

UNITED STATES COURT OF INTERNATIONAL TRADE

UNITED STATES OF AMERICA,

Plaintiff,

v.

TENACIOUS HOLDINGS, INC. (formerly  
known as Ergodyne Corporation),

Defendant.

Before: Gregory W. Carman, Judge  
Court No. 12-00173

OPINION AND ORDER

[Defendant's Motion to Dismiss is denied.]

Dated: May 15, 2013

Joshua A. Mandlebaum, Trial Attorney, Commerical Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Plaintiff. With him on the brief were Stuart F. Delery, Acting Assistant Attorney General, Jeanne E. Davidson, Director, and Franklin E. White, Jr., Assistant Director. Of counsel on the brief was Philip J. Hiscock, Staff Attorney, Office of Associate Chief Counsel, U.S. Customs and Border Protection, of Chicago, IL.

John M. Peterson, Richard F. O'Neill, and Russell A. Semmel, Neville Peterson LLP, of New York, NY, for Defendant.

**Carman, Judge:** Before the Court is a motion to dismiss filed by Defendant Tenacious Holdings, Inc. ("Tenacious"), formerly known as Ergodyne Corporation ("Ergodyne").<sup>1</sup>

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<sup>1</sup> Because Tenacious is the successor in interest to Ergodyne, the parties will both be referred to in this opinion as "Tenacious" for ease of reference.

Tenacious asks the Court to dismiss the case pursuant to USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. In brief, Tenacious argues that the claims underlying the suit of the United States were required to be brought, pursuant to USCIT Rule 13(a), as compulsory counterclaims in a separate case at the Court of International Trade (“CIT”)—the action Ergodyne, Inc. v. United States, Court No. 10-00200 (“the Ergodyne case”).<sup>2</sup> Tenacious reasons that the government’s failure to assert the penalty claims underlying this case as counterclaims in Ergodyne requires that the Court dismiss the present case.

The Court finds that USCIT Rule 13(a) does not prevent the government’s penalty suit from going forward, and the motion to dismiss will therefore be denied.

#### BACKGROUND

To resolve Tenacious’s motion to dismiss, it is first necessary to set forth the proceedings that have occurred in this case and the interrelated case of Ergodyne.

On July 14, 2010, Tenacious filed the Ergodyne case, naming the United States as defendant. See Summons, Court No. 10-00200, ECF No. 1. Tenacious initiated the Ergodyne case by the filing of a summons, but no complaint—an option permitted by USCIT Rule 3(a). Under USCIT Rule 83, cases initiated by the filing of a summons

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<sup>2</sup> The Ergodyne case is currently pending on the CIT reserve calendar and has not yet been assigned to a judge.

without a complaint may be placed on the Court of International Trade's (CIT) reserve calendar for a period of 18 months, or longer if the Court grants an extension, before a complaint must be filed. The Ergodyne case was permitted to remain on the reserve calendar without the filing of a complaint until July 30, 2012 on consent of the United States.<sup>3</sup>

On June 22, 2012, while the time for filing a complaint in the Ergodyne case was under extension, the government filed this penalty case as Court No. 12-00173 (the "Tenacious case"). About one month after the government filed the Tenacious case, Tenacious sought an extension until the end of 2012 for the Ergodyne case to remain on the reserve calendar. The government opposed the motion. The Court nevertheless granted a partial extension in the Ergodyne case, delaying Tenacious's deadline for the filing of its complaint until November 13, 2012 (later extended until December 13, 2012 on the consent of the government).

During the second extension of time for the Ergodyne case to remain on the reserve calendar, Tenacious filed the motion to dismiss the Tenacious case that is currently before the Court. Tenacious argues by its motion that the penalty claims asserted by the government must be dismissed because they are actually counterclaims

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<sup>3</sup> For the description of the history of the Ergodyne case, see generally Docket, Court No. 10-00200.

that may only be pleaded in the Ergodyne case.<sup>4</sup> The government filed its opposition to Tenacious's motion to dismiss the Tenacious case on November 7, 2012, and Tenacious filed a reply in support of the motion on December 3, 2012. The motion has been under submission to the Court for decision since December 17, 2012.

On December 22, 2012, five days after Tenacious filed its motion to dismiss the Tenacious case, Tenacious moved for a stay of all proceedings in the Ergodyne case until such time as its motion to dismiss the Tenacious case was decided. The government opposed. The court denied Tenacious's request for a stay and set February 22, 2013 as the deadline by which Tenacious was required to file its complaint in the Ergodyne case. Tenacious timely filed its Ergodyne complaint and the United States answered on May 9, 2013.

#### JURISDICTION & STANDARD OF REVIEW

The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1582 (2006).<sup>5</sup> Tenacious's motion to dismiss is brought pursuant to USCIT Rule 12(b)(5), which

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<sup>4</sup> At the time Tenacious asserted this argument in its motion to dismiss the Tenacious action, the Ergodyne action lay dormant on the reserve calendar, no complaint having been filed. This was a direct result of the Court's grant of Tenacious's motion for an extension in the Ergodyne case over the government's objection.

<sup>5</sup> Unless otherwise specified, all statutes are cited to the 2006 edition of the United States Code.

permits a party to assert, in motion form, the defense of “failure to state a claim upon which relief can be granted.” In deciding such a motion, “the Court assumes that all well-pled factual allegations are true, construing all reasonable inferences in favor of the nonmovant.” Cisco Systems, Inc. v. United States, 804 F. Supp. 2d 1326, 1330, 35 CIT \_\_\_, \_\_\_ (2011) (internal quotations and citations omitted). The Supreme Court has indicated that, “[t]o survive a motion to dismiss, a complaint must contain 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) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

## DISCUSSION

### I. Contentions of the Parties

#### A. Tenacious

##### 1. Penalty Claims Are Compulsory Counterclaims

Tenacious starts from the premise that, as to the 35 entries whose classification is disputed in the Ergodyne case and upon which the United States also seeks to impose penalties in the current case, the government can only seek to recover civil penalties for negligent misclassification by filing its penalty claim as a counterclaim in the Ergodyne case. Def.’s Mem. of Law in Supp. of Def.’s Mot. to Dismiss (“Def. Mem.”) at 3-4, ECF

No. 10-2. Tenacious claims this despite the fact that (as of the time Tenacious filed this motion) it had not yet filed a complaint in the Ergodyne case; in Tenacious's view, the absence of a complaint in the Ergodyne case was a difficulty that the government was obliged to overcome by forcing Tenacious to file its complaint. Def. Mem. at 4.

As statutory support for this theory, Tenacious invokes 28 U.S.C. § 1583, which vests exclusive jurisdiction in the CIT to enter judgment on "any counterclaim" in a civil action filed at the CIT, if the counterclaim "involves the imported merchandise that is the subject matter of such civil action" or "is to recover upon a bond or customs duties relating to such merchandise." Id. at 4. Tenacious also cites USCIT Rule 13(a), which states: "A pleading must state as a counterclaim any claim that — at the time of its service — the pleader has against an opposing party if the claim (1) involves the imported merchandise that is the subject matter of the civil action, or (2) is to recover on a bond or customs duties relating to such merchandise." Tenacious suggests that § 1583, taken in conjunction with Rule 13(a), requires that "a claim must be pleaded as a counterclaim in the CIT if it involves the imported merchandise that is the subject matter of [the] civil action." Def.'s Reply in Supp. of Def.'s Mot. to Dismiss ("Reply") at 3, ECF No. 19 (emphasis added, internal quotations omitted). Tenacious reasons that the government's penalty claims in the Tenacious case involve "the imported

merchandise that is the subject” of the Ergodyne case because they stem in large part from the classifications Tenacious gave to entries that are the focus of the Ergodyne classification case. Def. Mem. at 6-7 (internal quotations omitted). It was therefore mandatory, according to Tenacious, for the government to bring those claims as counterclaims in the Ergodyne case, and to avoid initiating a separate penalty case as the government did in commencing the Tenacious case. Id. at 7.

2. Failure to Assert Penalty as Counterclaim Requires Dismissal

Tenacious urges the Court to dismiss the government’s complaint as to the 35 entries that overlap with the Ergodyne case, claiming that such a consequence is required for violation of the compulsory counterclaim rule. Id. at 9-11. Tenacious gets to this conclusion by claiming that, “[b]ecause the Government’s claims are barred, the Court cannot grant relief thereupon” and that “[t]he principles of judicial economy, expediency, and fairness weigh heavily in favor of dismissing this action, rather than allowing two duplicative lawsuits . . . to move forward on separate tracks.” Id. at 10.

3. Dismissal Required as to Entries Not Overlapping Ergodyne Case

The penalty claims in the Tenacious case are based on allegedly negligent misclassification of the 35 entries underlying the Ergodyne case, as well as 16 other entries. Id. at 11. Tenacious suggests that the complaint in the Tenacious case should be

dismissed in its entirety, and not just as to the 35 entries that overlap, “without prejudice to the filing of a new, properly-pleaded action,” apparently as a punishment “because there was no reasonably [sic] excuse for the government’s disregard of the applicable rules.” Id.

Tenacious supports this aspect of its argument by citing USCIT Rules 3(a) and 13(h), along with case law. Since the Ergodyne case was formally “commenced,” within the meaning of USCIT Rule 3(a), by the filing of a summons, argues Tenacious, the government should have known that it had to file any penalty claims in that action. Id. at 12. And while Tenacious admits that it filed no complaint in the Ergodyne case, and therefore the government could not yet file a counterclaim, Tenacious insists that the government was nevertheless barred from filing a separate penalty action. Id. Instead, Tenacious suggests that the government should have subjected Tenacious to motion practice in order to force Tenacious to file its complaint in the Ergodyne case, allowing the government to bring its penalty action via counterclaims there. Id. at 12-13. Specifically, Tenacious argues that the government had to employ USCIT Rule 13(h), which provides a mechanism by which a defendant “may file a motion demanding that the plaintiff file a complaint” which, “[i]f the court grants” the motion, would result in the plaintiff being obliged to file the complaint within 30 days. Id. at 13-14. Tenacious



claims that the government's failure to force the filing of a complaint in the Ergodyne case as a means to file its penalty claims in that action was tantamount to "wast[ing] judicial resources" and the Tenacious case should be dismissed because the government "wantonly disregarded the Court's rules." Id. at 14-15.

**B. *United States***

1. Penalty Claims Are Not Compulsory Counterclaims

The government, in countering Tencious's position, starts by noting the following language in USCIT Rule 13(a): "a pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party." Pl.'s Resp. to Def.'s Mot. to Dismiss, ECF No. 16, at 5 (emphasis in original). The government views this language as indicating only "that parties must include in their answers any claims that they have at that time," rather than providing any "limitations whatsoever on a party's conduct prior to the filing of its answer." Id. (emphasis in original). The government states that "neither USCIT Rule 13(a), nor any other authority, considers our already-filed penalty claims to be compulsory counterclaims to Ergodyne's as-yet unfiled complaint." Id. at 6.

2. Litigating Penalty Claims in Ergodyne Would Be Inefficient

The government admits that penalty claims and classification claims may have

“some overlap when, as here, the basis for a penalty allegation is an incorrect classification asserted on entry documents,” but argues that “there is not always overlap between a classification challenge and a penalty claim based on misclassification.” Id. at 7. The two kinds of actions also differ in jurisdictional bases, elements, and jury trial rights, the government asserts. Id. at 8. All of this would lead to inefficiency if the two kinds of claims were forced to be litigated in one action. Id. at 6-7. The government points out that the entries underlying the two claims also may differ, as they do here, requiring an additional action to cover the non-shared entries. Id. at 8.

### 3. The Government Cannot Force Filing of Complaint

The government also rejects Tenacious’s claim that the government could have forced the filing of a complaint in the Ergodyne case by filing a USCIT Rule 13(h) motion, so that the government could then have brought its penalty claims in that action. The government gives four reasons this claim should fail: Rule 13(h) does not indicate that a failure to file a Rule 13(h) motion waives claims; Rule 13(h) permits the filing of a motion for the lodging of a complaint, but does not require it; since the Court can deny a Rule 13(h) motion, using such a motion to force filing of a complaint cannot be a mandatory prerequisite for asserting a claim; and even the granting of a Rule 13(h) motion would not always result in the filing of a complaint, since the plaintiff could

voluntarily dismiss its complaint instead and thereby prevent the filing of a counterclaim. Id. at 10-11.

4. Tenacious's View of Rule 13 Encourages Inefficiency

The government also points out that adopting the view of Rule 13 espoused by Tenacious would encourage gamesmanship by litigants before the CIT. Id. at 11. An importer anticipating a penalty claim, for instance, could file a classification claim and subsequently delay filing its complaint as long as possible "in the hope that the statute of limitations would expire before the Government could file an answer." Id. This and other potential gamesmanship permitted by Tenacious's view of Rule 13 would reduce litigation fairness and efficiency. Id.

5. Authorities Counter Tenacious's View of Rule 13

The government also notes that case law from this court has rejected prior attempts by importers to preclude later penalty actions based on prior classification decisions on the same entries, and to forestall or compel penalty actions. Id. at 12 (citing cases). Similarly, the government notes that 19 U.S.C. § 1621 allows five years for the filing of a penalty action, and that requiring such actions to be asserted as compulsory counterclaims to classification cases brought far earlier would nullify that statute of limitations. Id. at 13.

Finally, the government notes that it already attempted to elicit a complaint in the Ergodyne case by opposing a request for an additional six month extension for the filing of a complaint, and suggests that taking such a step was effectively the same as filing a Rule 13(h) motion. Id. at 13-14.

## II. Analysis

According to USCIT Rule 13(a), “[a] pleading must state as a counterclaim any claim that — at the time of its service — the pleader has against an opposing party if the claim (1) involves the imported merchandise that is the subject matter of the civil action, or (2) is to recover on a bond or customs duties relating to such merchandise” (emphasis added).

The Court of International Trade rule parallels the compulsory counterclaim rule under the same number in the Federal Rules of Civil Procedure.<sup>6</sup> As the Supreme Court has explained in the context of the Federal Rules, the compulsory counterclaim requirement “was designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters. The Rule was

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<sup>6</sup> In the United States district courts, “[a] pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction.” Fed. R. Civ. P. 13(a).

particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint.” Southern Construction Co., Inc. v. Pickard, 371 U.S. 56, 60 (1962).

This would typically take the form of a defendant in hypothetical Lawsuit #1 failing to plead an intimately connected claim as a counterclaim, then later initiating (as the plaintiff) hypothetical Lawsuit #2 against the plaintiff in Lawsuit #1 on the basis of the very claim never raised in Lawsuit #1. A litigant’s violation of Rule 13(a) in this manner, by failing to assert claims as compulsory counterclaims, “is usually applied in subsequent litigation on res judicata or estoppel principles.” Handy v. Shaw, Bransford, Veilleux & Roth, 325 F.3d 346, 350 (D.C. Circuit 2003) (citing cases). In other words, referring back to the hypothetical example above, rather than asking the court to prevent Lawsuit #2 from continuing via an injunction or order of dismissal, the defendant in Lawsuit #2 may claim that the matter has already been resolved in Lawsuit #1 and avoid entry of a further judgment on the underlying transaction or occurrence via res judicata. See id. at 350-51.

The current case is complicated by the Court of International Trade’s unique procedures for initiation of a suit brought pursuant to 28 U.S.C. § 1581(a) or (b). Under the Federal Rules of Civil Procedure, “[a] civil action is commenced by filing a

complaint with the court.” Fed. R. Civ. P. 3. In contrast, an action in the CIT to challenge Customs’ denial of a protest is initiated by filing of a summons only, which comprises the initial pleading in such actions. 28 U.S.C. § 2632(b); USCIT Rule 3(a)(1); DaimlerChrysler Corp. v. United States, 442 F.3d 1313, 1317-18 (Fed. Cir. 2006) (concluding that “the initial pleading in actions to contest the denial of a protest is the summons”). The Ergodyne case, in which Tenacious is the plaintiff under its former name of Ergodyne, challenges Customs’ denial of a protest and was, accordingly, initiated by the filing of a summons as the initial pleading, even though no complaint was filed at that time. See Docket, Court No. 10-00200.

This unique procedure for initiating suit made a difference here because, under USCIT Rule 7(a)(2), an answer can only be filed in response to a complaint and thus cannot be filed until such time as a complaint is filed. Eastalco Aluminum Co. v. United States, 14 CIT 724, 734, 750 F. Supp. 1135, 1142-43 (1990). Indeed, suits are initiated by complaint in the district courts and defendants may file an answer in response as soon as they like, but a plaintiff in a CIT classification case may, by rule, delay filing its complaint for over 18 months after commencement of suit. USCIT Rule 83(a) (providing 18 months for filing complaint, calculated from end of month in which summons was filed). This lengthy period for filing of a complaint can also be extended,

with no explicit time limitations imposed on such extensions. USCIT Rule 83(d). In the Ergodyne case, the time for filing of a complaint was extended repeatedly — on one occasion, over the government’s opposition; the complaint was not filed until February 22, 2013, after the present motion was under submission to the Court for decision. See Docket, Court No. 10-00200.

In the case before the Court, these procedural features of CIT classification lawsuits conspired to create a dilemma for the government: while the Ergodyne case sat dormant for well over two years, the statute of limitations for the government to sue for recovery of civil penalties expired as to several of Tenacious’s entries that were allegedly misclassified by negligence. This meant that the government faced the need to take action to preserve its access to legal remedies. The government then initiated this penalty suit.

The government presents a tempting but ultimately flawed argument: that the language of USCIT Rule 13(a) only imposes requirements at the moment a pleading is filed, and therefore could not apply to the government because its time to answer in the Ergodyne case did not arise under May 9, 2013 (its deadline to answer). This argument appears at first blush to be supported by this passage in USCIT Rule 13(a): “a pleading must state as a counterclaim any claims that — at the time of its service — the pleader has

against an opposing party” (emphasis added). This language lends itself to a reading that the rule’s obligation is strictly pinned to the moment of service of the answer and does not exist at other times. Such is the reading offered by the government. But the reading cannot be correct, because such an interpretation would undercut the core reason that the rule was implemented in the first place. As the Supreme Court stated in Southern Construction, Rule 13(a) of the Federal Rules of Civil Procedure “was designed to prevent multiplicity of actions,” and in particular to prevent a party that failed to assert a counterclaim from later initiating separate litigation on the basis of that claim. 371 U.S. at 60. But if the time of the Rule 13(a) obligation were read narrowly, the rule could no longer serve its purpose; every defendant could commence a collateral lawsuit based on the same imported merchandise, so long as it filed the collateral suit between the commencement of the primary suit and the deadline for answering. A too-narrow reading of the timing of Rule 13(a) would thus render the rule void, and must be rejected as counter to the underlying purpose of the rule.

It is likely for this reason that courts have indicated that the counterclaim obligation arises upon commencement of suit, so that all claims must be asserted in the first-commenced action. Yet this reading, espoused by Tenacious, also leads to absurd results: when combined with the procedure for commencement of suit by summons,



defendants are left unable to answer for over 18 months and are thus unable to assert any counterclaims as the statute of limitations period winds down.

Tenacious offers a solution: the defendant with a counterclaim that cannot be brought should be required to file a USCIT Rule 13(h) motion for a court order forcing the plaintiff to file its complaint, after which the defendant will be able to answer and assert its counterclaim. The Court rejects this reading of USCIT Rule 13 as manifestly unfair, since it would perversely allow plaintiffs to force defendants into motion practice just for the opportunity to file an answer. The Court agrees with the government that such an interpretation would open the door to procedural abuses in which plaintiffs could attempt to quell their defendants' claims by delaying the defendants' ability to answer and forcing them to incur the costs of motion practice simply to be able to answer the suit against them. The Court also agrees with the government that there is further cause for rejecting this argument because USCIT Rule 13(h) provides no guarantee that a motion brought to force the filing of a complaint will be granted.

The Court has not located any authority directly on point to resolving this issue, and the parties have not alerted the Court to any such authority. However, other courts have resolved disputes requiring application of USCIT Rule 13(a) (or its analog in the

Federal Rules of Civil Procedure) in circumstances that make those opinions instructive. Perhaps most relevant is Southern Construction. In Southern Construction, the Supreme Court addresses a situation created by a specific statutory arrangement under which the plaintiff “was required . . . to split [his] claims and to bring two separate actions in two different districts.” 371 U.S. at 60. The court decided that Rule 13(a) of the Federal Rules of Civil Procedure “did not compel this counterclaim to be made in whichever of the two suits the first responsive pleading was filed.” Id. at 61. To reach this conclusion, the court noted that Rule 13(a) “was designed to prevent multiplicity of actions,” and in particular to prevent a party that failed to assert a counterclaim from later initiating separate litigation on the basis of that claim. Id. at 60. Considering the policy and purpose behind Rule 13(a), the court permitted the claim to go forward because it found no sign of the “circuitry of action that Rule 13(a) was aimed at preventing,” since the plaintiff’s bringing of multiple actions was required by statute. Id. at 61.

Southern Construction shows that it is the purpose of the compulsory counterclaim rule that must be the ultimate touchstone in resolving a case in which procedural idiosyncracies cloud proper application of the rule. Here, as in Southern Construction, statutory quirks make straight-forward application of Rule 13(a)

impossible. In Southern Construction, those quirks required filing of actions in separate districts. In this case, a perfect storm was created by the requirement that a complaint be filed before a counterclaim may be lodged, the compulsory counterclaim rule, and the extensive delay provided in the rules between commencement of the action and filing of the complaint in the Ergodyne case. And here, as in Southern Construction, there are two lawsuits related to the same underlying substance, but there is no circuitry of action by the party who has failed to lodge its claims as counterclaims.

Given the lack of activity in the Ergodyne case, the Court rejects any notion that the government filed the Tenacious case as a means of opening multiple parallel litigation to engage in the gamesmanship that Rule 13(a) was designed to eliminate. The Court will therefore deny Tenacious's motion to dismiss.

This result also accords with the generally agreed upon principal that Rule 13(a) operates by res judicata to bar future suits pursued after judgment, but does not serve as a basis for preventing the government from pursuing its claims prior to either case reaching judgment. See Handy, supra, 325 F.3d at 350-51 (citing cases to support conclusion that compulsory counterclaim rule is applied in "subsequent litigation on res judicata or estoppel principles").

The Court also points out that, to the extent either party still wishes to litigate the

issues in the Ergodyne and Tenacious cases together, that party may file a motion requesting that the Court consolidate the actions under USCIT Rule 42(a)(2). Given that Rule 42 provides an avenue for merging the two cases and treating them together, it appears that Tenacious will not be prejudiced by any error, however unlikely, that may exist the Court's denial of the present motion to dismiss.

**CONCLUSION**

The Court has carefully considered the remainder of the contentions of the parties and does not believe they require further discussion. As a result of the considerations detailed above, the Court holds that USCIT Rule 13(a) does not bar the government from pursuing its penalty claims via the Tenacious case. In consequence of that finding, it is hereby

**ORDERED** that Defendant's motion to dismiss is denied.

/s/Gregory W. Carman

Gregory W. Carman, Judge

Dated: May 15, 2013  
New York, NY