No. 14-

In the Supreme Court of the United States

HARISH SHADADPURI, PETITIONER,

v.

UNITED STATES, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress created two civil penalty provisions in 1978 for acts of fraud, gross negligence, or negligence related to importation of goods committed by a "person": (1) who "may enter, introduce, or attempt to enter or introduce any merchandise ..." using material and false statements, acts, or omissions, 19 U.S.C. 1592(a)(1)(A), or (2) who "may aid or abet any other person..." who committed such acts. 19 U.S.C. 1592(a)(1)(B). Only an "importer of record" or customs broker can "enter" goods with Customs. 19 U.S.C. 1494(a)(1). The question presented is:

Whether the Federal Circuit en banc misconstrued 19 U.S.C. 1592(a)(1)(A) by holding a shareholder, officer, and employee of the corporate importer of record jointly and severally liable for gross negligence penalties under the court's theory that he "introduce[ed]" the goods, where the corporate importer of record had "entered" the goods with Customs, and where the government disavowed seeking liability against Petitioner as either an aider or abettor under 19 U.S.C. 1592(a)(1)(B) or by piercing the veil of the corporate importer, and had never advanced the court's theory.

RULES 14.1 AND 29.6 STATEMENTS

All parties are identified in the caption of this petition. Petitioner was a co-defendant in the United States Court of International Trade and was the appellant in the court of appeals. Trek Leather, Inc. was a co-defendant in the Court of International Trade but was not a party in the court of appeals, though it was listed as a defendant in the caption of the case below. No publicly held company owns 10% of the stock of Trek Leather, Inc.

Respondent United States was the plaintiff in the Court of International Trade. It filed a cross-appeal, but voluntarily dismissed its appeal and was listed as plaintiff-appellee in the decision of the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Harish Shadadpuri respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS AND ORDERS BELOW

The en banc opinion and judgment of the court of appeals (Appendix, *infra*, 1a-25a) ("App.") is reported at 767 F.3d 1288. The order of the court of appeals granting rehearing en banc (App. 26a-29a) is unreported. The now-vacated panel opinion and judgment of the court of appeals (App. 30a-60a) is reported at 724 F.3d 1330. The opinion and judgment of the United States Court of International Trade (App. 61a-74a) is reported at 781 F.Supp.2d 1306.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 2014. On December 4, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to February 13, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, § 110, 92 Stat. 888, 893-894, *amending* Section 592 of the Tariff Act of 1930, 46 Stat. 590, 750-751, as amended, 19 U.S.C. 1592(a)(1) provides, in part:

> **Penalties for fraud, gross negligence, and negligence**
> (a) **Prohibition**
> (1) **General Rule**
> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax or fee thereby, no person, by fraud, gross negligence, or negligence—
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—
> (i) any document or electronically transmitted data or information, written or oral statement, or act which is material or false, or
> (ii) any omission which is material, or
>
> (B) may aid or abet any other person to violate subparagraph (A).

Appendix E, App. 75a-76a, contains the prior version of Section 592 of the Tariff Act of 1930, 46 Stat. 590, 750-751, as amended by § 304(b) of the Anti-Smuggling Act of 1935, 49 Stat. 517, 527, *codified at* 19 U.S.C. 1592 (1976).

INTRODUCTION

The issue presented is of exceptional importance to the thousands of American-based corporations and their shareholders, officers, and employees who are involved in the importation of merchandise into the United States. The Federal Circuit's en banc decision misconstrues the civil penalty provision established by Congress in 1978 in the Tariff Act of 1930. The decision erroneously expands direct and personal liability for civil penalties to shareholders, officers, and employees of corporate importers and brokers beyond the limits set by Congress in 19 U.S.C. 1592(a)(1)(A). This erroneous analysis renders meaningless the separate penalty provision for "aiders or abettors" in 19 U.S.C. 1592(a)(1)(B).

The issue warrants review by this Court because of its importance and because no other court of appeals can review the issue, which is subject to the exclusive jurisdiction of the Federal Circuit, 28 U.S.C. 1582(1), and the Court of International Trade. 28 U.S.C. 1295(a)(5). *See United States v. United States Shoe Corp.*, 523 U.S. 360, 365-366 (1998). Thus, no conflict in the circuits can arise and

the Federal Circuit is unlikely to revisit its own en banc decision on this issue in the foreseeable future.

The panel decision in this case, App. 30a (Prager and O'Malley, *Cir. JJ.*; Dyk, *Cir. J.*, dissenting) was erroneously vacated by the en banc court. App. 26a. The panel properly held that Petitioner, the shareholder, president, and employee of the corporate importer of record could not be held jointly and severally liable with the corporate importer because the government did not assert liability against him as an "aider or abettor" under 19 U.S.C. 1592(a)(B) and the government did not seek to pierce the importer's corporate veil. App. 31a-32a. The panel noted that the record might have supported other theories of liability not advanced by the government but stated "[w]e do not want to fall into the trap of letting bad facts make bad law, and, thus, decline the invitation to do so." App. 50a n. 3

The Tariff Act of 1930, *codified at* 19 U.S.C. 1304 *et seq.*, as amended, is an elaborate statutory scheme which regulates importers and their customs brokers and governs the importation of goods into the United States, including the assessment and collection of customs duties, a major source of federal tax revenues.

In 1978, Congress created new civil penalties in the Tariff Act which could be imposed directly upon a person acting as importer of record or customs

brokers for material and false activities in connection with the entry of merchandise into the United States. The Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, § 110, 92 Stat. 888, 893-897 (the "Reform Act") amending § 592 of the Tariff Act of 1930, 46 Stat. 590, 750-751. The Reform Act created a separate penalty provision for persons who may "aid or abet" such misconduct. *Cf.* 19 U.S.C. 1592(a)(1)(A) *with* 19 U.S.C. 1592(a)(1)(B). Prior to the Reform Act, § 592 of the Tariff Act provided only for forfeiture of the imported goods (or their value) for false or fraudulent activities; it did not contain a personal civil penalty remedy (although Section 591 of the Tariff Act, 19 U.S.C. 1591, contained a criminal remedy).

Under the Reform Act provision, shareholders, officer, or employees of a corporate importer of record cannot be liable for statutory penalties unless (1) they "aid or abet" fraudulent violations by the importer of record, 19 U.S.C. 1592(a)(1)(A), or (2) the court pierces the corporate veil of the corporation. Federal Circuit law establishes that a person cannot be an "aider or abettor" under 19 U.S.C. 1592(a)(1)(B) except for fraudulent violations because "a party cannot negligently aid or abet a merely negligent violation of a statute." *United States v. Hitachi America, Ltd.*, 172 F.3d 1319, 1336 (Fed. Cir. 1999). The government must establish any fraud claim "by clear and convincing evidence ...." 19 U.S.C. 1592(e)(2).

The en banc decision erroneously holds Petitioner jointly and severally liable for civil penalties for violation of 19 U.S.C. 1592(a)(1)(A) under the theory that he was a "person" who "introduce[ed]" goods into the United States. This conclusion is based on various acts which the court erroneously attributed to Petitioner individually, despite the fact that he was at all times acting on behalf of Trek, the corporate importer of record. App. 7a-10a. This new theory of liability was not identified in the order granting rehearing en banc, which specified three issues for additional briefing by the parties; the en banc decision was issued without further argument App. 27a-29a. The en banc decision erroneously relies upon decisions of this Court which involved forfeiture provisions in tariff laws of 1890 and 1909 and factual circumstances different from those present here. App. 15a-22a.

The en banc court concluded that it could rest its decision on its interpretation of "introduce" in 19 U.S.C. 1592(a)(1)(A), App. 18a, "even though the parties did not specifically focus on that language in the [CIT] or in their briefs to the panel …," App. 24a, nor in the supplemental briefs to the en banc court, for that matter.

The en banc decision puts shareholders, officers, and employees of corporate importers at risk for enormous statutory penalties on the basis of negligence or gross negligence without regard to

whether they satisfy the "aider or abettor" requirement established by Congress in 19 U.S.C. 1592(a)(1)(B) or were using the corporation as their *alter ego*.

The en banc decision ignores the statute as a whole and makes the "aid or abet" provision, 19 U.S.C. 1592(a)(1)(B), superfluous, contrary to established principles of statutory construction. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The court's construction of one subpart of the statute should not "make nonsense" of another subpart. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 374 (1988). The "structure of the statute ..." is critical to its meaning. *See United States v. Hayes*, 555 U.S. 415, 434 (2009) (Roberts, Ch. J., dissenting).

The decision also ignores the established law in New Jersey and New York, where Trek was formed and where it had an office, that shareholders are ordinarily not liable for the obligations or debts of their corporations. *Richard A. Pulaski Construction Co., Inc. v Air Frame Hangars, Inc.*, 195 N.J. 457, 472, 950 A.2d 868 (2008); *accord*, *Morris v. New York State Dep't of Taxation and Finance*, 82 N.Y.2d 135, 140, 603 N.Y.S.2d 807 (1993). Federal courts normally follow state law on such matters unless there is an express federal statute to the contrary.

The language in 19 U.S.C. 1592(a), as enacted, is different from prior versions of the bill as it wended its way through Congress and is different from the earlier statutory provisions invoked by the en banc court. The en banc decision ignores the significant changes in the language in the law. The Conference Committee on the Reform Act accepted Senate Amendment No. 56 which created the separate "aid or abet" subpart as 19 U.S.C. 1592(a)(1)(B). This is the language finally enacted by Congress. The prior version of the bill had a single prohibition: "No person may enter, introduce, attempt to enter or introduce, *or aid or procure* the entry or introduction of any merchandise into the commerce of the United States ..." H.R. Rep. No. 95-1517, 95th Cong., 2d Sess. 2, 11-12 (1978) (emphasis added); *see* S. Rep. No. 95-778, 95th Cong., 2d Sess. 55 (1978); *see generally*, John M. Peterson, *Civil Customs Penalties under Section 592 of the Tariff Act: Current Practices and the Need for Further Reform*, 18 Vand. J. Transnat'l L. 679 (1985).

The en banc court's decision overlooks the significance of the change in the language, which created the separate prohibition in 19 U.S.C. 1592(a)(1)(B) for persons who "aid or abet" violations under 19 U.S.C. 1592(a)(1)(A). The language in 19 U.S.C. 1592(a) is also different from the in rem forfeiture provision which it replaced and is different from the language in prior customs laws in the cases relied upon by the en banc court.

Since the Federal Circuit's en banc decision in this case, Customs recently proposed an amendment of its Form 5106 in order to collect expansive and personal information from corporate officials. This indicates a clear intent to take advantage of the en banc court's expansive interpretation of 19 U.S.C. 1592(a)(1)(A). Notice and Request for Comment, 79 F.R. 61,091 (Oct. 9, 2014); *see* link to Customs notice and proposed new form at http://www.cbp.gov/trade/trade_community/cbp-publishes-federal-register-notice-proposing-revisions-cbp-form-5106.

Congress knows how to impose liability on corporate officers or shareholders for corporate activities; when Congress chooses to do so, it does so expressly, as the panel below recognized. App. 51a n. 4. *See*, *e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745, which imposes certification obligations on specified corporate officers, and the Internal Revenue Code, 26 U.S.C. 6671 and 6672, which impose obligations on corporate officers and employees to collect and pay certain taxes. *See Slodov v. United States*, 436 U.S. 238, 244-245 (1978) (officer or employee of employer who "willfully" fails to collect and pay employer's "trust fund taxes" may be personally liable).

The penalty provision in the Tariff Act, as amended, 19 U.S.C. 1592(a)(1)(A), is not such a statute, as the en banc Federal Circuit effectively

held. Only this Court can remedy the Federal Circuit's erroneous construction of the statute.

STATEMENT

A. Defendant Trek Leather, Inc.–Not Petitioner–Was Importer of Record for Entry of Men's Suits Into the United States.

Trek Leather, Inc., a New Jersey corporation doing business in New York, was the importer of record for 72 entries of men's suits made by Trek's customs broker with Customs at the Port of New York between February and October 2004 (the "Entries").[1] App. 4a-5a. Trek had various employees in addition to Petitioner, who was Trek's president and sole shareholder. App. 4a-5a, 9a.

Petitioner was not the importer of record nor the buyer or seller of any of the merchandise involved. App. 5a-7a. *See* 19 U.S.C. 1484(a). The transactions concerning the merchandise were between or among corporate entities. App. 7a.

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[1] "Customs" refers to the United States Bureau of Customs and Border Protection, now a part of the United States Department of Homeland Security. It was previously the United States Customs Service and was part of the United States Department of the Treasury.

B. Trek's Entries Did Not Include the Value of Fabric and Trim Provided to the Foreign Manufacturers--So-Called "Assists"--So That the Duties Owed by Trek Were Underreported.

Trek paid customs duties totaling $236,279.32 with the Entries of men's suits. Complaint Ex. A. However, Trek's entries did not include the value of fabric and trim which had been provided to the manufacturer of the suits – so-called "assists," which are dutiable. App. 9a-10a. 19 U.S.C. 1401a(h)(1)(A). Thus, the duties owed by Trek were underreported and not fully paid at the time the Entries were filed.

C. The United States Sued Trek and Petitioner Jointly and Severally for Civil Penalties Under 19 U.S.C. 1592(a)(1)(A) on Claims of Fraud, or Alternatively, Gross Negligence or Negligence.

Respondent United States filed a civil action against Trek and Petitioner in the United States Court of International Trade ("CIT") in 2009. App. 4a. It sought civil penalties and duties from Trek and Petitioner jointly and severally under 19 U.S.C. 1592.[2] The government sought a $2,392,307.00

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[2] Customs had initiated an administrative investigation of Trek's entries. Trek and its broker provided additional information. App. 8a-10a. Customs concluded that Trek undervalued the duties owed by failing to include the value of fabric and trim provided to the manufacturer. Customs had

penalty for fraud (its estimate of the domestic value of the suits imported by Trek). Alternatively, it sought $534,420.32 for gross negligence (calculated as four times the duties, taxes, and fees "of which the United States is or may be deprived ...." though the unpaid balance of duties was $45,245.39). Alternatively, the government sought $267,210.16 for ordinary negligence (its calculation of twice the unpaid duties). The government also sought unpaid duties of $45,245.39 from Trek and Petitioner under 19 U.S.C. 1592(d). App. 65a.

The complaint acknowledged that the corporation Trek was the importer of record but alleged that "*defendants* entered or introduced or attempted to enter or introduce men's suits ..." into the United States "by means of false acts, statements and/or omissions ...," *i.e.*, by understating "the dutiable value of the imported merchandise by failing to add the value of the fabric assists to the value of the imported men's suits." App. (emphasis added). Trek

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previously investigated another company of which Petitioner was part owner, for similar violations. In this case, Customs concluded that the duty loss on the 2004 Trek entries was $133,605.08. App. 9a-10a. Customs subsequently issued a Pre-Penalty Notice and a Penalty Notice to Trek and Petitioner proposing a monetary penalty of $2,392,307.00 for alleged fraud, plus payment of unpaid duties. During the investigation, Trek paid additional duties of $38,359.59 and its bonding company paid $50,000, leaving $45,245.39 in unpaid duties. App. 10a. No further payments were made by Trek after issuance of the Notice of Penalty.

and Petitioner denied the allegations of the complaint, except Trek admitted it was authorized to do business in New York. App. 65a, Answer.

D. On Summary Judgment, The Court of International Trade Held That Trek and Petitioner Were Jointly and Severally Liable for Penalties for Gross Negligence Under 19 U.S.C. 1592(a)(1)(A).

The government moved for summary judgment in the CIT, claiming that Trek and Petitioner were jointly and severally liable for fraud penalties because they failed to include the "assists" in duty calculations. Alternatively, the government claimed that they were jointly and severally liable for gross negligence or ordinary negligence. Trek and Petitioner opposed and cross-moved, particularly for dismissal of claims against Petitioner individually. App. 68a.

The government conceded that that Trek was the importer of record, but repeatedly referred to Trek and Petitioner jointly as having performed the various acts that were part of the entry process, *e.g.*, that "*defendants* entered or introduced or attempted to enter or introduce men's suits into the commerce of the United States ..., etc." Complaint ¶ 6 (emphasis added).

The government did not claim that Petitioner had "aided or abetted" violations by Trek under 19 U.S.C. 1592(a)(1)(B); nor did it seek to pierce Trek's corporate veil in order to impose liability directly on Petitioner.

The CIT denied summary judgment on the government's fraud claim, but granted judgment as to gross negligence against Trek and Petitioner, jointly and severally, under 19 U.S.C. 1592(a)(1)(A). App. 66a-70a. It concluded that the entry documents were false and material because they did not include the value of "assists." App. 67a.

The court construed the word "person" in 19 U.S.C. 1592(a)(1)(A) as broad enough to include Petitioner, though he was acting on behalf of the corporation. Trek. App. 68a. The court rejected Petitioner's argument that he could only be liable if shown to be an aider and abettor of fraud under 19 U.S.C. 1592(a)(1)(B), citing *United States v. Hitachi America, Ltd.*, 172 F.3d 1319 (Fed. Cir. 1999), a claim the government disavowed. The CIT held Trek and Petitioner jointly and severally liable for a civil penalty of $534,420.32 for gross negligence (calculated as four times the unpaid duties under 19 U.S.C. 1592(c)(2)) and for unpaid duties of $45,245.39 under 19 U.S.C. 1592(d). App. 70a-71a.[3]

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[3] The government and the CIT erroneously calculated the civil penalty based on the balance of unpaid duties prior to deducting the $38,359.69 paid by Trek and the $50,000 paid by

Petitioner filed a timely notice of appeal. The government filed a timely notice of cross-appeal, which it voluntarily dismissed.

E. On Appeal, the Federal Circuit Panel Reversed and Held That Petitioner Was Not Liable Under 19 U.S.C. 1592(a)(1)(A) Because He Was Not the Importer of Record and the Government Failed to Claim that He Was an "Aider or Abettor" of Fraud Under 19 U.S.C. 1592(a)(1)(B) or That He Used Trek as His *Alter Ego*.

A panel of the Federal Circuit (Plager and O'Malley, *Cir. JJ.*; Dyk, *Cir. J.*, dissenting) agreed with Petitioner and reversed the judgment against him:

> We find that, absent piercing Trek's corporate veil to establish that [Petitioner] Shadadpuri was the actual importer of record, as defined by statute, or establishing that Shadadpuri is liable for fraud under § 1592(a)(1)(A), or as an aider and abettor of fraud by Trek under § 1592(a)(1)(B), we must reverse the penalty assessment against Shadadpuri.

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its bonding company. The penalty should have been based on the net unpaid balance of $45,245.39, resulting in a maximum penalty of $180,981.56, not $534,420.32. App. 10a.

App. 31a-32a (footnote omitted).

The panel noted that the record might have supported other theories of Petitioner's liability, which the government expressly disavowed. App. 32a n. 1 and 50a-51a n. 3. The panel acknowledged the dissent's contentions for Petitioner's liability, but reiterated that the government did not pursue those theories:

> [W]e cannot endorse creating legal shortcuts for the government to impose a penalty in *this* case because that would free the government to employ that same shortcut in all other cases. We do not want to fall into the trap of letting bad facts make bad law, and, thus, decline the invitation to do so.

App. 50a-51a n. 3 (emphasis in original). It concluded that "[w]hat the government may not do is shortcut its burden of proof in a way that ignores both the statutory scheme of the Tariff Act and an importer of record's corporate form." App. 52a n. 5.

The panel held that the government and the CIT misconstrued 19 U.S.C. 1592(a)(1)(A) by concluding that it could encompass anyone, even though this subsection is limited to a *"person"* who is authorized to perform the specified acts. The panel recognized that "entry" is a term of art in customs law and that 19 U.S.C. 1592(a)(1)(A) refers to acts performed by

an importer of record or a customs broker, not just any person. App. 46a, 48a-49a.

> Under the facts of this case, it is undisputed that *Trek* is the importer of record because it is the owner of the merchandise which was entered into the United States and as to which Customs assessed duties. The government does not contend that [Petitioner] Shadadpuri was an "importer of record or customs broker." Nor does it assert that Shadadpuri had any independent duty under §§ 1484 and 1485 with respect to Trek's entries. It concedes that Trek is a corporation and that, even as its sole shareholder, Shadadpuri is not chargeable with its acts generally. The government cannot reasonable contend otherwise given long-standing principles of limited liability for shareholders and corporate officers when acting on behalf of a corporation. *See Anderson v. Abbott*, 321 U.S. 349, 361-62 (1944) ...; *Burnet v. Clark*, 287 U.S. 410, 415 (1932) ...."

App. 46a-47a (emphasis in original; parenthetical quotations omitted).

The panel also recognized that the court's prior decision in *United States v. Hitachi America, Ltd.*, 172 F.3d 1319 (Fed. Cir. 1999), held that the

corporate parent of an importer of record could not be held directly liable under 19 U.S.C. 1592(a)(1)(A) and could not be liable as an "aider or abettor" under 19 U.S.C. 1592(a)(1)(B) except for fraud. App. 47a.

The dissent contended that "the plain language of the statute and its legislative history ..." were contrary to the majority's determination. App. 55a slip 2. It concluded that 19 U.S.C. 1592(a)(1)(A) should be construed broadly to impose liability directly upon corporate shareholders, officers, and employees when acting on behalf of their corporations. App. 55a-58a.

F. On Rehearing En Banc, the Federal Circuit Affirmed the CIT and Held That Petitioner Was Jointly and Severally Liable for a Gross Negligence Penalty Under 19 U.S.C. 1592(a)(1)(A) on the Court's New Theory That Petitioner "Introduc[ed]" the Goods into the United States.

The Federal Circuit granted the government's petition for rehearing en banc, vacated the panel decision, and ordered further briefing on three specified issues, none of which focused on the meaning of "introduce" in 19 U.S.C. 1592(a)(1)(A). App. 26a-29a. The parties and two amici filed briefs. The en banc court then affirmed the CIT's judgment without further argument. It erroneously held Petitioner jointly and severally liable for civil

penalties of $534,420.32 under 19 U.S.C. 1592(a)(1)(A) and unpaid duties of $45,245.39 under 19 U.S.C. 1592(d). App. 18a.[4]

The en banc court stated that the only questions presented were (1) whether Petitioner was a "person" under 19 U.S.C. 1592(a)(1)(A) and (2) whether Petitioner's actions came within the meaning of "enter, introduce, or attempt to enter or introduce" under that subpart. App. 15a.

The en banc decision concluded that the word "person" in 19 U.S.C. 1592(a)(1) should be construed broadly to include humans as well as legal entities, which is not in dispute. App. 14a-18a. It acknowledged that Trek was a corporation and that it was the importer of record for the Entries. It also recognized that the government had not alleged or argued that Petitioner had "aided or abetted" violations under 19 U.S.C. 1592(a)(1)(B) and had not sought to impose liability on Petitioner by piercing Trek's corporate veil. App. 14a.

The en banc court erroneously referred to acts which related to Trek's entry of the goods as if they were the acts of Petitioner individually. App. __ slip 2. On that basis, the en banc court concluded that– separate and apart from Trek's "entry" of the goods–

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[4] Circuit Judge Plager, who joined the majority panel decision, did not participate in the en banc court. App. 2a n. *.

the acts it erroneously attributed to Petitioner individually fall within the meaning of "introduce" in 19 U.S.C. § 1592(A)(1)(A). Under that new theory, the en banc court concluded that Petitioner violated that subpart of the statute directly. App. 2a-3a.

The en banc court based its understanding of "introduce" on *United States v. 25 Packages of Panama Hats*, 231 U.S. 358 (1913), a forfeiture case under section 9 of the Tariff Act of 1890, as amended in 1909. App. 18a-19a. However, in *Panama Hats*, there never was an "entry" of the goods, as is the case here.[5] At that time, there was no provision for imposing civil penalties upon anyone in connection with such transactions; the only question was whether there was a basis for forfeiture of the goods. That decision does not control the proper construction of a law enacted by Congress in 1978 which provides for imposing personal civil liabilities in a different statutory structure.

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[5] In *Panama Hats*, 231 U.S. at 358, the Court held that the making of a false invoice by a consignor abroad "was an attempt to introduce [the hats] into the commerce of the United States ...," subjecting the hats to seizure and forfeiture when they were placed in a warehouse prior to any "entry" with Customs.

REASONS FOR GRANTING THE PETITION

The Federal Circuit en banc misconstrued the 1978 amendment to the Tariff Act of 1930 in 19 U.S.C. 1592(a)(1)(A) by imposing civil penalties upon Petitioner, jointly and severally with Trek, the corporate importer of record for the entries of goods at issue in the case, on the new theory that Petitioner had "introduce[ed] the goods, contrary to 19 U.S.C. 1592(a)(1)(A). Petitioner at all times was acting as shareholder, officer, or employee of Trek, not in his individual capacity, as the initial panel of the Federal Circuit correctly recognized.

Prior tariff laws contained only criminal penalties and *in rem* forfeiture provisions. In the 1978 amendment, Congress provides that a "person" may be liable for civil penalties if the person commits "fraud, gross negligence, or negligence" in connection with two separately defined activities set forth in two separate subparts of the statute, *i.e.*, 19 U.S.C. 1592(a)(1)(A) and (a)(1)(B).

The first subpart in 19 U.S.C. 1592(a)(1)(A) applies only to a "person" who "may enter, introduce, or attempt to enter or introduce any merchandise" "by fraud, gross negligence, or negligence;" such a person is defined as the importer of record or a customs broker in 19 U.S.C. 1594(a)(1). The second subpart in 19 U.S.C. 1592(a)(1)(B) applies only to a "person" who "may aid or abet any other persons to

violate" the first subpart, 19 U.S.C. 1592(a)(1)(A). *See* 1 U.S.C. 1 ("unless the context indicates otherwise ... 'person' .. includes corporations ... as well as individuals ..."); *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194 (1993) ("person" in *forma pauperis* statute means individuals only).

The en banc court erroneously relied upon common law principles of agency in holding Petitioner liable for acts of Trek (App. 23a). This case does not concern a common law tort; it concerns statutory penalties which cannot be imposed beyond the terms established by Congress.

The Federal Circuit en banc acknowledged that the government had not asserted liability against Petitioner as an "aider or abettor" under 19 U.S.C. 1592(a)(1)(B) nor sought to pierce Trek's corporate veil in order to impose direct liability upon Petitioner. App. 23a-25a.

The en banc court erroneously held that Petitioner, Trek's shareholder, officer, and employee, was jointly and severally liable with Trek for violation of 19 U.S.C. 1592(a)(1)(A) based on the en banc court's new theory that Petitioner had "introduce[ed]" the goods. This theory ignores the fact that the goods were in fact "entered" by Trek, the corporate importer of record. This "introduce" theory was not advanced by the government, not

briefed by the parties, and not addressed by the court below. The court erroneously relied upon *United States v. 25 Packages of Panama Hats*, 231 U.S. 358 (1913), a forfeiture case construing an 1890 tariff law not at issue in this case. App. 18a-19a.

The en banc decision erroneously finds support for its construction of the statute in the Conference Committee report on the 1978 amendment, overlooking the last-minute change by the Senate which created the two subparts in the statute as enacted. App. 16a; *see* H.R. Rep. No. 95-1517, 95th Cong., 2d Sess. 10-12 (1978). The Conference Report explained that the separate subparts for "aiding or abetting was created so that it did not relate "merely [to] the entry of merchandise ..." and "to prevent innocent parties who are somehow involved in the entry from being charged with a 592 violation." *Id.* at 11-12.

The initial panel decision of the Federal Circuit correctly construed the statute and held that Petitioner was not within the class of persons covered by the first subpart in 19 U.S.C. 1592(a)(1)(A). It recognized that the government elected not to allege violations of the second subpart, 19 U.S.C. 1592(a)(1)(B) and did not seek to pierce the corporate veil of the corporate importer in order to impose liability directly on Petitioner, its president and sole shareholder. Accordingly, the panel refused to "fall into the trap of letting bad facts make bad

law ...." App. 50a-51a n. 3. It refused to distort the statute in order to remedy the government's failure to pursue other possible claims against Petitioner.

The en banc decision construes the prohibitions in the first subpart over-broadly and renders the prohibitions in the second subpart superfluous, contrary to established principles of statutory construction.

The government can now routinely disregard corporate entities large and small and impose joint and several liability for substantial penalties on corporate shareholders, officers, and employees of American-based importers of record, Contrary to the scheme established by Congress.

This will have a serious and potentially costly impact on corporations and other legal entities involved in importations and their officers, shareholders, and employees who may now be at risk of personal liability under circumstances which were not intended by Congress. Customs is evidently pursuing just such a course of action. It recently proposed an amendment to a required customs entry document to collect personal financial and other information from corporate importers' officers. Notice and Request for Comment, 79 F.R. 61,091 (Oct. 9, 2014); *see* link to Customs notice and proposed new form at http://www.cbp.gov/trade/trade_community/cbp-

publishes-federal-register-notice-proposing-revisions-cbp-form-5106.

No other court of appeals can review this important question of customs law, so circuit conflicts cannot percolate. The Federal Circuit has exclusive jurisdiction, 28 U.S.C. 1295(a)(5), to review claims under 19 U.S.C. 1592, which must be brought in the Court of International Trade. 28 U.S.C. 1582(1). *See United States v. United States Shoe Corp.*, 523 U.S. 360, 365-366 (1998). The Federal Circuit is unlikely to review its own en banc decision in the foreseeable future.

I. The Federal Circuit En Banc Misconstrued The Statute Because Only an Importer of Record or Customs Broker Can Be Directly Liable for Civil Penalties for Acts Prohibited By 19 U.S.C. 1592(a)(1)(A).

Section 592(a)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. 1592(a)(1), provides, in pertinent part:

> (1) ... no person, by fraud, gross negligence, or negligence—
>
> > (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

> (i) any document or electronically transmitted data or information, written or oral statement, or act which is material or false, or
>
> (ii) any omission which is material, or
>
> (B) may aid or abet any other person to violate subparagraph (A).

The Federal Circuit en banc misconstrued 19 U.S.C. 1592(a)(1)(A) and erroneously held that Petitioner was a "person" who directly violated this subpart of the statute by "introduc[ing] the suits into commerce of the United States. App. __. It thus affirmed the CIT judgment that Petitioner is jointly and severally liable with Trek, the corporate importer of record, for civil penalties of $534,420.32 for gross negligence and unpaid duties of $45,245.39. App. 25a.

The "acts" of Petitioner which the en banc decision lists to support its conclusion that Petitioner "introduce[ed]" goods are each "acts" of the corporation Trek which related to its "entry" of the goods with Customs. Those "acts" erroneously attributed to Petitioner individually are: (1) "'[h]e imported men's suits through one or more of his companies'" (Trek was actually the importer of

record); (2) "he" caused shipments to be transferred to Trek through instructions to Trek's customs broker, which entered the goods as Trek's agent; "he" and other Trek employees sent documents necessary for "entry" with Customs to the customs broker; and (3) "he" did everything else but prepare the Customs "entry" forms. App. 22a-23a.

These were all "acts" of the corporation Trek performed in the only way corporations can act—through the services of their shareholders, officers, or employees. The en banc decision in reality bases its decision on acts which constitute "entry" under 19 U.S.C. 1592(a)(1)(A), an act performed by Trek, whatever else the word "introduce" might mean.

The en banc court acknowledged that neither the government nor the CIT had focused on this word "introduce" in the statute. App. 24a. Nevertheless, it relied upon *United States v. Twenty-Five Packages of Panama Hats*, 231 U.S. 358 (1913), a decision which applied the word "introduce" in a forfeiture proceeding under the Tariff Act of 1890, where neither the facts nor the law were comparable to those here.[6]

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[6] There, the Court held the goods were subject to forfeiture because the foreign consignor prepared false invoices undervaluing the goods, which were placed in restricted warehouse storage upon arrival in the United States, prior to entry. The Court concluded that this met the "introduce" requirement of the prior statute, where the goods were placed

There is no dispute that Petitioner is a "person" under the main part of 19 U.S.C. 1592(a), but that does not address what acts are prohibited by a "person" or what persons can perform those acts. The statute, 19 U.S.C. 1592(a)(1) has two different subparts, (A) and (B), which separately describe the acts prohibited by a "person." Under rules of statutory construction, the acts described in these subparts must be different; to construe the first subpart as broadly as the en banc court has done improperly renders the second subpart superfluous.[7] *See United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 374 (1988).

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in a warehouse and were never formally "entered" with Customs. *Panama Hats*, *supra*, 231 U.S. at 361. Here, Trek actually did "enter" the goods with Customs; they were not merely placed in a warehouse, as in *Panama Hats*. But it was the corporation Trek, the importer of record, which performed those acts, not Petitioner in his individual capacity. All of those acts were directed to "entering" the goods with Customs, not with some intermediate, preparatory activity, which might arguably be considered "introducing" the goods, an argument never advanced by the government.

[7] The en banc decision's reliance on *United States v. Mescall*, 215 U.S. 26 (1909), App. 15a-16a, is misplaced. The structure of the present statute is entirely different from the 1890 provision involved in *Mescall*. Here there is no question that "person" is defined broadly; the question is who can perform the acts referred to in the two subparts of the present statute and whether a shareholder, officer, or employee is liable directly for acts of a corporate importer of record.

Section 592(a)(1)(A) prohibits fraud, gross negligence, or negligence by a "person" who may "enter, introduce or attempt to enter or introduce any merchandise into the commerce of the United States ...." 19 U.S.C. 1592(a)(1). "Entry" is a terms of art under customs law. "Entry" and the other acts covered by this subpart of the statute are acts which can only be performed by the importer of record or a licensed customs broker. 19 U.S.C. 1484(a)(1) and (2)(b). The "importer of record" must be the owner or purchaser of the merchandise or a licensed customs broker. 19 U.S.C. 1484(a)(2)(B). Of course, a natural person could be an importer of record and subject to possible liability under 19 U.S.C. 1592(a)(1)(A). However, that is not the case here and certainly in most commercial or industrial importations, the importer of record will be a corporation or other legal entity.

This does not mean that no one except an importer of record can be liable for civil penalties in connection with the importation of merchandise. Congress expressly provided for imposing liability upon a "person" – natural or legal -- who "may *aid or abet* any other person to violate subparagraph (A)." 19 U.S.C. 1592(a)(1)(B) (emphasis added).

The Federal Circuit recognized that the government never alleged or sought to prove that Petitioner "aided or abetted" Trek's violations of 19 U.S.C. 1592(A)(1)(A). Nor did it seek to impose liability

upon Petitioner by seeking to pierce the corporate veil of Trek. But the Federal Circuit panel which reversed the judgment against Petitioner, understood that the government had made a strategic decision not to make such claims. App. 32a n. 1 and 50a-51 and n. 3. It recognized that sometimes "bad facts make bad law ...." App. 50a-51a n. 3. It thus declined to adopt the government's theory that Petitioner could be held jointly and several under 19 U.S.C. 1952(a)(1)(A) by ignoring the limitations on the scope of that provision and deliberately avoiding the separate burden of proof under 19 U.S.C. 1952(a)(1)(B). In addition, claims of fraud must be established by "clear and convincing evidence" under 19 U.S.C. 1952(e)(2).

Nevertheless, the en banc decision erroneously adopted the government's theory that Petitioner is liable for penalties under Section 1952(a)(1)(A), despite the fact that it is contrary to the language of the statute, particularly viewed in full context.

Regardless of whether the en banc court focused on "enter" or "introduce" in 19 U.S.C. 1592(a)(1)(A), it erroneously attributed Trek's acts as the corporate importer of record to Petitioner personally, completely disregarding Trek's corporate status. Further, unlike in *Panama Hats*, *supra*, the goods were in fact "entered" by Trek, not merely "introduced" prior to formal entry.

The en banc decision erroneously justifies its decision on a new theory of the case by asserting that it "'retains the independent power to identify and apply the proper construction of governing law.' *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ...." App. 24a-25a. *Kamen* does not justify the en banc court's decision to reach out and pursue the government's case on a theory which it deliberately chose not to advance.

This Court in *Kamen* in fact rejected the court of appeals' attempt to create a new federal common law rule on an issue normally governed by individual state laws, *i.e.*, whether a demand on a corporation board was required prior to bringing a shareholder derivative action under the Investment Company Act of 1940, 15 U.S.C. 80a-1(a). *Kamen* simply reiterated the rule in *Burks v. Lasker*, 441 U.S. 471, 486 (1979), that federal courts should normally adopt state law as the rule of decision on matters of corporate governance and relationships.

Here, both New Jersey, where Trek was incorporated, and New York, where it had an office, follow the established rule that shareholders and officers are ordinarily responsible for the acts or debts of their corporations. *Richard A. Pulaski Construction Co., Inc. v Air Frame Hangars, Inc.*, 195 N.J. 457, 472, 950 A.2d 868 (2008) (recognizing that "a primary reason for incorporation is the insulation of shareholders from the liabilities of the

corporate enterprise"); *accord*, *Morris v. New York State Dep't of Taxation and Finance*, 82 N.Y.2d 135, 140, 603 N.Y.S.2d 807 (1993) ("it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners").

The rule in *Kamen* and *Burks* applies here with equal force where the Federal Circuit en banc has adopted a federal rule under the Tariff Act which completely disregards the corporate entity Trek and imposes liability directly on Petitioner based solely on his activities as Trek's officer and shareholder. This ruling is contrary to pervasive federal and state laws under which officers and shareholders of corporations are not liable for acts of their corporations unless there are grounds to pierce the corporate veil, which the government admittedly did not seek to do here, or where there is a statute imposing such personal liability, as the initial panel of the Federal Circuit recognized. App. 50a n. 3 and 51a n. 4.

The en banc court's decision is not only contrary to established principles of corporate law, it also upsets the scheme established by Congress under which persons other than importers of record can be held liable for penalties as "aiders or abettors" under 19 U.S.C. 1592(a)(1)(B). *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The construction of one subpart of the statute should not "make nonsense" of the other subpart. *United Savings*

Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 374 (1988). The "structure of the statute ..." is critical to its meaning. *See United States v. Hayes*, 555 U.S. 415, 434 (2009) (Roberts, Ch. J., dissenting).

The en banc decision renders 19 U.S.C. 1592(a)(1)(B) superfluous, since the government now does not bear the burden of proving an "aider or abettor" committed fraud, which must be established by "clear and convincing evidence." 19 U.S.C. 1592(e)(2). *See United States v. Hitachi America*, *supra*. Instead, the government can disregard the corporate status of any importer of record and simply allege that any officer, shareholder, or employee of the importer of record who performed acts necessary for the corporation to enter or introduce goods into the United States can be directly and personally liable as a "person" under Section 1592(a)(1)(A). This erroneous analysis rewrites the scheme enacted by Congress and requires correction by this Court.

The en banc decision ignores the statute as a whole and makes the "aid or abet" provision, 19 U.S.C. 1592(a)(1)(B), superfluous, contrary to established principles of statutory construction. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The statutory provision should be viewed as a whole; the court's construction of one subpart of the statute should not "make nonsense" of another subpart in

the same statute. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 374 (1988). The en banc decision disregarded the "structure of the statute ...," which is critical to its meaning. *See United States v. Hayes*, 555 U.S. 415, 434 (2009) (Roberts, Ch. J., dissenting).

The en banc court opines that its decision will not vitiate 19 U.S.C. 1592(a)(1)(B), App. 23a-24a. But under its analysis, there do not appear to be any circumstances under which the government would ever need to charge a person as an "aider or abettor" under 19 U.S.C. 1592(a)(1)(B). Under the en banc decision, any individual who acts on behalf of a corporate or other legal entity in connection with an importation will be treated by Customs—and the CIT—as a direct violator of the penalty provision in 19 U.S.C. 1592(a)(1)(A), rendering 19 U.S.C. 1592(a)(1)(A) superfluous.

II. The En Banc Decision Overlooks the Change in the Structure of 19 U.S.C. 1592 During the Legislative Process.

The en banc decision invokes the legislative history of the 1978 amendment to 19 U.S.C. 1592 in support of its "broad" interpretation of the word "person" in the new provision. App. 17a. There is no dispute that the word "person" in the main paragraph is broad enough to cover legal entities and natural persons.

However, the en banc decision overlooks the fact that the 1978 amendment created two separate subparts which define separate prohibited acts in in this new civil penalty law--19 U.S.C. 1592(a)(1)(A) and 19 U.S.C. 1592(a)(1)(B). The prior forfeiture statutes relied upon by the en banc court, as well prior versions of the bill, were not written in this way.

This critical change in the structure of the bill occurred during the legislative process which led to the civil penalties provision enacted by the Reform Act in 1978. 19 U.S.C. 1592. Prior to the Reform Act, the Tariff Act provided only for civil forfeiture of the goods (or their value). 19 U.S.C. 1592 (1976), App. 75a-76a). It did not provide for the imposition of civil penalties upon importers or others for submission of false or fraudulent information in connection with importation of goods. H.R. Rep. No. 95-778, 95th Cong., 2d Sess. 1-3, 54-55 (1978).[8]

Prior to Senate Amendment No. 56, the proposed bill contained a single penalty provision which read: "[n]o person may enter, introduce, attempt to enter or introduce, or aid or procure the entry or

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[8] Among the purposes of the Reform Act were improving efficiency in import transactions; relating penalties to the "culpability of the offender" and "insur[ing] due process for persons potentially liable for penalties; modifying procedures to expedite processing of goods and reducing costs of administration. H.R. Rep. No. 95-778, *supra* at 1.

introduction of any merchandise into the commerce of the United States by means of ..." material and false documents, statements, or acts. S. Rep. No. 95-778, 95th Cong., 2d Sess. 55 (1978). Senate Amendment No. 56, which was accepted by the Conference Committee, and became the law, omitted the "aid or procure" language and created the new and separate subpart which prohibits persons from "aiding or abetting" violations by importers of record. *Cf.* 19 U.S.C. 1592(a)(1)(A) with 19 U.S.C. 1592(a)(1)(B).

> The Conference Report explains the reason for creating two separate subparts in 19 U.S.C. 1592(a): the language regarding 'aiding or procuring' [in the prior bill] is recast in such a way that it relates to a material and false statement or act, and not merely the entry of merchandise. This is meant to prevent innocent parties who are somehow involved in the entry from being charged with a 592 violation.

S. Rep. No. 95-778, *supra* at 11-12.

The en banc decision – which makes Petitioner jointly and severally liable with the importer of record – thus renders 19 U.S.C. 1592(a)(1)(B) superfluous, contrary to the intent of Congress, as expressed in the statute and its legislative history, and contrary to well-establish principles of statutory

construction. *K Mart Corp. v. Cartier, Inc.*, *supra*, 486 U.S. at 291.

III. The En Banc Decision Ignores the Settled Principle That Shareholders, Officers, and Employees Are Not Personally Liable for the Acts or Debts of Their Corporations Absent Veil-Piercing or Legislation Imposing Such Liability.

The en banc decision disregards the principle that shareholders, officers, and employees are not personally liable for acts undertaken on behalf of their corporations unless there is sufficient evidence to pierce the veil of the corporation or when there is a statute which imposes such personal liability directly. *Richard A. Pulaski Construction Co., Inc. v Air Frame Hangars, Inc.*, 195 N.J. 457, 472, 950 A.2d 868 (2008); *accord*, *Morris v. New York State Dep't of Taxation and Finance*, 82 N.Y.2d 135, 140, 603 N.Y.S.2d 807 (1993).

The only other basis for imposing liability on shareholders, officers, or employees of a corporate importer of record is where the government alleges and establish that such persons acted as "aiders or abettors" under 19 U.S.C. 1592(a)(1)(B), or where the government alleges and proves that the corporate veil should be pierced in order to impose personal liability. Here, the government disavowed both grounds of liability. App. 32a n. 1.

The prior panel decision of the Federal Circuit correctly recognized that the government and the CIT had disregarded the established principle that shareholders, officers, and employees of corporations are not liable for their acts on behalf of a corporation unless there is sufficient evidence to pierce the corporate veil or is express legislation imposes such liability upon a corporation's shareholders, officers, or employees. App. 50a n. 3 and 51a n. 4.

There is no statute imposing direct liability upon the shareholders, officers, or employees of a corporate importer of record for civil penalties under 19 U.S.C. 1592(a)(1)(A).

IV. The Issue is Important to United States Importers and their Shareholders, Officers, and Employees and No Other Court of Appeals Can Review the Issue.

The issue presented is of exceptional importance to American importers, large and small, as well as their shareholders, officers, and employees who deal with import transactions and with Customs.

The issue warrants review by this Court because no other court of appeals can review the issue, which is within the exclusive jurisdiction of the Federal Circuit and the CIT. 28 U.S.C. 1295(a)(5) and 1582(1). *See United States v. United States Shoe*

Corp., *supra*, 523 U.S. at 365-366. The en banc Federal Circuit is most unlikely to revisit its own decision on this issue in the foreseeable future.

The en banc court's decision will greatly expand the potential liability of corporate entities' shareholders, officers, and employees and will create significant issues for them of cross-liability and indemnification.

Since the Federal Circuit's en banc decision, Customs has proposed changes in an important Form 5106 required as a condition of importation of goods. The new Form 5106 would now impose new obligations and collect personal information from officers of corporate importers "who must have importing and financial business knowledge of the [importing] company ... and must have legal authority to make decisions on behalf of the company ...." The proposed new form would for the first time require the identification of related business entities, bank accounts, and personal information of corporate importer's officers, including phone numbers, email, social security numbers, and passport numbers. Notice and Request for Comment, 79 F.R. 61,091 (Oct. 9, 2014); *see* link to Customs notice and proposed new form at http://www.cbp.gov/trade/trade_community/cbp-publishes-federal-register-notice-proposing-revisions-cbp-form-5106.

The additional information sought to be collected by the government strongly indicates that Customs intends to pursue corporate officers as well as importers of record when Customs pursues penalty investigations and claims, as the Federal Circuit's erroneous en banc decision allows.

Congress knows how to impose direct liability upon corporate shareholders, officers, and employees for acts of their corporations. On those rare occasions when it chooses to do so, it does so expressly, as the Federal Circuit panel acknowledged (App. 51a n. 4). For example, in the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745, Congress required the Securities and Exchange Commission to issue rules enforcing a new statutory requirement that the chief executive officer and chief financial officer of reporting companies certify that they have reviewed the companies' annual and quarterly reports and that they do not contain "any untrue statement of a material fact or omit to state a material fact ...." 15 U.S.C. 7202. The SEC can remedy violations of this provision, and such officers may forfeit bonuses and profits if accounting restatements are required because of reporting misconduct. 15 U.S.C. 7243. These officers may also be subject to criminal prosecution for willful violations of their certification responsibilities. 18 U.S.C. 1350.

Similarly, Congress long ago imposed personal liability upon corporate officers and employees responsible for collecting and paying corporate "trust fund taxes" under 26 U.S.C. 6671 and 6672. There, 26 U.S.C. 6671 expressly defined "person" to include "an officer or employee of a corporation ... under a duty to perform the act in respect of which the violation occurs." *See Slodov v. United States*, 436 U.S. 238, 244-245 (1978) (officer or employee of employer who "willfully" fails to collect and pay employer's "trust fund taxes" may be personally liable for the taxes).

Congress did not impose such personal liability on corporate shareholders, officers, or employees in the Tariff Act, 19 U.S.C. 1592(a)(1)(A), as the en banc decision effectively held.

Only this Court can remedy the en banc Federal Circuit's incorrect construction of this important civil penalty provision in the Tariff Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 13, 2015

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

for the FEDERAL CIRCUIT

UNITED STATES,
Plaintiff-Appellee,

v.

TREK LEATHER, INC.,
Defendant,

AND

HARISH SHADADPURI,
Defendant-Appellant.

2011-1527

Decided: September 16, 2014

Appeal from the United States Court of International Trade in No. 09-CV-0041, Senior Judge Nicholas Tsoucalas.

STEPHEN C. TOSINI, Senior Trial Counsel, Commercial Litigation Branch, Civil Division,

United States Department of Justice, of Washington, DC, argued for plaintiff-appellee. With him on the brief were STUART F. DELERY, Assistant Attorney General, JEANNE E. DAVIDSON, Director, and FRANKLIN E. WHITE, JR., Assistant Director.

JOHN J. GALVIN, Galvin & Mlawski, of New York, New York, argued for defendant-appellant.

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, and CHEN, Circuit Judges.*

Opinion for the court filed by *Circuit Judge* TARANTO.

TARANTO, *Circuit Judge*.

Harish Shadadpuri transferred ownership of merchandise, while it was in transit to the United States, to a company he chose to be the importer of record for its entry into United States commerce. He also furnished to the hired customs broker, for use in completing and submitting the entry documents required for clearance through the Bureau of Customs and Border Protection (CBP), commercial invoices that materially understated the value of the

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* Sharon Prost assumed the position of Chief Judge on May 31, 2014. Pursuant to statute, Circuit Judge Plager, who was a member of the original panel in this case, elected not to participate in the decision of the en banc court. Circuit Judge Hughes did not participate in the consideration or decision of this case. Randall R. Rader, who was Chief Judge when en banc review was granted, retired from the position of Circuit Judge on June 30, 2014, and did not participate in this decision.

merchandise, thereby reducing the calculated customs duties. We hold that, by those actions, Mr. Shadadpuri "introduced" the merchandise into United States commerce by means of the undervaluation within the meaning of 19 U.S.C. § 1592(a)(1)(A). Because it is undisputed that he was grossly negligent in his actions, Mr. Shadadpuri violated section 1592(a)(1)(A). We affirm the judgment of the Court of International Trade holding him liable.

BACKGROUND

Section 1592(a)(1) of Title 19, U.S. Code, provides:

> (1) General rule
>
> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence--
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of--
>
> (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material, or
>
> (B) may aid or abet any other person to violate subparagraph (A).

19 U.S.C. § 1592(a)(1). That provision was the same in 2004, when the merchandise at issue here was imported. Section 1592 goes on, among other things, to specify procedures for enforcement of the quoted prohibitions and to provide penalties for violations, the authorized penalties depending on whether a violation involves fraud, gross negligence, or negligence. *Id*. § 1592(b), (c).

A

This case began in 2009, when the government filed a complaint in the Court of International Trade, invoking that court's jurisdiction under 28 U.S.C. § 1582 and alleging a violation of section 1592(a)(1). The complaint names Trek Leather, Inc., and Mr. Shadadpuri as defendants, alleging that Mr. Shadadpuri was Trek's president, and directed its business, at the time at issue. It charges that, between February 2, 2004, and October 8, 2004, the two defendants " entered or introduced or attempted to enter or introduce men's suits into the commerce of the United States" by means of " false acts, statements and/or omissions" that " understated the dutiable value of the imported merchandise" for the 72 itemized entries, resulting in an underpayment of $133,605.08 in duties. Complaint, *United States v. Trek Leather, Inc.*, Case No. 1:09-cv-00041-NT (Ct. Int'l Trade Jan. 28, 2009), at 1-2. According to the complaint, CBP had issued a penalty notice, and some of the properly calculated duties, and all of the penalties CBP sought to impose, remained unpaid. *Id*. at 2c3. The complaint includes separate counts alleging fraud, gross negligence, and negligence, and it seeks to recover

penalties, unpaid duties, and interest. *Id*. at 3-5.

In late 2010, after discovery took place, the government filed a motion for summary judgment of liability. The defendants opposed the motion; they also moved to dismiss the fraud count and argued that Mr. Shadadpuri personally could not be liable without fraud. The filings and accompanying evidence establish the following facts beyond genuine dispute. We rely mainly on the government's statement of uncontested facts ("Gov't Facts") and the defendants' response, which admits most of the government's stated facts ("Def. Facts").

Trek "is the importer of record for men's suits reflected in the 72 entry lines at issue in this case," and Mr. Shadadpuri is the president and sole shareholder of Trek, whose activities he directed from January 2003 to December 2004. Gov't Facts at 1, 6.[1] From February 2, 2004, to October 8, 2004,

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[1] 19 U.S.C. § 1484, titled "Entry of merchandise," defines "importer of record." Paragraph (a)(1) states that "one of the parties qualifying as 'importer of record' under paragraph (2)(B), either in person or by an agent authorized by the party in writing, shall, using reasonable care--(A) make entry therefor by filing with [CBP]" documentation or information needed for CBP "to determine whether the merchandise may be released from custody of [CBP]; (B) complete the entry . . . by filing with [CBP] the declared value, classification and rate of duty applicable to the merchandise, and such other documentation or . . . information as is necessary to enable [CBP] to--(i) properly assess duties on the merchandise . . . ." *Id*. § 1484(a)(1). Paragraph (2)(B) requires that the documentation be filed "either by the owner or purchaser of the merchandise or, when appropriately designated by the owner, purchaser, or consignee of the merchandise, a person holding a valid license under" 19 U.S.C. § 1641, *i.e.*, a customs broker,

"Mr. Shadadpuri imported men's suits through one or more of his companies, including Trek." *Id*. at 1. "Mr. Shadadpuri, through Trek and/or one of his other companies, provided" fabric to the manufacturer of the suits at issue free of charge or at reduced cost. *Id.; see id*. at 6. The statute labels such a subsidized component an "assist."[2]

By providing the manufacturer free or subsidized components, like the "fabric assists" here, an importer reduces the manufacturer's costs, and the manufacturer may then reduce the price it charges for the merchandise once manufactured. A suit maker, if it obtains its fabric for free, might shave $100 off the price it charges for a suit. In this case, "[t]he material assists . . . were not part of the price actually paid or payable to the foreign manufacturers of the imported apparel." Def. Facts at 2. In such circumstances, the manufacturer's invoice price understates the actual value of the merchandise, and if the artificially low invoice price is used as the merchandise's value when calculating customs duties based on value, disregarding assists results in understating the duties owed. To address

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and adds: "For the purposes of this chapter, the importer of record must be one of the parties who is eligible to file the documentation or information required by this section." *Id*. § 1484(a)(2)(B).

[2] The statute defines an "assist" to include materials incorporated into the ultimately imported merchandise "if supplied directly or indirectly, and free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or the sale for export to the United States of the merchandise." 19 U.S.C. § 1401a(h)(1). *See also* 19 C.F.R. § 152.102(a).

such an artificial reduction of customs duties, the statute and regulations expressly require that the value of an "assist" be incorporated in specified circumstances into the calculated value of imported merchandise used for determining the duties owed. 19 U.S.C. § 1401a(a)(1), (b)(1), (e)(1); 19 C.F.R. §§ 152.101(b)(1), 152.103(a), (b), (d); *see generally* 19 U.S.C. § § 1401a (value), 1500 (appraisal), 1503 (dutiable value).

Initially, all of the 72 shipments at issue here "were invoiced and shipped to non-party Mercantile Electronics, LLC," of which Mr. Shadadpuri was president and 40% shareholder. Gov't Facts at 1. But "[w]hile the subject men's suits were in-transit, Mr. Shadadpuri caused the shipments of the imported merchandise to be transferred from Mercantile Electronics to Trek." *Id*. at 1-2. Mr. Shadadpuri did so after receiving the manufacturer's invoice and deciding "which of his various companies had the funds to pay for the shipment." *Id*. at 4; Def. Facts at 3. "Once he determined that the shipments of the men's suits at issue here would be imported by Trek, he contacted his broker, non-party Vandegrift Forwarding Company, Inc. ('Vandegrift'), and directed that the merchandise be transferred while in transit." Gov't Facts at 4.

"The dutiable value of the men's suits imported by Trek and Mr. Shadadpuri did not include the value of the fabric assists." *Id*. at 2; *see id*. at 6. It is undisputed that the omission of that value violated statutory and regulatory obligations to state a proper value when filing the "entry" documentation required "to secure the release of

imported merchandise from [CBP] custody." 19 C.F.R. § 141.0a (defining "entry").[3] Moreover, Mr. Shadadpuri has acknowledged that " [p]rior to importing the men's suits at issue in this case, [he] knew that fabric assists must be included on the import documentation." Def. Facts at 2; *see* Gov't Facts at 6. Mr. Shadadpuri had been so informed by CBP (actually, by its predecessor, the U.S. Customs Service) during an investigation of similar undervalued importations in 2002. Gov't Facts at 2-3.

The CBP Form 7501 "entry summary" forms used for entry in this case list Trek as the importer of record, and they were prepared and submitted to CBP by Vandegrift, the customs broker "hired by Harish Shadadpuri," and signed by a Vandegrift representative. *See* Decl. of Michael Toole (Vandegrift vice president), Gov't Summ. Jdgt. App.

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[3] While leaving many details to agency specification, the statute imposes requirements regarding the submission of invoices, 19 U.S.C. § 1481; entry documents or information addressing value, among other facts, *id*. § 1484 (quoted *supra* n.1); and accompanying declarations, *id*. § 1485. Regulations require all imported merchandise to be "entered" unless a specific exception exists, 19 C.F.R. § 141.4(a); define "entry" as certain documentation or its filing, id. § 141.0a; specify that CBP Form 7501, an "entry summary" containing value information, when accompanied by commercial invoices and other documents, satisfies the filing requirement, *id*. §§ 141.61, 142.3, 142.11; and impose requirements for filing invoices and/or related documentation showing "[t]he values or approximate values of the merchandise," *id*. § 142.6(a)(3); *see, e.g., id*. §§ 141.81, 141.83, 141.86, 141.88, 141.90. *See generally* CBP, *What Every Member of the Trade Community Should Know About: Entry* (2004).

("SJ App.") A155; SJ App. A314-78 (corrected 7501s); Def. Summ. Jdgt. App. at CBP1203-2197 (including selected original and corrected 7501s). Vandegrift prepared the submissions based on papers he received from Mr. Shadadpuri and his aides. When the suit manufacturer was ready to ship completed suits, it sent Mr. Shadadpuri an invoice (SJ App. A419-20), and he and his aides sent it to Vandegrift: "I would fax, or my person who would help me would send a fax to the broker and the broker would file the entry." SJ App. A409 (Shadadpuri testimony). *See also* Def. Facts at 3 (" Upon receipt of a manufacturer's invoice, bill of lading and related importation documentation, Mr. Shadadpuri or one of Trek's employees or [the domestic suit seller] or one of its employees would fax a copy to Trek's customhouse broker for the preparation and filing of the required entry."); SJ App. A422-23 ("[W]hen we cut the invoice, we, and the people will send the fax to the broker.").

The "majority of invoices" sent to Vandegrift "did not contain any values or information reflecting the fact that fabric assists had been provided." Gov't Facts at 4; Def. Facts at 3; *see* SJ App. A166-240 (invoices).[4] When CBP began investigating, "Vandegrift determined that the majority of invoices and other information that had been provided by Mr. Shadadpuri did not disclose that any fabric assist

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[4] The information sent to Vandegrift included the suit maker's "Multiple Country Declarations" identifying work performed, but those declarations contain no price or other value information. *See, e.g.*, Def. Summ. Jdgt. App. at CBP1209, CBP1216, CBP1222.

had been provided." Gov't Facts at 4. Mr. Shadadpuri then "obtained new invoices from the manufacturer that revealed the fact that a fabric assist was provided, and the amount of the fabric assist." *Id.* Using the new invoices, Vandegrift prepared and submitted to CBP corrected entry documents showing the amount of duties actually due. *Id.* at 5; SJ App. A314-78. CBP calculated that the initial undervaluation had caused a $133,605.08 underpayment of duties--of which Trek and its surety paid $88,359.69 between 2005 and 2008, leaving $45,245.39 unpaid. Gov't Facts at 5, 6.

B

The government sought summary judgment of liability, of both defendants, for fraud, for gross negligence, and for negligence. The government recited the elements of its liability argument with some generality, including that "Trek and Mr. Shadadpuri entered, introduced, or attempted to enter or introduce merchandise into the United States" by the proscribed means, Gov't Summ. Jdgt. Mot. at 12 (Nov. 1, 2010), and that "Mr. Shadadpuri is a 'person' subject to liability under section 1592," *id.* at 14. Although the government, in its motion, several times invoked the "enter" language of section 1592(a)(1)(A) without separately mentioning the "introduce" language, *e.g., id.* at 9, 11, 15, it also stated its argument more generally, and the parties' dispute never focused on the different terms in subparagraph (A). The government's motion focused on establishing the different degrees of culpability required for fraud, gross negligence, and negligence, which carry different maximum penalties. *Id.* at 17-

24, 24-25, 26-28.

In their short response, defendants did not dispute Trek's liability for negligence or gross negligence. They argued, however, that the charge of fraud should be dismissed because the evidence showed no intent on the part of Trek or Mr. Shadadpuri that the entry documentation to be prepared by the customs broker would omit the value of the assists. Def. Mem. in Opp. to Summ. Jdgt. and in Support of Partial Dismissal at 4-6 (Dec. 17, 2010). Defendants then asserted that, where there was no fraud, Mr. Shadadpuri could not be liable "for negligent or grossly negligent aiding or abetting." *Id*. at 6-7. They relied on *United States v. Hitachi America, Ltd*., 172 F.3d 1319, 1336-38 (Fed. Cir. 1999), in which this court held that liability for aiding or abetting under subparagraph (B) of section 1592(a)(1) requires that a person have certain knowledge regarding the unlawfulness under subparagraph (A) of the action being aided or abetted--a ruling not dependent on whether the underlying violation involves fraud, gross negligence, or negligence. Defendants did not separately argue that Mr. Shadadpuri could not be liable directly for violating subparagraph (A).

In response, the government noted all of the facts that defendants left undisputed, Gov't Reply at 1-3 (Jan. 21, 2011), and it argued that it had proved fraud, *id*. at 4-6. It then argued that Mr. Shadadpuri had sufficient knowledge that he could be liable for aiding or abetting Trek's violations of subparagraph (A), even if Trek did not act fraudulently. *Id*. at 6-12. In reply, defendants reprised their argument against

any possible finding of fraud. Def. Reply at 1-7 (Feb. 18, 2011). With respect to Mr. Shadadpuri, they asserted, for the first time, that no person other than an importer of record may be liable under subparagraph (A). Def. Reply at 8-9.

C

The Court of International Trade granted the government's motion for summary judgment of liability of both defendants for gross negligence, denied the motion regarding fraud and negligence as moot, and denied defendants' motion to dismiss. *United States v. Trek Leather, Inc.*, 781 F.Supp.2d 1306, 1309 (Ct. Int'l Trade 2011). The court began by concluding that the charge of fraud presented a disputed fact question. *Id*. at 1310. It then concluded that Trek conceded gross negligence; that "[a]ny 'person' who engages in the behavior prohibited by 19 U.S.C. § 1592(a) is liable thereunder regardless of whether that 'person' is the importer of record or not"; that "it was Mr. Shadadpuri who had the responsibility and obligation to examine all appropriate documents including all assists within the entry documentation and to forward these assists to his customs broker"; and so "Trek's gross negligence . . . could not have been conceded but for the direct involvement of Mr. Shadadpuri." 781 F.Supp.2d at 1311-12. For those reasons, the court held both defendants liable for gross negligence, citing section 1592(a) generally; it did not state its holding as resting specifically even on paragraph (1) of section 1592(a), let alone distinguish subparagraph (A) from (B). The court entered a final judgment imposing liability for $45,245.39 in unpaid

duties and $534,420.32 in penalties, plus interest. 781 F.Supp.2d at 1312-13.

D

Mr. Shadadpuri alone appealed to this court, which has jurisdiction under 28 U.S.C. § 1295(a)(5). The government initially cross-appealed the dismissal of its fraud charge as moot, but it dropped the cross-appeal. In this court, the government has defended the Court of International Trade's judgment only on the basis of subparagraph (A) of section 1592(a)(1); subparagraph (B)'s proscription of aiding or abetting is therefore out of the case. With respect to subparagraph (A), Mr. Shadadpuri's contention on appeal is that liability under that provision is limited to importers of record in the absence of fraud.

A divided panel of this court reversed the Court of International Trade's judgment. *United States v. Trek Leather, Inc.*, 724 F.3d 1330 (Fed. Cir. 2013) (later vacated, as noted *infra*). The government did not press a claim for aiding-or-abetting liability, seek to pierce the corporate veil separating Trek and Mr. Shadadpuri, or make a separate "introduce" argument in its brief defending the judgment on review. Reflecting those choices, the majority focused on the term "enter" in section 1592(a)(1)(A) and concluded that Mr. Shadadpuri could not be liable for ordinary or gross negligence in violation of that provision. It reasoned that, not being the importer of record or an agent designated in writing, Mr. Shadadpuri was not subject to and did not violate a duty imposed on those making

entry under 19 U.S.C. §§ 1484, 1485. *Trek Leather*, 724 F.3d at 1331, 1335-40. Judge Dyk dissented, reasoning that, even in the absence of fraud, subparagraph (A)'s coverage is not limited to importers of record or obligations defined by 19 U.S.C. §§ 1484, 1485. 724 F.3d at 1340-43.

On the government's request for rehearing, this court vacated the panel decision and granted en banc rehearing of the appeal under Fed. R. App. P. 35. *United States v. Trek Leather, Inc.*, 2014 WL 843527 (Fed. Cir. Mar. 5, 2014). We review the Court of International Trade's grant of summary judgment de novo. *See, e.g., NEC Solutions (Am.), Inc. v. United States*, 411 F.3d 1340, 1344 (Fed. Cir. 2005). Statutory interpretation is a question of law, and the grant of summary judgment is proper if the facts not genuinely disputed on the summary-judgment record establish liability under the proper statutory interpretation, *i.e.*, no factual dispute exists that is material to the outcome. *Id.*

DISCUSSION

The issues for decision may be clarified by noting what issues are not before us. We are not faced with any issue about aiding-or-abetting liability under subparagraph (B) of section 1592(a)(1); the government relied only on subparagraph (A) in defending liability here. We are presented no issue about whether Mr. Shadadpuri was grossly negligent or whether, if he attempted to or did enter or introduce the merchandise at issue, he did so by means of false material statements or material omissions. Nor do we have any challenge to

the amount of the penalty if there is a violation of subparagraph (A).

The only questions presented for decision are whether Mr. Shadadpuri is a "person" covered by section 1592(a)(1)(A) and whether his actions come within the "enter, introduce, or attempt to enter or introduce" language of that provision. On these issues, moreover, Mr. Shadadpuri frames his arguments in all-or-nothing terms: he treats all of the imports of suits identically. Aside from the threshold "person" issue, therefore, the question before us is simply whether he engaged in any conduct respecting any of the suit shipments that constitutes entering, introducing, or attempting to enter or introduce merchandise into United States commerce under section 1592(a)(1)(A). We conclude that he did.

A

The threshold issue is straightforward. Mr. Shadadpuri is indisputably a "person," and section 1592(a)(1)--including both of its subparagraphs, (A) and (B)--applies by its terms to any "person." There is simply no basis for giving an artificially limited meaning to this most encompassing of terms, which plainly covers a human being. *See, e.g.*, 1 U.S.C. § 1; 19 U.S.C. § 1401(d) (confirming that the term "includes" partnerships, associations, and corporations; no exclusion of individuals).

The origins of the current statutory language confirm, rather than undermine, the plain broad meaning of "person." More than a hundred years

ago, in *United States v. Mescall*, 215 U.S. 26 (1909), the Supreme Court rejected a district court's holding that a predecessor of section 1592, even apart from its conduct-proscribing terms, was limited in its reach to a particular subset of persons, namely, those who make entries. The Court held that the statutory language--which covered an "owner, importer, consignee, agent, *or other person*," Act of June 10, 1890, § 9, 26 Stat. 131, 135-36 (emphasis added), quoted at 215 U.S. at 26--applied to persons other than the listed owners, importers, consignees, or agents. 215 U.S. at 32. The Court rejected the argument that, under the principle of *ejusdem generis*, the general term "person" should be narrowed based on the terms that preceded it in the provision. *Id*. at 31-32.

In 1976, section 1592, like its predecessor at issue in *Mescall*, listed certain persons (expanded to "consignor, seller, owner, importer, consignee, agent") and ended with general terminology, "or other person or persons." 19 U.S.C. § 1592 (1976). Congress extensively revised section 1592 in 1978, and as part of that revision, it replaced the listing with, simply, the general term, "person." *Id*. § 1592(a)(1). That simplification certainly does not suggest a narrowing; if anything, by removing the textual basis for an *ejusdem generis* argument, it would have suggested a broadening, if any broadening had remained possible after *Mescall*. And the relevant congressional committees stated that they intended no narrowing. *See* H.R. Conf. Rep. 95-1517, at 10 (1978); S. Rep. No. 95-778, at 17, 18, 20 (1978). There is, in short, no basis for giving "person" in section 1592(a)(1) less than its ordinary

broad meaning.

Mr. Shadadpuri argues that certain language in *Hitachi*, 172 F.3d at 1336, supports a narrow meaning of "person" in section 1592(a)(1)(A), limited to an importer of record. But *Hitachi* did not interpret "person," and what it said in passing in the cited passage about subparagraph (A) cannot bind this court sitting en banc and, indeed, was dictum. In *Hitachi*, the relevant claim (against Hitachi Japan) was only under subparagraph (B), for aiding or abetting, not under subparagraph (A); and the claim was rejected for lack of the knowledge required by subparagraph (B). 172 F.3d at 1336-38. *Hitachi* involved no attempt to apply subparagraph (A) to a person who was not an importer of record. Mr. Shadadpuri also cites *United States v. Inn Foods Inc.*, 560 F.3d 1338, 1346 (Fed. Cir. 2009), but even the cited language says only that sections 1484 and 1485 are restricted to importers of record, not that section 1592(a)(1)(A) is; and *Inn Foods*, like *Hitachi*, involved no claim that subparagraph (A) applies to a person other than an importer of record. In any event, we see no basis for departing from the plain meaning of "person" for section 1592(a)(1).[5]

Recognizing that a defendant is a "person," of course, is only the first step in determining liability for a violation of either of the subparagraphs. What

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[5] We do not address whether *Hitachi* or other decisions might bear on the scope of "enter" in the conduct-specifying language of section 1592(a)(1)(A), an issue we do not decide. As to the "introduce" language of that provision, our decision today necessarily controls over any contrary implication that might be drawn from *Hitachi*.

is critical is the defendant's conduct. The two subparagraphs of section 1592(a)(1) proscribe certain acts and omissions. Deciding whether a defendant is liable requires applying each subparagraph's language specifying the proscribed actions or omissions to determine if the defendant's conduct is within the proscriptions. That inquiry comes after the simple threshold step of noting that the defendant is a "person" covered by section 1592(a)(1). We now turn to the conduct-proscribing language of subparagraph (A) and how it applies to Mr. Shadadpuri's conduct.

B

Section 1592(a)(1)(A) forbids any person to "enter, introduce, or attempt to enter or introduce" merchandise into the United States by certain means with a certain intent or lack of care. We need not and do not decide whether Mr. Shadadpuri attempted to or did "enter" the merchandise at issue, and we therefore do not address the relevance to that question of statutory limitations on what persons are authorized to "enter" merchandise under 19 U.S.C. § 1484. We rely instead on the "introduce" language of section 1592(a)(1)(A). Controlling precedent has long established that "introduce" gives the statute a breadth that does not depend on resolving the issues that "enter" raises. And the term "introduce" readily covers the conduct of Mr. Shadadpuri.

The Supreme Court established the breadth of "introduce" in *United States v. 25 Packages of Panama Hats*, 231 U.S. 358 (1913). The statute at

issue was section 9 of the 1890 Act, 26 Stat. 131, 135, as amended in 1909. (*Mescall* involved section 9 before the 1909 amendment.) In the amended form, the statute provided for forfeiture of merchandise, and criminal punishment, "if any consignor, seller, owner, importer, consignee, agent, or other person or persons, shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States, any imported merchandise by means of any fraudulent or false invoice" or certain other acts or omissions. Tariff Act of 1909, § 28, 36 Stat. 11, 97 (Aug. 5, 1909), quoted in *Panama Hats*, 231 U.S. at 359-60. Consignors shipped merchandise to the United States with invoices that "falsely and fraudulently undervalued the merchandise," 231 U.S. at 359--invoices delivered to an American consulate abroad as required for ultimate entry in the United States, Tariff Act of 1909, § 28, 36 Stat. at 91-92 (amending Act of June 10, 1890, §§ 3, 4, 26 Stat. at 131-32). When the merchandise arrived in New York, neither the consignee nor anyone else called for it or took steps to enter it, so the merchandise was stored by customs officials. 231 U.S. at 359. The Supreme Court held that the statute applied to the "goods not technically entered at the New York customs house," *id.*, based on the word "introduce" added to the statute in 1909.

The Court explained that, before 1909, the statute provided for forfeiture "if any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice." 26 Stat. at 135, quoted at 231 U.S. at 360. Several district court cases had "held that the

language used did not cover the case of fraud by the consignor, nor could the goods be forfeited for the wrongful conduct of any person if the act preceded the making of the documents or taking any of the steps necessary to enter the goods." 231 U.S. at 360 (citing *United States v. 646 Half Boxes of Figs*, 164 F. 778 (E.D.N.Y. 1908), and *United States v. One Trunk*, 171 F. 772 (S.D.N.Y. 1909) (L. Hand, J.)). "In order to close these loopholes and to make the act more effective," the Court explained, Congress amended the statute not only to add "consignor or seller" to the enumerated persons covered (months before *Mescall* confirmed that the listing was not restrictive anyway) but also, of particular importance, to "enlarge[] the scope of conduct for which the goods should be forfeited." 231 U.S. at 361. Specifically: "Instead of punishing only for entering or attempting to enter on a fraudulent invoice, it punished an attempt by such means 'to introduce any imported merchandise into the commerce of the United States.'" *Id*.

The Court explained that the new language was critical to broadening the statute's coverage:

> This latter phrase necessarily included more than an attempt to enter, otherwise the amendment was inoperative against the consignor against whom it was specially aimed, for he does not, as such, make the declaration, sign the documents, or take any steps in entering or attempting to enter the goods. When he makes the false invoice in a foreign country there is no extraterritorial operation of the statute whereby he can be

> criminally punished for his fraud. But when the consignor made the fraudulent undervaluation in the foreign country, and on such false invoice the goods were shipped, and arrived consigned to a merchant in New York, the merchandise was within the protection and subject to the penalties of the commercial regulations of this country, even though the consignor was beyond the seas and outside the court's jurisdiction.

Id. The Court concluded:

> [I]n the present case when the goods, fraudulently undervalued and consigned to a person in New York, arrived at the port of entry there was an attempt to introduce them into the commerce of the United States. When they were unloaded and placed in General Order [official custody in a customs warehouse] they were actually introduced into that commerce, within the meaning of the statute intended to prevent frauds on the customs.

Id. at 362. *See also United States v. 18 Packages of Dental Instruments*, 230 F. 564 (3d Cir. 1916).

Panama Hats confirms that, whatever the full scope of "enter" may be, "introduce" in section 1592(a)(1)(A) means that the statute is broad enough to reach acts beyond the act of filing with customs officials papers that "enter" goods into United States commerce. *Panama Hats* establishes that "introduce" is a flexible and broad term added to

ensure that the statute was not restricted to the "technical" process of "entering" goods. It is broad enough to cover, among other things, actions completed before any formal entry filings made to effectuate release of imported goods. We need not attempt to define the reach of the term. Under the rationale of *Panama Hats*, the term covers actions that bring goods to the threshold of the process of entry by moving goods into CBP custody in the United States and providing critical documents (such as invoices indicating value) for use in the filing of papers for a contemplated release into United States commerce even if no release ever occurs.

What Mr. Shadadpuri did comes within the commonsense, flexible understanding of the "introduce" language of section 1592(a)(1)(A). He "imported men's suits through one or more of his companies." Gov't Facts at 1. While suits invoiced to one company were in transit, he "caused the shipments of the imported merchandise to be transferred" to Trek by "direct[ing]" the customs broker to make the transfer. *Id.* at 1-2, 4. Himself and through his aides, he sent manufacturers' invoices to the customs broker for the broker's use in completing the entry filings to secure release of the merchandise from CBP custody into United States commerce. *Supra* pp. 7-8. By this activity, he did everything short of the final step of preparing the CBP Form 7501s and submitting them and other required papers to make formal entry. He thereby "introduced" the suits into United States commerce.

Applying the statute to Mr. Shadadpuri does

not require any piercing of the corporate veil. Rather, we hold that Mr. Shadadpuri's own acts come within the language of subparagraph (A). It is longstanding agency law that an agent who actually commits a tort is generally liable for the tort along with the principal, even though the agent was acting for the principal. *Restatement (Second) of Agency* § 343 (1958); *Restatement (Third) of Agency* § 7.01 (2006). That rule applies, in particular, when a corporate officer is acting for the corporation. 3A *Fletcher Cyc. Corp*. § 1135 (2014). We see no basis for reading section 1592(a)(1)(A) to depart from the core principle, reflected in that background law, that a person who personally commits a wrongful act is not relieved of liability because the person was acting for another. *See United States v. Matthews*, 533 F.Supp.2d 1307, 1314 (Ct. Int'l Trade 2007), *aff'd*, 329 F.App'x 282 (Fed. Cir. 2009); *United States v. Appendagez, Inc.*, 560 F.Supp. 50, 54-55 (Ct. Int'l Trade 1983). That is as far as we go or need to go in this case. We do not hold Mr. Shadadpuri liable because of his prominent officer or owner status in a corporation that committed a subparagraph (A) violation. We hold him liable because he personally committed a violation of subparagraph (A).

Relatedly, applying the statute to Mr. Shadadpuri in the circumstances presented is consistent with Congress's specification of a separate rule for aiding or abetting, stated in subparagraph (B) of section 1592(a)(1). That subparagraph prohibits a person from aiding or abetting another's violation of subparagraph (A), thus creating a form of liability for those who play certain roles in an underlying violation short of committing the

violation. And this court has recognized a knowledge requirement inherent in "aiding or abetting." *Hitachi*, 172 F.3d at 1338. In this case, however, we hold that Mr. Shadadpuri himself committed a violation of subparagraph (A). This ruling does not weaken the requirements for "aiding or abetting" liability by those who do not violate subparagraph (A).

Finally, we may rest the decision here on the "introduce" language of section 1592(a)(1)(A) even though the parties did not specifically focus on that language in the Court of International Trade or in their briefs to the panel. The government invoked the entirety of the subparagraph in the Court of International Trade, without limiting itself to the "enter" language. The judgment of that court is not limited to one term within subparagraph (A), or even to subparagraph (A) as a whole, instead imposing liability for violating section 1592(a) generally. And it was not until their last-round brief in that court that defendants argued, as Mr. Shadadpuri argues in this court, that only an importer of record can violate subparagraph (A). It is a direct answer to that broad contention to hold that, whatever may be true for "enter," the "introduce" language of subparagraph (A) covers acts by persons other than importers of record.

The Supreme Court has made clear that "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v.*

Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991); *see Allen v. State Bd. of Elections*, 393 U.S. 544, 553-54 (1969). The power must be exercised fairly and prudently, but we see no impediment to relying on the "introduce" language of section 1592(a)(1)(A) here. Our doing so addresses the express judgment on appeal and responds to Mr. Shadadpuri's contention. The "introduce" language has a meaning that avoids issues presented by the "enter" language and that requires liability on the undisputed (mostly admitted) facts established by the record. These liability-entailing facts could not change, so a remand for application of "introduce" would be wasteful. In these circumstances, affirming liability based on the "introduce" language is fair, prudent, and efficient.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the Court of International Trade.

AFFIRMED

APPENDIX B

Note: This order is nonprecedential.

UNITED STATES COURT OF APPEALS

for the FEDERAL CIRCUIT

UNITED STATES,
Plaintiff-Appellee,

v.

TREK LEATHER, INC.,
Defendant,

AND

HARISH SHADADPURI,
Defendant-Appellant.

2011-1527

Appeal from the United States Court of International Trade in No. 09-CV-0041, Judge Nicholas Tsoucalas.

ON PETITION FOR REHEARING EN BANC

Before Rader, Chief Judge, Newman, Lourie, Dyk, Prost, Moore, O'Malley, Reyna, Wallach, Taranto, and Chen, Circuit Judges*.

PER CURIAM.

ORDER

A petition for rehearing en banc was filed by Plaintiff-Appellee United States and a response thereto was invited by the court and filed by Defendant-Appellant Harish Shadadpuri (Shadadpuri).

The petition for rehearing was considered by the panel that heard the appeal, and thereafter the petition for rehearing en banc and response were referred to the circuit judges who are authorized to request a poll to rehear the appeal en banc. A poll was requested, taken, and the court has decided that the appeal warrants en banc consideration.

IT IS ORDERED THAT:

(1) The petition for rehearing en banc of Plaintiff-Appellee United States is granted.

(2) The court's opinion of July 30, 2013 is vacated and the appeal reinstated.

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* *Circuit Judge* Hughes did not participate.

(3) The parties are requested to file new briefs. The briefs should address the following issues:

A) 19 U.S.C. § 1592(a) imposes liability on any "person" who "enter[s], introduce[s], or attempt[s] to enter or introduce" merchandise into United States commerce by means of fraud, gross negligence, or negligence by the means described in § 1592(a). What is the meaning of "person" within this statutory provision? How do other statutory provisions of Title 19 affect this inquiry?

B) If corporate officers or shareholders qualify as "persons" under § 1592(a), can they be held personally liable for duties and penalties imposed under § 1592(c)(2) and (3) when, while acting within the course and scope of their employment on behalf of the corporation by which they are employed, they provide inaccurate information relating to the entry or introduction of merchandise into the United States by their corporation? If so, under what circumstances?

C) What is the scope of "gross negligence" and "negligence" in 19 U.S.C. § 1592(a) and what is the relevant duty? How do other statutory provisions in Title 19 affect this inquiry?

(4) This appeal will be reheard en banc on the basis of the additional briefing ordered herein. An original and thirty copies of the new en banc briefs shall be filed, and two copies of each en banc brief shall be served on opposing counsel. Each principal

brief should not exceed 14,000 words, and the reply brief should not exceed 7,000 words. Shadadpuri's en banc brief is due 45 days from the date of this order. The United States' en banc response brief is due within 30 days of service of Shadadpuri's en banc brief, and any en banc reply brief is due within 15 days of service of the United States' en banc response brief. The case will be submitted without additional oral argument.

(5) Briefing should be limited to the issues set forth above.

(6) Other briefs of amici curiae will be entertained, and as such, amicus briefs may be filed without consent and leave of the court but otherwise must comply with Federal Rule of Appellate Procedure 29 and Federal Circuit Rule 29.

FOR THE COURT

March 5, 2014
Date

/s/ Daniel E. O'Toole
Daniel E. O'Toole
Clerk of Court

APPENDIX C

UNITED STATES COURT OF APPEALS
for the FEDERAL CIRCUIT

UNITED STATES,
Plaintiff-Appellee,

v.

TREK LEATHER, INC.,
Defendant,

AND

HARISH SHADADPURI,
Defendant-Appellant.

2011-1527

Appeal from the United States Court of International Trade in No. 09-CV-0041, Judge Nicholas Tsoucalas.

Decided: July 30, 2013

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for plaintiff-appellee. 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 was Scott A. MacGriff, Trial Attorney.

John J. Galvin, Galvin & Mlawski, of New York, NY, argued for defendant-appellant.

Before DYK, PLAGER, and O'MALLEY, Circuit Judges.

Dissenting opinion filed by *Circuit Judge* DYK.

O'MALLEY, *Circuit Judge*.

Mr. Harish Shadadpuri (" Shadadpuri") appeals the decision of the United States Court of International Trade granting in part the United States' ("the government") motion for summary judgment, finding Shadadpuri liable for gross negligence in connection with the entry of imported merchandise into the United States and imposing penalties under 19 U.S.C. § 1592(c)(2) for that conduct. Shadadpuri contends that corporate officers of an " importer of record" are not directly liable for penalties under § 1592(c)(2). In the circumstances presented here, we agree. We find that, absent piercing Trek's corporate veil to establish that Shadadpuri was the actual importer of record, as defined by statute, or establishing that Shadadpuri is liable for fraud under § 1592(a)(1)(A), or as an

aider and abettor of fraud by Trek under § 1592(a)(1)(B), we must reverse the penalty assessment against Shadadpuri.[1]

I.

The relevant facts are not in dispute. Trek Leather, Inc. ("Trek") was the importer of record for seventy-two (72) entries of men's suits between February 2, 2004, and October 8, 2004. Mercantile Electronics, LLC ("Mercantile Electronics"), which is not a party to this suit, was the consignee of the men's suits. Shadadpuri is the president and sole shareholder of Trek, and is also a forty-percent (40%) shareholder of Mercantile Electronics. There is no evidence or even allegation that Shadadpuri is himself a licensed customs broker.

Trek and Mercantile Electronics purchased a number of fabric "assists" and provided them to manufacturers outside the United States. An assist is defined by 19 U.S.C. § 1401a(h)(1)(A) as, among other things: "materials, components, parts, and similar items incorporated in the imported merchandise." 19 U.S.C. § 1401a(h)(1)(A)(i). The foreign manufacturers used the assists to make men's suits which Trek imported into the United States. In August 2004, the United States Customs

[1] While it appears from the record that the government would have been able to allege one or more of these theories of liability, it chose not to do so below and has expressly chosen not to seek an additional opportunity to do so here on appeal. The government relies solely on its claim that it can avoid having to make the showings Shadadpuri contends it must make by, instead, seeking to impose direct liability upon him for penalties under § 1592(c)(2).

and Border Protection ("Customs") investigated Trek's import activities and determined that the relevant entry documentation failed to include the cost of the fabric assists in the price paid or payable for the men's suits which, in turn, lowered the amount of duty payable by Trek. In November 2004, Customs informed Shadadpuri that Trek had failed to declare the value of the fabric assists when importing the merchandise.

Shadadpuri previously failed to include assists in entry declarations when acting on behalf of a corporate importer. In 2002, Customs discovered that Shadadpuri, acting on behalf of Mercantile Wholesale Inc. ("Mercantile"), failed to include in Mercantile's entry documentation the cost of fabric assists and trim when identifying the price actually paid or payable for the merchandise. The same Customs Import Specialist that conducted the investigation currently at issue discovered the discrepancies in 2002 and explained to Shadadpuri that assists were dutiable and must be included on import documentation. As a result of the 2002 investigation, Mercantile paid $46,156.89 in unpaid duties after admitting it failed to add the value of the assists in the price actually paid or payable for merchandise. Customs did not take any action against Shadadpuri personally.

When confronted in 2004 regarding the assists at issue in this case, Shadadpuri conceded he knew Trek should have included the value of the fabric assists in its duties. Neither Shadadpuri nor Trek paid the balance of the duties owed in connection with the assists. The government filed suit in the

Court of International Trade, claiming that both Trek and Shadadpuri, in his personal capacity, were liable for a penalty of $2,392,307, for fraudulently, knowingly, and intentionally understating the dutiable value of the imported men's suits. *See United States v. Trek Leather, Inc. and Harish Shadadpuri,* Case No. 1:09-cv-00041-NT, Doc. No. 2 ("Complaint"). The government alternatively alleged that Shadadpuri and Trek were either: (1) grossly negligent and liable for a civil penalty of $534,420.32, or (2) negligent and liable for a civil penalty of $267,310.16. The government further sought the unpaid customs duties of $45,245.39.

The statutory scheme which governs these claims and requests for penalties contains two relevant sections. First, § 1592(a) defines what conduct is subject to a penalty. It provides:

> (a) Prohibition
>
> (1) General Rule
>
> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence--
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of--
>
> (i) any document or

> electronically transmitted data or information, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material, or
>
> (B) may aid or abet any other person to violate subparagraph (A).

19 U.S.C. § 1592(a). Section 1592(c) then describes the penalties which may be assessed, depending on the level of an offender's culpability. It provides, in relevant part:

> (c) Maximum penalties
>
> (1) Fraud
>
> A fraudulent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise.
>
> (2) Gross negligence
>
> A grossly negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed--
>
> (A) the lesser of--
>
> (i) the domestic value of

the merchandise, or

(ii) four times the lawful duties, taxes, and fees of which the United States is or may be deprived, or

(B) if the violation did not affect the assessment of duties, 40 percent of the dutiable value of the merchandise.

(3) Negligence

A negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed--

(A) the lesser of--

(i) the domestic value of the merchandise, or

(ii) two times the lawful duties, taxes, and fees of which the United States is or may be deprived, or

(B) if the violation did not affect the assessment of duties, 20 percent of the dutiable value of the merchandise.

19 U.S.C. § 1592(c).

The government moved for summary judgment on all claims, and Trek and Shadadpuri

cross-moved for partial summary judgment on the fraud claim. Shadadpuri also cross-moved for summary judgment with respect to the negligence claims, contending that, because he was not the "importer of record" -- and was, instead, only a corporate officer -- no such cause of action could lie against him. During oral argument before the Court of International Trade, Trek conceded it had been grossly negligent, but denied having committed intentional fraud; Shadadpuri continued to deny liability on all counts.

Shadadpuri argued that, because Trek, a corporation, was the importer of record, he could only be liable personally if the government either pierced Trek's corporate veil or established that Shadadpuri either had committed fraud or aided and abetted fraud by Trek, making him liable under § 1592(a)(1)(B) ("[no person] may aid or abet any other person to violate subparagraph (A)"). Shadadpuri contended--relying on our decision in *United States v. Hitachi America, Ltd.,* 172 F.3d 1319 (Fed.Cir.1999) ("*Hitachi*")--that, because one cannot "aid and abet" negligent conduct, he cannot be liable for Trek's admitted negligence unless the government proves he was acting as Trek's alter ego, rather than as an officer of the corporation acting in his capacity as such.

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.

The Court of International Trade agreed with the government on all points. As to Trek, the court granted summary judgment in favor of the government and assessed a $534,420.32 penalty under § 1592(c)(2), for gross negligence in connection with its import documentation. The Court of International Trade then found Shadadpuri jointly and severally liable for the same penalty, finding that Shadadpuri is a member of the class of "persons" subject to liability under § 1592(a), whether or not he is the "importer of record," and that the plain language of § 1592(a)" does not recognize an exception for negligent corporate officers." *See United States v. Trek Leather, Inc. and Harish Shadadpuri,* Case No. 1:09-cv-00041, Slip Op. 11-68 at 9 (Doc. No. 44) (citations omitted). The Court of International Trade reasoned that Shadadpuri was personally responsible for examining all appropriate documents before forwarding them to a customs broker, and that Trek could not have been grossly negligent but for Shadadpuri's involvement in that negligence. *Id.* at 9. The court found the parties' motions for summary judgment on the fraud claim to be moot and entered an order dismissing those claims. *Id.* at 10-11. Shadadpuri timely appealed; the government has not appealed the dismissal of the fraud claims.

On appeal, Shadadpuri argues that only

"importers of record" may be *directly* liable for a penalty assessed under § 1592(c)(2) or (c)(3), based solely on assertions of negligence. Sections 1484 and 1485 of Title 19 set forth the level of reasonable care required in conjunction with the entry of merchandise, and, relying on *Hitachi,* Shadadpuri contends that those sections are directed at requiring "importers of record" to use reasonable care in providing Customs with true and correct documentation regarding the value of imported merchandise. And, because §§ 1484 and 1485 only apply to "importers of record," parties other than the importer of record cannot be *directly* liable for a penalty under § 1592(c)(2) or (c)(3) for *negligent* failure to comply with those provisions. He asserts that liability for corporate officers of an importer of record may only arise: (1) where those officers are liable for fraud under 19 U.S.C. §§ 1592(a)(1)(A) or (a)(1)(B), or (2) by way of the common law principle of piercing the corporate veil so as to equate the corporate officer with the importer of record. He therefore argues that, because he was not the importer of record (Trek was) and has not been charged with fraud, or aiding and abetting fraud, he cannot be directly subject to a penalty under § 1592(c)(2).

Shadadpuri further contends, citing both *Hitachi* and *United States v. Action Products, International,* 25 C.I.T. 139, 144 (Ct. Int'l Trade 2001), that, when an importer of record is liable only for negligence or gross negligence (as distinct from fraud), a third party cannot be liable for aiding and abetting that negligence. His premise is that someone cannot be liable for *negligent* aiding and

abetting because aiding and abetting requires a demonstration of knowledge or intent. *See Hitachi,* 172 F.3d at 1337-38.

The government counters that the plain language of § 1592 mandates that "no person" shall import merchandise into the United States by means of materially false statements or omissions and that the provision is not limited to "importers of record" or those committing fraud, but also includes corporate officers of a corporate importer of record. On this basis, the government contends that the Court of International Trade properly held Shadadpuri liable for a direct violation of § 1592(a) and properly imposed penalties under § 1592(c)(2). We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

II.

We review legal determinations from the Court of International Trade without deference and review factual questions for clear error. *NEC Elecs., Inc. v. United States,* 144 F.3d 788, 790 (Fed. Cir. 1998). We agree with the government that the word "person," as it appears in 19 U.S.C. § 1592(a), should be read broadly. Section 1592 is not a free standing criminal sanction, however. Accordingly, the operative question is not simply whether Shadadpuri is a "person" as defined in § 1592, but whether a corporate officer can be personally liable for a corporate importer of record's negligent violation of §§ 1484 and 1485 and punished under § 1592(c)(2) therefor.

We first turn to the statutory structure of the Tariff Act. Section 1484 of Title 19 sets forth the requirements and timing for making entry of imported merchandise into the United States:

> (a) Requirement and time
>
> > (1) Except as provided in sections 1490, 1498, 1552, and 1553 of this title, one of the parties qualifying as "importer of record" under paragraph (2)(B), either in person or by an agent authorized by the party in writing, shall, using reasonable care--
> >
> > > (A) make entry therefor by filing with the Bureau of Customs and Border Protection such documentation or, pursuant to an authorized electronic data interchange system, such information as is necessary to enable the Bureau of Customs and Border Protection to determine whether the merchandise may be released from custody of the Bureau of Customs and Border Protection;
> > >
> > > (B) complete the entry, or substitute 1 or more reconfigured entries on an import activity summary statement, by filing with the

> Customs Service the declared value, classification and rate of duty applicable to the merchandise, and such other documentation or, pursuant to an electronic data interchange system, such other information as is necessary to enable the Customs Service to--
>
> > (i) properly assess duties on the merchandise,
> >
> > (ii) collect accurate statistics with respect to the merchandise, and
> >
> > (iii) determine whether any other applicable requirement of law (other than a requirement relating to release from customs custody) is met.

19 U.S.C. § 1484(a).

Section 1484 provides that a party qualifying as an "importer of record," either in person or via an authorized agent, must use "reasonable care" in completing and submitting entry documentation to enable Customs to properly assess duties on the merchandise. An "importer of record" is defined as the owner or purchaser of the merchandise, or a customs broker with a valid license under 19 U.S.C. § 1641 designated by the owner, or a purchaser or consignee of the merchandise. 19 U.S.C. §

1484(a)(2)(B). The importer of record is required to use reasonable care when providing Customs documents demonstrating the declared value and rate of duty applicable to the merchandise so that Customs can, among other things, properly assess duties on the merchandise. 19 U.S.C. § 1484(a)(1)(B). An importer of record making entry under the provisions of § 1484 must also declare under oath that all the statements in the entry documents are true and correct. 19 U.S.C. § 1485(a)(3). Notably, the obligations of §§ 1484 and 1485 are also imposed on any agent "authorized in writing" by the importer of record to act on its behalf with respect to its duties under those sections.

Section 1592 provides specific penalties for failing to make a proper entry, whether through fraud, gross negligence, or even mere negligence. As the Court of International Trade observed in *United States v. Rockwell Automation, Inc.,* 462 F.Supp.2d 1243, 1246-47 (Ct. Int'l Trade 2006), "[i]n the event that Customs believes an importer failed to meet its obligations under [the Tariff Act of 1930], Customs may seek civil penalties under Section 592 of [the Tariff Act of 1930]."

Section 1592(a) focuses on particular conduct: the entry of merchandise into the United States. Specifically, § 1592(a) bars "person[s]" from *entering, introducing,* or *attempting to enter or introduce,* merchandise into the United States by way of fraud, gross negligence, or negligence. 19 U.S.C. § 1592(a). The provision focuses on such improper entry, introduction, or attempted entry or introduction of merchandise by means of any written or oral

statement or act that is materially false, or contains a material omission. *Id.* Section 1592 does not punish all fraud or negligence in dealings with Customs, it punishes such acts only when they occur in connection with the "entry" of merchandise into the United States and only when they are of such character as to affect Customs' decision-making when assessing duties in connection with such entry. *See United States v. Thorson Chem. Corp.,* 795 F.Supp. 1190, 1197-98 (Ct. Int'l Trade 1992). In this context, entry is defined as filing information to enable Customs to determine whether the subject merchandise may be released from custody and enable Customs to assess duties on the merchandise, collect accurate statistics, and determine whether any other applicable requirements are met. 19 U.S.C. § 1484(a); *see also* 19 C.F.R. § 141.0a (defining "entry" as the documentation required to be filed with Customs or the act of filing such documentation.).

The penalties assessed under § 1592(c)(2) and (c)(3) are for gross negligence or negligence in connection with such acts of "entry." Negligence is not defined separately in the statute. Accordingly, we must assume it carries its ordinary common law meaning when used in the Tariff Act. *See, e.g., Neder v. United States,* 527 U.S. 1, 21 (1999) ("It is a well-established rule of construction that where Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (citations omitted); *Standard Oil Co. of N.J. v. United States,* 221 U.S. 1, 59 (1911) ("[W]here

words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary.") (citations omitted). That meaning implies a duty, the breach of that duty, and harm causally flowing from breach of that duty. *See Huffman v. Union Pacific R.R.,* 675 F.3d 412, 418 (5th Cir. 2012) ("negligence ... requires proof of breach of a standard of care, causation, and damages.") (citing *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 540 (1994)); *Zimmerman v. Norfolk Southern Corp.,* 706 F.3d 170, 189 (3d Cir. 2013) ("The well-worn elements of common-law negligence are ... duty, breach, causation, and damages."); *Tufariello v. Long Island R. Co.,* 458 F.3d 80, 87 (2d Cir. 2006) (identifying "the traditional common law elements of negligence: duty, breach, foreseeability, and causation."). The only "duties" regarding the filing of documents in connection with the entry of merchandise set forth in the Tariff Act which could give rise to a negligence claim are those spelled out in §§ 1484 and 1485. Section 1592(c)(2) and (c)(3) are thus inextricably tied to §§ 1484 and 1485.

The government recognized this interaction between §§ 1484 and 1485 and the penalties which can be assessed under § 1592 when filing its summary judgment motion at the Court of International Trade. *See United States v. Trek Leather, Inc. and Harish Shadadpuri,* No. 1:09-CV00041-NT, Doc. 30 at 11. In its motion, under the section heading "[f]or [v]iolation [o]f 19 U.S.C. § 1592(a)," the government first sets out §§ 1484 and 1485, and related Customs regulations, to

demonstrate the procedures and requirements importers must follow--i.e. their "duties" under the Act--and documents that must be filed at the time of entry. *Id.* Only after setting forth these requirements does the government provide the details of § 1592 and the relevant levels of culpability and penalties which attach when an "entry" is fraudulent or negligently false. *Id.* at 11-12. When the government withdrew its fraud claims against both Trek and Shadadpuri, moreover, it obligated itself to prove the existence of and breach of a definable duty under the Act. Thus, the allegations in the government's complaint and the complete record in this case reveal that the government alleged that Trek and Shadadpuri were negligent in "making entry" of the men's suits under §§ 1484 and 1485--i.e., failed to use reasonable care in connection with its entry documentation--and should be liable for a penalty under § 1592(c)(2) or (c)(3) as a result.

Under the facts of this case, it is undisputed that *Trek* is the importer of record because it is the owner of the merchandise which was entered into the United States and as to which Customs assessed duties. The government does not contend that Shadadpuri was an "importer of record or customs broker." Nor does it assert that Shadadpuri had any independent duty under §§ 1484 and 1485 with respect to Trek's entries. It concedes that Trek is a corporation and that, even as its sole shareholder, Shadadpuri is not chargeable with its acts generally. The government cannot reasonably contend otherwise given long-standing principles of limited liability for shareholders and corporate officers when

acting on behalf of a corporation. *See Anderson v. Abbott,* 321 U.S. 349, 361-62 (1944) ("[n]ormally the corporation is an insulator from liability on claims of creditors. The fact that incorporation was desired in order to obtain limited liability does not defeat that purpose."); *Burnet v. Clark,* 287 U.S. 410, 415 (1932) ("[a] corporation and its stockholders are generally to be treated as separate entities."). Of course, Trek is chargeable with Shadadpuri's actions because he is a corporate officer (i.e., he is an "agent" of the corporation in the common law sense of that term); the question posed is whether Shadadpuri, under the circumstances here, can be personally chargeable with negligence for the actions he took in his capacity as a corporate officer and on behalf of the corporation. Under basic principles of corporate law, he cannot. *See* O'Neal and Thompson's Close Corporations and LLCs: Law and Practice, § 8.22 (Rev. 3d ed.) (stating that when an officer of a corporation acts, his action is that of the entity).

In *Hitachi,* for instance, we found that because §§ 1484 and 1485 apply by their terms only to importers of record, the corporate parent of an importer could not be directly liable for violations thereof, even where it had played "an active role" in the importer's entry of merchandise. *Hitachi,* 172 F.3d at 1337-38. We held, moreover, that the corporate parent could not be liable for aiding and abetting the importer's violations of §§ 1484 and 1485 because one cannot, as a matter of legal theory, "aid and abet" the negligence of another. *Id.* Thus, it would seem that, absent a showing that pierces Trek's corporate veil, Shadadpuri is as much a third party to Trek's activities as an "importer of record"

as was the corporate parent in *Hitachi* and, thus, cannot be directly chargeable with penalties under § 1592(c)(2) or (3) for Trek's negligence. As Shadadpuri concedes, he could be chargeable with a penalty under § 1592(a)(1)(B) for aiding and abetting corporate fraud had the government chosen to prove that Trek engaged in such fraud, but the government abandoned that claim. And, under *Hitachi,* aiding and abetting liability only applies to intentional acts, not negligent ones.

The government seeks to avoid the result that seems compelled by the structure of the Tariff Act and our decision in *Hitachi* by arguing that § 1592(a) defines "person[s]" subject to the penalties more broadly than §§ 1484 and 1485 define an "importer of record." And, the government argues that *Hitachi* only addressed the liability of parent "exporters" under § 1592(a) and did not mean to apply its holding to other potential "person[s]" under § 1592(a). We are not persuaded on either score.

While the word "person" generally carries a broad connotation, it cannot be divorced from the remainder of the language in § 1592. The word "person" must be read in context and "'with a view to [its] place in the overall statutory scheme.'" *Roberts v. Sea-Land Servs., Inc.,* ___ U.S. ___, 132 S.Ct. 1350, 1357 (2012) (quoting *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803 (1989)); *United States v. Morton,* 467 U.S. 822, 828 (1984) ("[w]e do not, however, construe statutory phrases in isolation; we read statutes as a whole."). As noted above, § 1592(a) does not simply prohibit persons from lying to customs-- though there may be other civil or criminal

provisions which address that activity--it *only* bars persons from making misstatements to Customs *in connection with* the entry of merchandise into the United States, and *only* from doing so in a way that might tend to affect Customs' assessment of duties on that merchandise. *See Thorson Chem. Corp.,* 795 F.Supp. at 1197-98. And, penalties under § 1592(c)(2) and (c)(3) for negligent conduct can only be assessed against those with definable "duties" under the Tariff Act relating to such entries. The word "person" in this context must be read to encompass those who are authorized to enter merchandise into the United States *and* who have duties imposed upon them which are concomitant with such entry. We do not read "person" as a disembodied term untethered to the conduct for which Congress deemed a penalty to be appropriate. Nor do we read into it an unstated purpose of Congress to repeal the common law principle of corporate-shareholder immunity.[2] We also decline to parse *Hitachi* as finely as the government asks that we do.

In *Hitachi,* we rejected the government's argument that § 1592(c)(2) and (c)(3) should be read broadly to encompass entities or individuals who, though not importers of record, are actively involved with the funding and control of the entry of merchandise by that importer of record. *Hitachi,* 172

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[2] We agree that the term "person" in § 1592(a) is broader than the term "importer of record." Indeed, there is no doubt that a variety of "persons," including corporate officers, may be liable for aiding and abetting fraud by an importer of record, even though they are not themselves the designated importer, or may be liable for their own direct acts of fraud.

F.3d at 1336-38. The position the government takes here, though phrased differently, is to the same effect; if we accept it, we would simultaneously overrule the result in *Hitachi*. We may not do that, nor do we wish to. We did not limit either our discussion or holding in *Hitachi* to exporters; our focus was on the fact that, as a corporate parent, Hitachi Japan was not the importer of record and had no duties as such, despite findings by the Court of International Trade that it was actively involved with and even directed the activity. As here, what we did in *Hitachi* was both respect the corporate form and recognize that a claim of negligence must be predicated upon a defensible legal duty; the government's effort to characterize our focus differently is unpersuasive.

The government had at least two separate avenues to hold Shadadpuri personally liable for penalties under § 1592 in connection with the duties owed for Trek's 2004 entries. It could have proven that Trek committed fraud and that Shadadpuri aided and abetted that fraud. Or, it could have pierced Trek's corporate veil and charged Shadadpuri with Trek's admitted negligence as Trek's alter ego. It is possible, moreover, that the government could have proven that Shadadpuri personally committed fraud and is liable for that conduct under § 1592(a).[3] While all of these routes

[3] The dissent makes a factual argument that may well support a finding that Shadadpuri either committed a personal act of fraud or aided and abetted fraud by Trek. Dissent at 5-6. While we do not disagree with the facts described, they support legal theories the government expressly has chosen not to pursue. The government never sought to establish that either

seem viable--indeed readily available--on the record before us, the government has steadfastly eschewed them all.

Instead, the government has asked us to adopt a broad legal principle that would expose all corporate officers and shareholders to *personal* liability for *negligent* acts they undertake *on behalf of their corporation.* Absent an explicit statutory basis for doing so, we decline to believe Congress intended to supplant the common law so completely.[4]

Shadadpuri or Trek committed fraud. While Shadadpuri's conduct was reprehensible, we cannot endorse creating legal shortcuts for the government to impose a penalty in *this* case because that would free the government to employ that same shortcut in all other cases. We do not want to fall into the trap of letting bad facts make bad law, and, thus, decline the invitation to do so.

[4] When Congress intends to impose personal liability on corporate officers for conduct taken in their capacity as such, it says so expressly. *See, e.g.,* 18 U.S.C. § 1350 (fraud provisions of Sarbanes-Oxley Act). The dissent argues that corporate officers should be liable *personally* for the cost of penalties assessed under § 1592, even when acting in their capacity as officers, and even when their conduct was merely negligent. In support of this proposition, it cites to *United States v. Islip,* 18 F.Supp.2d 1047, 1061 (Ct. Int'l Trade 1998), which, in turn, relies on *United States v. Appendagez, Inc.,* 560 F.Supp. 50 (Ct. Int'l Trade 1983), which relies on *Herm v. Stafford,* 466 F.Supp. 439 (W.D.Ky.1979) and *United States v. Wise,* 370 U.S. 405, 82 S.Ct. 1354, 8 L.Ed.2d 590 (1962). Those two cases do not address the circumstances at issue here, however. Those inapt cases have nothing to do with the liability of corporate officers accused of negligently filling out entry papers required of their corporation by §§ 1484 and 1485. Nothing in them supports the conclusion that Congress intended to put the personal assets of such corporate officers at risk based on negligent conduct that falls short of affirmative acts of fraud or the aiding and

And, we decline to reverse or dilute our holding in *Hitachi.*

Thus, while we may not fully understand the strategy choices the government made here, we hold it to them and reverse the judgment of the Court of International Trade to the extent it imposed penalties under § 1592(c)(2) upon Shadadpuri while acting in his capacity as a corporate officer of Trek, a corporate "importer of record."[5]

REVERSED

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abetting of fraud. *Herm* is a securities fraud case from Kentucky that discusses a corporate officer's culpability when *knowingly participating* in a corporation's fraudulent acts. *Wise* is a case interpreting the criminal provisions of the Sherman Act; its holding rests on a careful assessment of the scope of that provision and the class of entities and individuals historically within its reach, including corporate officers who knowingly engage in the illegal acts proscribed. There are neither criminal nor fraud claims asserted against Shadadpuri in this action. And, the Tariff Act is fundamentally different from and shares no common history with the Sherman Act.

[5] To the extent the dissent is concerned with making sure that corporate officers be held "liable for false statements made by a corporation if the officer knowingly participated in the deception or failed to correct the false statements upon learning of them" Dissent at 4, quoting *Islip,* 18 F.Supp.2d at 1061, there is no doubt they can be. Section 1592(a)(1)(B) makes clear that is so; all the government must do is prove that the importer of record committed fraud through those officers and that the corporate officer " knowingly participated in that deception" or covered it up, i.e., aided and abetted it. It is possible, alternatively, that the government could prove direct acts of fraud and attempt to assess a penalty under § 1592(c)(1) therefore. What the government may not do is shortcut its burden of proof in a way that ignores both the statutory scheme of the Tariff Act and an importer of record's corporate form.

COSTS

No costs.

UNITED STATES COURT OF APPEALS

for the FEDERAL CIRCUIT

UNITED STATES,
Plaintiff-Appellee,

v.

TREK LEATHER, INC.,
Defendant,

AND

HARISH SHADADPURI,
Defendant-Appellant.

2011-1527

Appeal from the United States Court of International Trade in No. 09-CV-0041, Judge Nicholas Tsoucalas.

DYK, *Circuit Judge*, dissenting.

The majority holds that only an importer of record or agent authorized in writing--as defined by 19 U.S.C. § 1484 of the customs statutes--may be liable for negligence as a "person" under § 1592(a)(1)(A). Absent piercing of the corporate veil, it

holds that corporate officers (agents of the corporation) like Shadadpuri are not liable for negligently submitting false customs forms.

In my view, the majority's interpretation is inconsistent with the plain language of the statute and its legislative history. I respectfully dissent.

I

The majority suggests that § 1592 is designed solely to impose penalties for violations of §§ 1484 and 1485, arguing that "[t] he only 'duties' regarding ... entry ... are those spelled out in §§ 1484 and 1485," and that "Section 1592(c)(2) and (c)(3) are thus inextricably tied to §§ 1484 and 1485." Maj. Op. at 13[---]. It argues that, since § 1484 only imposes duties on " importers of record" and "agents authorized by the [importer of record] in writing," those are the only persons who can be liable for penalties under § 1592. But § 1592 contains no reference to § 1484 and broadly sanctions any "person ... [who] by fraud, gross negligence, or negligence ... enter[s], introduce[s], or attempt[s] to enter or introduce any merchandise ... by means of ... any document ... which is material and false, or ... any omission which is material." 19 U.S.C. § 1592(a).

Alternatively, the majority urges that importers of record and written agents are the only persons who could make an "entry" within the meaning of § 1592. But this cannot be correct. Any importer of record typically acts through agents. The statutory scheme requires that an "entry" of merchandise is made by filing specific documents

with the customs service. *See* 19 U.S.C. §§ 1484, 1485. Those who submit those documents have a duty to ensure that they are accurate. Section 1592(a)(1)(A) is designed to impose liability on agents of importers of record who breach this duty in submitting the required documents for entries on behalf of the importer of record.

This is clear from the history of § 1592(a)(1)--not discussed or even acknowledged by the majority. The current language of the statute, which refers to a "person," was adopted in 1978. *See* Customs Procedural Reform and Simplification Act of 1978, Pub.L. No. 95-410, § 110, 92 Stat. 888, 893-94. The Supreme Court has made clear that "'person' often has a broad[ ] meaning in the law." *See Clinton v. City of New York,* 524 U.S. 417, 428 n. 13 (1998) (citing 1 U.S.C. § 1). The history of § 1592(a) shows that the term "person" has such a broad meaning in *that* statute. The precursor to § 1592(a)(1)(A) imposed liability for false statements to Customs on a wide range of individuals, including corporate representatives like Shadadpuri. Specifically, the prior version of the statute conferred liability on

> any *consignor, seller, owner, importer, consignee, agent, or other person or persons* [who] enters or introduces, or attempts to enter or introduce ... any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal....

19 U.S.C. § 1592 (1976) (emphasis added).

Shadadpuri would clearly be liable under this earlier statute. As the majority concedes, Shadadpuri qualifies as an agent of Trek. *See* Maj. Op. at 15 [----] (conceding that Shadadpuri "is an 'agent' of the corporation in the common law sense of that term"). And Shadadpuri clearly provided false information to Customs that omitted the value of certain fabric assists.

The question is whether the change in the statute's language--using the word "person" in the current version of § 1592(a) to replace the list of covered persons in the predecessor statute--changed the meaning of the statute. It is quite clear that the substitution of the word "person" for the list appearing in the predecessor statute was not designed to make a substantive change. The legislative history stated explicitly that "[t]he persons covered ... [we]re intended to remain the same as they [we]re under [the previous] law," and "emphasize[d] that ... the committee d[id] not change the scope of [the existing law] with respect to the persons potentially liable" under the provision. S.Rep. No. 95-778, at 18, 20 (1978); *see also* H.R.Rep. No. 95-1517, at 10 (1978) (Conf. Rep.) (noting that "the persons covered ... [we]re intended to remain the same").

Shortly after the current version of § 1592(a) was adopted, the Court of International Trade ("Trade Court"), explained that, in changing the language of the statute, the new version placed "[n]o limitation ... on whether such persons were corporations or natural persons," and it concluded that

> there is nothing in the Act [ ]or its legislative history to indicate that the Congress intended to restrict the applicability of the penalties [in § 1592] to corporations and to exclude from the applicability of the penalties officers of corporations merely because of a claim that they were acting in their corporate capacities.

United States v. Appendagez, Inc., 560 F.Supp. 50, 55 (Ct. Int'l Trade 1983). More recently, the Trade Court has stated that " [a] corporate officer may be liable for false statements made by a corporation if the officer knowingly participated in the deception or failed to correct the false statements upon learning of them." *United States v. Islip,* 18 F.Supp.2d 1047, 1061 (Ct. Int'l Trade 1998) (alteration in original) (quotation marks omitted). Unsurprisingly, then, the Trade Court has noted that " [t] he language of section 1592 leaves room for those other than the importer of record to be held accountable for violations," and that it has " consistently allowed corporate officers to be held [jointly and severally] liable for violations that were committed in the capacity of their employment," as was the case for Shadadpuri below. *United States v. Matthews,* 533 F.Supp.2d 1307, 1313-14 (Ct. Int'l Trade 2007).

II

The majority seems to distinguish these Trade Court cases as involving fraud rather than negligence. *See* Maj. Op. at 18 n. 4, 19 n. 5. But the same language in § 1592(a) (referring to liability of "persons") applies to both fraud and negligence. *See*

19 U.S.C. § 1592(c) (defining liability under § 1592(a) for fraud, gross negligence, and negligence). There is nothing in the statutory text that would distinguish between an agent's direct liability for fraudulent entries and negligent ones. The majority's effort to suggest that the statutory text might cover fraud and not negligence is misguided. *See Clark v. Martinez,* 543 U.S. 371, 386 (2005) (rejecting "the dangerous principle that judges can give the same statutory text different meanings in different cases").[1]

The construction of § 1592 mandated by the legislative history is not contrary to our decision in *Hitachi,* which did not address the question of whether a "person" other than an importer of record could be liable for material false statements or omissions under § 1592(a)(1)(A), which is at issue here. It merely held that Hitachi Japan, which was not the importer of record in that case, could not be liable for aiding and abetting negligent false statements made to Customs by the importer of record under 19 U.S.C. § 1592(a)(1)(B). 172 F.3d at 1336. The government did not argue and the case did not decide whether an agent or other individual could be a "person" liable for negligence.

III

Here, the record clearly showed that Shadadpuri signed the required entry documentation on Trek's behalf, Supp. J.A. 31-32, 79-88, and

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[1] To be sure under *United States v. Hitachi America, Ltd.,* 172 F.3d 1319 (Fed.Cir.1999), an individual could aid and abet a fraud, but not a negligent act.

Shadadpuri conceded at oral argument in the Trade Court that he "had the responsibility and obligation to examine all appropriate documents including all assists within the [required] entry documentation." *United States v. Trek Leather,* No. 09-00041, slip op. at 9 (Ct. Int'l Trade 2011). But the documentation Shadadpuri authorized had material omissions and therefore contained false representations. Because Shadadpuri had been responsible for the submission of similarly false entries in the past, the Trade Court reasonably deemed Shadadpuri's actions negligent, rendering him individually liable for his actions. This holding was consistent with the statute.

The Trade Court's interpretation of the statute is correct. The majority's interpretation is demonstrably incorrect. I respectfully dissent.

APPENDIX D

UNITED STATES COURT OF INTERNATIONAL TRADE

UNITED STATES OF AMERICA, Plaintiff,

v.

TREK LEATHER, INC., and HARISH SHADADPURI, Defendants.

Before: Nicholas Tsoucalas, Senior Judge

Court No. 09-00041

Dated: June 15, 2011

[Granting Plaintiff's Motion for Summary Judgment in part. Denying Defendant's Cross Motion for Summary Judgment.]

Tony West, Assistant Attorney General; Jeanne E. Davidson, Director, Franklin E. White, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Scott A. MacGriff); Mary McGarvey-Depuy, Office of the Associate Chief Counsel, United States Customs and Border Protection, Of Counsel, for Plaintiff.

Galvin & Mlawski (John Joseph Galvin), for Defendants.

OPINION

Tsoucalas, Senior Judge: Plaintiff United States Customs and Border Protection[1] ("the Government" or "CBP") commenced this action against Trek Leather, Inc. ("Trek"), and Harish Shadadpuri ("Mr. Shadadpuri") for unpaid customs duties and civil penalties for violating section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2003).[2] Currently before the Court are the Government's motion for summary judgment and the defendants' cross-motion for partial summary judgment pursuant to Rule 56 of the United States Court of International Trade. In accordance with the decision rendered at oral argument on May 31, 2011, and based upon all the evidence in the record, the Court grants the Government's motion for summary judgment on Count II of the Complaint finding that both the defendants are liable, jointly and severally, for gross negligence under 19 U.S.C. § 1592(a). The Court denies judgment on Count I and III of the Complaint as moot. Lastly, the Court denies the defendants' cross motion in its entirety.

I. Background

Trek was the importer of record for seventy-

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[1] The United States Customs Service was renamed the United States Bureau of Customs and Border Protection effective March 1, 2003. *See* Homeland Security Act of 2002, Pub.L. No. 107-296 § 1502, 2002 U.S.C.C.A.N. (116 Stat.) 2135, 2308; Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108-32, at 4 (2003).

[2] All further citations to the Tariff Act of 1930 are to the relevant provisions of the Title 19 of the United States Code, 2003 edition.

two entries of men's suits between February 2, 2004, and October 8, 2004. Mr. Shadadpuri is the president and sole shareholder of Trek. Pltf's Stmnt of Uncontested Fcts ("Uncontested Fcts") at 1.[3] Mr. Shadadpuri is the president and 40% shareholder of non-party Mercantile Electronics, LLC, the consignee of the subject goods. *Id.*

Mr. Shadadpuri, through his corporate entities, purchased fabric assists[4] and provided them to manufacturers abroad. *Id.* These manufacturers then incorporated the assists in the production of the men's suits at issue which were ultimately imported into the United States. *Id.* In August of 2004, CBP Import Specialist Dianne Wickware ("IS Wickware") investigated the defendants' activities and found that their entry documentation consistently failed to include the cost of fabric assists in the price actually paid or payable for the merchandise, thereby lowering the amount of duty paid to CBP by the

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[3] While the defendants do not agree with every fact set forth in Plaintiff's Uncontested Facts, all references to that document herein are uncontested by all parties.

[4] In relevant part, 19 U.S.C. § 1401a(h)(1)(A) provides as follows:

> (1)(A) The term "assist" means any of the following if supplied directly or indirectly, and free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or the sale for export to the United States of the merchandise:
>
> > (i) Materials, components, parts, and similar items incorporated in the imported merchandise.

19 U.S.C. § 1401a(h)(1)(A).

importer ("the 2004 Investigation"). *Id.* at 3.

This was not the first time that Mr. Shadadpuri failed to include assists in entry declarations. In 2002, CBP investigated Mr. Shadadpuri's filed entries for another company he owned, Mercantile Wholesale, Inc. ("the 2002 Investigation"). *Id.* at 2. Mr. Shadadpuri was also the president and 40% shareholder of Mercantile Wholesale, Inc. During the 2002 Investigation, IS Wickware found that Mercantile Wholesale, Inc. "consistently failed to include the cost of the fabric assists and trim in the price actually paid or payable for the merchandise on its entry documentation." Declaration of Dianne Wickware at 2. IS Wickware explained the term "assist" to Mr. Shadadpuri and advised him that "assists are dutiable and that the value of the fabric assists must be included on the importation documentation." *Id.* at 2-3. After the 2002 Investigation, IS Wickware noted that Mercantile Wholesale, Inc. paid $46,156.89 in unpaid duties after admitting they failed to add the value of the assists in the price actually paid or payable for the merchandise. *Id.* at 3. No action was filed as a result of the 2002 Investigation.

In November, 2004, IS Wickware informed Mr. Shadadpuri that he did not declare the value of the fabric assists when importing the men's suits. *Id.* IS Wickware told Mr. Shadadpuri that the assist "should have been included in the price actually paid or payable for this merchandise for the purposes of calculating duty. [IS Wickware] said, 'You know you should have declared this, ' to which he responded, 'I know.'" *Id.* at 3-4. Neither Mr. Shadadpuri nor Trek

have paid the balance of the remaining duties owed to the Government in the amount of $45,245.39. Uncontested Fcts at 5.

In this action, the Government claims the defendants are liable for damages in the amount of $2, 392, 307.00 for fraudulently, knowingly, and intentionally understating the dutiable value of the imported merchandise by failing to add the value of the fabric assists to the value of the imported men's suits. Compl. at 3-4. Alternatively, the Government alleges the defendants were grossly negligent for their actions and seek imposition of a civil penalty in the amount of $534,420.32. *Id.* at 4. As an additional alternative, the Government alleges a negligence theory of liability and seeks penalties in the amount of $267,310.16. *Id.* at 4-5. Plaintiff further seeks a judgment for unpaid customs duties in the amount of $45,245.39. *Id.* at 5. At oral argument on May 31, 2011, Trek conceded liability for gross negligence but denied committing intentional fraud. Mr. Shadadpuri denies all counts of the Complaint.

JURISDICTION AND STANDARD OF REVIEW

On a motion for summary judgment, the Court evaluates "the pleadings, the discovery and disclosure materials on file, and any affidavits" in order to determine whether there is any "genuine issue as to any material fact" and, if none exists, whether the "movant is entitled to judgment as a matter of law." USCIT R. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A factual dispute is material if it could affect the outcome of the suit under the governing law. *See Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The evidence should be viewed in the light most favorable to the non-moving party and all doubts resolved in its favor. *See Mazak Corp. v. United States*, 33 CIT ___, ___, 659 F.Supp.2d 1352, 1356 (2009). The Court determines all issues *de novo* under 19 U.S.C. § 1592(e)(1) and jurisdiction is pursuant to 28 U.S.C. § 1582.

III. Analysis

A. Intentional Fraud

There exists a question of fact as to whether the defendants intentionally committed fraud under 19 U.S.C. § 1592(a). The Government claims intent can be imputed from the record evidence. However, Mr. Shadadpuri contends it was an error and that he did not intentionally omit the assists. Examination Before Trial of Harish Shadadpuri at 80. "Intent is a factual determination particularly within the province of the trier of fact." *Allen Organ Co. v. Kimball Int'l, Inc.*, 839 F.2d 1556, 1567 (Fed. Cir. 1988). Therefore, the Court cannot grant the Government's motion for summary judgment as to the fraud count of the Complaint.

B. Gross Negligence

Defendants are liable for gross negligence under 19 U.S.C. § 1592(a),[5] if the violation "results

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[5] Section 1592(a) reads, in part,

> [N]o person, by fraud, gross negligence, or negligence-- (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the

from an act or acts (of commission or omission) done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute." 19 C.F.R. pt. 171, App. B(C)(2)(2003). Turning to the facts before the Court, the defendants do not dispute that Mr. Shadadpuri, through his corporate entities, paid for and provided the fabric assists to the manufacturers, who then incorporated these assists into the finished suits. *See* Uncontested Fcts at 1-2. The declared value on the entries failed to reflect the cost of the dutiable fabric assists, and the entries filed for the suits were, therefore, false. In addition to being false, the omissions were also material because it "has the natural tendency to influence or is capable of influencing agency action including, but not limited to a Customs action regarding: . . . (2) determination of an importer's liability for duty. . . ." 19 C.F.R. pt. 171, App. B(B) (2003). "Understated prices in customs entry documents are material because they alter the appraisement and liability for duty of entered merchandise." *United States v. Menard, Inc.*, 16 CIT 410, 417, 795 F.Supp. 1182, 1188 (1992). Therefore, the omissions on the entry documents were both material and false.

> United States by means of-- (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or (ii) any omission which is material, or (B) may aid or abet any other person to violate subparagraph (A).

19 U.S.C. 1592(a).

Trek conceded gross negligence at oral argument on May 31, 2011 as well as in their documents. *See* Defendants' Memorandum in Opposition to Pl.'s Mot. For Summ. Judgement [sic] and in Support of Defendants' Cross-Motion for Partial Dismissal at 7 ("Defendants' failure to ensure that the value of material assists were included in dutiable value may have been occasioned by negligence or, indeed, grounded on reckless disregard or inattention to consequences.").

Mr. Shadadpuri contends that he cannot be personally liable for gross negligence because he did not act intentionally as an aider or abetter under 19 U.S.C. § 1592(a)(1)(B). However, Mr. Shadadpuri is also a member of the class of "persons" subject to liability under 19 U.S.C. § 1592(a). This section is not limited to importers of record. Any "person" who engages in the behavior prohibited by 19 U.S.C. § 1592(a) is liable thereunder regardless of whether that "person" is the importer of record or not. "The language of section 1592 leaves room for those other than the importer of record to be held accountable for violations." *United States v. Matthews*, ___ CIT ___, ___, 533 F.Supp.2d 1307, 1313 (2007); *see also United States v. Golden Ship Trading*, 22 CIT 950, 953 (not reported in F.Supp. 2d) (1998) ("The plain language of the statute itself, which uses the term 'person' rather than 'importer, ' refutes [this] contention."). Mr. Shadadpuri is personally liable under the statute because "[t]he plain language, which proscribes negligent false entries by a person, does not recognize an exception for negligent corporate officers . . . . [A] corporate officer who is negligent can be held liable under § 1592(a)." *Id.* at

956. Moreover, at oral argument, the defendants conceded it was Mr. Shadadpuri who had the responsibility and obligation to examine all appropriate documents including all assists within the entry documentation and to forward these assists to his customs broker. Lastly, Trek's admission of gross negligence directly implicates Mr. Shadadpuri. Gross negligence requires knowledge of or wanton disregard for offender's obligations. Trek's gross negligence, therefore, could not have been conceded but for the direct involvement of Mr. Shadadpuri, the sole shareholder of Trek and the only person who had knowledge of the statutory obligation due to his involvement in the 2002 Investigation, to which Trek was not a party. It is Mr. Shadadpuri who is the common denominator in both the 2002 and the 2004 investigations. Therefore, Mr. Shadadpuri can also be found personally liable under 19 U.S.C. § 1592(a).

The Court finds that the Government has clearly and convincingly demonstrated that the defendants violated 19 U.S.C. § 1592(a). Specifically, (i) the defendants imported men's suits into the United States via false entry documents omitting the values of dutiable fabric assists; (ii) these omissions materially interfered with CBP's ability to properly assess duties on these imports; (iii) the defendants are both persons subject to liability; and (iv) the defendants were grossly negligent in their duties and responsibilities when they transmitted these entry documents to CBP with the omitted material information despite the awareness of their duty to declare assists.

There is no issue of material fact in dispute that might affect the outcome of the case under governing law. As such, based on all the evidence in the record and the defendants' admissions at oral argument on May 31, 2011, summary judgment is hereby granted to the Government on Count II of the Complaint. The defendants acted with gross negligence in violation of 19 U.S.C. § 1592(a) and are subject to penalties under 19 U.S.C. § 1592(c)(2).

IV. Assessment of Damages

A. Recovery of Unpaid Duties

The "language and structure of § 1592 indicates that subsection (d) is not limited to only importers and their sureties, but is intended to apply to further the mandatory recovery of unpaid duty from any party liable under subsection (a)." *See United States v. Inn Foods, Inc.*, 560 F.3d 1338, 1346 (Fed. Cir. 2009). Accordingly, both defendants are liable for unpaid duties jointly and severally.

As a result of the defendants' violation of 19 U.S.C. § 1592(a), the Government is entitled to lost duties in the amount that would have been assessed had the defendants properly included the fabric assists in the value declared. Accordingly, CBP is entitled to $45,245.39 from the defendants in unpaid customs duties.

B. Civil Penalties

Under 19 U.S.C. § 1592(c)(2), "[a] grossly negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to

exceed-- (A) the lesser of-- (i) the domestic value of the merchandise, or (ii) four times the lawful duties, taxes, and fees of which the United States is or may be deprived. . . ." 19 U.S.C. § 1592(c)(2).

Therefore, the penalty in this action may not exceed $534,420.32. The Court begins the penalty assessment on a clean slate without presuming that the maximum penalty should apply. *United States v. Complex Mach. Works Co.*, 23 CIT 942, 946, 83 F.Supp.2d 1307, 1312 (1999). The Court "possesses the discretion to determine a penalty within the parameters set by the statute." *United States v. Modes, Inc.*, 17 CIT 627, 636, 826 F.Supp. 504, 512 (1993). In making this determination, the defendants' degree of culpability is to be considered. *See United States v. Thorson Chem. Corp.*, 16 CIT 441, 452, 795 F.Supp. 1190, 1199 (1992). In evaluating such culpability, the Court may consider both mitigating and aggravating factors in order to determine the appropriate penalty amount. *See Matthews*, ___CIT at ___, 533 F.Supp.2d at 1316. Here, the defendants have failed to make a good faith effort to comply with the statute. Also, they were previously investigated and found liable for the identical violation herein. The nature and circumstances of this violation is particularly grave given their awareness of their statutory obligations. Therefore, based on the factors enunciated in *Complex Mach. Works Co.*, *supra*, the Court finds the defendants liable, jointly and severally, in the amount of $534,420.32.

CONCLUSION

For the foregoing reasons, the Court determines that Trek and Mr. 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. Accordingly, the defendants are jointly and severally liable for (1) restoration of lawful customs duties under 19 U.S.C. § 1592(d) in the amount of $45,245.39, plus pre judgment interest from the date of liquidation and post judgment interest; and (2) civil penalties under 19 U.S.C. § 1592(c)(2) in the amount of $534,420.32 plus interest.

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE

Dated: June 15, 2011
New York, New York

UNITED STATES COURT OF INTERNATIONAL TRADE

UNITED STATES OF AMERICA, Plaintiff,

v.

TREK LEATHER, INC., and HARISH SHADADPURI, Defendants.

Before: Nicholas Tsoucalas, Senior Judge

Court No. 09-00041

JUDGMENT

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in accordance with said decision, it is hereby

ORDERED that plaintiff's motion for summary judgment pursuant to USCIT R. 56 for gross negligence under 19 U.S.C. ß 1592(a) is granted; and it is further

ORDERED that both defendants are jointly and severally liable to the plaintiff in the amount of $534,420.32 plus lawful interest for civil penalties pursuant to 19 U.S.C. 1592(c)(2); and it is further

ORDERED that both defendants are jointly and severally liable to the plaintiff in the amount of $45,245.39 plus prejudgment interest from the date of liquidation and post judgment for the lawful

custom duties owed; and it is further

ORDERED that the Court having granted summary judgment for gross negligence, the claims pursuant to USCIT R. 56 for intentional fraud and negligence under 19 U.S.C. § 1592(a) are dismissed as moot; and it is further

ORDERED that defendants' cross-motion for partial summary judgment is denied.

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE

Dated: June 15, 2011
New York, New York

APPENDIX E

Section 592 of the Tariff Act of 1930, 46 Stat. 590, 750-751, as amended by § 304(b) of the Anti-Smuggling Act of 1935, 49 Stat. 517, 527, *codified at* 19 U.S.C. 1592 (1976), provided:

> **Same; penalty against goods.**
>
> If any consignor, seller, owner, importer, consignee, agent, or other person or persons enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or makes any false statement in any declaration under the provisions of section 485 of this title (relating to declaration on entry) without reasonable cause to believe the truth of such statement, or aids or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof,

embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement; or is guilty of any willful act or omission by means whereof the United States is or may be deprived of the lawful duties or any portion thereof accruing upon the merchandise or any portion thereof, embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from such person or persons, shall be subject to forfeiture, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates. The arrival within the territorial limits of the United States of any merchandise consigned for sale and remaining the property of the shipper or consignor, and the acceptance of a false or fraudulent invoice thereof by the consignee or the agent of the consignor, or the existence of any other facts constituting an attempted fraud, shall be deemed, for the purposes of this section, to be an attempt to enter such merchandise notwithstanding no actual entry has been made or offered.