No. 16-1398

IN THE

Supreme Court of the United States

VICTAULIC COMPANY,

Petitioner,

v.

UNITED STATES, EX REL. CUSTOMS FRAUD INVESTIGATIONS, LLC,

Respondent.

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

BRIEF OF *AMICUS CURIAE* THE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The American Association of Exporters and Importers (AAEI) has been a national voice of the international trade community since 1921. AAEI's membership is comprised of manufacturers, importers, exporters, distributors, and retailers of a wide spectrum of products—including electronics, machinery, footwear, automobiles, automotive parts, food, household consumer goods, textiles, and apparel—as well as international companies, freight forwarders, customs brokers, service providers and banks. Its membership includes hundreds of American companies and individuals that import goods into the United States who could be impacted by this case.

AAEI strongly supports the petition for writ of certiorari because the Third Circuit's holding that a failure to pay marking duties can give rise to False Claims Act ("FCA") liability is based upon critical misunderstandings of the federal country of origin marking statute set out in 19 U.S.C. § 1304. If this decision stands, similarly situated importers would face the prospect of the heavy burdens associated with defending against such actions.

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1. Pursuant to this Rule 37.6 of the Rules of this Court, AAEI affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus, its members, or its counsel made a monetary contribution to the brief's preparation or submission. AAEI timely notified counsel of record for all parties that it intended to submit this brief more than 10 days prior to its filing. All parties have consented to the filing of this brief. Written confirmations of the parties' consent has been provided to the Clerk of the Court.

As the premier trade association representing U.S. companies engaged in global trade, AAEI is recognized for its expertise in the rules and procedures governing trade and specifically in regards to importing goods into the United States. As such, AAEI is particularly well-suited to provide the Court with additional insights into the contingent nature of marking duties, which the Third Circuit erroneously characterized as an absolute obligation to pay the government, such as could form the basis for an action under the FCA.

SUMMARY OF ARGUMENT

The Third Circuit erred in finding that marking duties are an absolute obligation to pay the government that accrues at the time of importation, for purposes of the False Claims Act.

ARGUMENT

I. Marking Duties are not an Absolute Obligation Accruing upon Importation.

A. The Third Circuit Misapprehended the Marking Duties Regime.

Contrary to the Third Circuit's description of marking duties, they are never assessed at the time of importation or when the goods clear Customs. To benefit the Court in its review, we offer a brief outline of the mechanics of marking duty assessments by U.S. Customs and Border Protection ("Customs" or "CBP").[2] By statute, Customs is

2. Marking has been described as a means of ensuring that the ultimate purchaser will be made aware of the country of origin

authorized to examine merchandise upon importation to ensure compliance with the laws enforced by Customs. 19 U.S.C. § 1499. If, in the course of its examination, Customs finds that the merchandise is not properly marked, it will issue a CBP Form 4647 "Notice to Mark and/or Notice to Redeliver" to the importer. 19 C.F.R. § 134.51. At that point, the importer can discuss the marking with Customs to try to eliminate the issue. If Customs agrees with the marking, then no marking duties are due. If Customs continues to disagree with the marking, the importer can opt to export the goods, destroy the goods or mark the goods with country of origin for ultimate approval by Customs. If the goods are exported, destroyed or marked prior to "liquidation" of the entry in question,[3] then no marking duties are assessed. 19 U.S.C. § 1304(i). Moreover, the importer can request that liquidation be deferred for a reasonable time to permit marking, destruction or exportation of the merchandise. 19 C.F.R. § 159.46.

In the event that merchandise has been released from Customs' custody when the marking issue arises, then Customs can recall the merchandise for proper

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in the event that this factor might influence his or her decision to purchase imported goods. *See United States v. Friedlaender & Co.,* 27 C.C.P.A. 297, 302 (1940).

3. "Liquidation" is "the final computation or ascertainment of the duties (not including vessel repair duties) or drawback accruing on an entry." 19 C.F.R. § 159.1. Liquidation typically occurs approximately one year after the date of entry unless it is suspended or extended by specific actions taken by Customs or the Customs courts. Liquidation can be extended up to four years under 19 C.F.R. § 159.12(f) or suspended indefinitely 19 C.F.R. § 159.51.

marking. 19 C.F.R. § 141.113(a)(2).[4] To recall such released merchandise, Customs must issue a demand to the importer of record by means of a CBP Form 4647 or by an other appropriate form or letter. 19 C.F.R. §§ 141.113(f-g). The demand for recall must be issued within 30 days of release of the merchandise in question. 19 C.F.R. § 113.62.

The Form 4647 typically requires that the merchandise be redelivered to Customs within 30 days of the date that the notice was issued. Once the goods are returned to Customs' custody, Customs will make a determination as to whether the goods are properly marked.[5] If Customs finds that the goods are improperly marked, the importer is afforded the option to export or destroy the goods or to correctively mark the goods. *See* CBP Form 4647. If the importer complies with any of these three remedial measures, no marking duties are assessed. 19 U.S.C. § 1304(i).

When Customs does assess marking duties, it is because the importer failed to take corrective actions to export, destroy or mark following the issuance of the Form 4647 either prior to release of the merchandise

4. Subsequent to release, Customs may become aware of a potential marking issue in a number of ways including visits to the importer's warehouse facility; during a routine review of goods in commerce; or if notified by another governmental agency or a private individual. Additionally, Customs can request samples after the merchandise has been released affording Customs yet another opportunity to identify any marking issues. 19 C.F.R. § 151.11.

5. As discussed, *infra*, there are several situations under which imported goods are exempted from country of origin marking.

or in response to a redelivery notice. In either case, the assessment of marking duties by Customs occurs well after the date that the goods were imported.

The timing of the actual assessment of marking duties is significant for purposes of the relator's FCA allegation, which is predicated upon a supposed obligation to pay marking duties at the time of importation. *See* Relator's First Amended Compl. at ¶ 94. Given that marking duties are not assessed upon importation, it is impossible for an importer to knowingly avoid an obligation to pay marking duties to the Government at the time that it enters its merchandise.

B. Liability for Marking Duties Entails a Two-Part Test.

Marking duties are a contingent possibility and not an "obligation," for purposes of the FCA. It is well-established that under the current country of origin marking statute, marking duties attach only if (1) the merchandise was not properly marked at the time of entry and (2) subsequent remedial actions (marking, destruction or exportation) do not occur prior to liquidation of the import entry.

The marking statute was significantly amended by the Customs Administrative Act of 1938. Prior to these amendments, marking duties were assessed simply if the merchandise was not marked at the time of importation unless the goods were exported under Customs' supervision. Tariff Act of 1930, H.R. 2667, 71st Cong. § 304(b) (1930).

The 1938 amendments altered the provision so that marking duties would only be imposed upon a failure to take corrective post-importation actions:

> If at the time of importation any article (or its container, as provided in subsection (b) hereof) is not marked in accordance with the requirements of this section, ***and*** *if such article is not exported or destroyed or the article (or its container, as provided in subsection (b) hereof) marked after importation in accordance with the requirements of this section (such exportation, destruction, or marking to be accomplished under customs supervision prior to the liquidation of the entry* covering the article, and to be allowed whether or not the article has remained in continuous customs custody), there shall be levied, collected, and paid upon such article a duty of 10 per centum ad valorem, which shall be deemed to have accrued at the time of importation…..

Customs Administrative Act of 1938, H.R. 8099, 75th Cong. § 3(c) (1938) (emphasis and bold added).

Under the marking statute which has been in place since 1938, marking duties can only be assessed if the goods are not properly marked, **and** the importer fails to take remedial action. In an early case interpreting the amended statute, the importer challenged the assessment of marking duties where the goods had been marked subsequent to importation but prior to liquidation. *Geo. S. Bush & Co. v. United States*, C.D. 315, 4 Cust. Ct. 169 (1940). The court invalidated the assessment of marking

duties and noted that "[t]he directions in the amended regulations are to assess the additional duty *for failure to mark the merchandise* while the previous act and regulations thereunder directed that the additional duty should be assessed if the merchandised was not properly *marked at the time of importation*." *Id.* at 171. As such, the court stated "[w]e are of opinion that Congress intended that, if imported merchandise was properly marked prior to the time the customs officers' jurisdiction thereof ceased, additional duty at the rate of 10 per centum ad valorem should not be assessed." *Id.* at 172. Thus, one effect of the 1938 amendment was to transform marking duties from an obligation accruing upon importation into a potential or contingent obligation that could only be imposed if certain post-entry events did not occur.

Customs itself has ruled that its assessment of marking duties is subject to the fulfillment of two conditions. In HQ 731775 (November 3, 1988), Customs stated that two prerequisites must be present in order for it to be proper to assess marking duties under 19 U.S.C. § 1304(f). These two prerequisites are as follows:

> 1. the merchandise was not legally marked at the time of importation, and
>
> 2. the merchandise was not subsequently exported, destroyed or marked under customs supervision prior to liquidation.

C.S.D. 92-32, 26 Cust. B. & Dec. 504; 1992 CUSBUL LEXIS 94, at *11-12 (April 6, 1992). Accordingly, it follows that liability for marking duties is not an obligation that accrues upon importation since marking duties cannot be

assessed if the importer takes remedial post-importation action.

The U.S. Court of Appeals for the Federal Circuit has held that importing improperly marked goods does not deprive the government of an obligatory payment of duties. In *Pentax Corp. v. Robison*, 125 F.3d 1457 (Fed. Cir. 1997), the government argued that it had been deprived of duties, namely marking duties, when the importer mismarked its goods at the time of entry. The court rejected the government's position and stated as follows:

> The act of culpably mismarking goods cannot be said to have deprived the government of the 10 percent *ad valorem* duty assessed under 1304(f). To the contrary, but for the mismarkings (followed by the failure to export, destroy, or remark the articles in accordance with *section 1304*), the duty could not have arisen.

Pentax Corp. v. Robison, 125 F.3d 1457, 1463.

Thus, in contrast to the position adopted by the Third Circuit, *Pentax* stands for the proposition that an importer's failure to properly mark its goods at the time of entry does not automatically give rise to an obligation to pay marking duties. Such an obligation does not exist *ab initio* – the obligation only accrues where there is a mismarking (or failure to mark) **plus** a failure to take subsequent remedial action.

The term "obligation" is defined in the FCA as "an established duty, whether or not fixed." 31 U.S.C. § 3729(b)(3). The customs laws draw a distinction between established, lawful duties and additional duties. 19 U.S.C. § 1592(d) provides that whenever the United States has been deprived of "lawful duties" as a result of a violation of the customs laws, as specified in 19 U.S.C. § 1592(a), Customs shall require that such lawful duties be restored.

In *United States v. First Coast Meat & Seafood*, 30 CIT 282 (2006), the government sought to collect marking duties on the basis of the importer's alleged violations of the customs laws set forth in 19 U.S.C. § 1592(a). The court found that marking duties are "additional duties" and are not within the scope of the term "lawful duties." "In short, as a matter of law, it is impossible for the United States to be deprived of 19 U.S.C. § 1304(i) 'additional duties' by reason of violation of 19 U.S.C. § 1592(a), and notwithstanding that non- or mis-marking of imported merchandise can prove to have been the result of fraud or negligence." *United States v. First Coast Meat & Seafood*, 30 CIT 282, 286, 427 F. Supp 2d 1244, 1247 (2006). Thus, the specialized customs courts have recognized the distinction between established, lawful duties and contingent, additional marking duties. *See also United States v. Golden Ship Trading Co.*, 25 CIT 40, 42-44 (2001) (holding that the act of mismarking did not deprive Customs of marking duties and that "the act of mismarking cannot be the but-for cause of the failure to collect the [marking] duty").

Marking duties are inherently contingent because their assessment is conditional upon post-importation actions by both Customs and the importer. The Third

Circuit erred in misconstruing contingent, additional marking duties as an "established duty."

C. An Importer Cannot Self-Determine that its Goods are Improperly Marked and Subject to Marking Duties.

According to the relator, once its merchandise cleared Customs, Victaulic knew that it owed marking duties. *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, No. 15-2169, 2016 U.S. App. LEXIS 18026 at * 23. This assertion contravenes the clear language of the marking duties statute which provides that marking duties "shall be levied, collected, and paid…." 19 U.S.C. § 1304(i). "Levy" is defined as "[t]o impose or assess (a fine or a tax) by legal authority." Black's Law Dictionary 927 (8th ed. 2004). In the context of assessing marking duties, it is clear that only Customs has the legal authority to levy such duties. Thus, it is incorrect to assert that an importer is in a position to determine that marking duties are due, absent any such determination by Customs to that effect.

D. Marking Duties are not an Absolute Obligation.

Not only are marking duties a contingent obligation that is dependent on the mismarking of goods at the time of importation and a failure to take corrective action, Customs actually has the authority to waive country of origin marking altogether. 19 U.S.C. § 1304(a)(3) grants Customs the power to "[a]uthorize the exception of any article from the requirements of marking" if any one of several enumerated conditions are met. *See* 19 C.F.R. §§ 134.32, 134.33; *Diamond Match Co. v. United States*, 49 C.C.P.A. 52 (1962) ("It is evident from the statute

that the discretionary authority vested in the Secretary of the Treasury is whether or not to make regulations permitting the exception of articles from the marking requirements, if they meet the conditions described in the act. It is within his discretion to make or refuse to make such regulations.").[6]

Under this authority, Customs has issued marking waivers for individual shipments as well as blanket marking waivers that exempt marking requirements for an entire year. Moreover, Customs has granted marking waivers where the goods in question were already imported. In C.S.D. 84-46, 11 Cust. B. & Dec. 951 (October 25, 1983), Customs granted a marking waiver under 19 U.S.C. § 1304(a)(3)(K) for 2,083 dozen garments that had been imported without being conspicuously marked on the basis that requiring remarking would be economically prohibitive for the importer. Additionally, an importer can challenge Customs' refusal to grant a waiver by filing an administrative protest which is subject to judicial review. *See Diamond Match Co. v. United States*, 49 C.C.P.A. 52 (1962).

The fact that Customs can and has waived marking requirements (thereby eliminating any potential assessment of marking duties) evidences that the assessment of marking duties is a highly contingent possibility and not an "obligation."

6. The numerous exemptions to marking include articles that are incapable of being marked, articles where the ultimate purchaser would reasonably know the country of origin absent marking, imported articles where post-importation marking would be economically prohibitive, as well as enumerated classes of articles that are exempt from marking.

The contingent nature of this obligation is even further demonstrated by the fact that Customs can only impose marking duties up to the date of liquidation. 19 C.F.R. § 159.1. Customs itself has acknowledged that it cannot assess marking duties after liquidation has occurred. HQ H171176 (May 1, 2013)(noting that the importer's challenges to a Notice to Mark were moot because marking duties had not been assessed when the entry liquidated).[7]

E. The Third Circuit's Suggestion that an Importer would Knowingly Evade Marking Duties is Unrealistic.

The Third Circuit validated the relator's suggestion that an importer would act to knowingly evade marking duties. *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, No. 15-2169, 2016 U.S. App. LEXIS 18026 at * 23. The Third Circuit found that such evasions would constitute a knowing and improper avoidance of an obligation to pay the Government under the FCA. *Id.*

Marking duties are assessed extremely infrequently. Due to the infrequency in which they are being assessed, the existence of marking duties is little known in the importing community. For this reason, it is unlikely that an importer would even be in a position to knowingly evade marking duties. Moreover, a reasonable importer

7. Notwithstanding the several contingencies that are inherent in marking duties, the Third Circuit recently reiterated its misperception that marking duties are an absolute obligation. *United States ex rel. Petras v. Simparel, Inc.*, 857 F.3d 497 (3d Cir. May 18, 2017) ("the [marking] duty accrued at the time of importation, 'without exception,'").

who is aware that marking duties could be assessed would simply mark their goods prior to importation to avoid a potential 10% *ad valorem* assessment. Therefore, the Third Circuit's suggestion that importers may be knowingly evading marking duties is unrealistic.

Accordingly, applying a reverse FCA claim to marking duties would place an undue burden on all importers in response to a highly improbably scenario. In short, it would be a draconian solution where there is currently no problem.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment below should be reversed.

Respectfully submitted,

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