UNITED STATES COURT OF INTERNATIONAL TRADE

RACK ROOM SHOES, SKIZ IMPORTS LLC, and FOREVER 21, INCORPORATED, PlaintiffS, v. UNITED STATES, Defendant.	Before: Donald C. Pogue, Chief Judge Jane A. Restani, Judge Judith M. Barzilay, Sr. Judge. Consol. Court No. 07-00404

MEMORANDUM AND ORDER

[Plaintiff's motion for reconsideration is denied.]

Dated: June 1, 2012

John M. Peterson, George W. Thompson, Maria E. Celis, Russell A. Semmel, and Richard F. O'Neill, Neville Peterson LLP, of New York, NY, for the Plaintiff, Rack Room Shoes.

Michael T. Cone, McCullough Ginsberg Montano & Partners LLP, of New York, NY, for the Plaintiff, SKIZ Imports LLC.

Damon V. Pike, The Pike Law Firm P.C., of Decatur, GA, for the Plaintiff, Forever 21, Inc.

Tony West, Assistant Attorney General, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for the Defendant. With him on the briefs were Jeanne E. Davidson, Director; Reginald T. Blades, Jr., Assistant Director, and Aimee Lee, Trial Attorney. Of counsel on the briefs were, Yelena Slepak, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, and Leigh Bacon, Office of the General Counsel, United States Trade Representative.

Pogue, Chief Judge: In this action, Plaintiff Rack Room Shoes, Inc. ("Rack Room"), together with other United States

importers, allege, in their Amended Complaints, that certain glove, footwear and apparel tariff classifications violate the Equal Protection Clause of the Constitution. U.S. Const. amend. XIV, § 1, cl. 2. The court dismissed the complaints in Rack Room Shoes v. United States, 36 CIT __, 821 F. Supp. 2d 1341 (2012)(dismissing for failure to state a plausible claim of intent to discriminate).[1]

Rack Room, pursuant to USCIT Rule 59, now seeks reconsideration of the court's dismissal.[2] Rack Room asserts that there was legal error in the court's 1) failure to make necessary findings of fact, and 2) failure to articulate the applicable pleading standard or reconcile such a standard with USCIT Rule 9(b).

Because Rack Room's assertions are incorrect, as explained below, its motion for rehearing is denied.

STANDARD OF REVIEW

The court will grant a rehearing when there has been: "1) an error or irregularity, 2) a serious evidentiary flaw, 3) the discovery of new evidence which even a diligent party could not have discovered in time, or 4) an accident, unpredictable

[1] Familiarity with the court's earlier opinion is presumed.

[2] USCIT Rule 59 provides that a "court may . . . grant a . . . rehearing for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court."

surprise or unavoidable mistake which impaired a party's ability to adequately present its case." See, e.g., Target Stores v. United States, 31 CIT 154, 156, 471 F. Supp. 2d 1344, 1347 (2007). However, the court does not grant a motion for rehearing merely to permit the losing party another chance to re-litigate the case. USEC, Inc. v. United States, 25 CIT 229, 230, 138 F. Supp. 2d 1335, 1336 (2001). Rather, the moving party must show that the court committed a "fundamental or significant flaw" in the original proceeding. Id.

DISCUSSION

Rack Room first asserts that the court failed to make necessary findings of fact with regard to each provision of the Harmonized Tariff Schedule of the United States ("HTSUS") challenged in the prior proceeding. Specifically, Rack Room claims that the court failed to find that each challenged provision was not facially discriminatory before proceeding to dismiss the case.[3]

But classification is an inherent part of the HTSUS and therefore a claim of facial discrimination in the HTSUS, specifically in classifications that include only a reference to age or gender, will be unavailing. Leathers v. Medlock, 499 U.S.

[3] Plaintiffs have repeatedly, and incorrectly, conflated neutral classifications present throughout the HTSUS with the type of facial discrimination, arising from invidious intent, that is necessary to a finding of facial discrimination.

439, 451 (1991) ("Inherent in the power to tax is the power to discriminate in taxation."); Totes-Isotoner Corp. v. United States, 594 F.3d 1346, 1357, 1359 (Fed. Cir. 2010), cert. denied, 131 S. Ct. 92 (2010), ("[W]e . . . cannot assume that this differential treatment of different goods is invidious.")(Proust, J., concurring)(noting also that gender- or age-based tariff classifications which impose burdens on importers rather than "gender- or age-based classes of people" are not facially discriminatory). Thus, no separate fact-finding step is necessary, with regards to each individual HTSUS subheading that the Plaintiff challenges, because the gender- and age-based classifications at issue, regardless of which specific subheading is referred to, are not facially discriminatory.[4]

Moreover, there is no difference in the form of the multiple classifications that Plaintiffs challenge. Compare subheadings 4203.29.30 (men's gloves) and 4203.29.40 (gloves for "other persons"), which were challenged in Totes-Isotoner Corp. v. United States, 32 CIT 739, 569 F. Supp. 2d 1315 (2008), with 6403.99.60 (footwear for men, youths, and boys) and 6403.99.90 (footwear for women), which are among the many tariff subheadings

[4] Furthermore, as the government correctly notes, Plaintiffs overlook that this case was dismissed pursuant to USCIT Rule 12(b)(5). Therefore, Plaintiffs' argument that we failed to make the necessary findings of fact under USCIT Rule 52(a)(1) must fail.

challenged by the Plaintiffs. With regards to both classifications, the first heading makes reference to the gender or age of the intended user, then the classification further distinguishes items by characteristics such as the presence of lining, material, or simply states the name of the item.[5] The facial form of all challenged headings is the same. See Appendix A (listing all headings challenged by Plaintiffs).

Plaintiff's second alleged basis for reconsideration asserts that the court overlooked USCIT Rule 9(b) when ruling that Plaintiffs must plead sufficient facts to plausibly show that Congress had an invidious intent to discriminate in adopting the challenged HTSUS provisions.[6] This claim also fails.

USCIT Rule 9(b) states that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged

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[5] If anything, close examination of the subheadings reveals that the intended user's gender and/or age is but one of many factors taken into consideration when classifying imports. Most often, the provisions are concerned with the materials of which the goods are made or the manufacturing process of the item, e.g., knitted. Moreover, these are not actual use provisions so they create no requirement that the goods be used by purchasers of a particular sex or age. Accordingly, the reference to the intended user's gender and age cannot be considered invidious intent to discriminate.

[6] Plaintiff also claims, oddly, that the court failed to articulate the pleading standard on which its prior decision was based. But our prior opinion states quite clearly that Plaintiffs were required to allege sufficient facts to make out a plausible claim of invidious intent to discriminate. Rack Room Shoes, 36 CIT at __, 821 F. Supp. 2d at 1346. This claim, therefore, is also unavailing.

generally." USCIT R. 9(b). It follows, certainly, that intent may be alleged generally. Nonetheless, Plaintiffs must also allege facts sufficient to raise a plausible claim. See, e.g., Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007); Totes-Isotoner, 594 F.3d at 1358 (holding that plaintiffs claiming discrimination are "required to allege facts sufficient to establish a governmental purpose to discriminate"). Rather than being mutually exclusive, as Plaintiffs seem to suggest, the now-familiar Twombly standard, with its threshold plausibility requirement, is supplemental to, and informs the application of, Rule 9(b). Accordingly, our dismissal of Plaintiffs' Amended Complaints for failure to state a plausible claim is not inconsistent with USCIT Rule 9(b).

CONCLUSION

For the forgoing reasons, Plaintiff's motion for rehearing is denied.

So Ordered.

/s/ Donald C. Pogue
Donald C. Pogue, Chief Judge

Dated: June 1, 2012
New York, New York