2011-1527

United States Court of Appeals for the Federal Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TREK LEATHER, INC.,

Defendant,

and

HARISH SHADADPURI,

Defendant-Appellant.

Appeal from the U.S. Court of International Trade, No. 09-cv-41,
Senior Judge Nicholas Tsoucalas

BRIEF FOR *AMICUS CURIAE* THE ASSOCIATION OF SERVICE AND COMPUTER DEALERS INTERNATIONAL/NORTH AMERICAN TELECOMMUNICATIONS DEALERS IN SUPPORT OF APPELLANT HARISH SHADADPURI

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May 9, 2014

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

United States v. Trek Leather, Inc., and Harish Shadadpuri

No. 2011-1527

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) Amici Curiae (see below, field 1) certifies the following (use "None" if applicable; use extra sheets if necessary):

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The American Association of Exporters and Importers (AAEI); and
The Association of Service and Computer Dealers International/North American Telecommunications Dealers (ASCDI/NATD)

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

The American Association of Exporters and Importers (AAEI); and
The Association of Service and Computer Dealers International/North American Telecommunications Dealers (ASCDI/NATD)

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

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4. ☑ The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

John M. Peterson and Richard F. O'Neill of Neville Peterson LLP

April 23, 2014
Date

/s/ John M. Peterson
Signature of counsel

John M. Peterson
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INTEREST OF *AMICUS CURIAE*

Amicus curiae, Association of Service and Computer Dealers International/North American Association of Telecommunications Dealers ("ASCDI/NATD" or "Association"), is a nonprofit trade association whose nearly 400 members, most of them closely-held corporations, import, sell, and resell a wide range of information technology, automatic data processing and telecommunications products.[1] The Association provides its members with education and training on regulatory issues, maintains a member code of ethics and anti-counterfeiting program, and supports legislation which promotes a free, fair, and open market for the resale, import, and export of technology equipment and services.

The Association's members deal with the usual risks attendant to commercial importing, including the possibility of penalty assessments under 19 U.S.C. § 1592. Because members' products typically contain intellectual property ("IP"), members deal with various provisions of the Tariff Act dealing with protection of IP rights, such as exclusion orders issued pursuant to 19 U.S.C. § 1337 and anti-counterfeiting seizures and penalties under 19 U.S.C. § 1526(e) and (f).

[1] In accordance with FRAP 29(c)(5), the Association confirms that its board of directors has authorized the filing of this brief. No other party contributed to the drafting of the brief or contributed any money to the effort. The brief was drafted entirely by undersigned counsel for ASCDI/NATD.

The Court, sitting *en banc*, requests comment on several questions concerning who is a "person" liable for civil penalties under § 1592(a). For the reasons set forth herein, the Association submits that, under § 1592, the "person" primarily liable for penalties under that statute is the principal listed as importer of record ("IOR"), as defined in 19 U.S.C. § 1484, and others who "aid and abet" an IOR in fraudulent violations thereof. Nothing in the Tariff Act suggests that, in the administration and enforcement of § 1592 (or other penalty provisions therein), Congress intended to disregard or weaken the liability limitations afforded by the various States to those who do business in the corporate form. To look past the corporation and hold individual owners or directors liable for § 1592, a corporate "veil piercing" analysis must first be performed.

Because the issue of what "persons" are liable for Tariff Act violations may extend far beyond § 1592, the Association submits this brief *amicus curiae* in support of Appellant, Harish Shadadpuri.

SUMMARY OF ARGUMENT

In *United States v. Trek Leather, Inc.,* 724 F.3d 1330 (Fed. Cir. 2013) ("*Trek II*"), a panel majority of this Court reversed the 2011 holding of the U.S. Court of International Trade (CIT), 781 F. Supp. 2d 1306 ("*Trek I*"), that Harish Shadadpuri ("Shadadpuri") was jointly and severally liable with the IOR, Trek

Leather, Inc. ("Trek"), for a grossly negligent violation of 19 U.S.C. § 1592(a). The majority correctly held that the "principal"[2] listed as the IOR on entry documents is the only "person" who can be *directly* liable for gross negligence penalties under § 1592(c)(2) absent a demonstration that Trek was Shadadpuri's "alter ego," which requires a successful "piercing [of] Trek's corporate veil to establish that Shadadpuri was the actual [IOR], as defined by statute[.]" *Trek II* at 1331. Alternatively, the majority held that Shadadpuri might have been held guilty of aiding and abetting the direct violation had the principal's transgression resulted from fraud under § 1592(c)(1). However, because knowledge or intent is a required elements of aider–and-abettor liability, a third party cannot aid and abet a principal violator's negligence or gross negligence under § 1592(c)(2) or (3).

Not only does the history of limited liability and corporate personhood support this approach, consistent jurisprudence in this Court and the CIT interpreting third-party liability under § 1592 supports respecting the corporate veil unless (i) a veil piercing exercise is conducted; or (ii) the Government proves, by clear and convincing evidence, that a corporate importer committed a fraudulent violation and was

[2] The "principal" is the "person," natural or otherwise, who is named as the IOR on the entry documents, must exercise reasonable care under 19 U.S.C. § 1484, and declares under oath the veracity of the § 1481 documents pursuant to § 1485. Moreover, the principal is the CBP bond obligor (with the surety company) while CBP is the beneficiary. 19 U.S.C. § 1623; *see also* footnote 7 *infra*.

aided and abetted by a third party having the requisite knowledge of the violation and intent to perpetrate it, § 1592(e)(2). In addition, this Circuit's veil-piercing jurisprudence in patent cases may help inform the Court's determination of third-party liability for customs law violations under § 1592.

Because the 19 U.S.C. § 1592(a) prohibition is broadly worded, any construction of the statute allowing for complete disregard of corporate status in cases of mere negligence or gross negligence would likely lead to the statute's overuse and abuse. Virtually any violation of the customs laws can be said somehow to involve some misstatement or omission relating to the entry, or attempted entry, of merchandise. While Congress has provided numerous and significant penalties for violations of the customs laws, nothing in these laws suggests Congress intended to strip corporate importers of liability limitations universally accorded to properly organized and operated companies.

For the reasons discussed herein, *amicus curiae* ASCDI/NATD submits that the CIT's judgment against Shadadpuri should be reversed and vacated.

ARGUMENT

I. Section 1592 Limits Liability to the Importer of Record in All Circumstances Absent a Showing of Fraudulent Entry Practices

Under 19 U.S.C. § 1592(a), it is unlawful to enter, introduce, or attempt to enter merchandise into United States commerce by means of any document, statement, or act, which is material and false, or by any material omission. The statute

recognizes different levels of culpability for offenses—negligence, gross negligence and fraud—imposes civil penalties, § 1592(c), and delineates burdens of proof corresponding to the principal's culpability, § 1592(e). To enter or attempt to enter merchandise, the IOR must file certain documents or data with CBP—typically the Customs Form (CF) 3461 entry, and later the CF 7501 entry summary. False statements or material omissions in these documents may trigger liability for penalties under § 1592.

To establish fraud under § 1592, the Government must prove by a preponderance of the evidence the existence of a material violation of the statute, and then demonstrate by "clear and convincing evidence" the elements of fraud. 19 U.S.C. § 1592(e)(2). Gross negligence requires a finding of "willful, wanton, or reckless disregard in [the importer's] failure to ascertain both the relevant facts and the statutory obligation to report … payments." *United States v. Hitachi Am., Ltd.*, 172 F.3d 1319, 1329 (Fed. Cir. 1999). To establish a negligent violation, the Government need only prove by a preponderance of the evidence that a material violation occurred, and the burden then shifts to the defendant, § 1592(e)(4).

The Tariff Act designates and limits the "persons" who may act as IOR to the "owner or purchaser" of the goods, or a properly designated customhouse broker retained by the owner, purchaser or consignee of the goods. 19 U.S.C. § 1484. The person acting as IOR is subject to many statutory obligations, including obligations

to provide invoices with detailed descriptions of the goods, § 1481(a), and to use reasonable care in submitting the information required to enable CBP to properly assess duties, taxes and fees, collect accurate statistics, and determine other applicable requirements of law, § 1484(a)(1). An IOR must submit a declaration under oath affirming that the documents submitted under § 1481 are true and correct, § 1485.

Thus, direct liability for negligence penalties under § 1592(c)(2) and (3) can only flow to the principal listed on the § 1485 declaration, *i.e.*, the IOR. As Congress defined the IOR with reference to its relationship to the goods being imported, the IOR may be either a natural or (more likely) legal person, such as a corporation with limited liability.

Congress also specified and limited the circumstances where Customs could impose liability on persons other than the IOR. A third party who aids and abets an intentional violation of § 1592 can be liable along with the importer. In *Hitachi*, this Court held that §§ 1484 and 1485 "apply by their terms only to importers of record," and any third party whom CBP seeks to hold accountable "may not be held *directly liable* for a violation of those provisions and can only be liable under 19 U.S.C. § 1592(a)(1)(B) for aiding and abetting," which requires a state of mind present only in cases of intentional fraud. *Hitachi*, 172 F.3d at 1336 (emphasis added). In other words, a third party may be held liable for aiding and abetting a principal violator,

but only when the court finds that such principal committed fraud, and that the third party knowingly or intentionally aided such fraud. *Id.*

Absent a formal piercing of the corporate veil, Shadadpuri cannot be considered a principal violator. He was neither the IOR, a customhouse broker, the owner, purchaser, nor the consignee of the goods at bar, § 1484. He never swore the § 1485 oath and, absent a finding that the corporation was Shadadpuri's alter ego, there was no obligation that he personally exercise reasonable care. The IOR obligations only devolved on Trek as the "person" identified as the principal on the CBP bond, while the entry documents listed Trek as IOR and the owner and purchaser of the entered goods. The panel majority correctly commented that Shadadpuri could be found directly liable as the principal violator only if the Government successfully pierced Trek's corporate veil. *Trek II,* at 1331. This is a sound observation, supported by well-established theories of alter ego liability, but the Government "declined [Shadadpuri's] invitation" to pierce Trek's corporate veil. *Id.* at 1334.

It was Trek who provided foreign apparel manufacturers with fabric "assists," whose cost or value were not reflected in the "price actually paid or payable" for the merchandise declared at entry. Assists are governed by 19 U.S.C. § 1401a(h)(1)(A), and the Tariff Act requires that the IOR declare their value in the § 1481 entry documentation. Failure to declare assists violates § 1484's duty to make entry using

"reasonable care," while failure to correct the deficiency breaches the principal's § 1485 declaration.

The Government's Complaint charged Trek with fraud (Count I), gross negligence (Count II) and negligence (Count III),[3] but did not seek veil-piercing or other equitable relief. At oral argument on cross motions for summary judgment, "Trek conceded liability for gross negligence but denied committing intentional fraud. Mr. Shadadpuri denie[d] all counts of the Complaint." *Trek I*, at 1310. In turn, the CIT dismissed Counts I (fraud) and III (negligence) but found that Trek and Shadadpuri "committed gross negligence, in violation of 19 U.S.C. § 1592(a) by importing men's suits into the United States by means of material false entry documents with wanton disregard for and indifference to their obligations under the statute." *Id.* at 1313. Without explanation, the CIT found defendants "jointly and severally liable"[4]

[3] A fourth count asked the Court to hold Trek and Shadadpuri "jointly and severally liable," but did not appear to state an actual claim against either defendant.

[4] The notion that a court could hold third parties liable for the payment of CBP duties under § 1592(d) is particularly disturbing and should be carefully considered by this Court. Article I, Section 8, Clause 1 of the U.S. Constitution vests Congress with exclusive power to lay and collect duties. Congress has by law laid personal liability for duties only on the IOR, 19 U.S.C. § 1484. While § 1592(d) directs CBP to "require restoration" of duties, such collection can only be made against the IOR. Courts have noted that, in contrast to the rest of § 1592, subsection (d) is a non-penal, remedial revenue provision, which confers discretion on the courts. *Pentax Corp. v. Robison*, 924 F. Supp. 193, 199 (1996), *rev'd other grounds*, 125 F.3d 1457 (Fed. Cir. 1997).

for "restoration of lawful customs duties under 19 U.S.C. § 1592(d)," and for "civil penalties under 19 U.S.C. § 1592(c)(2)[.]" *Id.*

The cadence of the vacated majority opinion, and of the CIT's opinion below, suggests that a basis on which Trek could have been found liable for a fraudulent violation of § 1592, and Shadadpuri as an aider and abettor thereof, might have existed. Evidence indicated that another of Shadadpuri's companies had been investigated for a similar violation years earlier and that it was instructed that assists are dutiable. Shadadpuri admitted knowing the requirements of the valuation statute. *Trek I,* at 1310. However, Trek is not a party to this rehearing *en banc*, and the fraud count is not properly before this Court—

> Given Trek's concession of gross negligence, the government abandoned its fraud claim against Trek and asked for judgment on the gross negligence claim and a penalty under § 1592(c)(2). As for Shadadpuri, the government declined his invitation to either pierce Trek's corporate veil or to prove that Shadadpuri had aided or abetted a fraud by Trek. Instead, the government claimed it could prevail on its negligence claims against Shadadpuri in the absence of such proofs solely because Shadadpuri is a "person" within the meaning of § 1592(a) generally.

Separation-of-powers issues are implicated when the judicial branch recasts duty obligations on third parties despite that Congress squarely placed this responsibility on the IOR. *United States v. Inn Foods, Inc*., 560 F.3d 1338 (Fed Cir. 2009). The Association respectfully submits that this Court, sitting *en banc*, should reverse and vacate that part of the *Inn Foods* decision, which held that one corporation could be liable for payment of withheld duties relating to entries made by a related corporation whose debts had been discharged in bankruptcy and which had been dissolved.

Id. at 1334. The Court's description that the Government "declined [Shadadpuri's] invitation" to pierce Trek's veil certainly suggests an eagerness, based on the facts of this case, to find Shadadpuri personally liable. *Id.*; *see also Trek II*, at 1340 ("while we may not fully understand the strategy choices the government made here, we hold it to them and reverse … "). While it may have been an error in judgment for the Government to abandon its claims of fraud on appeal, liability cannot now be visited on Shadadpuri because Trek's culpability cannot be enhanced from gross negligence to fraud, and Shadadpuri cannot aid and abet gross negligence.

The question remaining, for which this appeal is an appropriate vehicle, is whether, in a non-fraud context, a reviewing court must pierce Trek's "corporate veil" to hold Shadadpuri personally liable for § 1592 penalties. The panel majority correctly held so, and the Government cannot "shortcut its burden of proof in a way that ignores both the statutory scheme of the Tariff Act and an [IOR's] corporate form." *Id.* at 1340. This court, *en banc*, should agree.

A. As a Matter of Law, to Aid or Abet Corporate Negligence or Gross Negligence is Impossible

This Court must draw a clear distinction between principal violators and third-party aiders and abettors. Aiding and abetting under § 1592(a)(1)(B) requires: (i) that a principal act with fraudulent intent; and (ii) that a third party take affirmative steps to bring about the desired result. Thus, aiding and abetting requires *at a*

minimum that the third party know that the principal's acts constituted a fraudulent violation of § 1592.

To prove the principal committed fraud, the Government must show by clear and convincing evidence that the person "'knowingly' entered goods by means of a material false statement." *Hitachi*, 172 F.3d at 1326 (quoting *United States v. Hitachi Am.*, 964 F. Supp. 344, 371 (Ct. Int'l Trade 1997)); *see also* 19 U.S.C. § 1592(e)(2). A third party can be found liable for aiding and abetting the principal's fraudulent entry practices if the Government demonstrates that such person knowingly or intentionally assisted the principal, or learned of the principal's fraudulent acts or practices and failed to undertake corrective action. Absent a specific showing of the third party's knowledge and intent respecting the principal's fraud, corporate officers and shareholders cannot be held personally liable for penalties under § 1592(c)(1), or duties under § 1592(d). There is in fact no legal basis for ever finding a third party liable under § 1592(c)(2) or (3)—the statute simply does not provide for it. *Hitachi,* at 1326 ("[t]he requirements of aiding or abetting negligent violations of the customs reporting statutes are [] questions of law because they turn on construction of the statute and application of basic legal doctrine.").

It makes sense that a person cannot aid or abet the negligent or reckless actions of another because aiding or abetting always has a knowledge and/or intent element. The Court should not apply a "should have known" standard, and "although a literal

reading of 19 U.S.C. § 1592(a) might at first blush suggest the possibility that a party can be found liable for negligently aiding or abetting negligence," *Hitachi*, at 1338, the statutory text cannot be read in a vacuum. There is a "generic requirement to show knowledge or intent to establish aiding or abetting liability," and to hold otherwise "is itself wholly without support and inconsistent with fundamental legal logic." *Id.* This is true because a third party can never possess more intent than a principal violator.

Some parallels can be drawn with this Court's veil-piercing jurisprudence under the patent laws. This Court has noted that "[t]he common law principles codified in [35 U.S.C.] § 271(b) most closely resemble tort and criminal law principles of aiding and abetting or accessory before the fact." Tal Kedem, *Secondary Liability for Actively Inducing Patent Infringement: Which Intentions Pave the Road?,* 48 Wm. & Mary L. Rev. 1465, 1468 (2007) "[C]ourts have consistently held that there can be no active inducement to infringe when there is no evidence of an underlying direct infringement." Kedem, at 1468-69 n.17 (citing *Epcon Gas Sys., Inc. v. Bauer Compressors, Inc*., 279 F.3d 1022, 1033 (Fed. Cir. 2002) ("It is well settled that there can be no inducement of infringement without direct infringement by some party.")); *see also, Water Techs. Corp. v. Calco, Ltd*., 850 F.2d 660, 668 (Fed. Cir. 1988) ("a

person [actively induces infringement] by actively and knowingly aiding and abetting another's direct infringement. Although § 271(b) does not use the word 'knowing,' the case law and legislative history uniformly assert such a requirement.").[5]

In *Hitachi*, this Court cited "various civil and criminal contexts" that support that "liability for aiding or abetting requires, *inter alia*, proof of knowledge of unlawfulness, also articulated intent to violate the law." 172 F.3d at 1337. Reviewing criminal jurisprudence, the Court cited *United States v. Giovannetti*, 919 F.2d 1223 (7th Cir. 1990) for the proposition that, "[a]ider and abettor liability is not negligence liability. The abettor and aider must know that he is assisting an illegal activity." *Hitachi*, at 1338. The Court explained that this is consistent with civil RICO cases, *Camp v. Dema*, 948 F.2d 455, 459 (8th Cir. 1991) ("Some knowledge must be shown … negligence, however, is never sufficient."), and cases interpreting federal

[5] Despite debate concerning whether "intent to cause the acts that constitute infringement" is sufficient, *Moba, B.V. v. Diamond Automation, Inc*., 325 F.3d 1306, 1318 (Fed. Cir. 2003), or whether "it must be established that the defendant possessed specific intent to encourage another's infringement and not merely that the defendant had knowledge of the acts alleged to constitute infringement." *Manville Sales Corp. v. Paramount Sys., Inc*., 917 F.2d 544, 553 (Fed. Cir. 1990), some degree of intent or knowledge by an inducer is always required. When an individual is not an inducer, he or she can only be held liable for a corporate infringer's acts if the corporate veil is pierced.

securities laws. *SEC v. Coffey*, 493 F.2d 1304, 1315 (6th Cir. 1974) (aider and abettor must "knowingly and substantially assist[] the violation"). *See e.g., Hitachi*, at 1337–38.

For entry violations under § 1592(a), the Government often may show that a defendant knew of a duty, and failed to discharge it. The Government must show that each person alleged to be an aider or abettor himself committed one of the material acts or failures, or otherwise met the standards for direct liability, save for the fact that he did not list himself as IOR. In certain cases, showing that the defendant knew of a duty, and failed to discharge it will be possible. Where a claim of fraud is demonstrated, a third party's knowledge of a material violation of Title 19 by the IOR, combined with some overt act of aiding and abetting that violation, is likely enough to trigger liability under § 1592.

II. The Court Should Continue Applying the Doctrine of Veil Piercing in Determining Section 1592 Liability Against Third Parties Not Listed as the Importer of Record.

A. Concepts of Corporate Personhood and Limited Liability are Well Established

Upon incorporation under State laws, a new entity is formed with an "identifiable persona" that can act and be acted upon, and who will become "the counterparty to all contracts that the corporation enters into with its various participants … ." Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. Ill.

L. Rev. 785, 787 (2013). Corporate personhood imparts a distinct identity, clear line of succession for property ownership, and for—

> … separating pools of assets according to which assets are dedicated to the business, and which assets are the personal assets of the human persons who are participating in the enterprise. The ability to partition assets in this way makes it easier to commit specialized assets to an enterprise and to lock-in those assets so that they remain committed to the enterprise.

Id.

Legal scholarship has evolved the "artificial person" theory which credits the corporate charter issued by the state of incorporation as the mechanism which breathes life into the corporate "person." In discussing the role of shareholders, Chief Justice Marshall applied the "artificial person" theory, explaining—

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or an incidental to its very existence.

Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819) (emphasis added). In *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888), the Court explained—

> Such corporations are merely associations of individual members united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. … The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State.

Moreover, the economic advantages of limiting shareholder liability are well-established. Limited liability promotes a "risk-bearing advantage" for shareholders through efficient diversification of limited shareholder resources. Douglas G. Smith, *A Federalism-Based Rationale for Limited Liability*, 60 Ala. L. Rev. 649, 681 n.19 (2009). Limited liability is credited for "'the expansion of industry and in the growth of trade and commerce,'" *Hambleton Bros. Lumber Co. v. Balkin Enters., Inc.*, 397 F.3d 1217, 1227 (9th Cir. 2005) (quoting William O. Douglas & Carol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929)), and according to one commentator—

> Reducing the likelihood that shareholders will be personally liable for the debts of the corporation increases the value that shareholders will place on corporate equities and reduces the costs associated with holding such investments.
>
> * * *
>
> If shareholders cannot be held liable for the debts of the corporation, the wealth of individual shareholders is irrelevant in valuing those shares. As a result, each share of the corporation may be valued equally and all shares are fungible.

Smith at 653–54. Extending liability to shareholders would significantly increase the economic costs of equity investment. *Id.* at 651.[6]

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[6] While limited liability is the rule, it is "not unique to corporations." Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 90 (1985). Just as a shareholder's liability is limited to its investment, lending institutions are not burdened by creditors' potentially illegal expenditures. *Id*.

B. The Veil-Piercing Doctrine

Courts generally require a strong equitable showing before piercing the corporate veil, and typically look for fraud in the acts of a corporate principal or third party who has exercised significant domination and control. Here, the analysis of veil-piercing should account for the penal scheme set out in § 1592—direct liability for the principal, and secondary liability for any third parties who aid and abet fraudulent violations. Section 1592 imposes no liability on anyone else: where fraud exists, the statute holds aiders and abettors directly liable; where only negligence, the corporate veil must be pierced to enter judgment against any third party. This is hardly inequitable, since, in cases of negligence, third parties will not have acted with improper intent.

C. Veil-Piercing Actions Often Depend on the Nature of the Violation as Sounding in Contract versus Tort

While all veil-piercing actions require some element of fraud or wanton disregard of the corporate form, courts impose this extraordinary measure more frequently in cases sounding in tort than in those sounding in contract, which appropriately distinguishes between voluntary and involuntary creditors. An involuntary creditor is harmed through some tortious act, and will always suffer some degree of "uncompensated risk" because he "can hardly negotiate with the [tortfeasor] in advance," Easterbrook & Fischel, *supra*, at 117; a voluntary creditor—harmed through some breach of contract—is "compensated *ex ante* for the increased risk of default

ex post," *id*. at 111. It is helpful to consider whether violations of § 1592 more closely resemble tort or contract violations.

The basic relationship between the IOR and Customs is contractual. The relationship begins, in fact, with an express contract—a promise by the principal to pay duties, taxes, and fees, and to satisfy all other obligations arising out of its import activities—such covenants being secured by a surety bond. *See* 19 U.S.C. § 1623.[7] The bond then obligates the IOR to perform duties outlined in CBP regulations, expressly incorporated as terms of the contract. *See* 19 C.F.R. § 113.62. These duties include, *inter alia*, the obligation to make entry using "reasonable care," which courts have adopted as the touchstone for determining when the § 1592(a) proscriptions are violated.

The IOR's obligation to restore lawful duties arises under § 1592(d) and is also contractual. Ordinarily, when Customs liquidates an entry under 19 U.S.C.

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[7] CBP advises that "[a] CBP bond is a contract that is given to insure the performance of an obligation or obligations imposed by law or regulation. A bond is like an insurance policy that guarantees payment to [CBP] if a required act is not performed." *See Questions and Answers on Customs Bonds,* CBP Publ. No. 0000-0590, at 1 (Nov. 2006) (emphasis added). CBP identifies three parties to the contract: "the *principal*, the *surety* and the *beneficiary*." *Id.* (Emphasis in original). The principal and surety are described as the "bond obligors," while "CBP is the beneficiary on all the bonds it authorizes." *Id.* In the event of default by the importer, the surety will be liable for the balance due, but up to the bond amount. *See United States v. Blum*, 858 F.2d 1566, 1570 (Fed. Cir. 1988) ("[Section 1592](d) provides the United States with a cause of action to recover duties from those parties traditionally liable for such duties, *e.g.,* the IOR and its surety."); *see also Inn Foods*, 560 F.3d at 1346.

§ 1514, the IOR obtains a defense of finality of liquidation. *United States v. Utex Int'l, Inc*., 857 F.2d 1408, 1409 (Fed. Cir. 1988); 19 U.S.C. § 1514(a). The IOR's entry in violation of § 1592(a), effectively waives that defense and requires restoration of lawful duties for transactions which would otherwise be final. This § 1592(d) obligation to restore duties is purely contractual, and courts have held this subsection to be compensatory, rather than penal, admitting of no judicial discretion. *Pentax Corp*., 924 F. Supp. at 199.

While some aspects of § 1592 sound in tort,[8] fundamentally, the Government voluntarily and contractually agrees to transact business with every importer, and thus if the Government wishes to pierce the corporate veil, it cannot claim to be an involuntary creditor incapable of contracting with the liable party for additional protections. This is relevant to the present case because "[c]ourts are more willing to disregard the corporate veil in tort than in contract cases." Easterbrook & Fischel, at 112. Indeed, one scholar reviewed nearly 4000 federal and state veil-piercing cases and found that veil-piercing claims succeeded roughly 40% of the time, far

[8] For example, third-party aiders and abettors of a principal importer's violations are not themselves bound by the obligations set out in the Tariff Act, and are not parties to the underlying surety contract between Customs and the importer. Their statutory liability, if any, would clearly sound in tort. In assessing § 1592 penalties, this Court has said "[w]e interpret section 1592(d) causation requirement as requiring nothing less than but-for causation." *Pentax Corp. v. Robison*, 125 F.3d 1457, 1463 (Fed. Cir. 1997).

more often in contract than tort.[9] Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036, 1044 (1991). Another scholar observed that "the inability of involuntary creditors to bargain or insure themselves against risk has led 'almost every commentator' to conclude that veil-piercing is more compelling in Tort than Contract." Peter B. Oh, *Veil-Piercing*, 89 Tex. L. Rev. 81, 87 (2010) (citing David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 Colum. L. Rev. 1565, 1601 (1991) ("[A]lmost every commentator has paused to note that limited liability cannot be satisfactorily justified for tort victims … ")).

Here, the surety bond is "binding upon the parties," § 1623(c), and CBP may "authorize the cancellation" of any importer's bond or condition pursuant to "publish[ed] guidelines establishing standards for setting the terms and conditions for cancellation of bonds or charges thereunder." *Id.* The agency has wide latitude to draft bond covenants, and Part 113 of the regulations authorizes CBP to require security or a bond as "necessary for the protection of the revenue or to assure compliance with any pertinent law, regulation, or instruction." 19 C.F.R. § 113.1; *see also* 19 U.S.C. § 1623. CBP may further designate which corporations may act as sureties

[9] Thompson's dataset included 1600 veil piercing cases until 1985, and an additional 2200 cases between 1985 and 1996. *See* Thompson, at 385; *see also*, Oh at 92.

on such bond, to "prescribe the conditions and form of such bond," and to "fix the amount of penalty" if the bond conditions are breached, § 1623(b)(1) and (3).

Accordingly, CBP is a voluntary creditor because it is "compensated *ex ante* for the increased risk of default *ex post*," when it contracts with the IOR to permit entry of goods. Easterbrook & Fischel, at 111. Where CBP determines that the revenue of the United States is unsecured, the agency may either prescribe additional bond conditions, or cancel the principal's bond entirely. In this sense, when pursuing third-party liability under § 1592, the Court should follow other circuits and only pierce the corporate veil in the most extreme circumstances.

In this case, the Government has failed to preserve the right to allege fraud against Trek or Shadadpuri. To seek to hold Shadadpuri liable for a violation of § 1592 in this case would require either: (i) a remand to the CIT, with an instruction that it conduct a veil-piercing analysis; or (ii) a veil-piercing analysis performed by a district court in an action to enforce the judgment entered against Trek.[10]

[10] It should be remembered that the CIT's final judgment against Trek can be registered in any judicial district for enforcement purposes. 28 U.S.C. § 1963. Such an action would give the Government an opportunity to attempt to pierce Trek's corporate veil and hold Shadadpuri personally liable for payment of the judgment against Trek for gross negligence. In such a proceeding, the Government would need only show that Shadapuri committed such acts as, under State law, would enable the piercing of Trek's corporate veil. Those acts, if they exist, need not even relate to the instant import transactions, and there would be no need to hold Shadadpuri personally liable for a violation of § 1592(a).

D. This Circuit Has Embraced the Veil-Piercing Doctrine in Cases Involving a Corporation's Patent Infringement

This Court's veil-piercing jurisprudence in patent infringement litigation can help to inform its decision here. Whereas customs law violations are rooted in contract, infringement of IP laws sound in tort.[11] Despite this difference, this Court's jurisprudence on infringement liability is consistent with traditional notions of veil piercing.

In patent actions, any person can be directly liable for infringement under 35 U.S.C. § 271(a), and where a corporation's direct infringement is knowingly and intentionally induced by a third party, the corporate veil will not protect that individual from personal liability. *Id.* § 271(b); *see Orthokinetics, Inc. v. Safety Travel Chairs, Inc*., 806 F.2d 1565 (Fed. Cir. 1986) ("[I]t is well settled that corporate officers who actively aid and abet their corporation's infringement may be personally liable for inducing infringement under § 271(b) regardless of whether the corporation is the alter ego of the corporate officer.") (citing *Power Lift, Inc. v. Lang Tools, Inc*., 774 F.2d 478, 481 (Fed. Cir. 1985)).

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[11] *Mars, Inc. v. Coin Acceptors, Inc.*, 527 F.3d 1359, 1365 (Fed. Cir. 2008) ("Patent infringement is a tort."). Damages for infringement are paid directly to the IP holder to make it "whole." *Pall Corp. v. Micron Separations*, 66 F.3d 1211, 1223 (Fed. Cir. 1995) (citing *Aro Mfg. Co. v. Convertible Top Replacement Co*., 377 U.S. 476, 507 (1964) (asking the question, "[h]ad the infringer not infringed, what would the patent holder … have made?")).

As with aiding and abetting violations, there is a distinct knowledge component for inducement. However, such knowledge relates to a knowing and intentional act: something more than mere negligence or gross negligence ("recklessness") is required. The Supreme Court in *Global-Tech Appliances, Inc., v. SEB S.A.*, 131 S. Ct. 2060 (U.S. 2011) considered whether a party, to "actively [induce] infringement" under § 271(b), must know that the induced act constitutes patent infringement, or whether deliberate indifference to a patent's existence can be considered a form of actual knowledge. The Court held that induced infringement requires knowledge of infringement, but because the petitioners knew of an infringement lawsuit involving the same invention, the Court's judgment that petitioners induced infringement was affirmed under the doctrine of willful blindness. The Court explained—

> While the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts. See G. Williams, Criminal Law § 57, p. 159 (2d ed. 1961) ("A court can properly find wilful blindness only where it can almost be said that the defendant actually knew"). By contrast, a reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing, see ALI, Model Penal Code § 2.02(2)(c) (1985), and a negligent defendant is one who should have known of a similar risk but, in fact, did not, see § 2.02(2)(d).

Id. at 2070 (footnotes omitted) (emphasis added).

More recently, in *Hall v. Bed Bath & Beyond, Inc*., 705 F.3d 1357 (Fed. Cir. 2013), this Court upheld a determination that a corporate officer, acting in her official capacity, was not personally liable for the infringing acts of the corporation. The Court applied veil-piercing principles specific to New York law, stating—

> … the party seeking to pierce a corporate veil [must] make a two-part showing: (i) that the owner exercised complete domination over the corporation with respect to the transaction at issue; and (ii) that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil.

Id. at 1365 (citing *Am. Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997); *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc*., 933 F.2d 131, 138 (2d Cir. 1991)).

On the other hand, where a corporate owner, officer, or employee has not been found liable for intentional inducement, this Court has not hesitated to rule that the corporate veil must be pierced before that individual can be held liable. *See e.g*. *Minn. Mining & Mfg. Co. v. Eco Chems., Inc.*, 757 F.2d 1256 (Fed. Cir. 1985) ("The corporate form is not easily brushed aside"); *see also A. Stucki Co. v. Worthington Indus., Inc.,* 849 F.2d 953 (Fed. Cir. 1988) (the veil may be pierced only "if the evidence reveals circumstances justifying disregard of the status of [the infringer] and [defendant] as distinct, separate corporations.").

Just as Congress, in the patent laws, provided liability for direct violators (in-

fringers) and knowing participants (inducers), so too in § 1592 has Congress provided liability for those who enter by wrongful means (principal IORs), and those third parties who intentionally aid and abet IORs in doing so. To hold third parties responsible for judgment debts imposed against corporate violators, in either scenario, requires a veil-piercing.

There may be sentiment among members of the Court that Shadadpuri's transgressions in this case were knowing and fraudulent. However, the procedural posture of this case precludes remand for the purposes of making such a determination. The judgment against Trek is for gross negligence, and is final. Under the circumstances, the only remedy available here is remand to the CIT for a veil-piercing analysis. There is no need—and no justification—for the Court to try to stretch the limits of § 1592 liability beyond those clearly delineated by Congress.[12]

III. Holding That the Corporate Veil Does Not Apply to Section 1592 Will Have Adverse Consequences in Other Areas of Customs Law

This Court's *en banc* determination could have far-reaching implications, for

[12] This does not work a harsh result on the Government. If in fact a claim of fraudulent aiding and abetting could have been proven against Shadadpuri, the Government has only itself to blame for the fact that such judgment was entered. The Government could have rejected Trek's offer for entry of summary judgment against it for gross negligence, and proceeded to trial in an effort to establish fraud by Trek and Shadadpuri. It presumably could have pursued its appeal to this court. In addition, the Government has at its disposal various criminal statutes to employ against corporate owners, officers, or directors who commit serious transgressions while operating an importing business.

both § 1592 and other provisions of the Tariff Act. If the Court adopts a position that § 1592's reference to "person" imposes liability *directly* on importers of record *and* their corporate officers or shareholders, one might expect that third-party defendants will be cited and sued every time a corporation violates § 1592. The corporate status of the IOR would become irrelevant to CBP and the availability of an unprotected pocket could motivate CBP to go after third-party natural persons much more aggressively. Many firms would cease importing altogether, purchasing goods on landed terms and letting foreign sellers act as the IOR, simply to avoid placing owners' and officers' personal assets at risk.[13]

Moreover, the proscriptions of § 1592(a) are extraordinarily broad—covering "entry" or "introduction" of goods, "attempts" at same, and an unlimited range of false "statements," "practices" and "acts." If § 1592 stands alone as a law which disregards ordinary corporate liability limitations, CBP will be irresistibly tempted to couple § 1592 claims with those arising elsewhere under the Tariff Act. This a major concern for ASCDI/NATD and its members.

Almost any violation of the customs laws must, at some point, involve a questionable statement, act, practice, or omission. For instance, if a corporate importer

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[13] Others might try to shield individual assets by wrapping importing companies in a labyrinth of holding companies, trusts, and other devices. This would hardly be to anyone's advantage—least of all CBP—in an environment where risk assessment and "trusted trader" programs help to protect the nation's borders.

incorrectly, negligently, certifies that imported goods are not subject to a 19 U.S.C. § 1337 exclusion order, would this allow for assessment of monetary penalties against the corporation and its directors (in addition to sanctions imposed under § 1337)? If an importer is penalized under 19 U.S.C. § 1526(e)[14] for importing allegedly counterfeit "Acme Widgets," would the invoice describing them as "Acme Widgets" be deemed a false statement offered in violation of § 1592(a), thereby subjecting the importer and its owners to monetary penalties under that statute as well?

As veil piercings more often occur against closely-held corporations than large, publicly-traded ones, there is ample reason for concern that expanded use of § 1592(a), arising out of a judicial pronouncement that it renders corporate forms invisible, would disproportionately and negatively impact smaller businesses.

CONCLUSION

Section 1592 provides a strong remedy against unlawful importation practices. Congress has clearly delineated when Customs may look beyond the IOR to affix penalty liability thereunder. There is neither need nor justification for expanding it. This Court should vacate the judgment against Shadadpuri and, if it believes

[14] There is no state-of-mind component under § 1526(f), which imposes civil penalties on "[a]ny *person* who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that is seized under subsection (e)" (emphasis added).

the record contains sufficient grounds, remand the matter to the CIT with instructions to perform a veil-piercing analysis.

Respectfully submitted,

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