukawa Am., Inc*., 445 F. App'x 992, 993 (9th Cir.

2011) (allowing *qui tam* False Claims Act proceeding alleging undervaluation of imported merchandise for the purpose of evasion of customs duties to go forward); *United States ex rel Huangyan Imp. & Exp. Corp. v. Nature's Farm Products, Inc*., 370 F. Supp. 2d 993, 999 (N.D. Cal. 2005) (quoting 31 U.S.C. § 3729(a)(7) to explain "reverse False Claims Act," "imposes liability on any person who 'knowingly makes . . . a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.'"); *United States ex rel. Felton v. Allflex USA, Inc*., 989 F. Supp. 259 (Ct. Int'l Trade 1997) (retransferring *qui tam* False Claims Act complaint alleging evasion of customs duties to district court). And, as with section 1592, the False Claims Act imposes liability on "*[a]ny person* who – knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim. . . ." 31 U.S.C. § 3279(a)(1) (emphasis added).

Also, like section 1592, the False Claims Act's "provisions, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544-45 (1943).

The False Claims Act is especially relevant here because its culpability standard is akin to the section 1592 standard for the very gross negligence that Mr. Shadadpuri committed. Under the False Claims Act, "the terms 'knowing' and 'knowingly' -- (A) mean that a person, with respect to information-- (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) *acts in reckless disregard of the truth or falsity of the information*; and (B) *require no proof of specific intent to defraud*." 31 U.S.C. § 3729(b)(1) (emphasis added). This is very similar to the standard for gross negligence in section 1592, as the Court explained in *Hitachi*: "A finding of gross negligence would require a willful, wanton, or reckless disregard in . . . failure to ascertain both the relevant facts and . . . statutory obligation[s]." *United States v. Hitachi Am., Ltd*., 172 F.3d 1319, 1329 (Fed. Cir. 1999). In sum, the very gross negligence at issue in this case falls squarely within the ambit of the False Claims Act, which, like section 1592, covers any "person."

II. If corporate officers or shareholders qualify as "persons" under § 1592(a), can they be held personally liable for duties and penalties imposed under § 1592(c)(2) and (3) when, while acting within the course and scope of their employment on behalf of the corporation by which they are employed, they provide inaccurate information relating to the entry or introduction of merchandise into the United States by their corporation? If so, under what circumstances?

Yes.

Corporate officers and shareholders may be liable for duties and penalties if they personally violate section 1592(a). Liability depends on whether the officer was personally responsible for the actions that violated the statute. The statute does not penalize any person solely because he or she happens to be a corporate officer or shareholder. Instead, an individual is liable if that person committed a fraudulent, grossly negligent, or negligent violation of section 1592(a). Indeed, Mr. Shadadpuri admits that the grossly negligent conduct here was his own. Shadadpuri Br. at 12 ("The issue posed is whether Mr. Shadadpuri, under the circumstances here, can be personally chargeable with gross negligence for the *actions he took* in his capacity as a corporate officer and/or shareholder on behalf of the corporation.") (emphasis added).

A violation of section 1592(a) may include instances in which the individual knowingly took action that caused a false statement or omission on importation. *Matthews*, 533 F. Supp. 2d 1307 (corporate officer fraudulently participated in

transshipment scheme to evade antidumping duties); *Golden Ship Trading*, 22 CIT 950 (officer negligently signed false country of origin documents). Similarly, if an individual failed to correct a material misstatement or omission on entry documentation submitted to CBP or failed to act with due diligence to ensure the accuracy of information to CBP on entries which are later determined to be false or incomplete, that individual may be liable. *Appendagez*, 560 F. Supp. at 55 (noting that corporate officer may be liable if his "action involved direct participation, some lesser degree of informed participation, or even an omission of a duty to correct false invoices when the falsity and materiality of the representations on the invoices were brought to his attention.").

For example, in this case, Mr. Shadadpuri was personally responsible for the material false statements. Mr. Shadadpuri himself controlled the purchase of fabric "assists" abroad and provided them to foreign manufacturers but nevertheless failed to include those costs in his representations of dutiable value to CBP. *Trek*, 781 F. Supp. 2d at 1309. Foreign manufacturers used the fabric to produce men's suits, which Trek then imported into the United States. *Id.* In essence, Mr. Shadadpuri arranged to purchase fabric and have it made into suits overseas. He then omitted the value of the fabric when he reported the dutiable value of the suits to CBP. The undervaluation of the merchandise stemmed directly from Mr.

Shadadpuri's grossly negligent conduct within the course and scope of his employment on behalf of the corporation, where he was the person responsible for providing accurate information to CBP and where he himself knew that he was required by law to include the cost of the fabric in dutiable value. *Id*. at 1309-11. In sum, Mr. Shadadpuri himself made the material false statements in this case.

Accordingly, the Government charged Mr. Shadadpuri with violations of section 1592 because he violated section 1592, not because his company violated section 1592. As importer of record, Trek itself was independently liable for the violations that Mr. Shadadpuri committed.

III. What is the scope of "gross negligence" and "negligence" in 19 U.S.C. § 1592(a) and what is the relevant duty? How do other statutory provisions in Title 19 affect this inquiry?

A. Scope Of Gross Negligence And Negligence

CBP provided the importing community with definitions of "negligence" and "gross negligence," as set forth in 19 U.S.C. § 1592(a). 19 C.F.R. Pt. 171, App. B. An act or omission is negligent if committed "through either the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances either: (a) in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute; or (b) in communicating information in a manner so that it may be understood by the

recipient." 19 C.F.R. Pt. 171, App. B(C)(1). In addition, "[a]s a general rule, a violation is negligent if it results from failure to exercise reasonable care and competence: (a) to ensure that statements made and information provided in connection with the importation of merchandise are complete and accurate; or (b) to perform any material act required by statute or regulation." *Id.* Gross negligence requires an act or omission "done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute." 19 C.F.R. Pt. 171, App. B(C)(2); *Hitachi*, 172 F.3d at 1329.

The Courts have repeatedly relied on CBP's definitions. *See, e.g.*, *United States v. New-Form Manufacturing Co.*, 277 F. Supp. 2d 1313, 1327 (Ct. Int'l Trade 2003) (holding New-Form grossly negligent because, despite knowing that its merchandise was subject to antidumping duties, it disregarded its obligations by identifying the merchandise with HTS numbers that did not apply to the subject merchandise, and denying to its broker that it was the subject merchandise); *United States v. Ford Motor Co.*, 387 F. Supp. 2d 1305, 1320-21 (Ct. Int'l Trade 2005) (despite knowledge of rules, Ford repeatedly failed to inform CBP that the prices declared at entry were provisional, thus understating duties owed), *aff'd in part and rev'd in part*, 463 F.3d 1286 (Fed. Cir. 2006); *United States v. Optrex*

America, Inc., 560 F. Supp. 2d 1326, 1335 (Ct. Int'l Trade 2008) (importer failed to exercise reasonable care in classification of LCD panels).

Similarly, Congress explained in legislative history that CBP's regulations define the levels of culpability under the penalty statutes in Title VI of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057 (1993) (Customs Modernization Act, commonly known as the "Mod Act"). The Senate Report concerning the Mod Act noted the pre-existing regulatory definitions for gross negligence and negligence, and the use of these definitions in administering 19 U.S.C. § 1592. The report explained that it "expect[ed] the Service to continue to use these definitions in the administration of the penalty provisions[]." S. Rep. No. 103-189, at 73 (1993). Those definitions were as follows:

> (1) Negligence – A violation is determined to be negligent if it results from an act or acts (of commission or omission) done through either the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute, or in communicating information so that it may be understood by the recipient, As a general rule, a violation is determined to be negligent if it results from the offender's failure to exercise reasonable care and competence to ensure that a statement made is correct.
>
> (2) Gross negligence – A violation is deemed to be grossly negligent if it results from an act or acts (of

> commission or omission done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute.

Id. at 73-74. The language defining gross negligence and negligence above is virtually identical to the definitions currently found in CBP's regulations. 19 C.F.R. Pt. 171, App. B. The Senate Report further cited the trial court's decision in *United States v. Thorson Chemical Corp*., 795 F. Supp. 1190 (Ct. Int'l Trade 1992), which noted that the court was guided by agency regulations and case law in defining the three levels of culpability set forth in 19 U.S.C. § 1592(a). Lastly, the Senate Report evinces no intent to limit the scope of "person[s]" liable under 19 U.S.C. § 1592(a)(1)(A) for their own grossly negligent or negligent acts.

B. Other Provisions In Title 19 Contain Negligence Requirements Much Like Section 1592

Other sections of Title 19 mirror the negligence standard in section 1592.

First, the legislative history explained that one of the purposes of the Mod Act was to modify 19 U.S.C. § 1484(a) and bring the responsibilities of the importing community in line with regulations requiring the exercise of reasonable care under 19 U.S.C. § 1592. Indeed, Congress intended to amend 19 U.S.C. § 1484(a) to set forth the reasonable care requirement, and to make it apply to the "importing community" as a whole. *See* S. Rep. No. 103-189, at 73 (explaining

that "for 'informed compliance' to work, it is essential that the importing community share with the Customs Service the responsibility to ensure that, at a minimum, 'reasonable care' is used in discharging the importer's responsibilities."). The "reasonable care" standard was chosen in part because it is the standard used for a finding of negligence under tort law. In common law contexts, to commit an act negligently is generally to commit the act without adhering to "the standard of care that a reasonably prudent person would have exercised in a similar situation." Black's Law Dictionary (9th ed. 2009); *see also* Model Penal Code 2.02(d); Restatement (Second) of Torts § 285 (1965). Similarly, the use of the inclusive phrase "importing community" in S. Rep. No. 103-189 demonstrates congressional intent that the duty of reasonable care extends to all persons involved in import transactions, not merely importers of record.

In sum, contrary to Mr. Shadadpuri's and the *amicus's* contentions, Shadadpuri Br. at 12-16; *Amicus* Br. at 5-10, section 1484 does not limit the scope of which "person" may be liable for penalties under section 1592, or excuse any "person" not named in that statute from his or her own acts. Rather, it simply makes clear that the entire importing community must exercise reasonable care. Put another way, Congress did not intend to silently amend section 1592 to excuse negligence and gross negligence by non-importers of record by setting forth

standards for the importing community to follow in section 1484. But that is the crux of Mr. Shadadpuri's and the *amicus's* contentions.

The negligence standard applicable to 19 U.S.C. § 1593a also mirrors the section 1592 standard. As previously discussed, section 1593a, like section 1592, applies to any "person," and the universe of potentially liable parties is not limited to importers of record. Unlike section 1592, section 1593a contains only two culpability levels: negligence and fraud. 19 U.S.C. § 1593a(c)(1)-(2). As with the definition used for section 1592, CBP's regulations regarding section 1593a require a person to "exercise the degree of reasonable care and competence expected from a person in the same circumstances":

> (1) Negligence. A violation is determined to be negligent if it results from an act or acts (of commission or omission) done with actual knowledge of, or wanton disregard for, the relevant facts and with indifference to, or disregard for, the offender's obligations under the statute or done through the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances in ascertaining the facts or in drawing inferences from those facts, in ascertaining the offender's obligations under the statute, or in communicating information so that it may be understood by the recipient. As a general rule, a violation is determined to be negligent if it results from the offender's failure to exercise reasonable care and competence to ensure that a statement made is correct.

19 C.F.R. Part 171, App. D (B) (1); *see* 19 C.F.R. Pt. 171, App. B (C)(1) (negligence definition for section 1592 also requiring a person to "exercise the degree of reasonable care and competence expected from a person in the same circumstances").

IV. Mr. Shadadpuri And The *Amicus* Misapply The Law

A. Mr. Shadadpuri And The *Amicus* Misapply The Customs Law

Mr. Shadadpuri and the *amicus* misapply the plain language and history of section 1592 and rely heavily on inapposite statutory schemes to contend that Mr. Shadadpuri owed no duty of care to CBP even though he was the source of the material false statements.

In essence, Mr. Shadadpuri and the *amicus* contend that the Government must pierce the corporate veil to impose liability on Mr. Shadadpuri, despite the fact that he was a "person" who was grossly negligent in making material false statements to CBP in connection with the entry of merchandise. Even though Mr. Shadadpuri was the source of the false statements and controlled the events that resulted in the violation, according to the *amicus*, "there was no obligation that he personally exercise reasonable care." *Amicus* Br. at 7. This argument is without merit.

First, Mr. Shadadpuri concedes that the word "'person' generally carries a broad connotation and, as used in § 1592(a), should be read broadly as encompassing individuals as well as corporate entities." Shadadpuri Br. at 3. Mr. Shadadpuri also asserts that words such as "person or persons" should be limited "'to those objects to which the legislature intended them to apply.'" *Id*. at 4 (quoting *United States v. Palmer*, 16 U.S. 610, 631 (1818)). As described above, the ordinary definition of "person" is "human being" and Congress has only expanded that definition. Similarly, the legislative history described above shows that Mr. Shadadpuri is within the universe of "objects to which the legislature intended [the word person] to apply." *Palmer*, 16 U.S. at 631.

Similarly, Mr. Shadadpuri misapplies sections 1481, 1484, and 1485 at pages four through seven of his brief. Section 1481(c) provides that "[a]ny information required to be set forth on an invoice may alternatively be provided by any of the parties qualifying as an 'importer of record' under section 1484(a)(2)(B) of this title by such means, in such form or manner, and within such time as the Secretary shall by regulation prescribe." 19 U.S.C. § 1481(c). Section 1484 requires that all entities involved in importations exercise reasonable care in submitting information to CBP, and section 1485 requires that certain representations to CBP be under oath. As described above, none of these

provisions excuse any "person" from the wholly separate requirements contained in section 1592. Similarly, that CBP receives information through importers of record does not overcome the plain language of section 1592(a) to excuse violators' own material false statements.

Second, Mr. Shadadpuri and the *amicus* contend that non-importers of record may be held liable under section 1592 only for aiding and abetting a fraudulent violation of section 1592 by the importer of record. Shadadpuri Br. at 7-10; *see also Amicus* Br. at 10-14. This contention has no merit. Implicit in both Mr. Shadadpuri's and the *amicus's* assertions is the unsupported premise that the universe of actions that constitutes aiding and abetting section 1592 violations is limited to the making of material false statements. As a result, they appear to contend that the aiding and abetting provision (section 1592(a)(1)(B)) would be superfluous if section 1592(a)(1)(A) were to apply to negligent and grossly negligent individuals who are not the importer of record. This is simply not the case. Rather, aiding and abetting can include a host of actions that go far beyond the provision of information to CBP. For example, a logistics company can assist in arranging transshipment of merchandise through a third country to evade special duties imposed on merchandise from the manufacturing country. *See*, *e.g.*, STAFF REPORT, DUTY EVASION: HARMING U.S. INDUSTRY AND AMERICAN WORKERS,

prepared for Senator Ron Wyden (Nov 8, 2010) at 65-78 (Wyden Report) (identifying companies providing transshipment assistance to evade antidumping duties on Chinese merchandise).[3] Similarly, a "person" may aid and abet a section 1592 violation by knowingly assisting the importer in injecting the merchandise into the stream of commerce after importation. *Matthews*, 533 F. Supp. 2d at 1313 (co-defendant liable for fraud even though not importer because after importation, some merchandise was "housed at McGuire Steel's warehousing facility").

Moreover, Mr. Shadadpuri's reliance on *Hitachi* and *Inn Foods* misplaced. Shadadpuri Br. at 11-18. In *Hitachi*, the Court held "that liability for aiding or abetting requires, *inter alia*, proof of knowledge of unlawfulness, also articulated as intent to violate the law." *United States v. Hitachi Am., Ltd*., 172 F.3d 1319, 1337 (Fed. Cir. 1999); *see also United States v. Inn Foods, Inc*., 515 F. Supp. 2d 1347, 1356 (Ct. Int'l Trade 2007), *aff'd*, 560 F.3d 1338 (Fed. Cir. 2009) (piercing corporate veil under alter ego theory but finding that "that the Inn Foods corporate entity itself was involved in one way or another . . . in the transactions that are at issue in this case."). Based on these cases, Mr. Shadadpuri makes the leap of logic that non-importers of record may only be held liable for fraudulently aiding and abetting under section 1592(a)(1)(B). As explained above, the aiding and abetting

[3] Available at < http://www.wyden.senate.gov/download/?id=ab312b37-d16b-495c-a103-c1887afb37af >.

provision can cover acts beyond those reached by section 1592(a)(1)(A), which covers the material false statements and omissions themselves. In addition, as previously noted, the aiding and abetting provision itself provides that no person "may aid or abet *any other person* to violate subparagraph (A)." 19 U.S.C. § 1592(a)(1)(B) (emphasis added). This reinforces the common sense reading that the use of the word "any" strongly suggests that the "other person" who violated subparagraph (A) cannot be limited to an importer of record.

In addition, Mr. Shadadpuri's reliance on *dicta* in the Court of International Trade's interlocutory decision *Aegis Sec. Ins. Co. v. Fleming*, 593 F. Supp. 2d 1346, 1354 (Ct. Int'l. Trade 2008), does not assist its cause. Shadadpuri Br. at 15. In that case, a surety sought subrogation on a customs bond from the president of the importer after the Government had settled its claim against the surety. The trial court stated that the importer's president could not he held personally liable under section 1592(a)(1)(A) for negligence, opining that the surety must demonstrate fraud if it were to obtain subrogation.[4] The Government, however, was not involved in that matter, having dismissed its complaint against the surety, and had not even sued the company or its principal at the time of the *Fleming* decision.

[4] The surety settled with the company president shortly after the trial court's opinion. Ct. Int'l Trade No. 05-00276 (ECF No. 126).

Lastly, and although not dispositive, Mr. Shadadpuri's contention that it is impossible to aid or abet negligence or gross negligence is wrong. For example, even if an importer of merchandise subject to the type of transshipment scheme identified in the Wyden Report was merely negligent in being duped by the exporter and consignee, those who knowingly facilitated those transactions may still be liable for aiding and abetting. Wyden Report at 65-78.

B. The Government Need Not Pierce The Corporate Veil

Mr. Shadadpuri and the *amicus* contend that the Government must pierce the corporate veil to hold Mr. Shadadpuri responsible for his own violations of section 1592(a). Shadadpuri Br. at 14-21; *Amicus* Br. at 14-24. These contentions are unpersuasive because section 1592, not state corporate law, defines the scope of any person's liability under that statute. As explained above, section 1592's plain language and legislative history demonstrate that the Government need not pierce the corporate veil to hold Mr. Shadadpuri responsible for his own actions.

The *amicus* notes at page 17 of its brief that veil piercing occurs "more frequently in cases sounding in tort than in those sounding in contract, which appropriately distinguishes between voluntary and involuntary creditors." From this observation, it makes the unsupported assertion that "[t]he basic relationship between the IOR [importer of record] and [CBP] is contractual. The relationship

begins, in fact, with an express contract—a promise by the principal to pay duties, taxes, and fees, and to satisfy all other obligations arising out of its import activities—such covenants being secured by a surety bond." *Id*. at 18 (citing 19 U.S.C. § 1623); *id*. at 18, n.7 (noting that a customs bond is a contract). This argument makes no sense. Importers and the Government do not contract; rather, various parties enter into contracts with insurers to issue bonds covering certain obligations to the Government. Breaches of importers' obligations to the Government are not breaches of contract merely because the importer obtained a bond. Section 1592 is not a contract statute – it is a civil enforcement statute penalizes and/or remedies negligent, grossly negligent, and fraudulent material false statements and omissions.

C. The *Amicus's* Reliance On Patent Law Is Misplaced

The *amicus* erroneously attempts to draw an analogy between section 1592 and the patent law. *Amicus* Br. at 22-25 (citing 35 U.S.C. § 271).

The patent law prohibits any person from infringing a patent. 35 U.S.C. § 271(a) ("[w]hoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent."). It also prevents inducing infringement. 35 U.S.C. § 271(b) ("Whoever actively

induces infringement of a patent shall be liable as an infringer."). The *amicus* contends that inducement of infringing requires actual knowledge of infringement, and corporate officers or shareholders who are found not to have induced infringement may only be held liable if the plaintiff can pierce the corporate veil. According to the *amicus*, section 1592 should work the same way: a corporate officer who did not knowingly aid and abet a violation of section 1592 should only be personally liable if the corporate veil is pierced. Although the patent law may work in this manner, there is no basis to apply this logic to section 1592, given that Congress's use of the word "person" conclusively demonstrates that liability for violations of section 1592(a)(1)(A) is not limited to importers of record.

The intellectual property law creates a private right of action between private parties, whereas section 1592 involves the sovereign interest of the United States in protecting its borders while at the same time facilitating free and open trade. The Supreme Court's teaching in *K Mart Corporation, Petitioner v. Cartier, Inc.*, 485 U.S. 176 (1988), is instructive on this fundamental difference. There, the Court addressed whether the Court of International Trade's jurisdiction to entertain matters related to "embargoes" covered the exclusion of certain gray market goods from the United States pursuant to 19 U.S.C. § 1526, which bars entry of merchandise that infringes Untied States issued trademarks. The Court held that

"[a]n importation prohibition is not an embargo if rather than reflecting a governmental restriction on the quantity of a particular product that will enter, it merely provides a mechanism by which a private party might, at its own option, enlist the Government's aid in restricting the quantity of imports in order to enforce a private right." *K Mart*, 485 U.S. at 185.

In contrast to the private right enforced under the patent laws, under section 1592, CBP enforces among other things the United States' core revenue function, 19 U.S.C. § 3 ("Superintendence of collection of import duties"), while at the same time fostering free and open international trade. Indeed, "NAFTA's goal of creating a more integrated North American market," S. Rep. No. 103-189, at 63, could not occur absent "'shared responsibility' between [CBP] and the trade community [that] allows [CBP] to rely on the accuracy of information submitted by importers." *Id*. at 88. Absent shared responsibility and the streamlined import system in place, the antiquated system of inspection and assessment of every entry by CBP personnel would virtually halt all trade at the border.

In sum, the patent laws have no bearing on the sovereign interests protected by section 1592 and, thus, should not upset section 1592's plain language.

D. The Consequences Alleged By The *Amicus* Are Unlikely

The *amicus* contends that reversal of the trial court's judgment would result in "tempt[ation] to couple § 1592 claims with those arising elsewhere under the Tariff Act." *Amicus* Br. at 26. As a preliminary matter, a person should be responsible for all violations that he or she commits. For instance, a driver who speeds and runs a red light should be ticketed for both offenses. In addition, any concerns that the *amicus* raises here have been in existence for decades, and the *amicus* can identify no flood of litigation or mass exodus from the import business as a result. *See United States v. 25 Packages of Panama Hats*, 231 U.S. at 359-61 (1913 case applying same expansive view of customs fraud statute that *amicus* contends will lead to unintended harsh consequences); *Appendagez, Inc.*, 560 F. Supp. at 55 (1983 opinion in which trial court held "that there is nothing in the Act nor its legislative history to indicate that the Congress intended to restrict the applicability of the penalties to corporations and to exclude from the applicability of the penalties officers of corporations merely because of a claim that they were acting in their corporate capacities."). Indeed, it was the Panel opinion in this case that upset the long-existing *status quo*, not the Government's argument.

Finally, in contrast to the speculative consequences that the *amicus* alleges will occur absent reversal of *Trek I*, Mr. Shadadpuri's and the *amicus's* proposed

rule would carve a loophole in the customs laws allowing serial violators like Mr. Shadadpuri to escape liability. Corporate importers are often sole proprietorships or closely held, and the principals often dissolve one corporate importer and continue business under a different name. In sum, Mr. Shadadpuri's and the *amicus's*

> rule would . . . permit those directly responsible for a violation of the customs laws to avoid liability, or, at the very least, to unduly delay enforcement of those laws. Owners and officers might choose to alter the nature of the corporation by dissolving the corporation or selling the assets or shares of the corporation after the United States has commenced suit, thereby precluding the Government from recovering the penalty . . . .

United States v. Priority Prods., Inc., 793 F.2d 296, 299-300 (Fed. Cir. 1986).

CONCLUSION

For these reasons, we respectfully request that the Court affirm the trial court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 2nd day of June 2014, "*EN BANC* BRIEF OF PLAINTIFF-APPELLEE UNITED STATES" was filed electronically. This filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/ Stephen C. Tosini

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(B), I certify that the foregoing brief contains 7,527 words, excluding the parts of the brief exempted by the rule. The brief complies with the typeface requirements and type style requirements of FRAP 32(a)(5) and has been prepared using Times New Roman 14 point font, proportionally spaced typeface.

/s/ Stephen C. Tosini