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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. REAL PROPERTY LOCATED AT 10681 PRODUCTION AVENUE, FONTANA, CALIFORNIA, Defendant.	Case No. 5:17-cv-01872-DMG-SPx CLAIMANT'S MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM (FED. R. CIV. PROC. 12(B)(6)) AND/OR FOR VIOLATIONS OF DUE PROCESS Hearing Date: November 3, 2017 Time: 9:30 a.m. Courtroom: 8C

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CLAIMANT'S MOTION TO DISMISS

The corporate entity 10681 Production Avenue, LLC (hereinafter the "Claimant"), as the owner of defendant real property, *i.e.*, the "Real Property Located at 10681 Production Avenue, Fontana, California" (the "Subject Property"), hereby moves to dismiss this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and states as follows:[1]

I. PRELIMINARY STATEMENT

This civil forfeiture action is premised on the government's contention that the Subject Property was used by Claimant to conceal aluminum pallets that, according to the government, were allegedly smuggled into the country between 2011 and 2014 under false pretenses, in violation of U.S. trade law, in particular the U.S. Department of Commerce's ("DOC") antidumping and countervailing duty orders (the "AD/CVD Orders"). This factual predicate, however, is demonstrably false based on the fact allegations in the complaint itself, viewed in context of indisputable facts that are a matter of public record and of which the Court may take judicial notice.[2]

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[1] Claimant is simultaneously submitting a notice of claim to the government pursuant to Fed. R. Civ. P. Title XIII, Rule(G)(5)(a), which will also be filed in this action. The government filed identical *in rem* actions against other real property in three related actions, captioned: *U.S.A. v. Real Property Located at 1001 S. Doubleday Avenue, Ontario, California*, No. 5:17-CV-1873; *U.S.A. v. Real Property Located at 14600 Innovation Drive, Riverside, California*, No. 5:17-CV-1875; and *U.S.A. v. Real Property Located at 2323 Main Street, Irvine, California*, No. 8:17-CV-1592. After its filing, each action was subsequently transferred to this Court as related to the matter *In re Seizure of Containers of Aluminum Pallets Detained at Long Beach Port*, 5:16-cv-2640-DMG-SPx. The owners of these other properties are filing similar motions to dismiss those actions.

[2] Along with this motion, Claimant has filed a separate request for judicial notice, cited herein as the "Req. Jud. Notice."

At the outset, as is evident even from the government's own pleaded facts, when the aluminum pallets were imported into the country years ago, the importer correctly described the property as heavy-duty aluminum shipping pallets. This fact, coupled with the undeniable fact that the government has *for years* known about this property and subjected it to numerous inspections, demonstrates that the government's own substantial delay violated due process. The government long had notice of this property and the import classification codes used by the importers. U.S. Customs and Border Protection ("Customs") permitted the duty entries related to the import of these products to be "liquidated" (*i.e.*, closed upon a determination that no additional duties were owed) in the normal course. The government repeatedly inspected similar shipments of these pallets and permitted thousands of these pallets to be exported after inspection, and in some cases after detention. Moreover, three years ago, starting in 2014, the government conducted a detailed audit of one of the pallet importers, and concluded in early 2015 there were no violations of U.S. trade law.

If this property were truly contraband, then there would *not* have been *six years* of government inaction. The opposite is true: The fact that the government has not taken any action against the pallets over the last six years is proof that these products, openly and accurately declared when they were imported and long known to the government, are not in fact contraband and were not imported in violation of the AD/CVD Orders.

What triggered the government's forfeiture action is a DOC June 2017 scope determination ruling pertaining to 6xxx-series aluminum pallets. In that scope determination – a determination requested by domestic competitors of the importers of aluminum pallets – the DOC concluded for the first time that the pallets are prospectively subject to antidumping penalties and countervailing duties. This ruling is not yet final, and remains subject to judicial review before

the Court of International Trade. In any event, basic due process principles, as well as case precedent, prohibit applying this new rule retroactively. It cannot apply to imports that long preceded (by years) the ruling, which for the first time promulgated that such aluminum pallets are within the scope of the AD/CVD Orders.

The government's failure to act until now – a failure that it attempts to explain away based on its untenable theory – lulled the importers to import millions of dollars of the pallets only to face, once the trap was sprung, the years-later imposition of treble penalties of over $1.5 billion which would inure to the benefit of the government. The government's unreasonable delay is all the more inexplicable in light of related litigation between the government and the importers' successor entity, Perfectus Aluminum, Inc. ("Perfectus"). Perfectus, through counsel, has been in communication *for a year* with the United States Attorney's Office for the Central District of California ("USAO") concerning the federal government's unlawful detention of some of Perfectus' export shipments of the aluminum pallets. Despite repeated attempts to cooperate with and address any concerns of the government, the USAO and other government agencies – for over a year – refused even to articulate any lawful basis for detaining (and now forfeiting) the aluminum pallets and related properties like the Subject Property.

Instead of conferring with Perfectus in good faith, the government made court filings and statements to the media to sensationalize the detention of Perfectus' aluminum pallets. That tactic was heightened by the government's executions of search warrants and seizure notices on September 14, timed with the concurrent filing of this and the related civil forfeiture actions on that same day, seeking fines and penalties for over $1.5 billion. *See* Petition for Protective Order, *In Re Grand Jury Subpoenas Dated May 10, 2017, etc.*, Case No. 17-CM-01283 (C.D. Cal.), filed Sept. 26, 2017.

Underscoring the government's conduct in this case, Perfectus and Claimant learned of this (and the related) forfeiture actions – not from the government – but from a news reporter: A Wall Street Journal reporter contacted Perfectus' outside legal counsel seeking comment on the forfeiture actions within hours of their filing. Claimant did not receive formal notice from the government until yesterday, more than two weeks later, on October 2, 2017. Further, other witnesses who have been questioned by the government were told that they should "read the Wall Street Journal" if they want information about the case.[3]

Given the complaint's focus on alleged import violations and alleged harm to the U.S. domestic aluminum industry, the government's failure to act until the products, without ever entering or affecting the U.S. stream of commerce, were almost fully *exported* is, to say the least, anomalous. The complaint nowhere addresses this internal contradiction.

The government's own conduct in this case, as is evident from the fact allegations in its own forfeiture complaint, necessitates dismissal.

II. FACTUAL BACKGROUND

This action is one of four the government simultaneously filed on September 14, 2017 in the Southern and Eastern Divisions of this Court, seeking the forfeiture of the real property at four locations in California, which the government refers to collectively as the "Warehouses," and individually as the "Ontario Warehouse," the "Fontana Warehouse," the "Irvine Warehouse," and the "Riverside Warehouse." Compl. ¶ 8. The government alleges the Warehouses were used to store aluminum products, including aluminum pallets, imported by various predecessor entities to Perfectus (the "importers"). *Id.* ¶ 28.

[3] Perfectus, accordingly, has demanded that the government retain all communications with the news media concerning Perfectus and these related actions.

Pallets are used to facilitate the transportation and storage of goods and materials. Unlike traditional wooden pallets, the pallets at issue in this action are manufactured from aluminum planks permanently welded together. They are also heavier than wooden pallets. For these reasons, the aluminum pallets are more durable and long-lasting than the typical wood pallets. *See id.* ¶¶ 21, 23. The aluminum pallets were designed and manufactured (*i.e.*, the aluminum component parts were manufactured and permanently "welded together") in China. *Id.* ¶¶ 18, 23. Thus, based on the allegations in the complaint, upon arrival in the United States, each pallet was a completely manufactured product which could not be disassembled, required no further modification or assembly, and was ready for use by an end-user.

In contrast to the pallets, which are finished products, aluminum extrusions are merely "objects such as bars, tubes, or other parts" extruded from blocks of raw aluminum (known as billets). *Id.* ¶ 11. On May 26, 2011, the DOC issued the AD/CVD Orders regulating such aluminum extrusions imported from China, at the time concluding the extrusions "materially injured the U.S. domestic aluminum industry." *Id.* ¶ 18. The AD/CVD Orders, however, explicitly "exclude[] finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry." Federal Register Vol. 76, No. 102 at p. 30654 (May 26, 2011). As explained above, and as implicitly conceded by the government in its complaint, the aluminum pallets at issue here fit squarely within this exclusion. They are finished merchandise fully and permanently assembled and completed at the time of entry.

The Perfectus-related importers imported aluminum pallets into the United States between 2011 and 2014. Compl. ¶ 53. Many of these pallets were delivered to warehouse facilities in California, though some were stored with a New Jersey company, Aluminum Shapes, LLC ("Shapes"). *See id.* ¶ 13. As noted below,

Shapes also imported the same type of aluminum pallets in this same period (2013 to 2014), which imports were audited by the government in 2014 and 2015 and determined not to be within the scope of the AD/CVD Orders.

Because, at the relevant time, pallets were not within the scope of these orders, the penalty duties imposed by the AD/CVD Orders were not due on any of the pallets that were imported. They were not extrusions of component parts subject to the AD/CVD Orders – *i.e.*, they were not (in the words of the government's complaint) "bars, tubes, or other parts" made from aluminum. *Id.* ¶ 11. Because the pallets were finished merchandise at the time of their entry, they were appropriately classified by the importers' customs brokers as "free and dutiable" on Form 7501 for each import. *Id.* ¶ 22. This designation was never previously challenged by the government. In fact, all Perfectus-related pallet imports were "liquidated" by Customs in the ordinary course within a year of their import, which means that Customs closed the book entries pertaining to these imports such that all final duties that were owed had been calculated, and paid, no later than 2015. *See* 19 C.F.R. §§ 159 *et seq*. The government never "suspended" liquidation of the imported pallets as it could have done had it disagreed with the classification used by the customs brokers.

It is undisputed and a matter of public record that, beginning in late 2014, Customs conducted an audit of Shapes that was focused on compliance with the AD/CVD Orders. This audit included an in-person inspection by Customs agents of the many thousands of pallets that had been delivered to Shapes' facility, and also a detailed review of import documentation and records for at least two shipments Shapes itself imported from China in January 2014, which together contained more than 4,700 individual aluminum pallets. The express "objective" of this audit was "to determine if imports made by [Shapes] were within the scope of the [AD/CVD Orders] dealing with Aluminum Extrusions from China."

Req. Jud. Notice, Ex. 1 (U.S. Customs and Border Protection Office of International Trade Regulatory Audit No. 931-15-ADD-AU-24805, Sept. 16, 2015) (the "Shapes Audit Report").

The final audit report noted that the government specifically reviewed whether the "imports potentially subject to [the AD/CVD Orders] were declared accurate and complete to CBP [U.S. Customs and Border Protection], including the risk of potential fraud." *Id.* The report also noted that the government "[t]ested 100% of transactions from [Shapes'] ACE [Automated Commercial Environment] import data to assess compliance with applicable laws," including proper classification and AD/CVD duties. *Id.* at 4.

As the government well knows (but omitted from its complaint), Customs completed its audit of Shapes' pallet imports on or about September 16, 2015, and concluded that the aluminum pallet "import transactions . . . were not within the scope of the Department of Commerce ADD/CVD case numbers A-570-967 and/or C-570-968, dealing with aluminum extrusions from China [*i.e.*, the AD/CVD Orders]." *Id.* at 5. In other words, the government concluded that the AD/CVD Orders did *not* apply to the aluminum pallets – the same type of aluminum pallets at issue in this case.

Shortly before the government issued the Shapes Audit Report, Perfectus completed its program of importing pallets in 2014. Compl. ¶ 53. After attempts to market the pallets in the United States (*id.* ¶ 48), Perfectus started to export the pallets to Vietnam. During 2016, Perfectus exported from the U.S. some 6,337 shipping containers of pallets it had imported during the preceding years. *Id.* ¶ 34. It is undisputed that Customs had the opportunity to inspect each and every container that was exported to ensure Perfectus had complied with applicable law. During much of 2016, thousands of containers of pallets were exported without any issue being raised by the government.

In September 2016, however, as Perfectus was in the midst of this export program, the government detained approximately 720 containers, the bulk of which held the exact same type of pallets as the 6,337 containers previously exported. *Id.* ¶ 43. This detention is the subject of the related case pending before this Court filed by Perfectus in December 2016. *See In re Seizure of Containers of Aluminum Pallets Detained at Long Beach Port*, 5:16-cv-2640-DMG-SPx. As pleaded in the government's complaint, Customs seized these containers – even though none of the other 6,337 containers had been detained – purportedly because Customs had "determined" at some point in October 2016 that the pallets were "subject to the AD/CVD Orders." *Id.* ¶ 42.

This determination contradicts the prior 2015 Shapes Audit Report. The government has thus taken irreconcilable positions regarding the applicability of the AD/CVD Orders. Furthermore, as also pleaded in the complaint, the DOC had made no determination concerning the applicability of the AD/CVD Orders to aluminum pallets until June 2017, *eight months later*, as described below. Thus, even the DOC had not determined whether its own AD/CVD Orders applied to aluminum pallets at the time that Customs detained Perfectus' export shipment. Additionally, the government's inaction with respect to the pallets at the time they were imported confirms that the government determined, at that time, the AD/CVD Orders *did not apply* to the pallets. Thus, until the 2017 scope ruling, Perfectus and its predecessor entities had no notice or reason to believe that the 2011 AD/CVD Orders applied to the imported aluminum pallets.

In March 2017, a consortium of competitors of Perfectus known as the Aluminum Extrusions Fair Trade Committee (the "AEC") petitioned the DOC to conduct a "scope ruling" on the type of pallets at issue here, namely those constructed from "6xxx Series" aluminum, contending that these pallets were within the scope of the 2011 AD/CVD Orders. *See Aluminum Extrusions from the*

People's Republic of China: Scope Ruling Request for 6xxx Series Aluminum Pallets, Barcode No. 3548525-01, DOC Case Nos. A-570-967, C-570-968 (March 3, 2017). This was the *first time* the DOC was asked to determine whether its AD/CVD Orders applied to 6xxx-series pallets. On March 28, 2017, Perfectus opposed AEC's Scope Ruling Request on the ground that, because pallet imports had ceased years earlier, such scope inquiry was moot. *See id.* Barcode No. 3555650-01.

Nonetheless, on June 13, 2017, the DOC made its determination on the scope ruling request, and – for the first time – found the at-issue pallets to be within the scope of the AD/CVD Orders (the "2017 scope ruling"). *Id.* at Barcode No. 3580871-01 (attached to Req. Jud. Notice as Ex. 2); Compl. ¶ 19. The 2017 scope ruling was made pursuant to 19 C.F.R. 351.225(k)(1), which means it was not the result of any formal scope review process, but instead was based on the self-serving contents of the AEC's scope ruling request petition. *See* Req. Jud. Notice Ex. 2 (2017 scope ruling) at 16; *see also* 19 C.F.R. § 351.225(k)(1). Additionally, as of this date, notice of the 2017 scope ruling has not yet been served on Perfectus, as required pursuant to the order. *See id.*; *see also* 19 C.F.R. § 351.225(d).

III. ARGUMENT

A. Applicable Legal Standard

"A complaint for forfeiture *in rem* is subject to a heightened pleading standard, and must 'state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial.'" *U.S. v. Approximately $28,120.00 in U.S. Currency*, No. 1:13-CV-00640, 2014 WL 7359189, at *2 (E.D. Cal. Dec. 24, 2014) (citing Fed. R. Civ. P. Title XIII, Rule G(2)(f)). A claimant may move to dismiss such a proceeding pursuant to Fed. R. Civ. P. 12(b). Fed. R. Civ. P. Title XIII, Rule G(8)(b)(i).

In general, pursuant to Fed. R. Civ. Proc. 12(b)(6), a complaint must be dismissed if it fails to state a claim upon which relief can be granted. When considering a motion to dismiss pursuant to Rule 12(b)(6), the Court must determine whether the complaint "contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Under this standard, "'well-pleaded factual allegations' in a complaint are assumed true, while '[t]hreadbare recitals of the elements of a cause of action' and 'legal conclusion[s] couched as a factual allegation' are not." *Benitez v. Hutchens*, 2016 WL 7477590, at *2 (C.D. Cal., Sep. 8, 2016) (quoting *Iqbal*, 556 U.S. at 678-79). The court is not required to "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

A claim is plausible when the "factual allegations permit 'the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). A complaint that only pleads facts that are "merely consistent with a defendant's liability does not meet the plausibility requirement." *Id.*

This determination is "context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility 'where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.'" *Orange Second, LLC v. Greystone Servicing Corp.*, 2009 WL 10672039, at *2 (C.D. Cal. Oct. 9, 2009) (quoting *Iqbal*, 556 U.S. at 679).

In addition, a claim that is barred as a matter of law also fails to state a claim. Where, as here, undisputed facts that are a matter of record demonstrate that the government violated constitutional due process, the forfeiture proceeding

should be dismissed at the pleading stage. *See, e.g.*, *United States v. Ball*, No. 15-10319, 2017 WL 4231568, at *2 (9th Cir. Sept. 25, 2017) (exorbitant delay caused by fundamentally unfair governmental conduct violated the Due Process Clause) (citing *Betterman v. Montana*, 136 S. Ct. 1609, 1613, 1617 (2016)).

B. The Complaint Allegations Are Insufficient to State a Claim

1. The Scope Ruling Cannot be Applied Retroactively

The 2017 scope ruling, cited by the government in its complaint (¶ 19), cannot be the basis for the relief the government seeks in this action for two reasons. First, and as described further below, Perfectus has not yet been given the opportunity to challenge the 2017 scope ruling in the Court of International Trade, though it will do so at its earliest opportunity (*i.e.*, when formal notice of the scope ruling has been formally served). Second, as discussed herein, the DOC cannot use the issuance of the scope ruling to reverse itself and retroactively suspend or reverse liquidation of the pallet imports to impose additional duties. Therefore, no violation of the AD/CVD Orders occurred and no AD/CVD duties are owed now, nor have any AD/CVD duties *ever* been owed.

The Court of International Trade considered this issue of retroactivity earlier this year in *United Steel and Fasteners, Inc. v. United States*, 203 F. Supp. 3d 1235 (Ct. Int'l Trade 2017). In that case, the court determined that the DOC did not have the authority to instruct Customs to suspend liquidation of imports retroactively when such entries were not previously subject to any suspension. The court rejected the government's attempt to impose antidumping duties as a result of a later-issued scope ruling made pursuant to 19 C.F.R. § 351.225(k)(1), the same provision under which the DOC issued its 2017 scope ruling as to the pallets. Under its governing regulations, the DOC does not have "unfettered authority to suspend liquidation retroactive to the date liquidation was first suspended for antidumping purposes." *United Steel*, 203 F. Supp. 3d at 1255. *See id.* at 1252

("Commerce's examination of the (k)(1) sources without a formal scope inquiry does not relieve the Department of its obligation to comply with its regulations concerning the effective date for suspending liquidation because the final scope ruling clarified the scope of an ambiguous order.") For that reason, a scope ruling clarification, under the DOC's own regulations, applies only prospectively and cannot be applied retroactively to "liquidated" import entries.

The court based this decision on sound policy considerations and a review of the relevant regulations:

> Commerce was mindful when drafting its regulations that suspension of liquidation is an action with a potentially significant impact on the business of U.S. importers and foreign exporters and producers. The Department explained that, "*when liquidation has not been suspended, Customs, at least, and perhaps the Department as well, have viewed the merchandise as not being within the scope of an order, importers are justified in relying upon that view, at least until the Department rules otherwise*."

Id. at 1250 (emphasis added).

Perfectus and its predecessors (*i.e.*, the importers) were, accordingly, justified in relying on the government's prior determinations that the pallets they imported were *not* subject to the AD/CVD Orders at the time of importation, and that those previously liquidated entries of pallets are *not* subject to the AD/CVD Orders at this time, even in light of the prospective 2017 scope ruling.

Because there was no suspension of liquidation, Customs never collected deposits of antidumping duties on the pallets when they were imported in 2011-2014. This confirms, according to *United Steel*, that at minimum "the scope of the [AD/CVD Orders] was not clear with respect to" the pallets, 203 F. Supp. 3d at 1253, and that retroactive penalty duties would be impermissible. Under the framework of *United Steel*:

> Customs' failure to assess antidumping duties on [the pallet] entries ostensibly showed that Customs did not view [the pallets] within the scope of the [AD/CVD Orders]. Commerce needed to issue the final scope ruling to clarify that [the pallets] are included within the scope of the [AD/CVD Orders].

Id. The DOC did so in June 2017, but that was well after Perfectus stopped importing any pallets.[4]

The entire premise of the government's theory as to the purported "illegality" of the pallet imports is based on the importers' purported non-compliance with duties imposed by the AD/CVD Orders. But, because liquidation was never suspended on the importers' 2011-2014 pallet entries, and because *United Steel* makes clear that the DOC cannot retroactively impose penalty duties based on a subsequent scope ruling, Perfectus' conduct was lawful, vitiating the entire theory of the government's forfeiture case. *See* Compl. ¶ 53. Therefore, the Subject Property at issue here (the Warehouses) – cannot be subject to forfeiture.

2. Other Pleading Deficiencies Mandate Dismissal

Even apart from this retroactivity issue, many of the complaint's conclusory allegations concerning the pallets are contradictory, and in some cases nonsensical. Such facially implausible allegations cannot meet the heightened forfeiture pleading standard and are insufficient to sustain an *in rem* forfeiture complaint. Dismissal, therefore, is warranted pursuant on Rule 12(b)(6). *See Sprewell*, 266

[4] If a suspension of liquidation on aluminum pallet imports occurred, it occurred at the earliest in March 2017 when the AEC initiated the scope inquiry – which is long *after* the pallets at issue here were imported and liquidated. *See* 19 C.F.R. § 351.225(l)(2) ("[T]he Secretary will instruct the Customs Service to suspend liquidation . . . on or after the date of initiation of the scope inquiry"). This is in contrast to *United Steel*, where the merchandise in question was actively being imported when that scope inquiry was initiated, which triggered a suspension of liquidation from that date forward. *See* 203 F. Supp. 3d at 1240, 1248-49.

F.3d at 988; *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004) ("conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss").

In the complaint, the government alleges now, for the first time, that the classification of the pallets as "finished product" on Customs import forms was knowingly false. *Id.* ¶¶ 22, 24. The facts actually pleaded in the complaint, however, confirm nothing was "false" about this classification. The government acknowledges (as it must) in its complaint that the pallets *were* "finished products" when they were imported, noting, "the 'pallets' imported by Perfectus were . . . Series 6 [aluminum] extrusions cut-to size [appropriate for pallets] and welded together in the shape of pallets." *Id.* ¶ 23. Such description accurately describes what the government refers to in the complaint as an "authentic aluminum pallet." *Id.* ¶ 42. Therefore, even the government's own pleaded facts make clear that the pallets imported between 2011 and 2014 were "finished products" at the time of their entry, not extrusions to be used in construction or assembling other finished products. That shows the designation used on import documentation was proper.

In any event, given that the recent scope ruling is not retroactive for the reasons stated above, even on the pleaded facts Perfectus at the very least had a reasonable, good faith belief that the import classification used for the pallets was truthful and correct. In the context of that indisputable fact, the government's complaint fails to allege with particularity any basis on which to conclude that Perfectus' classification designation was "knowingly false," as the deficient complaint alleges.

The government also for the first time now takes issue with how pallets were classified on export documentation beginning in 2016. The government alleges that Perfectus directed its freight forwarder to identify the pallets as "aluminum extrusions" on export documentation the third-party freight forwarded filed with

Customs. *Id.* ¶¶ 35, 39. But, as Perfectus already demonstrated in a court filing in February 2017 in the related pending case, the only evidence the government has to support this contention is *its own* documentation that *it* prepared. *See* Req. Jud. Notice, Ex. 3 (Perfectus' Reply Memorandum at p. 6 n.3, Case No. 5:16-cv-02640-DMG-SPx, Doc. No. 30, filed Feb. 17, 2017.) The export documentation Perfectus prepared, by contrast, identified the exports as containing aluminum pallets. *Id.*

Moreover, the government premised its complaint on a conclusory allegation that the pallets at issue here were "impractical for real-world use and too expensive to be sold for use as pallets." Compl. ¶ 21. Its own complaint, however, also alleges that there *is* a "practical" use for such pallets; specifically, it alleges that "industrial use" may be (as in fact it is) an appropriate use for such pallets. Then the government contradicts itself again by implying that, because a single pallet it inspected purportedly "did not appear to be designed for industrial use," all the pallets were similarly defective. *Id.* ¶ 42. The government fails to plead sufficient facts to support its conclusory and implausible claim of "impracticality," which, at the pleading stage, must, for that reason, be disregarded.

In light of these internal inconsistencies and inherent falsehoods, the government's allegations of "illegality" do not withstand scrutiny. As is evident from the face of the complaint, there were no entry of goods by means of a false statement, no smuggling of goods, and no unlawful export statements in violation of any of the statutes the government invokes. *See* Compl. ¶ 53. The Subject Property is, therefore, not forfeitable based on "illegality." *Id.*; *see also* 19 U.S.C. § 1595a.

C. Due Process Violations Preclude Forfeiture

In addition to the foregoing pleading deficiencies, at least three distinct violations of Claimants' due process rights also bar the government from

proceeding with this action. First, the 2017 scope ruling remains in limbo due to deliberate stalling by the government, preventing interested parties like Perfectus from seeking judicial review of the DOC's ruling. Second, the government, through Customs, previously confirmed that the AD/CVD duties did not apply to the importation of aluminum pallets. Therefore, it would be impermissible for it to reverse itself here. Third, the delay between the time the pallets were imported and commencement of these forfeiture actions violates constitutional principles of due process and fairness.

1. The Government's Failure to Serve its 2017 Scope Ruling Violates Due Process

According to 19 U.S.C. § 1516a, a party involved in a DOC scope inquiry, known as an "interested party," may seek judicial review of the DOC's conclusions at the Court of International Trade. However, according to the regulation, an interested party may seek such judicial review *only* upon the DOC's distribution of its scope ruling to all parties on the official service list of the particular DOC docket for the matter. As stated in the relevant portion of the regulation:

> Within thirty days after . . . the date of mailing of a [scope] determination . . . an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint . . . contesting any factual findings or legal conclusions upon which the determination is based.

19 U.S.C. § 1516a(a)(2)(A)(ii).

The 2017 scope ruling is dated June 13, 2017. The government, however, never served the ruling on Perfectus, an "interested party" on the service list for the action. Perfectus' counsel contacted the International Trade Compliance Analyst at DOC responsible for the 2017 scope ruling about this lengthy delay on multiple

occasions, but received no explanation for the delay. As of the date of this filing, the government has also failed to publish the June 2017 scope ruling in the Federal Register, which is atypical.

This delay thus appears intentional. It has prevented interested parties from seeking *any* review whatsoever of the DOC's determination as to the inclusion of aluminum pallets in AD/CVD Orders. This violates due process, and accordingly, the government should be prohibited from relying on the 2017 scope ruling to support its claims against Claimants here while it simultaneously prevents a full adjudication of the retroactivity of that order.

2. The Government Previously Confirmed Aluminum Pallet Imports Did Not Violate the AD/CVD Orders

As discussed above, in 2014–2015, Customs performed a detailed audit of aluminum pallets that had been imported by Shapes. The purpose of the audit was to determine whether the import of aluminum pallets violated the AD/CVD Orders. The audit involved a full evaluation of Shapes' procedures and records, including interviews of Shapes executives by Customs agents, and, most significantly, an inspection of the many aluminum pallets at Shapes' facility. Customs concluded that the import of the aluminum pallets was not in violation of the AD/CVD Orders. Req. Jud. Notice, Ex. 1 (U.S. Customs and Border Protection Office of International Trade Regulatory Audit No. 931-15-ADD-AU-24805, Sept. 16, 2015: Shapes' pallet "import transactions . . . were not within the scope of the Department of Commerce ADD/CVD case numbers A-570-967 and/or C-570-968, dealing with aluminum extrusions from China [*i.e.*, the AD/CVD Orders].").

The forfeiture theory in this action, however, is inconsistent with, and contradicts, the prior Customs' determination in this earlier audit. Such arbitrary and capricious government conduct cannot support a forfeiture action under applicable pleading standards. *See generally United States v. One White Crystal*

Covered Bad Tour Glove & Other Michael Jackson Memorabilia, No. CV-11-13582, 2012 WL 8467453, at *1 (C.D. Cal. Sept. 6, 2012) (motion to dismiss should be granted when "the Government had not alleged particular illegal acts committed by [defendant] and generally lacked sufficient detail to meet the pleading standard applied to forfeiture in rem actions").

3. The Government's Delay in Seeking Forfeiture Also Violates Due Process

Federal courts have long recognized that an unreasonable, unjustifiable delay between seizure of property by federal government officials and the institution of proceedings for forfeiture thereof will bar further proceedings on due process grounds. *See, e.g.*, *U.S. v. One 1970 Ford Pickup, Serial No. F10RG53615, License No. 73888E*, 564 F.2d 864 (9th Cir. 1977) ("From the standpoint of the claimant, the stage in the procedures at which excessive delay occurs is irrelevant. His concern, and the concern of the statutory scheme, is the quick and efficient determination of the property rights in the [property]"). The Supreme Court has likened a failure by the government to initiate forfeiture proceedings within a reasonable period to abridging the right to a speedy trial under the Sixth Amendment, applying the same balancing test in both circumstances. *See U.S. v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555, 555–56 (1983) ("the balancing test . . . developed to determine when Government delay has abridged the right to a speedy trial provides the relevant framework for determining whether the delay in filing a forfeiture action was reasonable").[5]

[5] Courts have also admonished the government for overreach, conflicts of interest, and improprieties with respect to civil forfeiture generally. *See U.S. v. Wetterer*, 210 F.3d 96 (2d Cir. 2000) ("We have previously observed the government's virtually unchecked use of the civil forfeiture statutes and the disregard for due

In this case, the government's theory of forfeiture of the Subject Property is that it was used to store and conceal contraband property (the pallets) that the government also seeks to forfeit in a separate proceeding. *See* Req. Jud. Notice, Ex. 4. But the government, despite detaining some of the pallets over a year ago and having notice of the pallets and their place of storage for many years, has unreasonably delayed any action to adjudicate the legality of the pallets on which the forfeiture of the Subject Property depends.

Under the applicable legal framework, the Court must weigh the following factors to determine whether the government's delay bars the institution of a forfeiture proceeding on due process grounds: (1) "length of the delay," (2) "the reason for the delay," (3) "the defendant's assertion of his right," and (4) "prejudice to the defendant." *Id.* at 556. As further observed by the Supreme Court, a delay that has "hampered the claimant in presenting a defense on the merits, through, for example, the loss of witnesses or other important evidence" is a "prejudice [that] could be a weighty factor indicating that the delay was unreasonable." *Id.* at 569. For the reasons set forth below, the government's delay in instituting forfeiture proceedings against the alleged contraband pallets is an unreasonable, unjustifiable violation of due process that warrants dismissal of the complaint in this case against the Subject Property.

First, the length of the government's delay here is *per se* unreasonable given the amount of time between the alleged illegal import activity and the commencement of this forfeiture action. As the complaint concedes, the importers

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process that is buried in those statutes. Another source of potential abuse is that forfeited funds are kept by the Department of Justice as a supplement to its budget. Thus the agency that conceives the jurisdiction and ground for seizures, and executes them, also absorbs their proceeds. This arrangement creates incentives that evidently require a more-than-human judgment and restraint.").

imported the aluminum pallets into the United States openly and notoriously and without issue beginning in 2011. Compl. ¶ 11. These pallets were allegedly stored at the Subject Property for a period between 3 to 6 years (*id.* ¶ 8), and yet the government took no action with respect to the pallets or the Subject Property at any time during that storage period. Only after Perfectus' pallet *export* program was well underway years later did the government detain and seize certain containers of pallets, in September 2016, which seizures form the basis of the government's complaint here. *See id.* ¶¶ 11, 30, 53. That delay – spanning multiple years – violated Claimant's due process rights.

In addition, when the government did detain the pallets, it did so a *year* ago, followed by an unjustified delay of many months, depriving Perfectus of its property without due process. See*, e.g.*, *U.S. v. $12,248 U.S. Currency*, 957 F.2d 1513, 1517 (9th Cir. 1991) ("the government's position was not substantially justified because the government violated the claimant's Fifth Amendment due process rights by depriving him of his property for an unreasonable period of time"); *see also U.S. v. Two Hundred Ninety-Five Ivory Carvings*, 689 F.2d 850 (9th Cir. 1982) ("the Government's delay of 18 months in referring the case to the United States attorney for institution of judicial forfeiture proceedings violated the owner's right to a prompt postseizure adjudication of the forfeiture and required dismissal of the forfeiture action"). Because the claim against the pallets is invalid on due process grounds, the past storage of those pallets cannot be a valid basis for derivative forfeiture of the Subject Property.

Second, the complaint does not even attempt to provide a reason for the protracted delay between the commencement of forfeiture proceedings against the warehouse Subject Property and the importation of the aluminum products allegedly once stored in the warehouse, which the government alleges began between 2011 and 2014. Compl. ¶¶ 8, 11, 30. As recognized by the Ninth Circuit,

the government's delay may be especially unreasonable where the government makes no effort to explain to why it could not have taken action sooner. *See U.S. v. $12,248 U.S. Currency*, 957 F.2d 1513, 1517 (9th Cir. 1991) (even a 13-month delay may be unreasonable under the Fifth Amendment when coupled with the government's a lack of explanation).

Moreover, any contention by the government that the delay is due to the investigation is directly contradicted by the government's own conduct. As conceded in the complaint, in January 2017, the government formally seized 549 of the 720 Perfectus shipping containers initially detained at the Long Beach Port, releasing 171 of them. Compl. ¶ 35. The government does not allege any justification as to why the 171 containers were released while the 549 containers were seized, nor can it since the released containers also had aluminum pallets. *See United States v. Eighty–Eight (88) Designated Accounts*, 786 F. Supp. 1578, 1582 (S.D. Fla. 1992) ("The Government's position is not substantially justified simply because it adduces 'some evidence' supporting its position.").

Third, beginning with the detention of Perfectus' containers in September 2016, Perfectus has diligently worked with the government to assert its rights with respect to the detained – and later-seized – shipping containers. As evidenced by Perfectus' petition for relief, captioned *In re Seizure of Containers of Aluminum Pallets Detained at Long Beach Port*, Case No. 5:16-cv-02640-DMG-SPx, and numerous filings in that action, Perfectus has not been responsible, in any part, for the government's unreasonable delay, and neither has Claimant. *See U.S. v. Thirteen (13) Mach. Guns and One (1) Silencer*, 689 F.2d 861, 863 (9th Cir. 1982) ("In establishing whether the claimant has concurred in the delay of the post-seizure hearing, the government must show affirmative proof that the claimant requested the delay or was responsible for it.").

Fourth, the government's delay has caused unjustifiable prejudice to the Claimant given the amount of time between the importation of the aluminum pallets starting in 2011 and the commencement of this action over six years later, in September 2017. As observed by the Supreme Court, the key inquiry is whether the government's delay has "hampered the claimant in presenting a defense on the merits." *See U.S. v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. at 569 ("the loss of witnesses or other important evidence . . . could be a weighty factor indicating that the delay was unreasonable"). Due to the inordinate delay, Claimant is at a disadvantage as to its ability to collect evidence and identify witnesses who are knowledgeable about the pallet import program, or at any other relevant time during the last six years, that could be called on to refute allegations in the government's complaint relating to the use of the Subject Property. *U.S. v. $12,248 U.S. Currency*, 957 F.2d 1513, 1519 (9th Cir. 1991) ("The loss of a trial witness is exactly the type of prejudice to which the Supreme Court spoke in *United States v. $8,850*.").

Based on the foregoing, the government has not shown – and cannot show – that its delay in commencing the forfeiture proceedings against the Subject Property is reasonable or justifiable. The government's failure to commence a forfeiture action within a reasonable period of time is a violation of Claimants' due process rights, and warrants dismissal of the complaint.

D. The Subject Property Is Not Forfeitable Under Section 1595A

In its complaint, the government relies on Section 1595a(a) of Title 19 of the U.S. Code. Compl. ¶ 1. This statute provides, in relevant part:

> [E]very vessel, vehicle, animal, aircraft, or other thing used in, to aid in, or to facilitate, by obtaining information or in any other way, the importation, bringing in, unlading, landing, removal, concealing, harboring, or subsequent transportation of any article

> which is being or has been introduced, or attempted to be introduced, into the United States contrary to law, whether upon such vessel, vehicle, animal, aircraft, or other thing or otherwise, may be seized and forfeited together with its tackle, apparel, furniture, harness, or equipment.

19 U.S.C. § 1595a(a).

The property which the government seeks to forfeit here is not a "vessel, vehicle, animal, aircraft, or other thing." It is real property. Accordingly, the government is not entitled to the relief it seeks pursuant to this statute, and the complaint should be dismissed on that ground as well. *See Omidi v. United States*, 851 F.3d 859, 862 (9th Cir. 2017) ("The government may obtain forfeiture of real property . . . only through judicial forfeiture proceedings [pursuant to] 18 U.S.C. § 985.")

The other elements of this statute are not met here in any event. The Subject Property was not used in importing the pallets or to transport or conceal them in any way. As the complaint itself notes, governmental authorities routinely inspected the warehouse at the Subject Property, and those authorities noted the pallets were even being stored in plain sight outside the warehouse. Compl. ¶¶ 28-33. Likewise, the government nowhere pleads that the Subject Property is the "fruit" of illegal activity or was purchased with proceeds from illegal activity. *Cf U.S. v. Real Property Located at 11211 E. Arabian Park Dr.*, 412 Fed. App'x 961, 963 (civil forfeiture of real property appropriate because government demonstrated it was purchased with the proceeds of unlawful activity); *United States v. Real Prop. Located at 5300 Lights Creek Lane, Taylorsville, Plumas Cty., Cal.*, 116 Fed. App'x 117, 119 (9th Cir. 2004) (civil forfeiture of real property appropriate because its value was not grossly disproportionate to amount of drugs seized).

The Subject Property is therefore not subject to forfeiture pursuant to 19 U.S.C. § 1595a(a).

CONCLUSION

For the foregoing reasons, Claimant respectfully requests the Court grant Claimant's motion to dismiss, dismiss this action in its entirety with prejudice, and award such other and further relief as it deems just and proper.

Dated: October 3, 2017

Respectfully Submitted,

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