

UNITED STATES COURT OF INTERNATIONAL TRADE

JARAMILLO SPICES CORP.,

Plaintiff,

v.

UNITED STATES,

Defendant.

Before: Timothy C. Stanceu, Judge

Court No. 20-00148

OPINION

[Dismissing action for lack of subject matter jurisdiction.]

Dated: July 19, 2021

*Fabian Guerrero*, Law Office of Fabian Guerrero, of McAllen, Texas, for plaintiff.

*Jeffrey B. Clark*, Acting Assistant Attorney General, Civil Division, U.S. Department of Justice, for defendant. With him on the brief were *Jeanne E. Davidson*, Director, *Justin R. Miller*, Attorney-in-Charge, and *Jason M. Kenner*, Senior Trial Counsel. Of counsel on the brief was *Brian N. Dunkel*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection.

Stanceu, Judge: Plaintiff Jaramillo Spices Corporation (“Jaramillo”) brings this action to contest a decision of United States Customs and Border Protection (“Customs” or “CBP”), which assessed Jaramillo liquidated damages of \$50,000 for failure to redeliver to CBP’s custody a shipment of tamarind imported from Mexico and determined by the Food and Drug Administration (“FDA”) to be adulterated. Before

the court is defendant's motion to dismiss this action for lack of subject matter jurisdiction under USCIT Rule 12(b)(1), which the court grants.

### I. BACKGROUND

The jurisdictional facts stated in this Opinion are not in dispute.<sup>1</sup> This case arises from a shipment of tamarind imported from Mexico under cover of a single entry made at the Port of Hidalgo, Texas on May 6, 2018. Def.'s Mem. in Supp. of its Mot. to Dismiss Ex. 3 (Oct. 21, 2020), ECF No. 6 ("Def.'s Br."). On May 9, 2018, the FDA issued a Notice of FDA Action placing a hold on the tamarind shipment pending FDA review. Pet. For Jud. Rev. of Agency Decision ¶ 5, Ex. A (Sept. 25, 2020), ECF No. 4 ("Compl."). On May 10, 2018, the FDA issued another Notice of FDA Action detaining the shipment as potentially subject to refusal of admission for appearing to be adulterated in violation of the Food, Drug, and Cosmetic Act ("FD&C Act"). Def.'s Br. Ex. 1. On June 11, 2018, the FDA refused admission of the shipment upon determining that the tamarind contained a pesticide chemical residue (permethrins) rendering it "adulterated" for purposes of the FD&C Act. *Id.* at Ex. 2.

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<sup>1</sup> The recitation of jurisdictional facts above is taken principally from defendant's submissions. Jaramillo expressly adopts the material facts in its response. *See* Pl.'s Resp. to Def.'s Mot. to Dismiss 2 (Nov. 13, 2020), ECF No. 7 ("Pl.'s Resp.").

On June 13, 2018, Customs issued Jaramillo a “Notice to Redeliver” directing Jaramillo to export or destroy the tamarind within 90 days of the FDA’s refusal of admission. *Id.* at 2–3, Ex. 3. Jaramillo did not do so.

On October 23, 2018, Customs issued a Notice of Liquidated Damages and Demand for Payment of \$50,000, representing liquidated damages assessed against Jaramillo for failure to comply with the Notice of Redelivery. *Id.* at Ex. 4. On November 27, 2018, Jaramillo sent Customs what it titled an “appeal for penalty or liquidated damages for extenuating circumstances.” *Id.* at Ex. 5. Treating this submission as a petition to mitigate or cancel the liquidated damages claim, Customs denied all relief on April 19, 2019. *Id.* at Ex. 7. On May 29, 2019, plaintiff’s counsel submitted to Customs a brief letter again seeking mitigation. *Id.* at Ex. 8. Treating this second submission as a supplemental petition for mitigation of the liquidated damages, Customs notified Jaramillo’s counsel on February 25, 2020 of its denial of any relief. *Id.* at Ex. 9.

On March 17, 2020, in the United States District Court for the Southern District of Texas (the “District Court”), Jaramillo filed a “Petition for Judicial Review” against Customs. Pet’r’s Pet. for Jud. Rev., 7:20-cv-00072 Entry No. 1 (*modified* Mar. 19, 2020) (“Pet. for Jud. Rev.”). On June 10, 2020, the District Court stated that because “Plaintiff’s ‘Petition for Judicial Review’ invoked jurisdiction under 28 U.S.C. § 1581,

which describes the jurisdiction of the Court of International Trade” and because the complaint concerns a matter that “appears to be within the exclusive jurisdiction of the Court of International Trade . . . . The Court is not persuaded that it has jurisdiction over this case.” Order 1–2, 7:20-cv-00072 Entry No. 5. The District Court then queried whether Jaramillo was “attempting to appeal an adverse Court of International Trade ruling,” noting that “such appeal belongs in the Court of Appeals for the Federal Circuit.” *Id.* at 2. The District Court directed plaintiff to “file a brief explaining why this case should not be dismissed” and provided, alternatively, that “[p]laintiff may file dismissal documentation under Federal Rule of Civil Procedure 41.” *Id.*

On June 16, 2020, Jaramillo filed in the District Court a motion for voluntary dismissal without prejudice, stating that plaintiff would seek to file the proceeding before the United States Court of Appeals for the Fifth Circuit.<sup>2</sup> Mot. for Voluntary Dismissal 1, 7:20-cv-00072 Entry No. 6 (“Mot. for Voluntary Dismissal”). The District Court dismissed the case the same day, without opining on whether the dismissal vested jurisdiction in the appellate court. Order (June 16, 2020), 7:20-cv-00072 Entry No. 7.

Jaramillo commenced its action in this Court on September 1, 2020. Summons, ECF No. 1. Defendant filed its motion to dismiss and accompanying brief on

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<sup>2</sup> It does not appear that Jaramillo initiated any appellate proceeding.

October 21, 2020. Def.'s Br. Plaintiff responded on November 13, 2020. Pl.'s Resp. to Def.'s Mot. to Dismiss, ECF No. 7 ("Pl.'s Resp."). On December 1, 2020, defendant filed a reply. Def.'s Reply to Pl.'s Resp. to Def.'s Mot. to Dismiss, ECF No. 8.

## II. DISCUSSION

"It is a well-established principle that federal courts . . . are courts of limited jurisdiction marked out by Congress." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 358 (Fed. Cir. 1992) (citations omitted). In the Customs Courts Act of 1980, Congress delineated the jurisdiction of the Court of International Trade over civil actions brought against the United States. Subsections (a)–(h) grant the Court jurisdiction over specific causes of action; subsection (i) contains a grant of residual jurisdiction. *See* 28 U.S.C. § 1581.<sup>3</sup>

Plaintiff attempts to invoke the court's jurisdiction under 28 U.S.C. § 1581(a), *see* Compl. ¶ 3, a jurisdictional provision empowering this Court to hear actions commenced under Section 515 of the Tariff Act of 1930, 19 U.S.C. § 1515, to contest the denial by Customs of an administrative protest. In the alternative, plaintiff argues in its response to defendant's motion to dismiss that the court should exercise jurisdiction according to 28 U.S.C. § 1581(i), the court's residual jurisdictional provision. Pl.'s Resp.

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<sup>3</sup> Citations to the United States Code herein are to the 2012 edition. Citations to the Code of Federal Regulations are to the 2018 edition.

4–5. For the reasons discussed below, neither jurisdictional provision allows the court to hear this cause of action.

**A. The Court Does Not Have Jurisdiction Under 28 U.S.C. § 1581(a)**

The burden is on a plaintiff to demonstrate facts establishing subject matter jurisdiction. *Pentax Corp. v. Robison*, 125 F.3d 1457, 1462 (Fed. Cir. 1997), *opinion amended on reh'g*, 135 F.3d 760 (Fed. Cir. 1998). To avail itself of this Court's jurisdiction according to 28 U.S.C. § 1581(a), plaintiff must show: (1) a valid and timely protest (i.e., a protest filed within 180 days of a protestable decision); (2) a protest denial by Customs; and (3) commencement of an action in this Court within 180 days of the date of mailing of a protest denial. 28 U.S.C. §§ 1581(a), 2636(a)(1); 19 U.S.C. §§ 1514(a), 1515.

The court need look no further than the third requirement, which is set forth in the Customs Courts Act of 1980 as a statute of limitations, as follows: "A civil action contesting the denial, in whole or in part, of a protest under section 515 of the Tariff Act of 1930 [19 U.S.C. § 1515] is barred unless commenced in accordance with the rules of the Court of International Trade . . . within one hundred and eighty days after the date of mailing of notice of denial of a protest under section 515(a) of such Act." 28 U.S.C. § 2636(a)(1). Jaramillo commenced this action by filing a summons on September 1,

2020.<sup>4</sup> Therefore, to establish jurisdiction under 28 U.S.C. § 1581(a), plaintiff must show that an event qualifying as a denial by Customs of a protest occurred on or after March 5, 2020 and on or before September 1, 2020. Plaintiff has not directed the court's attention to any event that occurred during such time period. Therefore, any action that plaintiff brought or could have brought according to 28 U.S.C. § 1581(a) is, or would be, barred by the statute of limitations.

In its response to defendant's motion to dismiss, plaintiff states that "[t]he Plaintiff filed this civil action within six months of the decision of U.S. Customs denying its protest. The denial was on February 12, 2020." Pl.'s Resp. 4. Under even plaintiff's own version of the facts, the summons plaintiff filed on September 1, 2020 to commence this action was untimely.<sup>5</sup>

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<sup>4</sup> Plaintiff did not file a summons in proper form for an action brought under the jurisdictional grant of 28 U.S.C. § 1581(a), for which a summons according to Form 1-1 would have been proper. Instead, plaintiff filed a summons in general form according to Form 4-1. The court does not reach the question of whether the incorrect summons defeats jurisdiction under § 1581(a), determining instead whether plaintiff has demonstrated any facts that could establish jurisdiction according to that provision. But had a summons in proper form been filed, it would have informed the court, *inter alia*, of essential jurisdictional facts including the date a protest was filed and the date the protest was denied. As discussed herein, plaintiff is not able to establish the requisite facts for the exercise of § 1581(a) jurisdiction.

<sup>5</sup> Plaintiff also states, in this regard, that it filed a protest with Customs at the Port of Hidalgo, Texas on January 27, 2018. Pl.'s Resp. 3. This is puzzling, as the date plaintiff identifies was prior to the May 6, 2018 date of entry. Defendant denies that any (continued . . .)

Moreover, to be considered a protestable decision as enumerated in 28 U.S.C. § 1581(a), a decision must be one made by Customs, not another agency. “Section 1514(a) does not embrace decisions by other agencies.” *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 976 (Fed. Cir. 1994). If Customs merely was effectuating a decision of the FDA to refuse admission, under which Customs lacked discretion over whether to issue a notice for redelivery, then the redelivery demand was not a protestable decision, and the court would lack jurisdiction even had plaintiff followed all procedural requirements for contesting a protest denial.

The “decision” by Customs to issue a notice of redelivery was, in fact, not within that agency’s discretion. The FDA’s refusal of admission provides that “[a] request has been made to Customs to order redelivery for all the above product(s), in accordance with 19 CFR 141.113. . . . Failure to redeliver into Customs custody will result in a claim for liquidated damages under the provisions of the entry bond.” Def.’s Br. Ex. 2 at 2. The provision of the Customs Regulations cited by the FDA, 19 C.F.R. § 141.113(c)(3), demonstrates that once the FDA reaches a determination to refuse admission of an imported food product, Customs may not decline to issue a notice of redelivery:

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(. . . continued)

protest was ever filed, Def.’s Mem. in Supp. of its Mot. to Dismiss 6 (Oct. 21, 2020), ECF No. 6, but whether or not such a protest was filed is of no consequence for the reasons noted herein.



If FDA refuses admission of a food, drug, device, cosmetic, or tobacco product into the United States, or if any notice of sampling or other request is not complied with, FDA will communicate that fact to the Center director. An authorized CBP official *will* demand the redelivery of the product to CBP custody. CBP *will issue* a notice of redelivery within 30 days from the date the product was refused admission by the FDA or from the date FDA determined the non-compliance with a notice of sampling or other request. The demand for redelivery may be made contemporaneously with the notice of refusal issued by the FDA.

19 C.F.R. § 141.113(c)(3) (emphasis added). *See also United States v. Utex, Int'l Inc.*, 857 F.2d 1408, 1411 (Fed. Cir. 1988) (noting that “it is Customs’ responsibility to carry out the FDA decisions, in accordance with customs law and regulation” and that “Customs is the enforcement arm of the process wherein admissibility is determined by the FDA.”).

In summary, under the uncontested jurisdictional facts, Jaramillo’s action could not be heard according to the court’s jurisdiction under 28 U.S.C. § 1581(a) because it was untimely, and even had it not been, the measure taken by Customs to effectuate the FDA’s decision to refuse admission of Jaramillo’s merchandise was not a protestable decision according to 19 U.S.C. § 1514(a).

#### **B. The Court Does Not Have Jurisdiction Under 28 U.S.C. § 1581(i)**

Jaramillo’s alternative argument, that the court should exercise jurisdiction according to 28 U.S.C. § 1581(i), is also meritless. Subsection (i)(3) of § 1581 provides as follows:

[T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . embargoes or other quantitative restrictions on the importation of merchandise *for reasons other than the protection of the public health or safety*.

28 U.S.C. § 1581(i)(3) (emphasis added). In this case, Jaramillo's tamarind was refused admittance to the United States for reasons relating to the protection of public health. *See* Def.'s Br. Ex. 2 at 2 ("The article is subject to refusal of admission . . . in that it appears to bear or contain a pesticide chemical residue, which causes the article to be adulterated. . . .") & Ex. 3 (noting the FDA's decision that the merchandise is in violation of the FD&C Act). Therefore, this Court lacks jurisdiction over this case according to 28 U.S.C. § 1581(i).

**C. It is Not in the Interests of Justice to Transfer this Action to Another Court in Which the Action Could Have Been Brought**

Finally, the court considers whether this case is appropriate for transfer to a court that could have jurisdiction over its claim. According to 28 U.S.C. § 1631, a court lacking jurisdiction over an action shall transfer that action to another court in which the action could have been brought if such a transfer is in the interest of justice and the transferee court would have had jurisdiction over the matter at the time it was filed. 28 U.S.C. § 1631.

The court concludes that it would not be "in the interest of justice" for the court to transfer this action. As mentioned above, Jaramillo, before commencing litigation

here, filed in the District Court a petition relating to its entry. *See* Pet. for Jud. Rev. Jaramillo's voluntary dismissal of that action on June 16, 2020 was without prejudice. Mot. for Voluntary Dismissal 1. (In moving for dismissal, Jaramillo indicated an intention to proceed in the United States Court of Appeals for the Fifth Circuit, but Jaramillo was not in a position to appeal a dismissal that was voluntary according to Federal Rule of Civil Procedure 41.) Jaramillo did not endeavor to bring a subsequent action in the District Court following that Court's dismissal of its action without prejudice. Thus, Jaramillo denied the District Court not only once, but twice, the occasion to rule on whether that Court had jurisdiction over its action. Plaintiff has had the full opportunity to pursue any available remedy against defendant United States, and its purposeful actions mitigate against continuing this litigation to allow a third opportunity.

### III. CONCLUSION

In conclusion, subject matter jurisdiction is lacking under 28 U.S.C. § 1581(a) because CBP's issuance of a notice of redelivery effectuated a decision of the FDA, and because any action Jaramillo could have brought to contest a protest denial would have been untimely. The court may not exercise jurisdiction according to 28 U.S.C. § 1581(i) because the imported merchandise was excluded for reasons of "public health or

safety,” 28 U.S.C. § 1581(i)(3). Transfer is not in the interests of justice. The court will grant defendant’s motion and enter judgment dismissing this action.

*/s/ Timothy C. Stanceu*

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Timothy C. Stanceu  
Judge

Dated: July 19, 2021  
New York, New York