

# U.S. Court of International Trade

Slip Op. 17-5

MID CONTINENT STEEL & WIRE, INC., Plaintiff, v. UNITED STATES,  
Defendant, v. OMAN FASTENERS, LLC Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge

Consolidated Court No. 15-00214

**PUBLIC VERSION**

[The court remands for Commerce to either change its selection of profit data or provide a more thorough explanation of its reliance on third-country profit data. Unless the issue is rendered moot on remand, the court orders Commerce to provide a more thorough explanation for any determinations concerning the calculation of a profit cap. The court sustains the remainder of the contested determinations of Commerce.]

Dated: January 26, 2017

*Adam Henry Gordon* and *Ping Gong*, The Bristol Group PLLC, of Washington, DC, argued for plaintiff.

*Mikki Cottet*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. With her on the brief were *Benjamin C. Mizer*, Principle Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *Lydia C. Pardini*, Office of Chief Counselor for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington D.C.

*Michael P. House* and *David J. Townsend*, Perkins Coie LLP, of Washington, D.C., argued for defendant-intervenor. With them on the brief was *David S. Christy, Jr.*

## **OPINION AND ORDER**

### **Goldberg, Senior Judge:**

Plaintiff, Mid Continent Steel & Wire, Inc. (“Mid Continent”), and Defendant-Intervenor, Oman Fasteners, LLC (“Oman Fasteners”), separately moved for judgment on the agency record under USCIT Rule 56.2. The court remands for the Department of Commerce (“Commerce”) to either change its selection of profit data or provide a more thorough explanation of its reliance on third-country profit data. Unless the issue is rendered moot on remand, the court orders Commerce to provide a more thorough explanation for any determinations concerning the calculation of a profit cap. The court sustains the remainder of the contested determinations of Commerce.

## BACKGROUND

In June of 2014, Commerce initiated an antidumping duty investigation on steel nails from the Sultanate of Oman (“Oman”). *Certain Steel Nails From India, the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam*, 79 Fed. Reg. 36,019 (Dep’t Commerce June 25, 2014) (initiation). Commerce selected Oman Fasteners as the mandatory respondent. Antidumping Duty Investigation of Certain Nails from the Sultanate of Oman Resp’t Selection, P.R. 51 (July 29, 2014).

Under 19 U.S.C. § 1673, antidumping duties are “equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the [subject] merchandise.” Section 1677a defines “export price” and “constructed export price.” The “export price” is the price the producer or exporter charges to an “unaffiliated purchaser” either within or for exportation to the United States. Sometimes, however, the producer sells subject merchandise to an affiliated purchaser in the United States. The “constructed export price” is the price that the affiliated purchaser charges within the United States “to a purchaser not affiliated with the producer or exporter.”

On December 29, 2014, Commerce issued its preliminary determination of sales at less than fair value. *Certain Steel Nails from the Sultanate of Oman*, 79 Fed. Reg. 78,034 (Dep’t Commerce Dec. 29, 2014) (prelim. determ.) (“*Preliminary Determination*”) and accompanying memorandum (“Prelim. Mem.”), P.R. 150 (Dec. 19, 2014). Mid Continent had urged Commerce to find that Oman Fasteners and its primary U.S. customer are affiliated. However, Commerce’s Preliminary Determination included a finding that there was no such affiliation. Prelim. Mem. 8–9.

When calculating normal value, Commerce generally equates the home-market price of subject merchandise with the normal value of subject merchandise. 19 U.S.C. § 1677b(a)(1). But there are exceptions to this norm. Commerce uses a third-country price as the normal value if the aggregate quantity of home-market sales of subject merchandise is less than five percent of U.S. sales of subject merchandise. *Id.* § 1677b(a)(1)(C)(ii). However, Commerce cannot use this third-country price if aggregate sales in the third-country amount to less than five percent of aggregate sales to the U.S. *Id.* § 1677b(a)(1)(B)(ii)(II). If Commerce cannot use a third-country price, Commerce then resorts to calculating the constructed value (“CV”) of subject merchandise. Section 1677b(e) guides Commerce’s calculation of CV. *Id.* § 1677b(a)(4).

In the course of the investigation, Commerce concluded that Oman Fasteners had an insufficient volume of both home-market and third-country market sales. Commerce Request for CV Profit Comments and Information, P.R. 93 (Oct. 17, 2014). As a result, Commerce asked any interested parties to submit information for use in calculating a constructed value selling expenses and profit ratio under § 1677b(e). *Id.* Oman Fastener's submitted information concerning various third parties, reflecting what Oman Fasteners believed to be an appropriate CV profit rate.

On May 20, 2015 Commerce issued its final determination. *Certain Steel Nails from the Sultanate of Oman*, 80 Fed. Reg. 28,972 (Dep't Commerce May 20, 2015) (final determ.) ("*Final Determination*") and accompanying memorandum ("I&D Mem."). In its *Final Determination*, Commerce declined to use Oman Fastener's preferred CV profit rate data, opting instead to use the financial statements of a Thai company, Hitech. I&D Mem. 12. Commerce also affirmed its earlier finding that no affiliation exists between Oman Fasteners and its U.S. purchaser. *Id.* at 20.<sup>1</sup>

Both Mid Continent and Oman Fasteners challenge the *Final Determination*. Mid Continent argues, as it did at the administrative level, that Commerce erred when it found no affiliation and, thus, declined to calculate a constructed export price for the steel nails. For reasons discussed below, the court disagrees and sustains Commerce's finding of no affiliation.

Oman Fasteners argues, as it did at the administrative level, that Commerce erred in relying on data from Hitech when determining the CV profit rate. Specifically, Oman Fasteners insists that Commerce erred when it (i) refused to use Oman Fastener's own home-market sales of steel nails to calculate the CV profit of the steel nails, (ii) relied on third-country profit data of comparable products instead of home-market profit data to calculate CV profit, (iii) rejected the partially translated financial statement of L.S. Industry Co Ltd. ("LSI"), a Thai producer of steel nails, and refused to allow Oman Fasteners to supplement the record with the fully translated LSI statement, and (iv) refused to calculate a profit cap on the CV profit rate. For reasons discussed below, the court sustains Commerce's decisions with the exception of its reliance on third-country profit data of comparable products instead of home-market profit data (point ii), which the court remands for either further explanation or

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<sup>1</sup> Commerce issued separately a memorandum specifically addressing the affiliation issue at greater length. *Certain Steel Nails from the Sultanate of Oman: Affiliation Status of Oman Fasteners, LLC and its U.S. Customer*, P.R. 225 ("Affiliation Mem.") (May 14, 2014).

reconsideration. The court also orders Commerce to more fully explain any profit cap determinations, unless that issue is rendered moot on remand.

## **DISCUSSION**

### **I. *The Court Sustains Commerce’s Finding of No Affiliation Between Oman Fasteners and its Largest U.S. Customer.***

To support its determination that Oman Fasteners was not affiliated with its largest U.S. customer,<sup>2</sup> Commerce explained that the customer did not control Oman Fasteners. Affiliation Mem. 4–6. Mid Continent contests this finding on two grounds. First, Mid Continent claims that Commerce applied the wrong legal standard for affiliation through control. Rule 56.2 Mot. for J. Upon the Agency R. of Pl. Mid Continent Steel & Wire, Inc. 19–20, ECF No. 26 (“Mid Cont. Br.”). According to Mid Continent, the law requires only an “ability to control” and Commerce incorrectly required that the customer assert actual control over Oman Fasteners. *Id.* Second, Mid Continent contends that Commerce’s finding of no affiliation lacked the support of substantial evidence. *Id.* at 14. For the reasons set forth below, Mid Continent’s claims are without merit.

#### **A. Background**

In an antidumping investigation, Commerce must determine either an export price or a constructed export price for the subject merchandise. *See* 19 U.S.C. § 1677(35). Generally, the export price is the price of the subject merchandise when sold to an “unaffiliated purchaser in the United States.” *Id.* § 1677a(a). When an exporter sells the merchandise to a U.S. purchaser with which it is affiliated, Commerce typically determines a constructed export price for the merchandise. *Id.* § 1677a(a), (b). Mid Continent argues that Oman Fasteners and the customer are affiliated, making it necessary to construct an export price.

Section 1677(33) defines “affiliated persons” as, in relevant part, “[a]ny person who controls any other person and such other person.” § 1677(33)(G). Section 1677(33) explains that “a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.” The Statement of Administrative Action accompanying the Uruguay Round Agreements Act (“SAA”) provides that “[a] company may be in a position to exercise restraint or direction . . . through

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<sup>2</sup> The court will refer to Oman Fasteners’ largest U.S. customer, [[ ]], as “the customer” to preserve confidentiality.

corporate or family groupings, franchises or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer becomes reliant upon the other.” SAA, H.R. Doc. No. 103–316, vol. 1, at 838 (1994). Commerce incorporated this guidance from the SAA in its regulations, which direct the agency to consider “[c]orporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships” when assessing control. 19 C.F.R. 351.102(b)(3). The regulation stipulates that the agency cannot “find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.” *Id.* In addition, Commerce “will consider the temporal aspect of a relationship in determining whether control exists; normally, temporary circumstances will not suffice as evidence of control.” *Id.*

On October 28, 2014, Mid Continent made a submission to Commerce arguing that Oman Fasteners was affiliated with its largest U.S. customer. *See Affiliation Analysis*, P.R. 116 (Nov. 7, 2014). Commerce “examined all claims submitted by [Mid Continent] related to 1) the [[ ]] by Oman Fasteners to [the customer]; 2) [[ ]]; 3) Oman Fasteners’ [[ ]] in the financial statements; and 4) Oman Fasteners’ president’s [[ ].” *Affiliation Mem.* 4–5. Specifically, Oman Fasteners’ sales of subject merchandise to the customer constituted nearly [[ ] of total U.S. sales of subject. *Id.* at 5. And the supply agreement includes a [[ ] provision under which, according to Oman Fasteners, “[s]ales orders from [[ ].” *Oman Fasteners’ Resp. to Suppl. Section A&C Questionnaire 7 (“Oman Fast. Resp.”)*, P.R. 129 (Nov. 21, 2014). Also, in its 2013 financial statement, Oman Fasteners recognized the [[ ] the customer as a [[ ]. *Affiliation Mem.* 6. Finally, Oman Fasteners’ [[ ]. *Affiliation Analysis* 11.

Commerce rejected Mid Continent’s argument in both the preliminary and the final determinations. In its *Preliminary Determination*, Commerce explained that

[a]fter careful examination of the record evidence, we have determined that Oman Fasteners is not affiliated with [the customer]. First, neither company shares common ownership, employees, [or] board members. Second, the fact that [[ ]], does not provide [the customer] control over Oman Fasteners. Nothing on the record indicates

that that the relationship between these two companies is not market driven or the sales are not at arm's length. Third, [the customer] is not Oman Fasteners' [[ ]] customer: Oman Fasteners sold to [an] additional [[ ]] during the POI. Fourth, [[ ]] between the two companies, does not substantiate finding affiliation between the two companies. Finally, the president of Oman Fasteners [[ ]]. Therefore, for all reason listed above, we preliminarily do not find that Oman Fasteners is affiliated with [the customer].

Prelim. Mem. 2–3. Commerce restated this reasoning in the Affiliation Memorandum and included additional reasons for its rejection of Mid Continent's arguments:

As we stated in the preliminary determination, we do not find that [[ ]] warrants finding affiliation. Consistent with [Commerce's] past decisions, we find that the proportion of sales to one customer does not constitute enough information to determine a close supplier relationship. For example in *OCTG from Taiwan and TIJID*, [we] did not find a “buyer and seller” affiliated even when “the proportion {of sales transactions} was 100 percent.” [Commerce] thoroughly verified the affiliation issue and found no evidence of control by [the customer]. [Mid Continent] also claims that the prices charged to [[ ]]. [Commerce] has not found that Oman Fasteners [[ ]]. Additionally, based on record evidence, we find that prices are based on sales negotiations and are arm's length transactions. For example, the record indicates [[ ]]. Additionally, record evidence indicates that Oman Fasteners [[ ]].

Second, notwithstanding Mid Continent's argument regarding the [[ ]], we disagree that Oman Fasteners [[ ]]. During our verification of Oman Fasteners, we did not find evidence that Oman Fasteners [[ ]]. Oman Fasteners ordinarily receives [[ ]] and, thus, there is no need to place [[ ]]. Additionally, during verification we saw that Oman Fasteners has [[ ]] customers and observed [[ ]]. Further, as Oman Fasteners noted [[ ]]. [[ ]]. In that proceeding, the Department found no affiliation between [[ ]].

Third, [Mid Continent] claims that Oman Fasteners recognizes that [[ ]]. Oman Fasteners' audited financial statements describe [[ ]]. We do not find this recognition as an additional factor toward a finding of affiliation because typically [[ ]]. In fact, we find that Oman Fasteners' listing [[ ]], underscores that the relationship between these companies is market-driven. Finally, record evidence indicates that Oman Fasteners is [[ ]] its customer base, which [[ ]]. Based on the above record evidence, we continue to find that Oman Fasteners and [its customer] are not affiliated.

Affiliation Mem. 5–7.

## B. Discussion

The court begins with Mid Continent's assertion that Commerce incorrectly required evidence of "actual control" even though "the law" requires only the "ability to control." Mid Cont. Br. 19. Mid Continent highlights Commerce's finding that there is no "evidence that Oman Fasteners [[ ]]." *Id.* (citing Affiliation Mem. 6). According to Mid Continent, such an empirical observation is irrelevant because, "as th[is] court has recognized, control will be found where one party has the ability to control another, without requiring such control to have actually been exercised." *Id.*<sup>3</sup>

But Commerce correctly applied the legal standard governing affiliation by control. Mid Continent focuses upon Commerce's statement about the [[ ]], to the exclusion of Commerce's more fulsome analysis. Moreover, while Commerce's statement appears consistent with an actual-control standard, it is also consistent with an ability-to-control standard. The fact that Oman Fasteners had never faced a production crunch necessitating the [[ ]] under the supply agreement is probative of whether Oman Fasteners might face such a crunch in the future. If there was little likelihood

<sup>3</sup> In raising its legal challenge, Mid Continent also cites 19 C.F.R. § 351.102(b)(3) for the proposition that "[t]he regulation merely requires 'the *potential* to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.'" Mid Cont. Br. 19. Although Mid Continent correctly states the regulation's text, that portion of the regulation does not govern the determination at issue in this case. The regulation provides that Commerce "will not find that control exists [based on certain factors, including a close supplier relationship] unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product." 19 C.F.R. § 351.102(b)(3). The court must uphold Commerce's reasonable interpretations of its regulations, and Commerce reasonably reads this portion of the regulation to delineate not when control exists, but rather when it will not exist. As such, the language cited by Mid Continent has no bearing here, where Commerce first determined that the customer did not control Oman Fasteners after considering the factors listed in § 351.102(b)(3).

that the [ ] provision would trigger, then Commerce could reasonably conclude that the provision did not in fact grant the customer the ability to control Oman Fasteners. Thus, the court finds that Commerce correctly applied the ability-to-control standard, and not an actual-control standard.<sup>4</sup>

Accordingly, the question now before the court is whether Commerce erred in concluding that the customer lacked control over Oman Fasteners in light of the statutory standard in 19 U.S.C. § 1677(33)(G) and the regulatory factors in 19 C.F.R. § 351.102(b)(3).

Mid Continent contends that the record, taken as a whole, mandates a finding of affiliation, and points to a number of pieces of record evidence that support this view. First, Mid Continent invokes the sheer percentage of Oman Fastener's U.S. sales that went to this particular customer, measured both by volume and value. Mid Cont. Br. 14. Mid Continent also highlights that Oman Fasteners was a [ ] in 2012, which had no nail-production capability [ ] and which enjoyed its relationship with the customer at least in part because [ ]. *Id.* at 15. Second, Mid Continent notes that Oman Fasteners recognized in its own financial statements that the firm's reliance on the customer was [ ]. *Id.* at 18, 20. Third, Mid Continent mentions that Oman Fasteners' [ ]. *Id.* at 18. Fourth, Mid Continent stresses that the supply agreement spans a [ ] term and has been in place since Oman Fasteners' [ ]. *Id.* at 18–19. And fifth, Mid Continent points to the provision of the supply agreement between Oman Fasteners and its customer that grants [ ]. *Id.* at 19–20.

The court finds that Commerce properly weighed the entire record, including those aspects highlighted by Mid Continent, when considering whether Oman Fasteners and its customer were affiliated. The court also finds that substantial evidence supports Commerce's finding of no affiliation. Addressing the percentage of U.S. sales between Oman Fasteners and the customer, Commerce stated that "the proportion of sales to one customer does not constitute enough information to determine a close supplier relationship." Affiliation Mem. 5. To support this proposition, Commerce cited previous investigations in which the agency deemed a buyer and seller unaffiliated even though the seller sold 100 percent of its subject merchandise to the buyer. *Id.* (citing *TIJID, Inc. v. United States*, 29 CIT 307, 366 F. Supp. 2d 1286

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<sup>4</sup> The court does not address whether, if the provision ever did trigger, the customer's contractual right to have [ ] amounts to the ability to control Oman Fasteners.



(2005) and *Certain Oil Country Tubular Products from Taiwan*, 79 Fed. Reg. 41,979 (Dep't Commerce July 18, 2014) (final determ.)).<sup>5</sup>

Commerce also determined that Oman Fasteners negotiated with the customer at arm's length, and cited as evidence negotiations over price between Oman Fasteners and the customer that, on at least one occasion, [[ ]]. *Id.* at 6. Indeed, Commerce noted that Oman Fasteners' prices to the customer for a particular product [[ ]] other customers for the particular product. *Id.* This corroborates the conclusion that the relationship was market-driven, with the customer lacking the ability to control Oman Fasteners. With regard to the reference to a [[ ]] in Oman Fasteners' financial statements, Commerce reasoned that this "underscores that the relationship between these companies is market-driven" because "typically [[ ]]." *Id.* Finally, as discussed above, Commerce determined that because the [[ ]] provision would not likely trigger, the provision did not in fact grant the customer the ability to control Oman Fasteners. *Id.*<sup>6</sup>

In sum, Commerce marshalled substantial evidence and a reasoned explanation for its determination that the customer did not control Oman Fasteners under the statutory standard of § 1677(33)(G), and the regulatory factors of § 351.102(b)(3). Although the evidence that Mid Continent emphasizes could cut the other way, Commerce's citations to arm's length negotiations and regular pricing, among other facts, are sufficient to support its determination as reasonable. The court will not usurp Commerce's authority by reweighing the evidentiary record.

<sup>5</sup> Mid Continent argues that *TIJID* is distinguishable. Mid Cont. Br. 17–18. According to Mid Continent, in *TIJID* the court upheld Commerce's finding of no affiliation despite the buyer purchasing 100 percent of the seller's subject merchandise because the record contained "no other evidence of affiliation." Mid Cont. Br. 17 (citing *TIJID*, 29 CIT at 322, 366 F. Supp. 2d at 1299). Mid Continent points out that the record here does contain other evidence that could support a finding of affiliation. *Id.* Even so, Commerce properly considered this additional evidence and nevertheless reached the supportable determination that Oman Fasteners was unaffiliated with the customer.

<sup>6</sup> Mid Continent argues that Commerce undermined this conclusion when it stated that, because Oman Fasteners "ordinarily receives [[ ]] . . . there is no need "to place [[ ]]." Mid Cont. Br. 22. According to Mid Continent, "[t]his reasoning is flawed" because, if Oman Fasteners "ordinarily" receives [[ ]] that means sometimes the company does not. *Id.* In those instances, Mid Continent contends that Oman Fasteners would be forced to [[ ]] and would therefore be controlled by the customer. *Id.* However, the court finds Commerce's reasoning to be sound and Mid Continent's arguments to be too speculative. The fact that Oman Fasteners might on occasion receive an [[ ]] does not necessarily obligate Oman Fasteners to [[ ]]. The supply agreement mandates [[ ]] only when necessary to [[ ]]. Oman Fast. Resp. 7. Just because [[ ]] does not mean this provision would trigger. And in fact, Commerce found at verification that Oman Fasteners had never had cause to [[ ]]. Affiliation Mem. 6.

## II. *The Court Sustains Commerce’s Decision to Reject Oman Fasteners’ Home Market Profit Data, but the Court Remands for Either Further Explanation or Reconsideration of the Selection of Financial Statements.*

Oman Fasteners challenges the way that Commerce calculated constructed value (“CV”). Oman Fasteners first argues that Commerce erred in failing to use Oman Fasteners’ own home market sales to calculate the CV profit rate. Second, Oman Fasteners argues that, even if Commerce properly chose to use financial statements from other companies to ascertain the CV profit rate, Commerce chose the wrong financial statements. Third, Oman Fasteners argues that Commerce erred in failing to put a ceiling, or “profit cap,” on the CV profit rate.

### A. Background

Under 19 U.S.C. § 1677b(a)(1), the normal value of subject merchandise is generally the home-market price of the merchandise. However, if the aggregate quantity of home-market sales of the subject merchandise is less than five percent of U.S. sales of the subject merchandise, Commerce uses a third-country price as the normal value. *Id.* § 1677b(a)(1)(B)(ii). This third-country price is also subject to the five-percent threshold, and if that threshold is not met, then Commerce resorts to CV. *Id.* § 1677b(a)(4).

19 U.S.C. § 1677b(e) provides that the CV of merchandise is equal to the sum of (1) “the cost of materials and fabrication or other processing of any kind employed in producing merchandise,” (2) “the actual amounts incurred and realized by the specific . . . producer being examined . . . for selling, general, and administrative expenses [“SG&A”], and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country,” and (3) “the cost of all containers and coverings of whatever nature, and all other [incidental packaging] expenses.” However, if “actual data” on the second component of CV—the specific producer’s SG&A and profit—are “not available,” then the statute permits Commerce to use any one of three alternative data sources listed under (2)(B):

- (i) the actual amounts incurred and realized by the specific . . . producer . . . for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
- (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the inves-

tigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or

(iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.

The SAA explains that the statute “does not establish a hierarchy or preference among these alternative methods.” SAA 840. The SAA further provides that “no one approach is appropriate for use in all cases,” and that “the selection of an alternative will be made on a case-by-case basis, and will depend, to an extent, on available data.” *Id.*

Commerce concluded that it could not determine a normal value for the subject merchandise because Oman Fasteners “did not have a viable home or third-country market during the POI.” I&D Mem. 12–13. Instead, Commerce calculated the CV of the merchandise. Commerce explained that the lack of a viable home or third-country market precluded the agency from calculating CV profit “using the preferred method under [19 U.S.C. § 1677b(e)(2)(A)], *i.e.*, based on the respondent’s own home market or third country sales made in the ordinary course of trade.”<sup>7</sup> *Id.* at 13. Specifically, Commerce found that “because Oman Fasteners did not have a viable home or third-country market, its volume of home market sales during the POI is too insignificant to reflect a meaningful home market profit rate.” *Id.*

Turning to the alternative profit sources listed in 19 U.S.C. § 1677b(e)(2)(B), Commerce again cited Oman Fasteners’ lack of home-market sales as the reason it could not use the first alternative, Oman Fasteners’ profit for comparable merchandise. *Id.* at 13–14. Commerce also rejected the second alternative, profit for other exporters or producers subject to the investigation, “because Oman Fasteners is the only respondent in this proceeding.” *Id.* at 14. Accordingly, Commerce made use of the third alternative, deriving a profit figure using “any other reasonable method.” *Id.*

<sup>7</sup> Commerce’s reasoning applied to SG&A as well. But because no party appeals Commerce’s calculation of SG&A, the court addresses only profit.

For its “reasonable method,” Commerce elected to use the profit rate listed in another producer’s financial statements. To identify a specific producer and statement, Commerce applied four criteria that the agency announced in prior investigations:

[(1) the similarity of the potential surrogate companies’ business operations and products to the respondent’s business operations and products; [(2) the extent to which the financial data of the surrogate company reflects sales in the home market and does not reflect sales to the United States; . . . [(3) the contemporaneity of the data to the POI . . . ]; and (4)] the extent to which the customer base of the surrogate company and the respondent are similar (*e.g.*, original equipment manufacturers versus retailers).

*Id.* (citing *Pure Magnesium from Israel*, 66 Fed. Reg. 49,349 (Dep’t Commerce Sept. 27, 2001) (final determ.)). The record included several statements from which Commerce could choose:

[(1) the 2013 financial statements of Al Jazeera, an Omani producer of steel bars and pipes; [(2) the 2012 financial statements of Larsen & Toubro, an Omani construction conglomerate; [(3) the 2013 financial statements for two Omani producers of corrugated cartons; [(4) the 2012 financial statements of Hitech, a Thai producer of screws and rivets; [(5) the 2012 financial statements of LSI, a Thai producer of nails; [(6) the financial statements for the fiscal year ending March 31, 2014, of Sundram, an Indian producer of auto parts and fasteners; and [(7) the 2013 financial statements of Chun Yu and Sumeeko, two Taiwanese producers of screws and fasteners.

*Id.*

Commerce eliminated the statements from Omani firms Al Jazeera and Larsen & Toubro, as well as the Omani corrugated-carton producers, because none of the companies produced merchandise comparable to the subject merchandise, steel nails. *Id.* at 15. Commerce acknowledged that generally it “would prefer to use the financial statements of a producer of steel nails that primarily produces and sells steel nails in Oman,” but noted that “such information is not available on the record of this proceeding.” *Id.*

Turning to third-country financial statements, Commerce discarded the statements of Sundram, a producer of various automotive products, finding that Sundram’s products were also not sufficiently comparable. *Id.* at 16. Commerce also excluded the financial statements of LSI, Chun Yu, and Sumeeko, each of which was only “par-

tially translated.” *Id.* Commerce cited “an established practice of not considering financial statements unless they are completely translated.” *Id.* Commerce explained that “[t]ypically, the footnotes and disclosures included in a company’s financial statements” are “deemed vital to the users of those financial statements” and that “we equate leaving any footnotes or disclosures untranslated to omitting them completely, [because] . . . they are unavailable for either [Commerce] or the parties to a proceeding to review or comment on.” *Id.*

Oman Fasteners disputed the rejection of the LSI statements. Oman Fasteners asserted that Commerce should accept the LSI statements because Commerce had accepted the statements in a separate proceeding. Oman Fasteners’ Case Br. 29, P.R. 191 (March 11, 2015). Oman Fasteners also argued that, while it admittedly attempted to provide Commerce with fully translated LSI statements only after the relevant deadlines had passed, Commerce should have nevertheless accepted the translated statements. *Id.* at 35. Commerce dismissed both arguments. I&D Mem. 17. Commerce characterized its decision to accept the partially translated statements in a separate proceeding as a “mistake” that it was not bound to repeat, and it insisted that its submission deadlines were firm. *Id.*

Commerce was then left with only the statements of Hitech, a Thai producer of screws and rivets. *Id.* at 18. Commerce found Hitech’s “screws and other fasteners” to be comparable to Oman Fasteners’ merchandise. *Id.* Commerce therefore characterized the Hitech statements as “the only useable financial statements of a producer of merchandise identical or comparable to subject merchandise available on the record” and used the statements to calculate Oman Fasteners’ CV profit. *Id.*

Finally, Commerce considered whether, because it was calculating profit under 19 U.S.C. § 1677b(e)(2)(B)(iii), the agency was required to calculate what is referred to as a “profit cap.” *Id.* Profit calculated pursuant to § 1677b(e)(2)(B)(iii) “may not exceed the amount normally realized by exporters or producers . . . in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.” However, Commerce explained that, when the record lacks facts substantiating a profit cap, the SAA authorizes Commerce to calculate profit on the basis of “facts available.” I&D Mem. 18–19 (citing SAA 841); *see also* 19 U.S.C. § 1677e(a) (allowing Commerce to reach determinations using “facts otherwise available” in certain situations, including when “necessary information is not available on the record”). Because Commerce determined that the record in this case

lacked the necessary data, it declined to apply a profit cap for Oman Fasteners' constructed-value profit.

**B. Commerce Acted in Compliance with the Law and With the Support of Substantial Evidence When it Refused to Use Oman Fastener's Home-Market Sales to Calculate the CV Profit.**

Under 19 U.S.C. § 1677b(e)(2)(A), Commerce must use “the actual amounts . . . realized by the specific . . . producer . . . for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country.” Commerce can resort to using the alternatives listed in section 1677b(e)(2)(B), as it did here, only if such “actual data are not available.” Oman Fasteners' argues that Commerce was obligated to calculate Oman Fasteners' CV profit using actual profit data from its home-market sales of the subject merchandise. Br. of Pl. Oman Fasteners, LLC in Supp. of Pl.'s Mot. for J. Upon the Agency R. 11, ECF No. 29 (“Oman Fast. Br.”). But Commerce decided that, due to the “extremely low volume” of those home-market sales, they “do not constitute a proper basis for CV profit.” I&D Mem. 14. The court sustains Commerce's decision to reject the home-market data because the rejection stemmed from Commerce's reasonable interpretation and application of an ambiguous statute.

Oman Fasteners argues that the words “not available” in the statute unambiguously require Commerce to use home-market profit data when such data exist, regardless of the relative or absolute significance of the sales the data reflects. Oman Fast. Br. 13. But Oman Fasteners' argument ignores other language in the statute that is ambiguous. Specifically, section 1677b(e)(2)(A) instructs Commerce to use actual profit data pertaining to a “foreign like product” sold “in the ordinary course of trade.” The statute defines “ordinary course of trade” as “the conditions and practices which, for a reasonable time prior to the export of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind.” 19 U.S.C. § 1677(15). Imprecise terms like “reasonable” and “normal” create ambiguity as to what exactly constitutes the “ordinary course of trade.” By extension, it is unclear when home-market profit data is “available” for the “foreign like product” sold “in the ordinary course of trade.”<sup>8</sup>

<sup>8</sup> Oman Fasteners also cites the SAA which, like the statute, instructs Commerce to base profit on “actual data.” See Oman Fast. Br. 14 (citing SAA 841). However, the SAA also provides that, in calculating CV profit under § 1677b(e)(2)(A), “Commerce may ignore sales that it disregards as a basis for normal value” under § 1677b(a)(1). SAA 839. As discussed above, Commerce appropriately rejected Oman Fastener's home-market sales as a basis for

Because the statute is ambiguous, Commerce is entitled to a reasonable interpretation. Commerce interprets the statute to render actual home-market profit data “unavailable” if the producer’s “volume of home market sales during the POI is too insignificant to reflect a meaningful home market profit rate.” I&D Mem. 13. This interpretation comports with the statutory scheme, namely, that the record must provide Commerce with enough information to determine whether sales were made under “conditions and practices which, for a reasonable time prior to the export of the subject merchandise, have been normal in the trade,” i.e., made in the “ordinary course of trade.” If the record does not in fact support such a determination, then the proffered “actual” home-market sales data cannot be said to comply with § 1677b(e)(2)(A), and Commerce is correct to move on to the alternatives listed in § 1677b(e)(2)(B). This interpretation of the ambiguous statute, which aligns with the SAA, *see supra* note 8, is reasonable.<sup>9</sup>

Furthermore, Commerce reasonably applied the ambiguous statute. As stated above, in calculating normal value, section 1677b(a)(1)(C) considers home-market sales nonviable if the sales constitute less than five percent of the aggregate quantity of sales to the U.S. Record evidence confirms that Oman Fasteners’ home sales constituted [[ ]] of the company’s U.S. sales by volume, and [[ ]] by value. *See* Oman Fasteners’ CV Profit Submission Ex. CV-1, P.R. 82 (Oct. 6, 2014). Commerce considered these sales nonviable under section 1677b(a)(1)(C), leading Commerce to deem home-market sales unsuitable for use in calculating CV profit under section 1677b(e)(2)(A). Prelim. Mem. 2. The meager proportion of home-market sales is substantial evidence supporting Commerce’s finding of a lack of viability.<sup>10</sup>

In summary, Commerce (1) reasonably interpreted the statute to consider nonviable home-market sales “unavailable,” (2) concluded with the support of substantial evidence that Oman Fasteners’ home-market sales were nonviable, and therefore, (3) correctly refused to use Oman Fasteners’ home-market sales to calculate CV profit and (4) correctly turned to the three alternative methods for calculating CV profit listed under § 1677b(e)(2)(B).

calculating normal value under § 1677b(a)(1) because the sales comprised less than five percent of U.S. sales. Accordingly, under the SAA, Commerce may ignore these home-market sales, or consider them “unavailable,” when calculating CV profit under § 1677b(e).

<sup>9</sup> Oman Fasteners argues that Commerce did not find that its sales were outside the ordinary course of trade. Oman Fast. Br. 14. However, in the court’s view, the final results indicate such a finding.

<sup>10</sup> The court does not address whether there is more to the standard for viability, specifically whether the application of metrics besides sales quantity could lead to a finding of nonviability.

**C. The Court Remands for Commerce to Provide a More Thorough Explanation of its Reliance on Third-Country Profit Data Rather than Home-Market Profit Data.**

Oman Fasteners argues that, “[i]n relying on a third-country producer, to the exclusion of all else, Commerce unlawfully ignored probative record evidence of the profit realized by producers in Oman, the foreign country under investigation, contrary to the statute’s requirement that CV profit be representative of a respondent’s experience in the home market,” such that “Commerce’s decision was contrary to the statute and unsupported by substantial record evidence.” Oman Fast. Br. 16. Because it does appear that Commerce deviated from its prior practice without any explanation, the court remands for Commerce to either (1) change its selection of profit data or (2) provide more explanation of its decision to rely on third-country data.

As explained above, Commerce properly concluded that it could not rely on Oman Fastener’s home-market profit data for sales of the subject merchandise pursuant to 19 U.S.C. § 1677b(e)(2)(A) and correctly proceeded to the alternative methods listed in § 1677b(e)(2)(B).

Oman Fasteners argues that its home-market profit rate on sales of steel nails is the best data available for calculating CV profit pursuant to the first alternative method, 19 U.S.C. § 1677b(e)(2)(B)(i). Oman Fast. Br. 23. But Commerce rejected option (i) because it did “not find it reasonable to base CV profit and selling expenses on [Oman Fasteners’] extremely low volume of home market sales in this case[, as] . . . such sales are not significant enough to represent a meaningful home market profit rate.” I&D Mem. 14. Commerce rejected option (ii) “because Oman Fasteners is the only respondent in this proceeding.” *Id.* Thus, Commerce chose option (iii), which allowed Commerce to use “any other reasonable method” to calculate CV profit. *Id.*

Four criteria, established in prior investigations, constituted Commerce’s “reasonable method” of selecting financial statements for CV profit:

[1] the similarity of the potential surrogate companies’ business operations and products to the respondent’s business operations and products; [2] the extent to which the financial data of the surrogate company reflects sales in the home market and does not reflect sales to the United States; . . . [3] the contemporaneity of the data to the POI . . . ; and (4) the extent to which the customer base of the surrogate company and the



respondent are similar (*e.g.*, original equipment manufacturers versus retailers).

*Id.* (citing *Pure Magnesium from Israel*, 66 Fed. Reg. 49,349).

Commerce applied these criteria to its list of potential financial statements. Commerce conceded that it “would prefer to use the financial statements of a producer of steel nails that primarily produces and sells steel nails in Oman.” *Id.* at 15. However, “because none of the Omani companies on the record can reasonably be considered to produce or sell merchandise identical or comparable to subject merchandise [i.e. steel nails], [Commerce] excluded those companies from consideration as a data source for the calculation of CV profit and selling expenses.” *Id.* Accordingly, Commerce discarded the statements of Al Jazeera, an Omani producer and seller of “pipes, hollow sections and bar mill products using hot-rolled coils and billets” because “[s]uch products . . . bear no relation to the production of steel nails using drawn wire. These products are produced using completely different equipment than steel nails . . . and are used by customers in completely different applications (*e.g.*, large scale infrastructure projects versus the fastening of wood in the building of homes).” *Id.* Commerce also rejected the financial statements of another Omani company, Larsen & Toubro, because the company “execut[es] construction projects related to the oil and gas industries.” *Id.* Instead, Commerce chose the financial statements of Hitech, a company that neither produces steel nails nor has any production or sales in Oman, the home-market. I&D Mem. 14–16.

Oman Fasteners argues that Commerce violated its prior practice and “unlawfully ignored the statutory and regulatory preference for home market profit experience when it used the profit rate of a third-country producer with no connection to Oman.” Oman Fast. Br. 16. Oman Fasteners insists that “the statute and this Court’s decisions make clear that any of the alternatives applied pursuant to [§ 1677b(e)(2)(B)] must be representative of the respondent’s home market profit experience.” *Id.* at 16–17. Accordingly, “Commerce’s resort to the profit rate of a third-country producer (Hitech) that neither produced the foreign like product nor had any connection whatsoever to Oman, and Commerce’s simultaneous disregard of probative record evidence of the profit rates realized by home market producers on their sales in Oman, violated the statute’s requirements and was unlawful.” *Id.* at 17.

This argument raises legitimate concerns. “The goal in calculating CV profit is to approximate the home market profit experience of the

respondents.” *Husteel Co., Ltd., v. United States*, 39 CIT \_\_, \_\_, 98 F. Supp. 3d 1315, 1349 (2015). “Commerce’s task [is] to estimate, reasonably and fairly, a profit rate that [the respondent] would have realized from sales in its home market.” *Thai I-Mei Frozen Foods Co. v. United States*, 32 CIT 865, 883, 572 F. Supp. 2d 1353, 1368 (2008); see also *Thai I-Mei Frozen Foods Co. v. United States*, 616 F.3d 1300, 1307 (Fed. Cir. 2010) (explaining that “the alternative methods outlined in [§ 1677b(e)(2)(B)] all ‘mimic’ the methodology of [§ 1677b(e)(2)(A)] by giving alternatives to that attempt to track its requirements”).

In accordance with this goal, there are many instances of proceedings where Commerce chose to rely on home-market data rather than third-country data to calculate CV profit. See *Oman Fast. Br. 19–22* (citing, among other proceedings, *Bottom Mount Combination Refrigerator-Freezers from Mexico*, 77 Fed. Reg. 17,422 (Dep’t Commerce March 26, 2012) (final determ.) and *Electrolytic Manganese Dioxide from Australia*, 73 Fed. Reg. 47,586 (Dep’t Commerce Aug. 14, 2008) (final determ.)).<sup>11</sup> But it appears that there is no instance of Commerce ever successfully using exclusively third-country profit data of merely comparable merchandise under § 1677b(e)(2)(B)(iii), as it did here. Thus, Commerce departed from its prior practice when it prioritized third-country data from a producer of comparable merchandise over home-market data. Commerce failed to explain this departure. Admittedly, Commerce explained that the Omani companies did not produce identical or comparable merchandise. Commerce also explained that Hitech produced comparable merchandise. But this does not adequately explain why third-country data of comparable merchandise better represents Omani sales of steel nails than home-market sales data from Omani steel producers. The court remands for Commerce to either provide more explanation or to change its selection of financial statements.

**D. The Court Sustains Both Commerce’s Rejection of the LSI Financial Statement and Commerce’s Refusal to Allow Oman Fasteners to Supplement the Record Following the Deadline for Submitting Factual Information.**

October 31, 2014 was the deadline for submitting factual information on CV profit. I&D Mem. 17. Oman Fasteners timely submitted

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<sup>11</sup> For example, in *Certain Steel Nails from the United Arab Emirates*, Commerce calculated CV profit on steel nails. 77 Fed. Reg. 17,029 (Dep’t Commerce March 23, 2012) (final determ.) and accompanying I&D Mem. at cmt. 6. Contrary to its method here, Commerce first excluded the financial statements of companies outside the United Arab Emirates, the home market, because Commerce “disagree[d] that the profit experience of these [third-country] companies reflect[ed] the profit experience for a UAE company.” *Id.*

the partially translated financial statement of LSI, a Thai producer of steel nails. Oman Fasteners' Submission of Factual Info. Ex. SCV-6 ("Oman Fast. Submission"), P.R. 110–112 (Oct. 31, 2014). On February 12, 2015, after learning that Commerce intended to reject the LSI statement due to its incomplete translation, Oman Fasteners sought to submit a complete translation of the LSI statement. Oman Fasteners' Request to Permit New Factual Info., P.R. 176–177 (Feb. 12, 2015). Commerce deemed the submission untimely and, on that basis, rejected the translated LSI statement. Commerce Letter to Oman Fasteners Rejecting New Factual Info., P.R. 178 (Feb. 13, 2015). Oman Fasteners again requested leave to submit the LSI statement, but Commerce did not respond. Oman Fasteners' Revised Request to Permit New Factual Info., P.R. 180 (Feb. 18, 2015).

As discussed above, Commerce discarded the financial statement of LSI because the statement was only partially translated. The LSI statement reflected a profit rate of 2.08 percent on sales of steel nails. Oman Fast. Submission Attach. 9. Commerce eventually chose the Hitech statements, which resulted in a CV profit rate of 19.74 percent. *See* Prelim. Mem. 5; *see also* Oman Fasteners' Case Br. 48. This profit rate was significantly higher than the profit rates of the home-market companies on the record. *See* Oman Fasteners' Case Br. Ex. 1.

Oman Fasteners disputes Commerce's treatment of the LSI statement. First, Oman Fasteners argues that Commerce erred in rejecting the partially translated LSI statement. Second, Oman Fasteners insists that Commerce abused its discretion when barring the submission of the fully translated LSI statement. The court disagrees on both counts.

1. *Commerce Acted Reasonably in Rejecting the LSI Statement.*

To support its contention that Commerce erred in rejecting the partially translated LSI statement, Oman Fasteners cites two previous proceedings involving steel nails. Oman Fast. Br. 33 (citing *Certain Steel Nails from the People's Republic of China*, 79 Fed. Reg. 19,316 (Dep't Commerce Apr. 8, 2014) (final results) and accompanying I&D Mem. ("*China Nails AR4*") and *Certain Steel Nails from the People's Republic of China*, 80 Fed. Reg. 18,816 (Dep't Commerce Apr. 8, 2015) (final results) and accompanying I&D Mem. ("*China Nails AR5*")). In those two proceedings, Commerce rejected the same Hitech statement that it accepted here, and it accepted the same partially translated LSI statement that it rejected here. Commerce rejected the Hitech statements in the previous proceedings because Hitech

produces merely comparable merchandise, and it accepted the LSI statement in the previous proceedings because LSI produces identical merchandise. *See, e.g., China Nails AR4* at cmt. 2. Oman Fasteners highlights that Commerce “previously determined, when faced with the identical financial statement and company records of LSI and Hitech that are on the record here, that ‘Hitech’s financial statements are not the best information on the record.’” Oman Fast. Br. 33 (quoting *China Nails AR4* at cmt. 2). Oman Fasteners characterizes Commerce’s previous stance as a “consistent” determination that the partially translated LSI statement is “the most probative third-country source to determine profit ratios for producers of steel nails, the subject merchandise.” *Id.* at 34. Thus, Oman Fasteners maintains that Commerce violated an established practice.

“An action . . . becomes an ‘agency practice’ when a uniform and established procedure exists that would lead a party, in the absence of notification of change, reasonably to expect adherence to the established practice or procedure.” *Ranchers-Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999). Oman Fasteners points to only two proceedings, but this court has previously held that “two prior determinations are not enough to constitute an agency practice that is binding on Commerce.” *Shandong Huarong Mach. Co. v. United States*, 30 CIT 1269, 1293 n.23, 435 F. Supp. 2d 1261, 1282 n.23 (2006). Consequently, Oman Fasteners failed to demonstrate an established practice that Commerce violated. Further, Commerce provided a reasonable and persuasive explanation for the difference in treatment, stating that the “use of partially translated financial statements in *China Nails AR4* was contrary to our established practice. . . . The Department is not obligated to accept an incorrect methodology and perpetuate a mistake because it was accepted in a previous proceeding.” I&D Mem. 17. Moreover, even if Commerce has a practice regarding the treatment of the LSI statement—an unlikely event given the fact-intensive nature of the issue—Commerce persuasively argues that it also has at least as prevalent a practice of refusing to use partial translations of financial statements. *See id.* at 16 n.63. Thus, it is unlikely that Oman Fasteners reasonably expected adherence to an “established practice” of always preferring to use incomplete translations of a specific company’s financial statements.

Nevertheless, Oman Fasteners argues that, rather than summarily disregard the partially-translated LSI statement, Commerce “must compare the probative value of a partially translated statement with the deficiencies of other potential financial statements before concluding that the partially translated statement should be disregarded.”

Oman Fast. Br. 36 (citing *CP Kelco US, Inc. v. United States*, Slip Op. 15–27, 2015 WL 1544714, at \*7 (CIT Mar. 31, 2015)). Thus, Oman Fasteners maintains that Commerce lacked the support of substantial evidence when it prioritized the fully translated Hitech statement, which covered merely comparable merchandise, over the partially translated LSI statement, which covered identical subject merchandise. *Id.*

But Oman Fasteners excluded critical portions of *CP Kelco*. The court recognized that Commerce has “a past practice of rejecting those statements that are missing [vital] information.” *CP Kelco*, 2015 WL 1544714, at \*8 n.7 (citation omitted). For example, “Commerce has often deemed financial statements to be unusable when they are missing all or many accounting notes.” *Id.* (listing proceedings where this occurred). *See also* Def.’s Resp. in Opp’n to Pl.’s Mot. for J. Upon the Agency R. 34 n.8, ECF No. 43 (“Gov’t Br.”) (listing proceedings where Commerce refused to use partially translated statements). In *CP Kelco*, however, substantial evidence did not support a finding that the statements at issue were in fact missing vital information. *See CP Kelco*, 2015 WL 1544714, at \*6. The court found that the extent of the untranslated portions of the statements at issue was “two paragraphs at the bottom of accounting note twelve, concerning depreciation of assets” and that “[a]ccounting note twelve nonetheless contained a fully translated depreciation schedule.” *Id.* On these facts, the court held that Commerce was required to compare and contrast the merits and deficiencies of each of the available statements on the record.

In stark contrast here, Commerce found that “for LSI, the audit report was left untranslated, as well as several financial statements and all footnotes with the exception of a note related to income taxes.” I&D Mem. 16. This is substantial evidence in support of Commerce’s finding that the LSI statement lacked vital information, “preclud[ing] the Department from fully evaluating the appropriateness of the financial information set forth in these financial statements.” *Id.* For that reason, Commerce had no obligation to compare the LSI statement to the Hitech statements, as Oman Fasteners argues. Commerce therefore acted reasonably and in accordance with prior practice when it discarded the LSI statement.

2. *Commerce Did Not Err in Precluding Oman Fasteners from Adding to the Record after the Submission Deadline.*

Oman Fasteners argues that “Commerce’s refusal to accept a fully translated LSI statement on the record was an abuse of discretion

and contrary to law.” Oman Fast. Br. 38. Oman Fasteners explains that, at the time it provided the timely submission of the partially translated LSI statement, Commerce “had already expressly relied upon the identical partially translated 2012 LSI statement as a proper basis for the calculation of profit in at least two prior and concurrent proceedings on steel nails.” *Id.* Oman Fasteners insists that because “Commerce provided no notice to Oman Fasteners prior to the factual information deadline,” Commerce “denied Oman Fasteners a fair opportunity to respond to a significant change in Commerce’s position.” *Id.* at 41–42. Because Commerce, in the *China Nails* proceedings, permitted the parties to provide complete translations of the LSI statement after the deadline for submitting CV profit information, Oman Fasteners argues that “Commerce’s disparate and unequal treatment of parties in the same circumstances in two different proceedings was arbitrary and an abuse of discretion.” *Id.* at 42.

This Court reviews whether Commerce properly excluded evidence as untimely under the abuse of discretion standard. *See Artisan Mfg. Corp. v. United States*, 38 CIT \_\_, \_\_, 978 F. Supp. 2d 1334, 1344 (2014). “Thus, while deferring to Commerce’s necessary discretion to set and enforce its deadlines, the court will review on a case-by-case basis whether the interests of accuracy and fairness outweigh the burden placed on the Department and the interest in finality.” *Grobtest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 CIT \_\_, \_\_, 815 F. Supp. 2d 1342, 1365 (2012).

Commerce provided the following explanation for its decision to preclude the submission of the fully translated LSI statement:

Oman Fasteners was afforded ample opportunity to file fully translated LSI financial statements on the record of this proceeding within the deadlines specified by the Department’s regulations. The Department established a deadline of October 31, 2014, for all parties to submit CV profit and selling expense information. Oman Fasteners itself acknowledged this deadline in a letter to the Department, as it specifically cited to it as a reason to reject factual information regarding CV profit and selling expenses submitted by the Petitioner after the deadline. Further, under the Department’s regulations, all parties were permitted to file new factual information up to 30 days prior to the preliminary determination (in this case, November 17, 2014) provided that they explained why that information did not meet the definition of the information provided in response to the Department’s specific request for CV profit information. Oman Fasteners failed to timely submit fully translated financial

statements within either of these deadlines even though evidence on the record indicates that it had access to a full translation of the LSI financial statements well before the established deadlines. It was not until February 12, 2015, several months after the deadline for CV profit and selling expense information, that Oman Fasteners attempted to file a fully translated version of the LSI financial statements. As such, the Department rejected the submission as untimely.

#### I&D Mem. 17.

The court finds that Commerce did not abuse its discretion in denying Oman Fasteners' request to supplement the record. Oman Fasteners claims that it relied on Commerce's alleged established practice of accepting partially translated LSI statements. Reply Br. of Pl. Oman Fasteners, LLC in Supp. of Pl.'s Mot. for J. on the Agency R. ("Oman Fast. Reply Br.") 17. However, as established above, Commerce has no practice of always accepting partially translated LSI statements, which makes any reliance on this ostensible practice by Oman Fasteners unreasonable. On the contrary, Commerce's regulations provided ample notice to Oman Fasteners that submitting partial translations may result in the rejection of the statements. Under 19 C.F.R. § 351.303(e),

[a] document submitted in a foreign language must be accompanied by an English translation of the entire document or of only pertinent portions, where appropriate, unless the Secretary waives this requirement for an individual document. A party must obtain the Department's approval for submission of an English translation of only portions of a document prior to submission to the Department.

Oman Fasteners never sought permission before submitting partial translations. Oman Fasteners could have submitted a fully translated LSI statement but chose not to do so within the deadline. Commerce did not abuse its discretion by enforcing its clear deadlines in a manner that, contrary to Oman Fastener's claims, violated no established practice. Consequently, the court finds that Commerce acted reasonably.

#### **E. If the Profit Cap Issue Remains Disputed on Remand, Commerce Must Provide a More Thorough Explanation for its Determination.**

As explained above, Commerce calculated the CV profit under 19 U.S.C. § 1677b(e)(2)(B)(iii), which allows Commerce to calculate CV

profit using “any other reasonable method.” However, the statute specifies that “the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than [Oman Fasteners] . . . ) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.” *Id.* This is called a “profit cap.” The profit cap “serves to prevent the various possible calculation methods from yielding anomalous results that stray beyond the amount normally realized from sales of merchandise in the same general category.” *Atar S.R.L. v. United States*, 730 F.3d 1320, 1327 (Fed. Cir. 2013) (quoting another source).

Commerce declined to calculate and apply a profit cap, explaining that

the SAA makes clear that the Department may calculate CV profit without a profit cap, particularly, as is the case here, where there is no viable domestic market in the exporting country for merchandise that is in the same general category of products as the subject merchandise. In numerous previous cases, the Department calculated CV profit under section [19 U.S.C. § 1677b(e)(2)(B)(iii)] of the Act without quantifying the profit cap, as facts available. The legislative history indicates that Congress recognized that there may be instances where, due to a lack of data, the Department would need to use facts available and calculate a CV profit rate pursuant to section (iii) of the Act without quantifying a profit cap. With respect to this provision of the statute, Congress intended the profit cap to be: (1) based on home market sales information of the same general category of products as the subject merchandise, (2) non-aberrational to the industry under consideration (*i.e.*, “the amount normally realized”), and (3) not based on the data of the respondent for which the Department is calculating CV. Accordingly, we have examined the available data in this case and conclude that there is no information that would meet these standards. As such, we are unable to calculate the profit normally realized by producers other than Oman Fasteners in connection with domestic market sales of merchandise in the same general category as the subject merchandise. Consequently, in accordance with the statute, we have not quantified a profit cap in applying the statutory alternative to determine CV profit for Oman Fasteners.

I&D Mem. 18–19 (citations omitted). Commerce also cites prior proceedings in which, as here, it calculated CV profit under §



1677b(e)(2)(B)(iii) without quantifying the profit cap. *Id.* at 19 n.79.<sup>12</sup>

Oman Fasteners argues that “[t]he statute provides no exception that permits Commerce to ignore the calculation of a profit cap, even where Commerce believes there is no suitable home market profit data.” Oman Fast. Br. 44. Oman Fasteners insists that the Hitech financial statements yielded an anomalous CV profit rate and that substantial record evidence warranted a cap on that figure. *Id.* at 46.

Because the court is remanding Commerce’s choice of the Hitech financial statements over home-market information, *see supra* Part II(C), the profit cap issue may be rendered moot. If on remand Commerce selects financial statements yielding a CV profit figure within a range that Oman Fasteners finds appropriate, the profit cap issue may be resolved. If however the issue remains disputed between the parties, then Commerce must provide a more thorough explanation for its determination, in accordance with the below guidance.

While Commerce is correct that, under certain circumstances, it may decline to calculate a profit cap, it may do so only when it offers a thorough explanation as to why the available data prevents such a calculation. *See Husteel Co. v. United States*, 39 CIT \_\_, \_\_, 98 F. Supp. 3d 1315, 1348 (2015). This court has reasoned that if CV profit may be selected using “facts available” under § 1677b(e)(2)(iii), then “it would seem a ‘facts available’ profit cap may also be used.” *Geum Poong Corp. v. United States*, 25 CIT 1089, 1097, 163 F. Supp. 2d 669, 679 (2001). Therefore, “[w]here the record lacks data on profit normally realized by other companies on sales of the same general category of products, Commerce still must attempt to comply with the profit cap requirement through the use of facts otherwise available.” *Atar S.R.L. v. United States*, 34 CIT 465, 469, 703 F. Supp. 2d 1359, 1364 (2010). In sum, this court has made clear that the profit cap is a statutory requirement that cannot be lightly cast aside.

Here, Commerce expounded on the legal framework applicable to profit caps, but its discussion of the record is limited to the statement that “we have examined the available data in this case and . . . we are unable to calculate the profit normally realized by producers other than Oman Fasteners in connection with domestic market sales of merchandise in the same general category as the subject merchandise.” I&D Mem. 19. As Oman Fasteners points out, this court has held that terse explanations, nearly identical to the one provided by

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<sup>12</sup> *Stainless Steel Plate in Coils from Belgium*, 77 Fed. Reg. 73,013 (Dep’t Commerce Dec. 7, 2012) (final results) and accompanying I&D Mem. at cmt. 3; *Certain Lined Paper Products from India*, 76 Fed. Reg. 10,876 (Dept. Commerce Feb. 28, 2011) (final results) and accompanying I&D Mem. at cmt. 3; *Bottom Mount Combination Refrigerator-Freezers from Mexico*, 77 Fed. Reg. 17,422 (Dep’t Commerce March 26, 2010) (final determ.) and accompanying I&D Mem. at cmt. 26.

Commerce here, are insufficient. *See* Oman Fast. Br. 44 (citing *Hussteel*, 39 CIT at \_\_, 98 F. Supp. 3d at 1349). Indeed, Commerce’s explanation only establishes that “necessary information is not available on the record” such that Commerce “shall . . . use the facts otherwise available in reaching the applicable determination.” *See* 19 § U.S.C. 1677e(a)(1). But Commerce’s explanation does not account for its decision to not make use of “facts otherwise available” in order to ensure that the selected CV profit data does not “yield[] anomalous results that stray beyond the amount normally realized from sales of merchandise in the same general category.” *Atar S.R.L. v. United States*, 730 F.3d 1320, 1327 (Fed. Cir. 2013) (citation omitted). A thorough explanation seems especially appropriate here, where the chosen CV profit is several multiples larger than the other profit figures on the record. Accordingly, should the profit cap issue remain disputed on remand, Commerce must provide a more fulsome explanation of its determination.

### CONCLUSION

The court remands for further explanation or modification of Commerce’s decision to rely on third-country profit data rather than home-market profit data. Unless the issue is rendered moot, the court orders Commerce to provide a more thorough explanation for any determinations concerning the profit cap. The court sustains Commerce on all other issues.

Accordingly, it is hereby,

**ORDERED** that the final determination of Commerce, published as *Certain Steel Nails from the Sultanate of Oman*, 80 Fed. Reg. 28,972 (Dep’t Commerce May 20, 2015) (final determ.) is hereby REMANDED to Commerce for reconsideration in accordance with this Opinion and Order; it is further

**ORDERED** that Plaintiff’s Motion for Judgment on the Agency Record Under USCIT Rule 56.2 is DENIED; it is further

**ORDERED** that Defendant-Intervenor’s Motion for Judgment on the Agency Record Under USCIT Rule 56.2 is GRANTED in part and DENIED in part in accordance with this Opinion and Order; it is further

**ORDERED** that Commerce shall issue a redetermination (“Remand Redetermination”) in accordance with this Opinion and Order that is in all respects supported by substantial evidence and in accordance with law; it is further

**ORDERED** that Commerce shall modify or further explain its decision to rely on third-country profit data rather than home-market profit data; it is further

**ORDERED** that Commerce shall provide a thorough explanation of any profit cap determinations, should that issue remain disputed between the parties; it is further

**ORDERED** that Commerce shall have ninety (90) days from the date of this Opinion and Order in which to file its Remand Redetermination, which shall comply with all directives in this Opinion and Order; that the Plaintiff and Defendant-Intervenors shall have thirty (30) days from the filing of the Remand Redetermination to file comments thereon; and that the Defendant shall have thirty (30) days from the filing of Plaintiff's and Defendant-Intervenors' comments to file comments.

Dated: January 26, 2017

New York, New York

*/s/ Richard W. Goldberg*

RICHARD W. GOLDBERG  
SENIOR JUDGE



Slip Op. 17-7

YANTAI CMC BEARING CO. LTD., Plaintiff, v. UNITED STATES, Defendant,  
THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Mark A. Barnett, Judge

Court No. 16-00011

**PUBLIC VERSION**

[The court denies Plaintiff's Motion for Judgment on the Agency Record.]

Dated: January 30, 2017

*Edmund W. Sim, Kelly A. Slater, and Jay Y. Nee*, Appleton Luff Pte Ltd., of Washington DC, for plaintiff.

*Tara K. Hogan*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of Counsel on the brief was *Shelby M. Anderson*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

*William A. Fennell, Terence P. Stewart and Patrick J. McDonough*, Stewart and Stewart, of Washington DC, for defendant-intervenor.

## **OPINION**

### **Barnett, Judge:**

In this action Yantai CMC Bearing Co. Ltd. ("Yantai CMC" or Plaintiff) challenges the final results of the U.S. Department of Commerce ("Commerce") in its administrative review of the anti-dumping duty order on tapered roller bearings from the People's Republic of China ("PRC" or "China") for the June 1, 2013, to May 31,

2014, period of review (“POR”). *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People’s Republic of China*, 81 Fed. Reg. 1,396 (Dep’t Commerce Jan. 12, 2016) (final results of the antidumping duty admin. review; 2013–2014) (“Final Results”), Public Joint Appendix (“PJA”) Tab 17, ECF No. 39; Public Admin. R. (“PR”) 235, ECF No. 21–1, and accompanying *Issues and Decision Mem.*, A-570–601 (Jan. 4, 2016) (“I&D Mem.”), PJA Tab 16, PR 227.<sup>1</sup> Plaintiff argues that Commerce erred by denying Yantai CMC a separate rate and, in the alternative, that Commerce erred in assigning to Yantai CMC an antidumping duty rate based on “adverse facts available” (“AFA”). Mem. of P. & A. in Supp. of Pl. Yantai CMC Bearing Co. Ltd.’s Rule 56.2 Mot. J. on the Agency R. (“Pl.’s Mem.”) at 5–15, ECF No. 28; *see also* Rule 56.2 Mot. for J. Upon The Agency on Behalf of Pl. Yantai CMC Bearing Co. Ltd., ECF No. 27. Defendant responds that Commerce’s decision to deny Yantai CMC separate rate status is supported by substantial evidence and that assigning Yantai CMC the countrywide antidumping rate does not constitute an unlawful application of AFA. *See generally* Confidential Def.’s Resp. to Mot.[] for J. Upon the Agency R. (“Def.’s Resp.”), ECF No. 30.<sup>2</sup> For the reasons detailed below, the Court denies Yantai CMC’s Motion for Judgment on the Agency Record.

## BACKGROUND

On February 3, 2014, Commerce initiated an administrative review of the antidumping duty order on tapered roller bearings for the June 1, 2013 to May 31, 2014, POR. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 79 Fed. Reg. 44,390 (Dep’t Commerce July 31, 2014), PJA Tab 1, PR 12. Yantai CMC was selected as a mandatory respondent. Respondent Selection Mem. at 8, PJA Tab 2; PR 19; Confidential Joint Appendix (“CJA”) Tab 1, ECF No. 38; Confidential Admin. R. (“CR”) 6, ECF No. 21–2.<sup>3</sup>

Commerce preliminarily determined that Yantai CMC had failed to rebut the presumption of government control. *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s*

<sup>1</sup> Commerce subsequently published a correction to the final results. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China*, 81 Fed. Reg. 4,251 (Dep’t Commerce Jan. 26, 2016) (correction to final admin. review). The contents of the correction are not relevant to this litigation.

<sup>2</sup> Defendant-Intervenor also filed a response to Plaintiff’s motion. Confidential Resp. of the Timken Co. to Yantai CMC Bearing Co. Ltd.’s Mem. in Supp. of its Rule 56.2 Mot. for J. on the Agency R., ECF No. 31.

<sup>3</sup> Parties filed a public and a confidential joint appendix, *see supra* p. 2 (and the United States filed public and confidential versions of the administrative record, *see id*). All further citations are to documents contained in the confidential joint appendix unless otherwise noted.

*Republic of China*, 80 Fed. Reg. 38,665, 38,666 (Dep't Commerce July 7, 2015) (prelim. results of antidumping duty admin. review), PJA Tab 12, PR 213. Commerce, therefore, assigned Yantai CMC the countrywide rate of 92.84 percent. *Id.* at 38,666. In the final results, Commerce confirmed this finding. Final Results, 81 Fed. Reg. at 1,396–97. In its *Issues & Decision Memorandum*, Commerce explained that Yantai CMC had “demonstrated a lack of *de jure* control” but it “[did] not satisfy the criteria demonstrating an absence of *de facto* government control over export activities.”<sup>4</sup> I&D Mem. at 32–33; see also Separate Rate Analysis for Yantai CMC Bearing Co., Ltd. (“Separate Rate Mem.”), CJA Tab 9, CR 452.

### JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),<sup>5</sup> and 28 U.S.C. § 1581(c).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). “Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It “requires more than a mere scintilla,” but “less than the weight of the evidence.” *Nucor Corp. v. United States*, 34 CIT 70, 72, 675 F. Supp. 2d 1340, 1345 (2010) (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004)). The fact that a plaintiff can point to evidence that detracts from the agency’s conclusion or that there is a possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency’s finding from being supported by substantial evidence. *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (citing *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 619–20 (1966)). The court may not “reweigh the evidence or . . . reconsider questions of fact anew.” *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015) (quoting *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992)); see also *Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272

<sup>4</sup> All parties italicize the terms *de facto* and *de jure* in their pleadings to the court, but the Department of Commerce underlines the terms in its memoranda. In the interest of consistency the court will italicize the terms, including changing underlining to italics in quotations, where applicable.

<sup>5</sup> All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition, and all references to the United States Code are to the 2012 edition, unless otherwise stated.

(2004) (citation omitted) (the court “may not reweigh the evidence or substitute its own judgment for that of the agency”).

## DISCUSSION

### I. Legal Framework for Separate Rate Status in Proceedings Involving Non-Market Economy Countries

In antidumping duty proceedings involving a country that Commerce considers to have a nonmarket economy (“NME”), including China, Commerce employs a rebuttable presumption that all enterprises operating within the NME country are controlled by the government. *Jiangsu Jiasheng Photovoltaic Tech. Co., Ltd. v. United States* (“*Jiangsu Jiasheng II*”), 39 CIT \_\_\_, \_\_\_, 121 F. Supp. 3d 1263, 1266 (2015); *see also Huaiyin Foreign Trade Corp.*, 322 F.3d at 1372 (“[A]s it has done in previous investigations, the Department adopted in this proceeding a presumption that the PRC was an [NME] country pursuant to 19 U.S.C. § 1677(18)(A), requiring companies desiring an individualized antidumping duty margin to so request and to demonstrate an absence of state control.”); *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997) (reviewing and affirming Commerce’s use of the NME presumption). Commerce assigns each exporter of subject merchandise a single countrywide rate, unless the “exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*)” over its export-related activities. *Jiangsu Jiasheng II*, 39 CIT at \_\_\_, 121 F. Supp. 3d at 1266; *see also Sigma Corp.* 117 F.3d at 1405 (“no manufacturer would receive a separate antidumping duty rate unless it could demonstrate that it enjoyed both *de jure* and *de facto* independence from the central government”). The exporter of subject merchandise bears the burden of showing it is autonomous of government control. *AMS Assoc., Inc. v. United States*, 719 F.3d 1376, 1379–80 (Fed. Cir. 2013); *see also Sigma Corp.*, 117 F.3d at 1405–06 (Commerce’s decision to place burden on exporters is justified because exporters have best access to information) (citing *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993)).

To establish whether an exporter is eligible for a separate rate, Commerce applies a test it first set forth in *Final Determination of Sales at Less Than Fair Value: Sparklers from the People’s Republic of China*, 56 Fed. Reg. 20,588, 20,589 (Dep’t Commerce May 6, 1991), and modified in *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People’s Republic of China*, 59 Fed. Reg. 22,585, 22,586–87 (Dep’t Commerce May 2, 1994); *see also* Policy Bulletin on the Topic of Separate-Rates Practice and Application of

Combination Rates in Antidumping Investigations involving Non-Market Economy Countries (April 5, 2005) (“Policy Bulletin 05.1”) at 1–2, available at <http://enforcement.trade.gov/policy/bull05-1.pdf> (last visited January 23, 2017) (restating the *de jure* and *de facto* criteria). Only Commerce’s finding pursuant to the *de facto* test is challenged here.<sup>6</sup>

To determine whether an exporter is free of *de facto* government control, Commerce considers four factors: (i) whether export prices are set by or subject to the approval of a governmental authority; (ii) whether the exporter has authority to negotiate and sign contracts and other agreements; (iii) whether the exporter has autonomy from the government in making decisions regarding the selection of its management; and (iv) whether the exporter retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses. See Policy Bulletin 05.1 at 2; see also *Jiangsu Jiasheng Photovoltaic Technology Co., Ltd. v. United States* (“*Jiangsu Jiasheng I*”), 38 CIT \_\_\_, \_\_\_, 28 F. Supp. 3d 1317, 1349 (2014).

## II. Commerce’s Finding that Yantai Did Not Rebut the Presumption of State Control is Supported by Substantial Evidence

The court will uphold a Commerce determination provided it is based on substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i). Plaintiff argues that Commerce’s denial of separate rate status ignored record evidence of Yantai CMC’s autonomy from Chinese government control and that Commerce, in effect, applied an irrebuttable presumption of control when it focused on the potential for control resulting from an ownership interest in the exporter. Pl.’s Mem. at 8–13. Defendant responds that Commerce’s determination is supported by substantial evidence in the record and constituted a proper application of the *de facto* test. Def.’s Resp. at 8–17. For the reasons detailed below, the court sustains Commerce’s determination.

Commerce applies a rebuttable presumption of state control to exporters from a nonmarket economy country, such as China. *Jiangsu Jiasheng II*, 39 CIT at \_\_\_, 121 F. Supp. 3d at 1266; see also *Huaiyin Foreign Trade Corp.*, 322 F.3d at 1372. The burden of showing autonomy from government control lies with the exporter, in this case, Yantai CMC. *AMS Assoc.*, 719 F.3d at 1379; see also *Sigma Corp.* 117 F.3d at 1405–06 (citations omitted). In the underlying administrative proceeding, Commerce reviewed record evidence and made a determination that Yantai CMC did not demonstrate an absence of *de facto*

<sup>6</sup> Commerce found that Yantai CMC successfully demonstrated an absence of *de jure* government control. See Pl.’s Mem. at 6.

control by the Chinese government. I&D Mem. at 32–33; *see also* Separate Rate Mem. at 4–5. This determination was based upon Yantai CMC’s ownership chain, which extended from the Chinese government to Yantai CMC. I&D Mem. at 32–33; *see also* Separate Rate Mem. at 4–5. Specifically, Commerce reviewed questionnaire responses and articles of association from Genertec, which owned China National Machinery Import & Export Corporation (“CMC”), which, in turn, owned Yantai CMC with Paryocean Company Limited (“Paryocean”). *See* I&D Mem. at 32–33 and nn. 133–138; Separate Rate Mem. at 4–5 and nn. 13–21.<sup>7</sup>

Commerce determined that the Yantai CMC chain of ownership extended to the Chinese government because Yantai CMC is more than majority owned by CMC,<sup>8</sup> which is, in turn, more than majority owned by Genertec, and Genertec is wholly-owned by the State-owned Assets Supervision and Administration of the State Council (“SASAC”). Separate Rate Mem. at 4; I&D Mem. at 32; *see also* Yantai CMC Section A Questionnaire Resp. (Sept. 25, 2014) (“Yantai CMC Section A Resp.”) at 2–4, CJA Tab 2, CR 8 ; Yantai CMC Suppl. Sections A & C Resp. (Apr. 16, 2015) (“Yantai CMC Suppl. Sections A & C Resp. I”) at 5–6, CJA Tab 4, CR 313 . Commerce examined this information and concluded that, “as a result, Yantai CMC is indirectly [majority] owned by SASAC.” Separate Rate Mem. at 4. Plaintiff does not contest any of these factual findings by Commerce that Yantai CMC’s chain of ownership extended to the Chinese government. *See generally* Pl.’s Mem.; *see also* I&D Mem. at 33 and n. 139.

Having established this chain of indirect ownership, Commerce noted that it “would expect any majority shareholder, including a government, to have the ability to control . . . the operations of the company” and that “[t]he record in this case supports that expectation.” Separate Rate Mem. at 4; *see also* I&D Mem. at 32. Commerce based this finding on its review of the articles of association for Yantai CMC, CMC, and Genertec, as well as the record evidence showing SASAC’s exercise of authority via the chain of control. *See generally* I&D Mem. at 32–33; Separate Rate Mem. at 4–5 and nn. 16–21; Def.’s Resp. at 10–12. Specifically, Commerce reviewed Genertec’s articles of association, which provide SASAC with the ability to appoint Genertec’s directors, and the record, which showed SASAC exercised this authority. I&D Mem. at 32 and n. 133; Separate Rate Mem. at 4 and

<sup>7</sup> While aspects of this ownership chain were treated as business proprietary during the administrative proceeding, Plaintiff made this information public in its moving brief. *See* Pl.’s Mem. at 9, n. 19.

<sup>8</sup> CMC owns [ ] percent while Paryocean owns the remaining [ ] percent. Separate Rate Mem. at 4.



n. 16; *see also* Yantai CMC Second Suppl. Section A Resp. (May 28, 2015), CJA Tab 6, CR 434, Ex. 2 (“[Genertec] Articles of Assoc.”) (showing relationship between Genertec and SASAC) and Ex. 3 (“Notice of Appointment [Genertec]”) (showing the appointment of four directors). Commerce then noted that Genertec “has the ability to appoint all board members of its wholly-owned PRC company ([CMC]),” I&D Mem. at 32 and n. 134;<sup>9</sup> *see* Separate Rate Mem. at 4–5 and n. 17.

Further, as the majority owner of Yantai CMC, CMC has the authority to appoint the majority of Yantai CMC’s board.<sup>10</sup> I&D Mem. at 32 and n. 135; Separate Rate Mem. at 4 n. 18; Yantai CMC Suppl. Sections A & C Resp. (Apr. 16, 2015) (“Yantai CMC Suppl. Sections A & C Resp. II”), Ex. S-8 (“Yantai CMC Articles of Assoc.”), CJA Tab 5, CR 314.<sup>11</sup> CMC’s board of directors also have the power to nominate Yantai CMC’s general manager (for approval by Yantai CMC’s board) and to appoint its general management. I&D Mem. at 32 and nn. 136, 137; Separate Rate Mem. at 5 n. 19, 20; *see also* Yantai CMC Articles of Assoc. In its review of the record documents, Commerce found instances of overlap in officials at companies within the Yantai CMC chain of ownership. I&D Mem. at 33; Separate Rate Mem. at 5. A member of CMC’s board of directors and its Deputy General Manager, is also a Deputy General Manager at Genertec.<sup>12</sup> I&D Mem. at 33; Separate Rate Mem. at 5 and n. 21; *see also* Yantai CMC Section A Resp. at 2, Yantai CMC Suppl. Sections A & C Resp. I at 6. In addition, the chairman of Yantai CMC’s board is also a vice president at CMC.<sup>13</sup> Separate Rate Mem. at 5 and n. 21; *see also* Yantai CMC Section A Resp. at 8; Yantai CMC Suppl. Sections A & C Resp. I at 8.

Based upon its review of these facts, Commerce determined that “Yantai CMC has not demonstrated an absence of *de facto* control” and that “evidence demonstrates that, via SASAC, the PRC government exercises its rights inherent in majority ownership, as expected.” Separate Rate Mem. at 4. Yantai CMC does not appear to contest Commerce’s factual findings as to its chain of ownership and

<sup>9</sup> Citing Yantai CMC Suppl. Sections A & C Resp. II, Ex. S-7 (“[CMC] Articles of Assoc.”), CJA Tab 5, CR 314, (describing the board as its [ ] [ ]).

<sup>10</sup> Specifically, CMC has the authority to appoint [ ] of [ ] board members for Yantai CMC. Yantai CMC Articles of Assoc.

<sup>11</sup> Defendant noted that the record shows “CMC exercised this authority on several occasions.” Def.’s Resp. at 11 (citing Yantai CMC Second Suppl. Section A Resp. (May 28, 2015), Ex. 8 (“Notice of Appointment Yantai CMC”), CJA Tab 7, CR 435). While the agency did not expressly rely on these particular facts in making its determination, the path of the agency’s reasoning is sufficiently clear for the court to reference them. *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987) (per curiam).

<sup>12</sup> This official is named [ ] [ ]

<sup>13</sup> This official is [ ] [ ]

the line of control extending through its corporate structure, except to assert that it is “extremely attenuated, based on four degrees of separation at the corporate entity level between SASAC and Yantai CMC.” Pl.’s Mem. at 9. Plaintiff claims that Commerce’s determination was not based on substantial evidence in the record, *see* Pl.’s Mem. at 7–13, but, in fact, Plaintiff seeks to have the court reweigh the evidence.

Plaintiff asserts that Commerce “ignored” evidence that “none of [Yantai CMC’s] managers or board members . . . had any relationships with any level of the PRC government” and that the record contained “[no] [sic] evidence showing that the POR managers and board members . . . disregarded the normal corporate governance structure or interfered with the day-to-day operations of Yantai CMC.” Pl.’s Mem. at 7. As proof of this, Plaintiff cites to statements it made in its questionnaire responses. *Id.* (citing to *see also* Yantai CMC Section A Resp. at 8; Yantai CMC Suppl. Section A & C Resp. I at 13). Similarly, Plaintiff claims that “Commerce ignored documentation demonstrating that Yantai CMC’s management team is selected by its board of directors” and the company is not obligated to submit its “candidates for managerial positions . . . for approval to any government entity.” Pl.’s Mem. at 8. Again, Plaintiff cites to statements made in its questionnaire responses. *Id.* (citing to Yantai CMC Section A Resp. at 8; Yantai CMC Suppl. Section A & C Resp. I at 13).

Commerce’s role in an administrative proceeding is to weigh the evidence established in the record. *See Camau Frozen Seafood Processing Import Export Corp. v. United States*, 38 CIT \_\_\_\_, \_\_\_\_, 968 F. Supp. 2d 1328, 1337 (2014). It is the respondent’s burden to create the record. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir. 2002) (respondent has burden to create an accurate record); *Zenith Elecs. Corp.*, 988 F.2d at 1583 (“The burden of production [belongs] to the party in possession of the necessary information.”). In the instant proceeding, Commerce determined to give more weight to record evidence such as the chain of ownership from Yantai CMC to SASAC and the articles of association and letters showing appointment of directors and officers than to claims made by the respondent that were not similarly supported by the record. Commerce weighed the evidence and arrived at a conclusion that, while not to Plaintiff’s liking, is supported by substantial evidence on the record. It is not the court’s role to reweigh that evidence. *Matsushita Elec.*, 750 F.2d at 933.

Plaintiff claims that “there was no record evidence” that “Yantai CMC’s board’s overseeing of the company’s management, as part of its

normal obligations to the company in any way translated into any interference with the company's daily operations, let alone export activities." Pl.'s Mem. at 8. Plaintiff appears to misunderstand its burden. Plaintiff's assertion fails to demonstrate "autonomy from the central, provincial and local governments in making decisions regarding the selection of management." Policy Bulletin 05.1 at 2. Instead, it challenges Commerce's finding on the basis that the agency failed to consider evidence that was not placed on the record by Yantai CMC. As the exporter in an NME country and an entity that is indirectly majority-owned by SASAC, Yantai CMC had the burden to bring forth evidence establishing its autonomy from government control to rebut the presumption of state control. Because Yantai CMC failed to produce such evidence, Commerce reasonably found that the presumption of state control was not rebutted.

Plaintiff argues that Commerce erred in its *de facto* analysis by "focus[ing] on majority government ownership to the exclusion of all other traditional *de facto* factors" and that Commerce's "reli[ance] upon the notion of a theoretical 'potential' for Chinese government control . . . [was] problematic from a basic evidentiary perspective" because there was "no record evidence . . . that there was any involvement of the shareholders of Yantai CMC in its export activities." Pl.'s Mem. at 9–10. According to Yantai CMC, this amounts to an "irrebuttable presumption" because "no information or argument regarding the other *de facto* criteria would be sufficient to overcome this theoretical, 'potential' government control" regardless of how remote the ownership interest might be. *Id.* at 10. Defendant responds that Yantai CMC "do[es] not demonstrate any error in Commerce's analysis," that Commerce is "entitled to presume that the Chinese government controls Yantai CMC," and that Yantai CMC has the burden to rebut the presumption. Def.'s Resp. at 9, 16–17 (emphasis omitted). Yantai CMC's arguments are unavailing.

Plaintiff misunderstands the interplay between the presumption of government control and the four factor *de facto* test. Commerce applies a presumption of government control for entities operating within an NME and permits the respondent to rebut this presumption by satisfying the *de jure* and *de facto* tests. The prong of the *de facto* test at issue in this case involves whether the exporter or respondent "has autonomy from the . . . government[ ] in making decisions regarding the selection of its management." Policy Bulletin 05.1 at 2. Yantai CMC placed documents on the record explaining the corporate ownership structure and relationship between SASAC, Genertec, CMC, and Yantai CMC. *See supra* pp. 9–11. Commerce reviewed this documentation and concluded that Yantai CMC did not

have autonomy from the Chinese government as a result of this chain of ownership through which SASAC was an indirect majority owner of Yantai CMC. That Commerce considered this to be dispositive in the instant case does not mean that the agency misapplied the presumption or made it irrebuttable. That particular facts (majority ownership) may be sufficient to support an agency determination of control, and the existence of those facts in this particular case (*i.e.*, indirect majority control by SASAC), does not alter the test into an irrebuttable presumption; instead, it means that, on the basis of these facts, Plaintiff failed to rebut the presumption. Moreover, Yantai CMC's references to "theoretical, 'potential' government control" are belied by evidence in the record. Commerce also found actual exercise of control through the appointment of officials and the overlap in management between the companies. Separate Rate Mem. at 4–5. Accordingly, the court sees no reason to disturb Commerce's finding.

As noted above, Commerce requires that exporters satisfy all four factors of the *de facto* control test in order to qualify for separate rate status. *See Advanced Tech. & Materials Co. v. United States*, 37 CIT \_\_\_, \_\_\_, 938 F. Supp. 2d 1342, 1349 (2013), *aff'd without op.*, 581 F. App'x 900 (Fed. Cir. 2014) (quoting Commerce's second remand determination "each of the *de facto* prongs must be satisfied for a company to get a separate rate"); *see also* Policy Bulletin 05.1 at 2. Specifically, the third factor asks "whether the respondent has autonomy from the . . . government[ ] in making decisions regarding the selection of management." Policy Bulletin 05.1 at 2. As an exporter in an NME country that is indirectly majority-owned by the government, Yantai CMC has the burden to show that it has such autonomy. *Sigma Corp.*, 117 F.3d at 1406. Yantai CMC failed to meet the third factor of the test. Given that all four factors must be satisfied, Commerce had no further obligation to continue with the analysis.

### III. Commerce's Decision to Assign Yantai the Countrywide Rate is in Accordance with Law

Plaintiff argues that "Commerce effectively assigned an [AFA] rate to Yantai CMC because it was denied separate rate status" when the countrywide rate was "based on AFA during the 2006–2007 administrative review." Pl.'s Mem. at 13. Plaintiff contends this was unlawful because Yantai CMC cooperated to the best of its ability in the instant proceeding. Pl.'s Mem. at 13–15. Defendant responds that "Commerce [did not] rely upon facts available, or [AFA], in determining a rate for Yantai CMC. Rather, Commerce found that Yantai CMC failed to meet its burden of rebutting the presumption of government control,

and that as a result, Yantai CMC was found to be part of the China-wide entity, and subject to the [countrywide] rate.” Def.’s Resp. at 18. The court agrees.

The use of AFA and the need to establish facts to obtain a separate rate are distinct concepts. *Advanced Tech.*, 31 CIT at \_\_\_, 938 F. Supp. 2d at 1351; *Watanabe Group v. United States*, 34 CIT 1545, 1551 n. 8 (2010) (“These are two distinct legal concepts: a separate AFA rate applies to a respondent who has received a separate rate but has otherwise failed to cooperate fully whereas the [countrywide] rate applies to a respondent who has not received a separate rate”). As discussed above, in antidumping proceedings involving NME countries, Commerce presumes that all entities operating within the country are subject to government control. Those entities “desiring an individualized antidumping duty margin” must request a separate rate and show they operate autonomously from government control. *Huaiyin Foreign Trade Corp.* 322 F.3d at 1372; see also *Jiangsu Jiasheng II*, 39 CIT at \_\_\_, 121 F. Supp. 3d at 1266. When an exporter is able to show autonomy from state control, Commerce assigns it a separate rate. See *Sigma Corp.*, 117 F.3d at 1405–07. However, when an exporter is unable to “affirmatively demonstrate an absence of government control,” Commerce assigns it the single countrywide rate. *Jiangsu Jiasheng II*, 39 CIT at \_\_\_, 121 F. Supp. 3d at 1266. In the present case, Yantai CMC failed to demonstrate autonomy from state control and was assigned the countrywide rate. The fact that the countrywide rate in this instance stemmed from an earlier application of AFA does not mean that Commerce must meet the statutory requirements for applying AFA to Yantai CMC in this review; Yantai CMC simply receives the countrywide rate currently in effect as the result of its failure to qualify for a separate rate.

Yantai CMC made this argument during the administrative proceeding and Commerce rejected it, noting that the Court of International Trade “addressed and rejected a similar argument” in *Advanced Tech.* I&D Mem. at 34 (“a separate AFA rate applies to a respondent who has received a separate rate but has otherwise failed to cooperate to the best of its ability whereas the countrywide rate applies to a respondent who has not received a separate rate”). Plaintiff offers the court nothing new in support of its argument. This court agrees that Commerce assigned Yantai CMC the separate rate because it failed to rebut the presumption of government control. The court, therefore, sustains Commerce’s determination as in accordance with law.

## CONCLUSION

Based on the foregoing, the court denies Plaintiff's motion for judgment on the agency record. Judgment will issue separately.

Dated: January 30, 2017

New York, New York

/s/ *Mark A. Barnett*

MARK A. BARNETT, JUDGE



Slip Op. 17-9

LA NICA PRODUCT, INC., Plaintiff, v. UNITED STATES, Defendant.

**Before: Claire R. Kelly, Judge**

**Court No. 13-00300**

**PUBLIC VERSION**

[Denying Plaintiff's motion for summary judgment and granting Defendant's cross-motion for summary judgment.]

Dated: February 2, 2017

*Peter Stanwood Herrick*, Peter S. Herrick, P.A., of St. Petersburg, FL, and *Joshua Asher Levy*, Marlow, Adler, Abrams, Newman & Lewis, P.A., of Coral Gables, FL, for plaintiff.

*Beverly A. Farrell* of the U.S. Department of Justice, International Trade Field Office, of New York, NY, for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Amy M. Rubin*, Assistant Director, International Trade Field Office.

## OPINION

### **Kelly, Judge:**

Before the court are cross-motions for summary judgment pursuant to USCIT Rule 56. Pl.'s Mot. Summary J. and Mem. L., Jun. 22, 2016, ECF No. 36 ("Pl. Mot."); Def.'s Cross-Mot. Summary J. Confidential Version, Sept. 30, 2016, ECF No. 56 ("Def. Cross-Mot."). Plaintiff La Nica Products ("La Nica") contests the denial of protests<sup>1</sup> of U.S. Customs and Border Protection's ("Customs" or "CBP") denial of the claims for preferential tariff treatment on three entries of hard white cheese from Nicaragua,<sup>2</sup> pursuant to the Dominican Republic-

<sup>1</sup> Plaintiff's protests were made pursuant to 19 U.S.C. § 1514(c)(1), authorizing an importer to protest a decision of U.S. Customs and Border Protection as to the rate and amount of duties chargeable. 19 U.S.C. § 1514(c)(1); 19 U.S.C. § 1514(a)(2); *see* 19 C.F.R. § 174.11(b)(2).

<sup>2</sup> Entry No. E84-0074522-8 (entry date January 26, 2012), with corresponding Protest No. 520113-100058; Entry No. E84-0074601-0 (entry date February 13, 2012), with corresponding Protest No. 5201-13-100057; and Entry No. E84-0074617-6 (entry date February 17, 2012), with corresponding Protest No. 5201-13-100056. Pl.'s Statement of Material Facts ¶¶ 7, 16, 24, Nov. 11, 2016, ECF No. 59 ("Pl. 56.3 Statement"); Def.'s Resp. Pl.

Central America-United States Free Trade Agreement (“CAFTA-DR”).<sup>3</sup> For the reasons that follow, the court holds that as a matter of law the goods are not entitled to preferential tariff treatment under CAFTA-DR. Therefore, the subject entries were properly liquidated at the non-preferential tariff rate. Accordingly, the court denies Plaintiff’s motion for summary judgment and grants Defendant’s cross-motion for summary judgment.

### **STANDARD OF REVIEW AND JURISDICTION**

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) and the Tariff Act of 1930, as amended, 19 U.S.C. § 1515 (2006).<sup>4</sup> The court reviews an action under § 1581(a) de novo. *See* 28 U.S.C. §§ 2640(a)(1). Summary judgment is appropriate if “there is no genuine issue as to any material fact,” and “the movant is entitled to judgment as a matter of law.” USCIT R. 56(c).

### **UNDISPUTED FACTS**

The following facts are not in dispute. In January and February 2012, Plaintiff, a U.S. importer of cheeses containing cow’s milk, imported the three shipments of the merchandise at issue into the United States from Nicaragua.<sup>5</sup> Pl.’s Statement of Material Facts ¶¶ 1–8, 9–16, 17–24, Nov. 16, 2016, ECF No. 59 (“Pl. 56.3 Statement”); Def.’s Statement of Material Facts ¶¶ 3–4, Sept. 30, 2016, ECF No. 55–2 (“Def. 56.3 Statement”). The merchandise consisted of “queso morolique,” or hard white cheese. Pl. 56.3 Statement ¶¶ 5, 13, 22; Def.’s Resp. Pl. Statement of Material Facts ¶¶ 5, 13, 22, Dec. 16, 2016, ECF No. 63 (“Def. Resp. Pl. 56.3 Statement”).

On January 26, February 13, and February 17, 2012, respectively, Plaintiff’s customs broker filed an entry for each shipment. Pl. 56.3 Statement ¶¶ 7, 16, 24; Def. Resp. Pl. 56.3 Statement ¶¶ 7, 16, 24. The entry forms entered the merchandise under subheading 0406.90.97<sup>6</sup> of the Harmonized Tariff Schedule of the United States

Statement of Material Facts ¶¶ 7, 16, 24, Dec. 16, 2016, ECF No. 63; Pl.’s Resp. Def.’s Statement of Facts ¶ 11, Nov. 11, 2016, ECF No. 57–2; Def.’s Statement of Material Facts ¶¶ 3–4, 11, Sept. 30, 2016, ECF No. 55–2 (“Def. 56.3 Statement”); *see also* Joint Appendix Confidential Version, CA 1, 20, 36, Dec. 19, 2016, ECF No. 65 (“Joint Appendix”).

<sup>3</sup> CAFTA-DR is the agreement establishing free trade between the United States, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua. *See* 19 U.S.C. §§ 4001, 4011. CAFTA-DR is implemented in the Harmonized Tariff Schedule of the United States (“HTSUS”) General Note 29. *See* General Note 29(a)(iii), HTSUS.

<sup>4</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2006 edition.

<sup>5</sup> Nicaragua is a country party to CAFTA-DR. 19 U.S.C § 4002(2)(F); Pl. 56.3 Statement ¶¶ 3, 11, 19; Def. 56.3 Statement ¶ 6.

<sup>6</sup> Subheading 0406.90.97, HTSUS, provides for “Cheese and curd: Other cheese: Other cheeses, and substitutes for cheese, including mixtures of the above: Other, including

(2012) (“HTSUS”)<sup>7</sup> and included a claim for preferential tariff treatment under CAFTA-DR.<sup>8</sup> Pl. 56.3 Statement ¶¶ 7, 16, 24; Def. 56.3 Statement ¶ 5. Plaintiff, La Nica, was listed as the importer of record. Pl.’s Resp. Def.’s Statement of Facts ¶ 4, Nov. 7, 2016, ECF No. 572 (“Pl. Resp. Def. 56.3 Statement”); Def. 56.3 Statement ¶ 4.

On August 30, 2012, Plaintiff filed Post-Entry Amendments (“PEAs”) with Customs.<sup>9</sup> Pl. 56.3 Statement ¶ 26; Def. Resp. Pl. 56.3 Statement ¶ 26; Joint Appendix Confidential Version, CA 87–89, Dec. 19, 2016, ECF No. 65 (“Joint Appendix”). In the PEAs Plaintiff sought to amend the importer of record on each of the entries, averring that it had sold the merchandise in each of the three shipments in transit to a subsequent U.S. purchaser and seeking to recover the cost of entry fees Plaintiff paid on each entry.<sup>10</sup> Pl. 56.3 Statement ¶¶ 25–26; Def. Resp. Pl. 56.3 Statement ¶ 26. The PEAs did not reference Plaintiff’s claims for preferential tariff treatment under CAFTA-DR. Pl. 56.3 Statement ¶ 27; Def. Resp. Pl. 56.3. Statement ¶ 27.

On August 31, 2012, Customs requested additional information from Plaintiff in relation to the PEAs and Plaintiff’s claims for preferential tariff treatment pursuant to CAFTA-DR. Pl. 56.3 Statement ¶ 28; Def. Resp. Pl. 56.3 Statement ¶ 28; Joint Appendix at CA 9. Specifically, Customs requested that Plaintiff provide valid certifications of origin for the CAFTA-DR claims, as well as records of payment documenting the sales of the goods from the foreign seller to the subsequent purchasers. Pl. 56.3 Statement ¶ 28; Def. Resp. Pl. 56.3 Statement ¶ 28; *see also* Joint Appendix at CA 9. Plaintiff did not respond to Customs’ request for information. Pl. 56.3 Statement ¶ 29; Def. 56.3 Statement ¶ 8; Joint Appendix at CA 9.

On November 21, 2012, Customs denied Plaintiff’s PEA requests. Pl. 56.3 Statement ¶ 30; Def. 56.3 Statement ¶ 9; Joint Appendix at CA 8. Customs explained that the denial was based on Plaintiff’s failure to respond to the August 31, 2012 request for information. Pl.

mixtures of the above (excluding goods containing mixtures of subheadings 0406.90.61 or 0406.90.63): Other: Other: Containing cow’s milk (except soft-ripened cow’s milk cheese): Other.” Subheading 0406.90.97, HTSUS.

<sup>7</sup> All references to the HTSUS refer to the 2012 edition.

<sup>8</sup> Consistent with the regulations, the entry form for each shipment included a “P+” to indicate a claim of duty-free treatment under CAFTA-DR. Pl. 56.3 Statement ¶¶ 7, 16, 24; Def. 56.3 Statement ¶ 5; *see* 19 C.F.R. § 10.583(b).

<sup>9</sup> Plaintiff submitted the PEAs pursuant to Customs’ post-entry amendment procedure, which is “authorized under § 101.9(a) of [19 C.F.R. § 101.9(a)], and allows importers to amend entry summaries . . . prior to liquidation by filing with [CBP] . . . an individual amendment letter upon discovery of certain kinds of errors.” *Post-Entry Amendment (PEA) Processing Test: Modification, Clarification, and Extension*, 76 Fed. Reg. 37,136 (CBP 2011).

<sup>10</sup> The PEAs indicate that Entry Nos. E84–0074601–0 and E84–0074522–8 were sold to [[ ]] and Entry No. E84–0074617–6 was sold to [[ ]]. Joint Appendix at CA 87–89.



56.3 Statement ¶ 30; Def. Resp. Pl. 56.3 Statement ¶ 30; Joint Appendix at CA 8. Customs subsequently liquidated the entries at the non-preferential tariff rate.<sup>11</sup> Pl. 56.3 Statement ¶ 32; Def. 56.3 Statement ¶ 10; Joint Appendix at CA 2, 21, 37. The duties amounted to a total of \$85,012 (plus fees and interest) for the three entries. Pl. 56.3 Statement ¶ 32; Def. 56.3. Statement ¶ 10; Def. Resp. Pl. 56.3 Statement ¶ 32.

In February 2013, Plaintiff timely filed three protests challenging Customs' denial of CAFTA-DR preferential treatment on the entries. Pl. 56.3 Statement ¶ 33; Def. Resp. Pl. 56.3 Statement ¶ 33. Plaintiff submitted supporting documentation including certifications of origin, invoices for Plaintiff's purchase of the queso morolique, invoices of Plaintiff's sale of the cheese to the subsequent purchaser, and shipping documents. Pl. 56.3 Statement ¶ 33; Def. Resp. Pl. 56.3 Statement ¶ 33; *see* Joint Appendix at CA 1–19, 20–35, 36–52. In February and March 2013, Customs denied each of the protests, for failure to provide sufficient documentation to support the claims. Pl. 56.3 Statement ¶¶ 34–35; Def. 56.3 Statement ¶¶ 12–13. In May 2013, Plaintiff filed with Customs a request to void the protest denials pursuant to 19 U.S.C. § 1515(d), to which Customs did not respond.<sup>12</sup> Pl. 56.3 Statement ¶ 36; Def. Resp. Pl. 56.3 Statement ¶ 36.

In August 2013, Plaintiff commenced this action. Summons, Aug. 23, 2013, ECF No. 1. In its complaint, Plaintiff did not allege that it is the importer of record of the three entries at issue. Pl. Resp. Def. 56.3 Statement ¶ 15; Def. 56.3 Statement ¶ 16; *see* Compl. For Damages, Nov. 12, 2013, ECF No. 11. Plaintiff moved for summary judgment, arguing that it had substantiated its claims for preferential tariff treatment under CAFTA-DR on the three entries. Pl. Mot. 11–18. In its statement of undisputed facts, Plaintiff asserts that it had sold in transit all three entries' goods. Pl. Mot. 8; Pl. 56.3 Statement ¶ 25. Defendant filed a cross-motion for summary judgment on

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<sup>11</sup> Although Plaintiff contends the non-preferential rate was \$1.50 per kilogram, Pl. 56.3 Statement ¶ 32, and Defendant contends the rate was \$1.509 per kilogram, Def. Resp. Pl. 56.3 Statement ¶ 32, the HTSUS provides that the rate is \$1.509 per kilogram. Subheading 0406.90.97, HTSUS.

<sup>12</sup> Plaintiff's May 8, 2013 letter to Customs cited 19 U.S.C. § 1515(d), Pl. 56.3 Statement ¶ 36; Def. Resp. Pl. 56.3 Statement ¶ 36, which provides that Customs may void the denial of a protest "on its own initiative, or pursuant to a written request by the protesting party filed with the appropriate port director within 90 days after the date of the protest denial," if the protest was "denied contrary to proper instructions." 19 U.S.C. § 1515(d). Plaintiff stated that "[t]he proper instructions that were not followed is the non-acceptance of amendments to validly filed protests." Joint Appendix at CA 56. Defendant states that "Plaintiff cites no instructions, proper or otherwise, that were contrary to the denial of the protests. The protests were denied because plaintiff failed to provide CBP with sufficient documentation to support its claim." Def. Cross-Mot. 3, n.5 (internal citations omitted). Customs' non-response to Plaintiff's request to void the protest denials is not challenged here.

the grounds that Plaintiff has not established eligibility for CAFTA-DR preferential tariff treatment. Def. Cross-Mot. 4–17.

### DISCUSSION

Plaintiff argues it is entitled to preferential tariff treatment under CAFTA-DR on its three entries as a matter of law. Pl. Mot. 11–18. Defendant argues that the record before the court demonstrates that Plaintiff has failed as a matter of law to demonstrate that its entries are entitled to preferential tariff treatment. Def. Cross-Mot. 6–16. Based upon the record before the court, Plaintiff has failed to demonstrate that its entries are entitled to CAFTA-DR preferential treatment. Therefore, as a matter of law, Plaintiff's entries are not entitled to preferential tariff treatment under CAFTA-DR.

A good originating in a country party to CAFTA-DR may be eligible for preferential tariff treatment under the terms of the agreement,<sup>13</sup> General Note 29, HTSUS, where the importer makes a valid claim for preferential treatment.<sup>14</sup> 19 C.F.R. §§ 10.582(a), 10.583(a) (2013).<sup>15</sup> A claim may be based on a valid certification prepared by the importer, exporter, or producer of the good, certifying that the good qualifies as originating in one or more CAFTA-DR countries.<sup>16</sup> 19 C.F.R. §§

<sup>13</sup> The statute provides that a good imported into the customs territory of the United States is eligible for treatment as an originating good if, *inter alia*, “the good is a good wholly obtained or produced entirely in the territory of one or more of the CAFTA-DR countries.” 19 U.S.C. § 4033(b)(1); *see* 19 C.F.R. § 10.594(a).

<sup>14</sup> The regulations provide that such

claim is made by including on the entry summary, or equivalent documentation, the letter “P” or “P+” as a prefix to the subheading of the HTSUS under which each qualifying good is classified, or by the method specified for equivalent reporting via an authorized electronic data interchange system.

19 C.F.R. § 10.583(b). The importer of record must make entry on its merchandise “by filing with the Customs Service the declared value, classification and rate of duty applicable to the merchandise.” 19 U.S.C. §§ 1484(a)(1)(A), (B). Pursuant to the regulations, the importer of an entry is “the person primarily liable for the payment of any duties on the merchandise, or an authorized agent acting on his behalf.” 19 C.F.R. § 101.1. Such person may be the consignee, the importer of record, the actual owner of the merchandise, if an actual owner's declaration and superseding bond has been filed, or the transferee of the merchandise, if the right to withdraw merchandise in a bonded warehouse has been transferred. *Id.* The importer of record may be the owner or purchaser of the merchandise, or a customs broker designated by the owner, purchaser, or consignee of the merchandise, as the parties “eligible to file the documentation or information required” when an entry of merchandise is made. 19 U.S.C. § 1484(2)(B). Here, a customs broker designated by La Nica made entry on the products, Pl. 56.3 Statement ¶¶ 7, 16, 24; Def. Resp. Pl. 56.3 Statement ¶¶ 7, 16, 24, and the entry summaries listed Plaintiff as the importer of record. Pl.'s Resp. Def. 56.3 Statement ¶ 4; Def. 56.3 Statement ¶ 4.

<sup>15</sup> Further citations to Title 19 of the Code of Federal Regulations are to the 2013 edition.

<sup>16</sup> The importer may also claim CAFTA-DR preferential tariff treatment on the basis of “the importer's knowledge that the good qualifies as an originating good, including reasonable reliance on information in the importer's possession that the good is an originating good.” 19 C.F.R. § 10.584(a)(2). However, “[a]n importer who makes a claim for preferential tariff treatment [on the entry summary] . . . [i]s responsible for submitting any supporting documents requested by CBP.” 19 C.F.R. §§ 10.585(a); *see also* 10.616(a).

10.583(a)(1), 10.584(a). The certification must be in writing or transmitted electronically to CBP, must be in the possession of the importer at the time the claim for preferential treatment is made, and must include certain information, including, *inter alia*, “[t]he legal name, address, telephone, and e-mail address (if any) of the importer of record of the good, the exporter of the good (if different from the producer), and the producer of the good.”<sup>17</sup> 19 C.F.R. §§ 10.584(a)(1)–(3).

A claim for preferential tariff treatment “will be subject to such verification as the port director deems necessary,” including verification by “written request for information from the importer, exporter, or producer.” 19 C.F.R. §§ 10.616(a), (a)(1). The importer is responsible for submitting any documentation requested by Customs to substantiate the claim for preferential treatment. 19 C.F.R. § 10.585(a)(3). If the port director determines that the importer provided “insufficient information to verify or substantiate the claim” for CAFTA-DR preferential tariff treatment, the port director may deny

<sup>17</sup> In full, the regulation provides that the certification:

- (1) Need not be in a prescribed format but must be in writing or must be transmitted electronically pursuant to any electronic means authorized by CBP for that purpose;
- (2) Must be in the possession of the importer at the time the claim for preferential tariff treatment is made if the certification forms the basis for the claim;
- (3) Must include the following information:
  - (i) The legal name, address, telephone, and e-mail address (if any) of the importer of record of the good, the exporter of the good (if different from the producer), and the producer of the good;
  - (ii) The legal name, address, telephone, and e-mail address (if any) of the responsible official or authorized agent of the importer, exporter, or producer signing the certification (if different from the information required by paragraph (a)(3)(i) of this section);
  - (iii) A description of the good for which preferential tariff treatment is claimed, which must be sufficiently detailed to relate it to the invoice and the HS nomenclature;
  - (iv) The HTSUS tariff classification, to six or more digits, as necessary for the specific change in tariff classification rule for the good set forth in General Note 29(n), HTSUS; and
  - (v) The applicable rule of origin set forth in General Note 29, HTSUS, under which the good qualifies as an originating good; and
- (4) Must include a statement, in substantially the following form:

“I certify that:

The information on this document is true and accurate and I assume the responsibility for proving such representations. I understand that I am liable for any false statements or material omissions made on or in connection with this document; I agree to maintain and present upon request, documentation necessary to support these representations;

The goods originated or are considered to have originated in the territory of one or more of the Parties, and comply with the origin requirements specified for those goods in the Dominican Republic—Central America—United States Free Trade Agreement; there has been no further production or any other operation outside the territories of the Parties, other than unloading, reloading, or any other operation necessary to preserve the goods in good condition or to transport the goods to the United States; the goods remained under the control of customs authorities while in the territory of a non-Party; and

This document consists of \_\_ pages, including all attachments.”

19 C.F.R. §§ 10.584(a)(1)–(4).

the claim for preferential treatment. 19 C.F.R. § 10.616(a). The regulations also specifically establish that the port director may deny preferential tariff treatment in the event that the importer does not provide a complete, valid certification when requested.<sup>18</sup> 19 C.F.R. § 10.588(a).

Plaintiff has failed to establish that it is the importer for the entries at issue for the purposes of CAFTA-DR preferential treatment. Here, Plaintiff made a claim for CAFTA-DR preferential tariff treatment on each entry upon importation, Pl. 56.3 Statement ¶ 7, 16, 24, on the basis of a certification provided by Plaintiff as the importer of the goods. Joint Appendix at CA 2, 11, 14, 21, 31, 73; Pl. Mot. 5–7; 19 C.F.R. §§ 10.583(a), 10.584(a); 19 U.S.C. § 1484(2)(B). Yet the undisputed facts reveal that Plaintiff claimed in writing to CBP that it had sold the goods in transit, Pl. 56.3 Statement ¶¶ 25–26; Def. Resp. Pl. 56.3 Statement ¶ 26, which raised questions as to whether Plaintiff could have been the importer of record as it did not own the goods at the time of entry.<sup>19</sup> See 19 U.S.C. § 1484(2)(B). Thus, although Plaintiff is listed on the entry summaries as the importer of record, it appears, based upon unrefuted evidence here, that Plaintiff was not the owner of the goods at the time of entry and therefore could not have been the importer of the goods.<sup>20</sup> The court need not resolve whether La Nica is properly the importer of record for purposes of the entry summaries and what consequences there might be if it is not. In this action the court must determine whether the requirements for

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<sup>18</sup> The parties do not dispute that Plaintiff was permitted to submit the requested certifications with its protests, despite not providing the certifications upon Customs' original Request for Information in August 2012. Pl. Mot. 12; Def. Cross-Mot. 7–8. Pursuant to 19 C.F.R. § 10.112, a party may submit to Customs required documentation in support of a preferential tariff treatment claim until the liquidation becomes final. 19 C.F.R. § 10.112. Plaintiff's timely-filed protests prevented liquidation from becoming final. 19 U.S.C. § 1514(a).

<sup>19</sup> Plaintiff submitted a PEA on each entry requesting to change the importer of record, contending that the goods had been sold in transit so Plaintiff should not be liable for the duties and fees paid upon entry; Plaintiff was seeking reimbursement of those costs. Plaintiff did not reference the CAFTA-DR claim on the PEAs. Nonetheless, the PEAs necessarily brought the CAFTA-DR issue to Customs' attention since, per the regulations, only the importer may make a claim for CAFTA-DR preferential treatment. 19 C.F.R. § 10.583(a); 19 U.S.C. § 1484(2)(B). After Plaintiff submitted a PEA on each entry attesting that the goods had been sold in transit and requesting that the importer of record be changed from La Nica to the subsequent owners of the goods, CBP requested additional documentation from Plaintiff to determine if the goods were eligible for the CAFTA-DR preferential rate. Joint Appendix at CA 9; see 19 C.F.R. § 10.585(a)(3).

<sup>20</sup> To establish CAFTA-DR eligibility under the specific circumstances of the instant case, Plaintiff would need to affirmatively demonstrate that it was the owner of the goods at the time of entry and that the certification of origin and all other information and documentation submitted as requested by Customs was sufficient to establish CAFTA-DR eligibility. 19 C.F.R. §§ 10.583(a), 10.584(a); 19 U.S.C. § 1484(2)(B). Plaintiff's PEAs expressly affirmed that Plaintiff sold the goods in transit. Pl. 56.3 Statement ¶ 25; Joint Appendix at CA 10, 28, 43.

CAFTA-DR eligibility and certification are met. Those requirements include that the CAFTA-DR claim be made by the importer, based on a certification prepared by the importer, exporter, or producer of the goods. 19 C.F.R. §§ 10.583(a), 10.584(a). The claim made, and the certification provided, by the Plaintiff here are as the importer, and yet the unrefuted evidence in this case demonstrates that the Plaintiff sold the goods in transit and therefore was not entitled to be the importer of record. Even before this court, Plaintiff reasserts that it sold the goods in transit and Plaintiff does not allege that it is the importer of record. Pl. Resp. Def. 56.3 Statement ¶¶ 15, 25; Def. 56.3 Statement ¶ 16. Plaintiff has failed to affirmatively demonstrate that it owned the goods at the time of entry and was therefore a proper party to claim CAFTA-DR treatment. Accordingly, Plaintiff could not have made a valid claim for CAFTA-DR preferential treatment, and Plaintiff is not entitled to CAFTA-DR preferential treatment as a matter of law.

Plaintiff seeks to rely on Customs' denial of the PEA requests to effectively demonstrate that Customs found Plaintiff to be the importer of record and, thus, entitled to claim CAFTA-DR treatment. Pl.'s Resp. Opp'n Def.'s Cross-Mot. Summ. J. and Reply Def.'s Resp. Opp'ing Pl.'s Mot. Summary J. 10, Nov. 7, 2016, ECF No. 57 ("Pl. Reply"). Plaintiff argues that the certifications of origin submitted naming La Nica as the importer of record should therefore be deemed valid.<sup>21</sup> *Id.* at 11–14. This argument is not logically or factually sound. Plaintiff has not rescinded the affirmation made in the PEA requests that the goods were sold in transit and, indeed, repeats the claim that the goods were sold in transit before this court. Pl. 56.3 Statement ¶ 25. Customs' denial of the PEA requests does not equate to an affirmative determination that Plaintiff was the proper importer of record of these goods. Rather, by denying the PEA requests, Customs determined that Plaintiff had not substantiated the claims made in the PEA requests to demonstrate that [[ ] and [[ ]],

<sup>21</sup> Plaintiff also argues that the certifications should be deemed valid because CETREX, a Nicaraguan government entity that validates certifications in that country, determined they were valid. Pl.'s Resp. Opp'n Def.'s Cross-Mot. Summ. J. and Reply Def.'s Resp. Opp'ing Pl.'s Mot. Summ. J. 13, Nov. 7, 2016, ECF No. 57, citing Joint Appendix at CA 83. Even if the certifications are accurate from a Nicaraguan standpoint, CBP requires that entry be made by the importer (and certification be provided by, *inter alia*, the importer), which means that the party claiming preferential treatment must be the "person primarily liable for the payment of any duties on the merchandise, or an authorized agent acting on his behalf" (*i.e.*, the consignee, the importer of record, the actual owner of the merchandise, if an actual owner's declaration and superseding bond has been filed, or the transferee of the merchandise, if the right to withdraw merchandise in a bonded warehouse has been transferred), 19 C.F.R. § 101.1, and the importer of record is the owner, purchaser, or designated customs broker. See 19 U.S.C. §1484(2)(B); 19 C.F.R. § 10.583(a). For the reasons discussed above Plaintiff has not shown that this CBP requirement has been met.

respectively, were the actual importers of record of the goods.<sup>22</sup> See Joint Appendix at 8, 86–89. Although Plaintiff failed to affirmatively prove the goods were sold in transit, as would be necessary for Customs to approve the PEA requests, the PEA requests themselves raise questions about whether Plaintiff was the actual owner of the goods at the time of entry, as required to make a valid claim to establish CAFTA-DR eligibility. 19 C.F.R. § 10.583(a); 19 U.S.C. §1484(2)(B). The burden is on the claimant to provide “sufficient information to verify or substantiate the claim” for preferential treatment, 19 C.F.R. § 10.616(a), and Plaintiff did not do so. Therefore, Plaintiff has not established CAFTA-DR eligibility.

Plaintiff argues that the government should be judicially estopped from now taking the position that Plaintiff is the importer of record because Customs denied Plaintiff’s PEA requests to change the importer of record. Pl. Reply 10–11. The doctrine of judicial estoppel, which may be invoked by a court at its discretion, see *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) provides that, “when a party successfully urges a particular position in a legal proceeding, it is estopped from taking a contrary position in a subsequent proceeding where its interests have changed.” *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996) (internal citations omitted). Plaintiff’s argument for judicial estoppel is misplaced. In denying Plaintiff’s PEA request to change the importer of record, Customs did not “successfully urg[e] a particular position.” *Id.*; see *New Hampshire v. Maine*, 532 U.S. at 750. Rather, Customs declined to change the importer of record and denied the PEAs because insufficient information was provided in support of the PEAs. Joint Appendix at CA 8. The doctrine of judicial estoppel is inapplicable to the present case.

### CONCLUSION

For the foregoing reasons, as a matter of law the court holds that Plaintiff has failed to establish a claim for preferential tariff treatment under CAFTA-DR. Plaintiff’s motion for summary judgment is denied, and Defendant’s cross-motion for summary judgment is granted. Judgment will enter accordingly.

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<sup>22</sup> Plaintiff does not dispute that it did not respond to the request for information in support of the PEAs. Pl. 56.3 Statement ¶ 29. Although Plaintiff did provide certain supporting documentation in the protests submitted in February 2013, see Joint Appendix at CA 1–19, 20–35, 36–52, Plaintiff did not protest, and does not challenge before this court, Customs’ denial of the PEAs. Pl. Reply 14–15 (“[T]he decision protested, decided, and now under review relates solely to a claim for preferential treatment under DR-CAFTA, and whether Customs correctly decided that Plaintiff did not comply with the regulations for Plaintiff’s claims [ . . . ] Plaintiff only identified Customs decision to deny preferential treatment for the three entries as the decision that Plaintiff was protesting, not the denial of its request for post-entry amendments.”).

Dated: February 2, 2017  
New York, New York

*/s/ Claire R. Kelly*  
CLAIRE R. KELLY, JUDGE

Slip Op. 17–15

ALLSTAR MARKETING GROUP, LLC, Plaintiff, v. UNITED STATES,  
Defendant.

Before: Mark A. Barnett, Judge  
Court No. 13–00395

[The court finds that the subject imports are properly classified as “blankets” under HTSUS subheading 6301.40.00. Accordingly, the court grants Plaintiff’s motion for summary judgment and denies Defendant’s cross-motion for summary judgment.]

Dated: February 10, 2017

*Joseph M. Spraragen, Robert B. Silverman, and Frank J. Desiderio*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, for Plaintiff.

*Hardeep K. Josan*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Chi S. Choy*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection of New York, NY.

**OPINION**

**Barnett, Judge:**

Before the court are cross-motions for summary judgment. *See* Pl.’s Mot. for Summ. J., ECF No. 39; Mem. of Law in Supp. of Pl.’s Mot. for Summ. J. (“Pl.’s MSJ”), ECF No. 39–2; Def.’s Cross-Mot. for Summ. J. & Def.’s Mem. of Law in Opp’n to Pl.’s Mot. for Summ. J. & in Supp. of Def.’s Cross-Mot. for Summ. J. (“Def.’s XMSJ”), ECF No. 42. Plaintiff Allstar Marketing Group, LLC (“Allstar” or “Plaintiff”) contests the denial of protest number 2809–11–100237<sup>1</sup> challenging U.S. Customs and Border Protection’s (“Customs”) liquidation of the subject import, a polyester fleece knit article referred to as a “Snuggie®,”

<sup>1</sup> In March 2013, Plaintiff filed suit challenging nine protest denials covering 30 entries of merchandise. *See Allstar Marketing Group, LLC v. United States*, Court No. 13–00110, Summons at 3–6, ECF No. 1. On December 11, 2013, this court granted Plaintiff’s consent motion to sever protest number 2809–11–100237 and related entries and include them in a new action designated Court No. 13–00395. *See* Order (Dec. 11, 2013), ECF No. 1. Herein, all references to the Summons are to the Summons filed in Court No. 13–00110.

under subheading 6114.30.30 of the Harmonized Tariff Schedule of the United States (“HTSUS”),<sup>2</sup> as “Other garments, knitted or crocheted: Of man-made fibers: Other,” dutiable at 14.9 percent *ad valorem*. See generally Compl., ECF No. 6; see also Pl.’s MSJ at 8–27; Pl.’s Mem. of Law in Resp. to Def.’s Cross-Mot. for Summ. J. (“Pl.’s Resp.”) at 1–18, ECF No. 51.<sup>3</sup> Plaintiff contends that Customs should have classified the subject imports under subheading 6301.40.00, HTSUS, as “Blankets,” dutiable at 8.5 percent *ad valorem*, or alternatively, under subheading 6307.90.98, HTSUS, as “Other made up articles,” dutiable at 7 percent *ad valorem*. Pl.’s MSJ at 27–31; Pl.’s Resp. at 18–22. Defendant, United States, contends that Customs correctly classified the subject imports pursuant to subheading 6114.30.30. Def.’s MSJ at 7–18; see also Def.’s Reply Mem. in Further Supp. of Def.’s Cross-Mot. for Summ. J. (“Def.’s Reply”) at 2–7, ECF No. 54. Defendant agrees that if the court finds the Snuggie® not classifiable as a garment or blanket, it should be classified under heading 6307. Def.’s XMSJ at 20.

There is no genuine issue of material fact regarding the properties of the subject import that would preclude summary judgment. The sole issue before the court is whether, as a matter of law, the Snuggie® should be classified under heading 6114, 6301, or 6307.<sup>4</sup> For the following reasons, the court finds the subject import is properly classified as a blanket under subheading 6301.40.00.

## BACKGROUND

### I. Material Facts Not in Dispute

The court’s rule regarding summary judgment requires the moving party to show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” United

<sup>2</sup> All citations to the HTSUS refer to the 2009 version, as determined by the date of importation of the merchandise.

<sup>3</sup> There are two entries at issue, Entry Numbers 231–9479092–2 and 231–9480435–0, which entered at the Port of San Francisco on December 12, 2009, and December 18, 2009, respectively, and which Customs liquidated on October 22, 2010, and October 29, 2010, respectively. Summons at 3. In connection with another protest filed by Allstar regarding different Snuggie® styles than those at issue here, Customs issued Headquarters Ruling HQ H145555. Def.’s Ex. C (HQ H145555) (Aug. 6, 2012), ECF No. 42–1. Therein, Customs determined that the Snuggie® should be classified as a garment pursuant to heading 6114. Def.’s Ex. C at 14. On that basis, on September 26, 2012, Customs denied the protest at issue in this case. See Def.’s XMSJ at 2.

<sup>4</sup> The court must consider the correctness of the government’s classification, both independently and in comparison with the importer’s alternative, in order to arrive at the correct result. *EOS of N. Am., Inc. v. United States*, 37 CIT \_\_\_, \_\_\_, 911 F. Supp. 2d 1311, 1317–18 (2013) (quoting *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984)); see also *Latitudes Int’l Fragrance, Inc. v. United States*, 37 CIT \_\_\_, \_\_\_, 931 F. Supp. 2d 1247, 1252 (2013).



States Court of International Trade (“USCIT”) Rule 56(a). Movants should present material facts as short and concise statements, in numbered paragraphs, and cite to “particular parts of materials in the record” as support. USCIT Rule 56(c)(1)(A); *see also* USCIT Rule 56.3(a) (“factual positions described in Rule 56(c)(1)(A) must be annexed to the motion in a separate, short and concise statement, in numbered paragraphs”). In responsive papers, the nonmovant “must include correspondingly numbered paragraphs responding to the numbered paragraphs in the statement of the movant.” USCIT Rule 56.3(b). Parties submitted separate statements of undisputed material facts with their respective motions and responses to the opposing party’s statements. *See* Pl.’s Statement of Material Facts not in Dispute (“Pl.’s SOF”), ECF No. 39–1; Def.’s Resp. to Pl.’s Statement of Undisputed Material Facts (“Def.’s Resp. to Pl.’s SOF”), ECF No. 42–2; Def.’s Statement of Undisputed Material Facts in Supp. of its Cross-Mot. for Summ. J. (“Def.’s SOF”), ECF No. 42; Pl.’s Resp. to Def.’s Statement of Undisputed Material Facts (“Pl.’s Resp. to Def.’s SOF”), ECF No. 51–1. Upon review of Parties’ facts (and supporting exhibits), the court finds the following undisputed and material facts.<sup>5</sup>

### A. Facts Regarding Jurisdiction

Customs liquidated Entry Numbers 231–9479092–2 and 231–9480435–0 under tariff classification 6114.30.30, HTSUS, dutiable at 14.9 percent *ad valorem*, on October 22, 2010 and October 29, 2010, respectively. Summons at 2–3; Compl. ¶ 47; Answer ¶ 47, ECF No. 18; Pl.’s SOF ¶ 7; Def.’s Resp. to Pl.’s SOF ¶ 7. Allstar timely protested, claiming the subject imports should have been liquidated under tariff classification 6301.40.00 or 6307.90.98. Summons at 2; Compl. ¶ 3, Answer ¶ 3.

### B. Facts Regarding the Subject Imports

Allstar is the importer of record of the subject merchandise. Pl.’s SOF ¶ 1; Def.’s Resp. to Pl.’s SOF ¶ 1. “The subject merchandise consists of an adult-sized Snuggie®, designated by Allstar as Item [Numbers] 21065 [(serial number SN011106)] and 21495 [(serial number SN31106)].”<sup>6</sup> Pl.’s SOF ¶ 6; Def.’s Resp. to Pl.’s SOF ¶ 6; Def.’s SOF ¶ 2; Pl.’s Resp. to Def.’s SOF ¶ 2. The Snuggie consists of

<sup>5</sup> Citations are provided to the relevant paragraph number of the undisputed facts and response; internal citations generally have been omitted.

<sup>6</sup> Serial number SN011106 corresponds to the royal blue Snuggie®; serial number SN31106 corresponds to the camel colored Snuggie®. Compl., Ex. B. (physical samples of the different colored Snuggies®); Notice of Manual Filing (Mar. 4, 2014) (notice of manual filing of two physical samples of the Snuggie® and retail packaging), ECF No. 9

polyester fleece knit, is made in one size only, and measures 71 inches by 54 inches. Pl.'s SOF ¶¶ 15, 28; Def.'s Resp. to Pl.'s SOF ¶¶ 15, 28; Def.'s SOF ¶ 1; Pl.'s Resp. to Def.'s SOF ¶ 1. It has "sleeves" that are 28.5 inches long. Pl.'s SOF ¶¶ 16, 28; Def.'s Resp. to Pl.'s SOF ¶¶ 16, 28. There is no closure, and it is open in the back. Pl.'s SOF ¶ 28; Def.'s Resp. to Pl.'s SOF ¶ 28.

The Snuggie® was inspired by the "Slanket®" and the "Freedom Blanket," two products already on the market that were marketed as blankets. Pl.'s SOF ¶ 10; Def.'s Resp. to Pl.'s SOF ¶ 10. In discussions with the foreign vendor of the subject imports, and in purchase orders and specifications submitted thereto, Allstar referred to the Snuggie® as a blanket. Pl.'s SOF ¶ 11; Def.'s Resp. to Pl.'s SOF ¶ 11. Commercial invoices in the subject entries described the Snuggie® as a "Snuggie Fleece Blanket" or "Snuggie Fleece Blnkt." Pl.'s SOF ¶ 4; Def.'s Resp. to Pl.'s SOF ¶ 4. Likewise, purchase orders from and invoices to Plaintiff's retail customers describe the Snuggie® as a blanket. Pl.'s SOF ¶ 12; Def.'s Resp. to Pl.'s SOF ¶ 12. Allstar obtained trademark protection from the U.S. Patent and Trademark Office to use the mark "Snuggie<sup>®</sup>" on "fleece blankets and throws." Pl.'s SOF ¶ 14; Def.'s Resp. to Pl.'s SOF ¶ 14.

To produce the Snuggie®, the factory cuts polyester fleece knit into rectangles and hems all four sides using a machine over-locked or "blanket" stitch. Pl.'s SOF ¶ 17; Def.'s Resp. to Pl.'s SOF ¶ 17. Two holes are cut, and "tubes" of the same polyester fleece are sewn onto the holes. Pl.'s SOF ¶ 17; Def.'s Resp. to Pl.'s SOF ¶ 17.<sup>7</sup> Inspection reports taken for Plaintiff included the following measurements: "length, width, sleeve length, armhole, cuff, across back shoulder, [and] distance from armhole to edge." Def.'s SOF ¶ 8; Pl.'s Resp. to Def.'s SOF ¶ 8.<sup>8</sup>

<sup>7</sup> The "tubes" are merely "sleeve-like" according to Plaintiff, or are "sleeves" according to Defendant. Pl.'s SOF ¶ 17; Def.'s Resp. to Pl.'s SOF ¶ 17. *But see* Pl.'s SOF ¶ 28 (stating the length of the Snuggie®'s "sleeves"); Pl.'s Resp. to Def.'s SOF ¶ 1 (admitting that "sleeves [are] sewn into the armholes"). Thus, Parties agree that the "tubes" attached to the polyester fleece rectangles may be characterized as "sleeves."

<sup>8</sup> Allstar avers the Snuggie® meets "the voluntary blanket flammability standard" stated in "ASTM D4151 Standard Test Method for Flammability of Blankets." Pl.'s SOF ¶ 13 (citing Declaration of Scott Boilen ("Boilen Decl.") ¶ 11 & Ex. D, ECF No. 39-13). Defendant "[a]dmits that the cited declaration supports the statement," but avers that the product tested may not have been the subject imports because the tested sample was described as a "Snuggle Up Fleece Knit Blanket." Def.'s Resp. to Pl.'s SOF ¶ 13 (citing Boilen Decl., Ex. D). The test report appended to the Boilen Declaration describes the "Snuggle Up Fleece Knit Blanket" as made from 100 percent polyester fleece and measuring 71 inches by 54 inches, which matches Snuggie® specifications. Boilen Decl., Ex. D; *see also* Pl.'s SOF ¶¶ 8, 15; Def.'s Resp. to Pl.'s SOF ¶¶ 8, 15. Though arguably material to the classification analysis discussed *infra*, the outcome of the analysis does not turn on resolving this issue. Thus, there is no "genuine issue" of "material fact" barring summary judgment. *See Gill v. District of Columbia*, 751 F. Supp. 2d 104, 107-08 (D.D.C. 2010) ("A 'genuine issue' is one whose resolution could establish an element of a claim or defense and, therefore, affect the

In addition to being the importer of record, Allstar markets and sells the Snuggie®. Pl.'s SOF ¶ 9; Def.'s Resp. to Pl.'s SOF ¶ 9. Allstar markets the Snuggie® in television commercials, print media, and copy printed on the boxes in which the Snuggie® is sold. Pl.'s SOF ¶ 20; Def.'s Resp. to SOF ¶ 20. Retail packaging and television advertising describe the Snuggie® as a blanket with sleeves. Compl., Ex. B, (retail packaging describing the Snuggie® as “The Blanket That Has Sleeves”); Def.'s SOF ¶ 5; Pl.'s Resp. to Def.'s SOF ¶ 5;<sup>9</sup> Def.'s Ex. D at 00:22 (DVD copy of television commercial describing the Snuggie® as “The Blanket With Sleeves!”); Notice Of Manual Filing (July 29, 2016) (notice of manual filing of video disc), ECF No. 44; Def.'s SOF ¶ 6; Pl.'s Resp. to Def.'s SOF ¶ 6 (disputing Defendant's characterization of the television commercial, but asserting the DVD “produced as Defendant's Exhibit D is the best evidence of its contents”).

The retail packaging states that the Snuggie® enables users to “Keep Hands Free,” is made of “Super-Soft Fleece,” is “Machine Washable,” and is sized “One Size Fits All.” Compl., Ex. B. The retail packaging shows users wearing<sup>10</sup> the Snuggie® on their front with their arms through the sleeves while reclining or seated on an airplane, couch, bed, and floor, and engaging in activities such as reading, writing, knitting, holding a remote control, using a laptop, hold-outcome of the action.”) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

<sup>9</sup> Allstar avers it markets the Snuggie® as a “blanket.” Pl.'s SOF ¶ 21 (citing Boilen Decl. ¶¶ 17, 23, 24). Mr. Boilen declares that the Snuggie®'s retail packaging “refers to the product as a blanket,” and “printed marketing materials . . . always describe the [subject imports] as a blanket.” Boilen Decl. ¶¶ 23, 24 (citing Boilen Decl., Ex. G) (print copy advertising the Snuggie® as “[t]he one and only Snuggie®, the blanket that keeps you totally warm and gives you the freedom to use your hands.”). Defendant denies Plaintiff's assertion, and avers that Allstar markets the Snuggie as “The Blanket That Has Sleeves.” Def.'s Resp. to Pl.'s SOF ¶ 21 (citing Def.'s Ex. A (photocopy of retail packaging), ECF No. 42–1); see also Def.'s SOF ¶ 5 (asserting that retail packaging describes the Snuggie® as “The Blanket That Has Sleeves”) (citing Compl., Ex. B; Def.'s Ex. A). Plaintiff denies Defendant's assertion, concedes that Defendant quotes from the language on the retail packaging, but avers that the retail packaging produced as an Exhibit to the complaint “is the best evidence of its contents.” Pl.'s Resp. to Def.'s SOF ¶ 5. In sum, Parties do not dispute that the retail packaging produced with the complaint refers to the Snuggie, *inter alia*, as “The Blanket That Has Sleeves.” See Compl., Ex. B.

<sup>10</sup> As part of arguing that the Snuggie® is not a garment, Plaintiff disputes whether the Snuggie® is “worn.” Pl.'s MSJ at 10, 16 n.4; Pl.'s Resp. at 8. Defendant contends the Snuggie® is “worn.” Def.'s XMSJ at 11, 13. Neither party addresses in detail the significance if any of the term “worn,” nor its relevance to the classification analysis. Webster's defines “worn” as the past participle of “wear,” which in turn is variously defined as “to clothe, put on, wear”; “to bear or have upon the person”; or “to carry on or as if on the person,” for example a sword or cane. Webster's Third New Int'l Dictionary of the English Language Unabridged (2002) (“Webster's”) at 2589, 2636. Accordingly, and as common parlance indicates, the term “worn” is not limited to the context of garments and may be used to refer to a broader array of articles. Consequently, the court uses the term “wearing” for ease of reference.

ing a baby, and playing backgammon. Compl., Ex. B. It also shows users wearing the Snuggie® outside, while seated, ostensibly cheering a sports team. Compl., Ex. B.

The television commercial displays text informing viewers that the Snuggie® enables users to use their hands (for example, to read a book), is made of “[u]ltra-soft fleece,” has “[o]versized sleeves,” is “[o]ne size fits all,” and will keep them “[w]arm from head to toe” “[a]nywhere you go,” including the outdoors. Def.’s Ex. D at 00:22–1:010. The commercial opens with a woman appearing frustrated with her blanket’s apparent inability to provide satisfactory coverage, and shows her using a Snuggie® instead. Def.’s Ex. D at 00:11–00:25. In addition to showing people wearing the Snuggie® while engaging in the same activities as depicted on the retail packaging, the commercial also shows a woman wearing the Snuggie® while standing and pouring coffee in her kitchen. Def.’s Ex. D at 00:51–00:53.

The Snuggie® is sold in the “bedding, housewares, general merchandise, ‘impulse buy,’ or ‘as-seen-on-TV’ departments of retail stores,” never in the wearing apparel department. Pl.’s SOF ¶¶ 23–24; Def.’s Resp. to Pl.’s SOF ¶¶ 23–24.<sup>11</sup>

## II. Procedural History

This case involves two entries of merchandise, consisting of adult sized Snuggies®, imported in December 2009. Summons at 3. In October 2010, Customs liquidated the imports as garments pursuant to subheading 6114.30.30. Summons at 2, 3. Allstar timely protested

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<sup>11</sup> Defendant avers that “[p]eople have worn the Snuggie® during pub crawls.” Def.’s SOF ¶ 7 (citing Def.’s Ex. E (black and white copies of photographs of people wearing something that may or may not be the Snuggie®), ECF No. 42–1); *see also* Def.’s XMSJ at 13. Plaintiff disputes Defendant’s assertion, and contends the photographs are not suitable subjects for judicial notice. Pl.’s Resp. to Def.’s SOF ¶ 7; Pl.’s Resp. at 15–18. Defendant contends “the photographs meet the standard for judicial notice because the information is ‘generally known’” on the basis of “[a] quick internet search.” Def.’s Reply at 7. Judicial notice of an adjudicative fact is appropriate when the fact in question is not subject to reasonable dispute because it “is generally known within the trial court’s territorial jurisdiction,” or “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b); *see also* 28 U.S.C. § 2641(a)(2012) (“the Federal Rules of Evidence shall apply to all civil actions in the Court of International Trade”). The photographs are inappropriate subjects for judicial notice. Whether the persons appearing in the photographs are actually wearing the Snuggie® at issue here is “subject to reasonable dispute.” *See* Fed. R. Evid. 201(b). Defendant provides no support for the accuracy of the ostensive source, “SnuggiePubCrawls.com.” *See* Def. Ex.’s E. Moreover, mere fact of publication on a website does not make it “generally known.” *See Tri Union Frozen Prod., Inc. v. United States*, 40 CIT \_\_\_, \_\_\_, 161 F. Supp. 3d 1333, 1337 (2016) (“The standard is not that the offered information is ‘not subject to reasonable dispute’ because it is published on a website, but rather, the standard is that the offered information is not subject to reasonable dispute because it is ‘generally known’ or ‘can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.’”) (citing Fed. R. Evid. 201(b)). Thus, the court declines to consider the photographs.

the classification. Compl. ¶ 3; Answer ¶ 3. On September 26, 2012, Customs denied the protest. Summons at 3. Allstar challenges the denial of its protest. Parties have fully briefed the issues. The court now rules on the cross-motions for summary judgment.

### JURISDICTION AND STANDARD OF REVIEW

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(a). Jurisdiction is uncontroverted in this case. Compl. ¶ 1; Answer ¶ 1; Pl.’s SOF ¶ 2; Def.’s Resp. to Pl.’s SOF ¶ 2.

The Court may grant summary judgment when “there is no genuine issue as to any material fact,” and “the moving party is entitled to judgment as a matter of law.” *Anderson*, 477 U.S. at 247; USCIT Rule 56(a).<sup>12</sup> The court’s review of a classification decision involves two steps. First, it must determine the meaning of the relevant tariff provisions, which is a question of law. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citation omitted). Second, it must determine whether the merchandise at issue falls within a particular tariff provision, as construed, which is a question of fact. *Id.* (citation omitted). When no factual dispute exists regarding the merchandise, resolution of the classification turns solely on the first step. *See id.* at 1365–66; *see also Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999).

The court reviews classification cases *de novo*. *See* 28 U.S.C. §§ 2640(a), 2643(b). While the court accords deference to Customs classification rulings relative to their “power to persuade,” *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), it has “an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms,” *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)). It is “the court’s duty to find the correct result, by whatever procedure is best suited to the case at hand.” *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

### DISCUSSION

The General Rules of Interpretation (“GRIs”) provide the analytical

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<sup>12</sup> When parties have filed cross-motions for summary judgment, the court generally must evaluate each party’s motion on its own merits, drawing all reasonable inferences against the party whose motion is under consideration. *JVC Co. of Am., Div. of US JVC Corp. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000); *Specialty Commodities Inc. v. United States*, 40 CIT \_\_\_, \_\_\_, 2016 WL 7048013, at \*2 (2016). Here, the material facts are undisputed.

framework for the court’s classification of goods. See *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001). “The HTSUS is designed so that most classification questions can be answered by GRI 1.” *Telebrands Corp. v. United States*, 36 CIT \_\_\_, \_\_\_, 865 F. Supp. 2d 1277, 1280 (2012), *aff’d* 522 Fed. App’x 915 (Fed. Cir. 2013). GRI 1 states that, “for legal purposes, classification shall be determined according to the terms of the headings and any [relevant] section or chapter notes.” GRI 1, HTSUS. The court must consider Chapter and Section Notes of the HTSUS in resolving classification disputes because they are statutory law, not interpretive rules. *Arko Foods Intern., Inc. v. United States*, 654 F.3d 1361, 1364 (Fed. Cir. 2011) (citation omitted); *N. Am. Processing Co.*, 236 F.3d at 698.

“Absent contrary legislative intent, HTSUS terms are to be ‘construed [according] to their common and popular meaning.’” *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999) (quoting *Marubeni Am. Corp. v. United States*, 35 F.3d 530, 533 (Fed. Cir. 1994)). Courts may rely upon their own understanding of terms or consult dictionaries, encyclopedias, scientific authorities, and other reliable information. *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988); *BASF Corp. v. United States*, 35 CIT \_\_\_, \_\_\_, 798 F. Supp. 2d 1353, 1357 (2011). For additional guidance on the scope and meaning of tariff headings and Chapter and Section Notes, the court also may consider the Explanatory Notes (“EN”) to the Harmonized Commodity Description and Coding System, developed by the World Customs Organization. See *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1367 n. 1 (Fed. Cir. 2013). Although Explanatory Notes do not bind the court’s analysis, they are “indicative of proper interpretation” of the tariff schedule. *Lynteq, Inc. v. United States*, 976 F.3d 693, 699 (Fed. Cir. 1992) (quoting H.R. Rep. No. 100–576, at 549 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582) (quotation marks omitted).

## I. Tariff Headings at Issue

Customs liquidated the subject imports as garments pursuant to subheading 6114.30.30. The United States contends Customs correctly classified the subject imports. Def.’s XMSJ at 6–9; Def.’s Reply at 2–5. This subheading covers:

<b>6114</b>	Other garments, knitted or crocheted:	
	6114.30	Of man-made fibers:
	6114.30.30	Other:.....14.9%

Allstar contends that the subject imports are not garments, but are blankets classifiable under subheading 6301.40.00. Pl.'s MSJ at 8, 27–30. This subheading covers:

<b>6301</b>	Blankets and traveling rugs:	
6301.40:	Blankets (other than electric blankets) and traveling rugs, of synthetic fibers:	
6301.40.00:	Other:.....	8.5%

If the court finds that the Snuggie® is not a garment or a blanket, Parties agree that the Snuggie® is classifiable as an “other made up article.” Pl.'s MSJ at 30–31; Def.'s XMSJ at 20. The relevant basket provision covers:

<b>6307</b>	Other made up articles, including dress patterns:	
6307.90:	Other:	
6307.90.98	Other:.....	7.5%

## II. Relationship Between the Competing Classifications

All of the asserted classifications fall within Section XI of the HTSUS, which covers “textiles and textile articles,” and includes Chapters 50 to 63 of the HTSUS. Chapter 61 (which covers “articles of apparel and clothing accessories, knitted or crocheted”) and Chapter 63 (which covers, *inter alia*, “other made up textile articles”) apply only to “made up” articles. Note 1 to Chapter 61; Note 1 to Chapter 63.<sup>13</sup> Note 7(e) to Section XI defines “made up” as, *inter alia*, an item “[a]ssembled by sewing, gumming or otherwise.”<sup>14</sup> Parties do not dispute that the Snuggie® is assembled by sewing. Pl.'s SOF ¶ 17; Def.'s Resp. to Pl.'s SOF ¶ 17 (Snuggie® is produced in part by sewing sleeves onto the holes cut into the rectangular polyester fleece knit fabric). Thus, the Snuggie® is a made up article.<sup>15</sup>

Note 2(a) to Chapter 63 states that subchapter 1 to Chapter 63, which includes headings 6301 to 6307, does not cover “[g]oods of chapters 56–62.” Parties agree that if the Snuggie® is properly clas-

<sup>13</sup> Chapter 61 applies only to “made up knitted or crocheted articles.” Note 1 to Chapter 61. Chapter 63 applies only to “made up articles, of any textile fabric.” Note 1 to Chapter 63.

<sup>14</sup> Excluded from the definition of “made up” are “piece goods consisting of two or more lengths or identical material joined end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded.” Note 7(e) to Section XI.

<sup>15</sup> Parties do not expressly address the definition of “made up” or its application to the Snuggie®. However, the proposed classifications imply the absence of dispute. *See* Pl.'s MSJ at 30 (“[I]t cannot be disputed that the subject merchandise is a ‘made up article.’ . . . [S]ince it is [D]efendant’s position that the subject merchandise is classifiable in Chapter 61, it necessarily follows that [D]efendant agrees that the Snuggie® is a made up article.”).

sified as a garment pursuant to heading 6114, it is not classifiable as a blanket or other textile pursuant to headings 6301 and 6307. Pl.'s MSJ at 9; Def.'s XMSJ at 7. Accordingly, the court first addresses whether the Snuggie® is classifiable as a garment under subheading 6114.30.30.

### III. The Snuggie® is Not Classifiable under Subheading 6114.30.30.

The GRIs govern the proper classification of merchandise and are applied in numerical order. *N. Am. Processing Co.*, 236 F.3d at 698. “Under GRI 1, the Court must determine the appropriate classification ‘according to the terms of the headings and any relative section or chapter notes’ . . . [with] terms of the HTSUS . . . construed according to their common commercial meaning.” *Millenium Lumber Dist. Ltd. v. United States*, 558 F.3d 1326, 1328–29 (Fed. Cir. 2009) (citations omitted).

Subheading 6114.30.30 is an *eo nomine* provision covering “Other garments, knitted or crocheted: Of man-made fibers: Other.” See *GRK Canada, Ltd. v. United States*, 761 F.3d 1354, 1361 (Fed. Cir. 2014) (Reyna, J., dissenting) (noting that the HTSUS has distinctive use and *eo nomine* provisions; defining *eo nomine* as that which “describes an article by a specific name”) (citations omitted); see also *H.I.M./Fathom, Inc. v. United States*, 21 CIT 776, 783, 981 F. Supp. 610, 617 (1997) (heading 6114 is not a use provision). Parties agree that the Snuggie® consists of polyester knit fleece. Pl.'s SOF ¶ 17; Def.'s Resp. to Pl.'s SOF ¶ 17; Def.'s SOF ¶ 1; Pl.'s Resp. to Def.'s SOF ¶ 1. The issue is whether the Snuggie® is classifiable as a garment. “Garment” is not defined in the relevant section or chapter notes or in the legislative history. Accordingly, the court considers its common commercial meaning.

To that end, Parties disagree whether the court should consider the meaning of “apparel” or “wearing apparel” to inform its interpretation of the term “garment.” Plaintiff contends that “apparel” is interchangeable with “garment” and “clothing,” and relies on the Court of Appeals for the Federal Circuit’s (“Federal Circuit”) interpretation of “wearing apparel” in *Rubie’s Costume Co. v. United States*, 337 F.3d 1350 (Fed. Cir. 2003). See Pl.'s MSJ at 9–10. Defendant argues that Allstar’s reliance on the definition of “wearing apparel” is misplaced because the phrase does not appear in the headings, section notes, or chapter notes for Chapter 61. Def.'s XMSJ at 10–11. Defendant further contends that *Rubie’s Costume* is inapposite because it interpreted Note 1(e) to Chapter 95, not heading 6114. Def.'s Reply at 4. Defendant asserts that “garment” is defined as “an article of outer clothing (as a coat or dress) usu. exclusive of accessories,” and



“[c]lothing is defined as ‘covering for the human body or garments in general: all the garments and accessories worn by a person at any one time.’” Def.’s XMSJ at 8 (quoting *H.I.M. / Fathom*, 21 CIT at 781, 981 F. Supp. at 615 (1997) (quoting Webster’s Third New Int’l Dictionary of the English Language Unabridged (1993) at 428, 936).

“Fundamentally, courts interpret statutory language to carry out legislative intent.” *Rubies Costume*, 337 F.3d at 1357 (citing *Nippon Kogaku (USA), Inc. v. United States*, 69 C.C.P.A. 89, 673 F.2d 380, 383 (1982)); see also *EOS of N. Am., Inc. v. United States*, 37 CIT \_\_\_, \_\_\_, 911 F. Supp. 2d 1311, 1318 (2013). As noted above, Chapter 61 covers “articles of apparel and clothing accessories, knitted or crocheted.” Note 14 to Section XI states, *inter alia*, that the phrase “textile garments” means garments covered by headings 6101 to 6114. A review of the headings of Chapter 61 indicates a delineation whereby headings 6101 to 6114 cover garments,<sup>16</sup> and headings 6115 to 6117 cover clothing accessories.<sup>17</sup> Reading the chapter title in concert with the chapter headings and Note 14 to Section XI suggests the drafters intended the phrase “articles of apparel” in the chapter title to encompass the garment provisions (headings 6101 to 6114), and the phrase “clothing accessories” to encompass the accessory provisions (headings 6115 to 6117). The notion that the terms “apparel” and “garments” are interchangeable is further supported by The American Heritage Dictionary of the English Language’s definition of “garment” as “An article of clothing,” and “clothes” as “Articles of dress; wearing apparel; garments.” The American Heritage Dictionary of the English Language (2000) (“The American Heritage Dictionary”) at 350, 725 (emphasis added). Accordingly, the court considers the meaning of “apparel” and the case law discussing that meaning to inform its interpretation of “garment.”

Further, contrary to Defendant’s assertion, *Rubie’s Costume* considered whether the Halloween costumes at issue were “fancy dress, of textiles, of chapter 61 or 62,” such that they were not classifiable pursuant to Chapter 95. *Rubies Costume*, 337 F.3d at 1357; see also Note 1(e) to Chapter 95 (“This chapter does not cover . . . Sports clothing or fancy dress, of textiles, of chapter 61 or 62[.]”). If the Halloween costumes were properly classified as garments pursuant

<sup>16</sup> Headings 6101 to 6112 cover specific types of garments; headings 6113 and 6114 are basket provisions for garments.

<sup>17</sup> Heading 6115 covers “Panty hose, tights, stockings, socks and other hosiery, including stockings for varicose veins, and footwear without applied soles, knitted or crocheted”; heading 6116 covers “Gloves, mittens and mitts, knitted or crocheted”; and heading 6117 is a basket provision covering “Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories.”

to subheading 6114.30.30, as the government had contended, then they were not classifiable as “festive articles” under subheading 9505.90.60, as the trial court had found. *Rubies Costume*, 337 F.3d at 1351–52. According to the Federal Circuit, deciding whether the Halloween costumes were classifiable under Chapter 61 or 62 (covering “Articles of apparel and clothing accessories, not knitted or crocheted”) required interpreting the phrase “wearing apparel.” *Id.* at 1357.

The Federal Circuit began its analysis with the U.S. Supreme Court’s definition of “wearing apparel” as “all articles which are ordinarily worn—dress in general.” *Id.* at 1357 (quoting *Arnold v. United States*, 147 U.S. 494, 496 (1893)) (emphasis added in *Rubie’s Costume*). It further noted that the Customs Court had defined “wearing apparel” as “clothes or covering[] for the human body worn for decency or comfort,” and stated that “common knowledge indicates that adornment is also an element of many articles of wearing apparel.” *Rubies Costume*, 337 F.3d at 1357 (quoting *Antonio Pompeo v. United States* (“*Pompeo*”), 40 Cust. Ct. 362, 364 (1958)) (alteration omitted).

Parties disagree whether the *Pompeo* decency/comfort/adornment definition is disjunctive, whereby an article fulfilling one characteristic constitutes wearing apparel. Plaintiff argues the *Pompeo* definition is not strictly disjunctive because *Rubie’s Costume* found that although the Halloween costumes at issue afforded some decency or comfort, those features were incidental to the costumes’ festive purpose. Pl.’s MSJ at 10; Pl.’s Resp. at 8–9. Plaintiff concedes the Snuggie® offers comfort; however, Plaintiff contends the Snuggie® is not worn for decency or adornment and asserts that “all items that impart comfort are not necessar[ily] wearing apparel.” Pl.’s MSJ at 10, 11 & n.2 (citing space heaters, blankets, throws, and sheets as examples). Defendant contends the *Pompeo* definition is disjunctive, and the Snuggie® is, thus, “wearing apparel” because “it is a covering for the human body that is worn for comfort.” Def.’s XMSJ at 11. Plaintiff responds that Defendant has misinterpreted *Rubie’s Costume*. Pl.’s Resp. at 8–9.

A review of the Federal Circuit’s reasoning in *Rubie’s Costume* shows that the court synthesized the *Arnold* and *Pompeo* definitions. The court explained:

While the [Halloween costumes] may simulate the structural features of wearing apparel, and have some incidents of “clothes or coverings for the human body worn for decency or comfort,”

Antonio, 40 Cust. Ct. at 364, they are not practical “articles which are ordinarily worn,” Arnold, 147 U.S. at 496, 13 S.Ct. 406.

*Rubie’s Costume*, 337 F.3d at 1358. Although the court considered the Halloween costumes’ tendency to impart decency or comfort relevant to the inquiry, the case ultimately turned on whether the costumes were “ordinarily worn.” *Id.* at 1358; *see also LeMans Corp. v. United States*, 660 F.3d 1311, 1317 (Fed. Cir. 2011) (discussing *Rubie’s Costume* and noting that the decency or comfort features were secondary to the festive value of the costumes). Finding that the costumes were not ordinarily worn, the court reasoned that although the costumes may impart decency or comfort, “such benefits are incidental and the imports are primarily created for Halloween fun, strongly promoting festive value rather than *cognitive association as wearing apparel*. Such costumes are generally recognized as not being *normal articles of apparel*.” *Rubie’s Costume*, 337 F.3d at 1358 (emphasis added).

The dictionary definition of garment proposed by Defendant complements the Federal Circuit’s understanding of “wearing apparel.” Webster’s defines “garment” as “an article of outer clothing (as a coat or dress) usu. exclusive of accessories,” and clothing is defined as “covering for the human body or garments in general: all the garments and accessories worn by a person at any one time.” Webster’s at 428, 936; Def.’s XMSJ at 7; *see also LeMans Corp. v. United States*, 34 CIT 156, 163, 675 F. Supp. 2d 1374, 1381 (2010), *aff’d* 660 F.3d 1311 (Fed. Cir. 2011) (considering the Webster’s definition of garment); *H.I.M./Fathom*, 21 CIT at 781, 981 F. Supp. at 615 (considering same).

Defendant emphasizes the clothing portion of the definition, asserting that the Snuggie® is “worn as an outer covering for the human body at a particular time, such as when seated, standing, or reclining.” Def.’s XMSJ at 8 (internal quotation marks and citation omitted). Plaintiff urges the court to focus on the recognized exemplars, asserting that “a garment is something that can be identified as an article of outer clothing[,] such as ‘a coat or dress.’” Pl.’s MSJ at 12; Pl.’s Resp. at 5–6 & n.6 (contending the words “coat or dress” should not be ignored; rather, “they make it clear that common parlance defines garments to be recognized articles of clothing”).<sup>18</sup>

<sup>18</sup> Parties belabor the need to identify the “any one time” garments are worn to compose clothing. Pl.’s MSJ at 15 (arguing the Snuggie® is not worn at a particular time because it is used when a person is merely sitting or reclining “virtually motionless”); Def.’s XMSJ at 8–9 (arguing that being seated, standing, or reclining constitutes the “particular time” the Snuggie® is worn, retail packing shows people wearing the Snuggie® while “playing a board game, holding a baby, sewing, using a remote control or a laptop, and reading a

The exemplars contained in the garment definition are supported by the *Arnold* interpretation of “apparel” as that which is “ordinarily worn,” “ordinarily” being defined as “in the ordinary course of events: usually,” or, “in a commonplace . . . way.” Webster’s at 1589. Reference to the exemplars is also supported by *Rubie’s Costume*, which considered the primary purpose of the costumes as “promoting festive value rather than [having] cognitive association as wearing apparel.” *Rubie’s Costume*, 337 F.3d at 1358; *see also Pompeo*, 40 Cust. Ct. at 366 (crash helmets outside the scope of the term “wearing apparel” because “they would not be considered *in ordinary parlance* to be ‘wearing apparel’”) (emphasis added).

A review of the specialized articles included in the Explanatory Note (“EN”) to heading 6114 also supports interpreting “garment” as identifiable clothing items, and disfavors classifying the Snuggie® as a garment. Pursuant to EN 61.14, heading 6114 covers:

- (1) Aprons, boiler suits (coveralls), smocks and other protective clothing of a kind worn by mechanics, factory workers, surgeons, etc.
- (2) Clerical or ecclesiastical garments and vestments (e.g. monks’ habits, cassocks, copes, soutanes, surplices).
- (3) Professional or scholastic gowns and robes.
- (4) Specialized clothing for airmen, etc. . . .
- (5) Special articles of apparel . . . used for certain sports or for dancing or gymnastics (e.g. fencing clothing, jockeys’ silks, ballet skirts, leotards). . . .

When the nature of the article is unclear, EN 61.14 describes the article by reference to an identifiable clothing type (e.g., coveralls, habits, skirts, leotards). Defendant contends the Snuggie® is akin to “clerical or ecclesiastical garments and vestments” and “professional or scholastic gowns and robes” because those garments “have wide-armed sleeves and flow loosely around the body.” Def.’s XMSJ at 18. As Plaintiff contends, however, clerical and ecclesiastical garments have closures. Pl.’s Resp. at 7. It is unclear what constitutes a “book/magazine”; Def.’s XMSJ at 13–14 (Plaintiff improperly adds “functional mobility” to the “any one time” requirement). Recent cases in this court have paraphrased the definition of garment as “an outer covering for the human body at a particular time.” *H.I.M. / Fathom*, 21 CIT at 781, 981 F. Supp. at 615 (emphasis added) (finding the definition met because the wetsuits at issue were outer coverings worn while scuba diving); *see also LeMans Corp.*, 34 CIT at 163–64, 675 F. Supp. 2d at 1381–82 (noting that an individual wears motocross jerseys, pants, and motorcycle jackets “at a particular time,” such as when “engaging in motocross activities” or riding in off-road courses and public streets). The Webster’s definitions of garment and clothing do not require the identification of a particular time or activity in which the wearer may engage; rather, the “any one time” language simply conveys the idea that “clothing” constitutes the garments and accessories a person wears together at some time. What activity one engages in at that time, if any, is immaterial.

fessional or scholastic “gown,” distinct from a “robe,” but for Defendant’s analogy to hold, at a minimum, one must wear the Snuggie® backwards. Accordingly, the court is not persuaded by Defendant’s argument.

Finally, the manner in which the Snuggie® is used also disfavors classification as a garment. Preliminarily, Parties disagree whether use is an appropriate consideration when determining whether a good is properly classified in an *eo nomine* provision. Pl.’s MSJ at 16–17; Pl.’s Resp. at 12 (court should consider whether the Snuggie® is designed, manufactured, marketed, sold, and used as a garment); Def.’s XMSJ at 14–16 (consideration of use is improper because heading 6114 is an *eo nomine* provision); Def.’s Reply at 6. However, a careful review of the relevant Federal Circuit case law confirms the relevance of use in the context of an *eo nomine* provision.

In *GRK Canada*, the Federal Circuit explained that use may be considered in classifying an article pursuant to an *eo nomine* provision when (1) the use of the subject article is an important aspect of its identity, and consequently the article’s classification; or, as relevant here, when (2) “determining whether [the subject article] fits within the classification’s scope.” *GRK Canada*, 761 F.3d at 1358–59 (internal citations omitted) (considering use to determine under which *eo nomine* tariff provision to classify certain screws);<sup>19</sup> see also *CamelBak Prod., LLC v. United States*, 649 F.3d 1361, 1367–69 (Fed. Cir. 2011) (considering such factors as design, use or function, and sales and marketing literature to determine whether the inclusion of a hydration component with a cargo component rendered the subject

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<sup>19</sup> Recently, in *Sigma-Tau HealthScience, Inc. v. United States*, the Federal Circuit declined to consider use to determine whether the subject merchandise was covered by an *eo nomine* provision pertaining to vitamins. 838 F.3d 1272, 1278 (Fed. Cir. 2016). (“Because we conclude that HTSUS heading 2936 is an *eo nomine* provision with respect to “vitamins,” we need not consider the *Carborundum* factors, which pertain only to certain use provisions of the HTSUS.”). *Carborundum* analyzed whether imported powdered ferrosilicon “belongs to a class or kind of merchandise which is commonly used as raw material in the manufacture of ferrous metals.” *United States v. the Carborundum Co.*, 63 C.C.P.A. 98, 101–02, 536 F.2d 373, 376–77 (1976). The court relied on the following factors:

use in the same manner as merchandise which defines the class; the general physical characteristics of the merchandise; the economic practicality of so using the import; the expectation of the ultimate purchasers; the channels of trade in which the merchandise moves; the environment of the sale, such as accompanying accessories and the manner in which the merchandise is advertised and displayed; and the recognition in the trade of this use.

*Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312–13 (Fed. Cir. 2012) (citing *Carborundum*, 63 C.C.P.A. at 98, 536 F.2d at 377). Read together, *GRK Canada* and *Sigma-Tau HealthScience* stand for the proposition that this court may, but need not, consider use and related factors when determining the scope of an *eo nomine* provision. However, when considering use to determine whether an article fits within the scope of an *eo nomine* provision, the court is guided by the more limited use factors referenced in *GRK Canada*, which dealt with use in the context of an *eo nomine* provision, not *Carborundum*, which dealt with a use provision.

article beyond the scope of an *eo nomine* provision for backpacks); *Mast Industries, Inc. v. United States*, 9 CIT 549, 552–53 (1985), *aff’d* 786 F.2d 1144 (Fed. Cir. 1986) (subject imports were designed, manufactured, marketed and used as nightwear,” and, thus, were not classifiable under the *eo nomine* provision covering “shirts”); *United States v. Quon Quon Co.*, 46 C.C.P.A. 70, 73 (1959) (considering use to determine whether “certain rattancore, woven articles” are baskets) (“While unhesitatingly granting the truth of the contention that ‘baskets’ in the tariff act provides for baskets ‘*eo nomine*,’ this does not help us in the least to decide whether the imported articles *are* baskets.”). Factors guiding this court’s determination whether the Snuggie® is classifiable as a garment include (1) its “physical characteristics” and “features,” (2) “how it was designed and for what objectives,” (i.e., its intended use), and (3) “how it is marketed.” *GRK Canada*, 761 F.3d at 1358.

First, as to its physical characteristics and features, the Snuggie® consists of a 71-by-54 inch rectangular piece of polyester fleece knit fabric, with 28.5 inch sleeves attached to the front. Pl.’s SOF ¶¶ 15, 16, 28; Def.’s Resp. to Pl.’s SOF ¶¶ 15, 16, 28; Def.’s SOF ¶ 1; Pl.’s Resp. to Def.’s SOF ¶ 1. There is no closure, and it is open in the back. Pl.’s SOF ¶ 28; Def.’s Resp. to Pl.’s SOF ¶ 28. *In camera* inspection of the physical sample reveals a soft, long, loose-fitting article, measuring almost six feet by 4.5 feet, worn on the front, with long, loose sleeves. See *Trans-Atlantic Co. v. United States*, 60 C.C.P.A. 100, 102–03, 471 F.2d 1397, 1398 (1973) (viewing a sample of the subject import before concluding that it is covered by an *eo nomine* provision for hinges) (“the sample of the imported merchandise . . . is itself a potent witness”). Defendant contends the “one size fits all” nature of the Snuggie® supports classifying it as a garment because “fit” is “characteristic of a specification for garments.” Def.’s XMSJ at 16. However, “fit” in the context of “one size fits all” is a misnomer, and merely conveys single size availability. Notwithstanding the presence of the loose-fitting sleeves, there is nothing “fitted” about the Snuggie®.<sup>20</sup> The Snuggie®’s physical characteristics and features, such as

<sup>20</sup> Parties separately dispute whether the mere addition of sleeves to the polyester fleece knit fabric renders the Snuggie® classifiable as a garment. Plaintiff contends the sleeves are not “garment-like.” Pl.’s MSJ at 22–23 (citing Decl. of Hazel Clark, ECF No. 39–14). Defendant disputes Dr. Clark’s expertise in garment construction. Def.’s Resp. to Pl.’s SOF ¶ 19; Def.’s XMSJ at 15. Defendant argues that the “sleeves are shaped to the contours of the human body,” as evidenced by inspection reports showing that production of the Snuggie® required measuring across the back shoulder. Def.’s XMSJ at 16–17 (citing Def.’s Ex. G (inspection reports), ECF No. 42–1); see also Def.’s SOF ¶ 8; Pl.’s Resp. to Def.’s SOF ¶ 8. Lexicographic sources and relevant case law do not suggest that the presence of sleeves is outcome determinative. Rather, the issue is whether the Snuggie®, as a whole, is within the scope of the tariff term “garment” as the court has interpreted it. Although the sleeves “may simulate [a] structural feature[] of wearing apparel,” their addition to the fabric is

its dimensions and lack of rear closure, do not resemble a “normal article of apparel,” or an article “ordinarily worn” in any “common-place . . . way.”

Second, relevant to design and intended use,<sup>21</sup> the Snuggie® was inspired by the “Slanket®” and the “Freedom Blanket,” two products that are marketed as blankets. Pl.’s SOF ¶ 10; Def.’s Resp. to Pl.’s SOF ¶ 10. As discussed above, inspection of the physical sample shows that the Snuggie® was designed (and, thus, intended) to be loosely worn as an outer layer roughly covering the front of the user to provide warmth. Compl., Ex. B. The Snuggie® was not designed and was not intended to be used as a “normal article of apparel” classifiable as a garment.

Finally, as to sales and marketing, Allstar referred to the Snuggie® as a blanket, not apparel, in discussions with the foreign vendor of the Snuggie®, and in purchase orders, specifications, and commercial and retail invoices. Pl.’s SOF ¶¶ 4, 11, 12; Def.’s Resp. to Pl.’s SOF ¶¶ 4, 11, 12. Additionally, Allstar obtained trademark protection to use the mark “Snuggie®” on fleece blankets and throws. Pl.’s SOF ¶ 14; Def.’s Resp. to Pl.’s SOF ¶ 14. The Snuggie® is sold in the “bedding, housewares, general merchandise, ‘impulse buy,’ or ‘as-seen-on-TV’ departments of retail stores,” not in the apparel department. Pl.’s SOF ¶¶ 23–24; Def.’s Resp. to Pl.’s SOF ¶¶ 23–24. Defendant contends that Allstar’s emphasis on the sleeves in marketing materials supports garment classification. Def.’s XMSJ at 16. However, retail packaging and television advertising consistently describe the Snuggie®, *inter alia*, as a *blanket with sleeves*. The marketing materials depict people using the Snuggie® as a warm cover, as one might use a blanket, albeit one held in place and permitting greater use of hands with the addition of the sleeves. *See generally* Compl., Ex. B; Def.’s Ex. D.

In sum, after considering the terms of the headings, relevant Section or Chapter Notes, Explanatory Notes, and the common commercial meaning of garment as stated in lexicographic sources and case insufficient to find the Snuggie® a “practical ‘article[] . . . ordinarily worn.” *Rubies Costume*, 337 F.3d at 1358 (quoting *Arnold*, 147 U.S. at 496).

<sup>21</sup> Parties also discuss manufacturing (garment construction), relying on a mix of disputed and non-disputed facts and testimony. Pl.’s MSJ at 18–20; Def.’s XMSJ at 15. Because the Snuggie®’s method of manufacturing is not pertinent, the court need not reach those arguments. *See GRK Canada*, 761 F.3d at 1358 (discussing factors relevant to a use analysis in the context of an *eo nomine* provision); *CamelBak Prod.*, 649 F.3d at 1367–68 (discussing same). *But see Mast Industries*, 9 CIT at 552–53 (that subject imports were manufactured in the manufacturer’s lingerie division supported classification as nightwear, rather than as shirts)

law, the court finds the Snuggie® is not classifiable under subheading 6114.30.30.<sup>22</sup> The court turns to whether the Snuggie® is classifiable under subheading 6301.40.00.

#### **IV. The Snuggie® is Classifiable as a Blanket under Subheading 6301.40.00.**

As noted above, the court begins with GRI 1 to determine the appropriate classification according to the terms of the heading and relevant section or chapter notes, construing terms in accordance with their common commercial meaning. *N. Am. Processing*, 236 F.3d at 698; *Millenium Lumber Dist.*, 558 F.3d at 1328–29. Subheading 6301.40.00 is an *eo nomine* provision covering “Blankets (other than electric blankets) and traveling rugs, of synthetic fibers.”

Plaintiff contends the Snuggie® is classifiable under heading 6301 as an “enhanced or ‘improved’ blanket with ‘sleeves.’” Pl.’s MSJ at 28. Plaintiff further contends that the ENs to heading 6301, the dictionary definition of “blanket,” commercial references to the Snuggie® as a “blanket,” and its use as a blanket collectively support its classification under heading 6301. Pl.’s MSJ at 28–30. Defendant contends that Plaintiff’s dictionary definition does not support classifying the Snuggie® as a blanket, and “calling an article a blanket [in commerce] does not necessarily make it a ‘blanket’ for classification purposes.” Def.’s XMSJ at 18–20.

“Blanket” is not defined in the statute or legislative history; thus, the court considers its common commercial meaning. *Baxter Healthcare Corp.*, 182 F.3d at 1337. Plaintiff proposes the following dictionary definition, defining “blanket” as “a warm woolen (or nylon etc.) covering used esp. on a bed: any extended covering.” Pl.’s MSJ at 29 (quoting *New Webster’s Dictionary and Thesaurus of the English Language*, Lexicon Publications, Inc. (1993) at 102). Defendant proposes two additional definitions: *Merriam Webster*, defining “blanket” as “a large usually oblong piece of woven fabric used as a bed covering; a similar piece of covering used as a body covering (as for an animal),” and *Oxford Dictionaries*, defining “blanket” as “a large piece of woolen or similar material used as a bed covering or other covering

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<sup>22</sup> Plaintiff also contends that classifying the Snuggie® as a garment “is inconsistent with Customs’ longstanding position . . . that textile articles with some apparel features are not necessarily wearing apparel.” Pl.’s MSJ at 23–24 (collecting Customs rulings). Plaintiff further contends the court should consider the opinions expressed by certain Customs’ officials that the Snuggie® should not have been classified as a garment. Pl.’s MSJ at 26–27 (citing Pl.’s Ex.’s E–J, ECF Nos. 39–7 to 39–12). Defendant—correctly—contends that the Customs rulings cited by Allstar are inapposite, and the emails are “irrelevant.” Def.’s XMSJ at 17–18. Neither Customs’ rulings on different merchandise nor Customs’ officials’ emails, unadopted as the position of the agency, bear on this court’s “independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms.” *Warner-Lambert*, 407 F.3d at 1209.



for warmth.” Def.’s XMSJ at 19 (citations omitted). Likewise, The American Heritage Dictionary defines “blanket” as “[a] large piece of woven material used as a covering for warmth, especially on a bed.” The American Heritage Dictionary at 94.

Plaintiff “offer[s] as a common meaning that a ‘blanket’ is a flat, rectangular textile covering placed over the body to keep the user warm.” Pl.’s MSJ at 29. Defendant contends the dictionary “definitions suggest that a blanket is a single, continuous, uninterrupted piece of fabric that is usually used to cover a bed or an animal.” Def.’s XMSJ at 19.<sup>23</sup> Two points emerge from the dictionary definitions: first, that a blanket is a large (possibly oblong) piece of fabric, and second, that a blanket is used as a covering for warmth, often, but not always, as common knowledge dictates, on a bed. *See Brookside Veneers, Ltd.*, 847 F.2d at 789; *BASF Corp.*, 35 CIT at \_\_\_, 798 F. Supp. 2d at 1357 (courts may rely on their own understanding to construe HTSUS terms); *see also* EN 63.01 (heading 6301 “also covers . . . blankets for cots or prams”).

Retail packaging refers to the Snuggie®’s ability to “Keep[] You Warm And Your Hands Free!” Compl., Ex. B; Def.’s SOF ¶ 5 (quoting the retail packaging); Pl.’s Resp. to Def.’s SOF ¶ 5 (the retail packaging is the best evidence of its contents). The key inquiry, however, is whether the addition of sleeves transforms what may have been a blanket, into something that is not a blanket. *See* Def.’s XMSJ at 19 (the addition of sleeves transforms a piece of fabric “that may . . . have met the definition of blanket” into a garment); Pl.’s Resp. at 19 (“The parties appear to agree that after its initial stages of construction . . . the article resembles a blanket. . . . The basic functionality as a blanket has not been compromised by the addition of sleeves.”).

“Absent limitation or contrary legislative intent, an *eo nomine* provision includes all forms of the named article, even improved forms.” *CamelBak Prod.*, 649 F.3d at 1364–65 (internal quotation marks, alterations, and citation omitted). An article that “has been improved or amplified but whose essential characteristic is preserved or only incidentally altered is not excluded from an unlimited *eo nomine* statutory designation.” *Casio, Inc. v. United States*, 73 F.3d 1095, 1098 (Fed. Cir. 1996). However, when the subject import “is in char-

<sup>23</sup> Defendant also contends that Plaintiff’s dictionary definition is overbroad because pursuant to it, “a poncho could arguably be a ‘blanket.’” Def.’s XMSJ at 20. Plaintiff disputes this characterization, asserting that a poncho readily meets the definition of “garment” discussed *supra*, and contrasts the features of a poncho with the Snuggie®. Pl.’s Resp. at 20–21. The court need not resolve the Parties’ argument because neither the proper classification of a poncho nor its (dis)similarity to the Snuggie® are material to resolving the issue before the court.

acter or function something other than as described by a specific statutory provision—either more limited or more diversified—and the difference is significant,” it is not classifiable within that provision. *Casio*, 73 F.3d at 1097 (citation omitted). In other words, courts must assess whether the article has “features *substantially in excess* of those within the common meaning of the term.” *Casio*, 73 F.3d at 1098 (affirming trial court’s classification of a synthesizer as a musical instrument because the “additional features are designed primarily to make it easier for a musician to create music or embellish the sound he or she would normally be able to produce”); *see also CamelBak Prod.*, 649 F.3d at 1368–69 (article composed of hydration and cargo components was not classifiable as a backpack because it was principally designed to afford “hands-free” hydration). Relevant factors include the subject import’s design, use, or function, how the article is regarded in commerce and described in sales and marketing literature, and whether the addition “is a substantial or incidental part of the whole product.” *CamelBak Prod.*, 649 F.3d at 1368 (citations omitted).<sup>24</sup>

As discussed above, Parties do not dispute that specifications, purchase orders, and invoices describe the Snuggie® as a blanket, and Allstar has trademarked “Snuggie®” to use on blankets and throws. Pl.’s SOF ¶¶ 4, 11, 12, 14; Def.’s Resp. to Pl.’s SOF ¶¶ 4, 11, 12, 14. The Snuggie® is marketed as a blanket, albeit one with sleeves. Compl., Ex. B; Def.’s Ex. D. Retail packaging depicts people wearing the Snuggie® in the types of situations one might use a blanket; for example, while seated or reclining on a couch or bed, or outside cheering a sports team. Compl., Ex. B. The television commercial additionally shows a woman wearing a Snuggie® in place of a blanket that failed to sufficiently cover her. Def.’s Ex. D at 00:11–00:25. All of the above indicates that the Snuggie® is designed, used, and functions as a blanket, and is regarded in commerce and described in sales and marketing literature as a blanket.<sup>25</sup> *Cf. CamelBak Prod.*, 649 F.3d at 1368–69 (subject import not classifiable as a backpack when its design and marketing emphasized hydration); *Fairchild Camera & Instrument Corp. v. United States*, 53 C.C.P.A. 122, 124 (1966) (subject import classifiable as a camera when described as such in sales literature and by industry witnesses).

<sup>24</sup> Beyond general arguments about the significance (or lack thereof) of the sleeves, Parties do not address the case law relevant to this inquiry. *See* Pl.’s MSJ at 27–30; Def.’s XMSJ at 18–20; Pl.’s Resp. at 19–21; Def.’s Reply at 7.

<sup>25</sup> That the commercial also shows a woman standing and pouring coffee while wearing the Snuggie® does not detract from the court’s conclusion. Def.’s Ex. D at 00:51–00:53. One can also stand and pour coffee while wearing a “typical” sleeveless blanket over the shoulders.

The court further finds that the sleeves are incidental to the Snuggie®'s use as a blanket; the sleeves are not so substantial as to transform the Snuggie® into something other than a blanket. *See CamelBak Prod.*, 649 F.3d at 1368. The undisputed facts show that the Snuggie® “preserve[s]” the “essential characteristic[s]” of a blanket—a large piece of fabric providing a warm covering. *See Casio*, 73 F.3d at 1098. The sleeves support, rather than detract from, the Snuggie®'s “primary design and use” as a blanket because they ostensibly enable the Snuggie® to remain in place and keep the user warm while allowing the user to engage in certain activities requiring the use of their hands. *See Def.'s Ex. D* at 00:11–00:25; *see also CamelBak Prod.*, 649 F.3d at 1368–69 (trial court erred in “discount[ing] the hydration component . . . without considering the subject articles’ primary design and use”). The court thus concludes that the Snuggie® is correctly classified as a “blanket” under subheading 6301.40.00.<sup>26</sup>

### CONCLUSION

For the foregoing reasons, the court holds that the subject import is properly classified under tariff provision 6301.40.00, HTSUS. Thus, the court grants Plaintiff's motion for summary judgment, and denies Defendant's cross-motion for summary judgment. Judgment will be entered accordingly.

Dated: February 10, 2017

New York, New York

*/s/ Mark A. Barnett*

MARK A. BARNETT, JUDGE

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<sup>26</sup> The court need not reach Parties' alternative proposed classification pursuant to subheading 6307.90.98, which is a basket provision covering “Other made up articles.” While the Snuggie® is a “made up article,” GRI 3(a) mandates classification under the “most specific description,” which, here, is subheading 6301.40.00, covering blankets as a type of made up textile article.

## Slip Op. 17–16

WELL LUCK CO., INC., Plaintiff, v. UNITED STATES, Defendant.

**Before: Claire R. Kelly, Judge  
Court No. 13–00064**

[Granting Defendant's motion for summary judgment and denying Plaintiff's cross motion for summary judgment.]

Dated: February 15, 2017

*Luis F. Arandia, Jr.* and *Robert Thomas Givens*, Givens & Johnston, PLLC, of Houston, TX, for plaintiff.

*Alexander J. Vanderweide*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General and *Amy M. Rubin*, Assistant Director, International Trade Field Office. Of counsel on the brief was *Sheryl A. French*, Office of the Assistant Chief Counsel International Trade Litigation, U.S. Customs and Border Protection.

**OPINION****Kelly, Judge:**

This matter is before the court on cross-motions for summary judgment regarding the proper classification of Plaintiff's entry of roasted, salted, and/or flavored whole sunflower seeds in their shells.<sup>1</sup> See Def.'s Mot. Summ. J., Sept. 1, 2016, ECF No. 29; Pl.'s Cross Mot. Summ. J., Oct. 10, 2016, ECF No. 32. Defendant maintains that summary judgment should be granted in its favor because there is no genuine issue of material fact that United States Customs and Border Protection ("Customs") properly classified Plaintiff's entry of roasted, salted, and/or flavored whole sunflower seeds in their shell imported by Well Luck Co., Inc. ("Well Luck") under Harmonized Tariff Schedule of the United States (2010) ("HTSUS") subheading 2008.19.90,<sup>2</sup> which covers "Fruits, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included: Nuts, peanuts (ground-nuts) and other seeds, whether or not mixed together: Other, including mixtures: Other" at a duty rate of 17.9% ad

<sup>1</sup> On June 5, 2015, the court granted Plaintiff's consent motion to designate this action as a test case "selected from a number of other pending actions involving the same significant question of law or fact, that is intended to proceed first to final determination to serve as a test of the right to recovery in other actions" in accordance with USCIT Rule 84. See Order, June 5, 2015, ECF No. 19; see also USCIT R. 84.

<sup>2</sup> Plaintiff's Entry Number D52–0938894–6 was entered on April 9, 2010 through the Port of Los Angeles/Long Beach. See Summons, Feb. 8, 2013, ECF No. 1. Therefore, all references to the HTSUS refer to the 2010 edition corresponding to the version of the HTSUS in effect at the time of entry.

valorem. See Def.'s Mem. Supp. Mot. Summ. J. 5–13, Sept. 1, 2016, ECF No. 29 (“Def.’s SJ Br.”). Plaintiff challenges Customs’ denial of its protest contesting Customs’ classification of its imported merchandise within subheading 2008.19.90, HTSUS. Compl. ¶¶ 20, 21–44, Sept. 2, 2014, ECF No. 5. Plaintiff contends Defendant’s motion for summary judgment should be denied and that summary judgment should be granted in its favor. Mem. Law and Authorities Supp. Well Luck Company, Inc.’s Cross-Mot. Summ. J. and Resp. Def.’s Mot. Summ. J. 10–38, Oct. 10, 2016, ECF No. 32 (“Pl.’s Br. Supp. X-Mot. SJ and Resp.”) Plaintiff contends there is no genuine issue of material fact that Customs misclassified its entry, and that, as a matter of law, Customs should have classified its entry under subheading 1206.00.00, HTSUS, which covers “Sunflower seeds, whether or not broken” at a duty-free rate. *Id.* For the reasons that follow, the court grants Defendant’s motion for summary judgment and denies Plaintiff’s cross-motion for summary judgment.

### ***JURISDICTION AND STANDARD OF REVIEW***

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2006) and Section 515 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1515 (2006),<sup>3</sup> which together grant the court authority to review actions contesting the denial of a protest regarding the classification of imported merchandise, and the court reviews such actions de novo. 28 U.S.C. § 2640(a)(1) (2006). The court will grant summary judgment when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” USCIT R. 56(a).

### ***UNDISPUTED FACTS***

The following facts are not in dispute. The imported merchandise in Plaintiff’s entry consists of “three varieties of wet-cooked and/or roasted, salted, flavored and/or unflavored sunflower seeds in unbroken shells”: “All Natural Flavor,” “Spiced Flavor,” and “Coconut Flavor.” Def.’s Statement Undisputed Material Facts ¶¶ 1–2, Sept. 1, 2016, ECF No. 29 (“Def.’s Statement Facts”); Pl.’s Resps. Def., Rule 56.3 Statement Undisputed Material Facts ¶¶ 1–2, Oct. 10, 2016, ECF No. 32 (“Pl.’s Resp. Def.’s Facts”). The contents of the “All Natural Flavor” variety are sunflower seeds and salt. Def.’s Statement Facts ¶ 2(a); Pl.’s Resp. Def.’s Facts ¶ 2(a). The contents of the “Spiced Flavor” variety are sunflower seeds, salt, spice, artificial sweetener (Acesulfame Potassium), Monosodium Glutamate, and ar-

<sup>3</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2006 edition.

tificial Flavor. Def.'s Statement Facts ¶ 2(b); Pl.'s Resp. Def.'s Facts ¶ 2(b). The contents of the "Coconut Flavor" variety are sunflower seeds, salt, coconut flavor, artificial sweetener (Acesulfame Potassium), and Monosodium Glutamate. Def.'s Statement Facts ¶ 2(c); Pl.'s Resp. Def.'s Facts ¶ 2(c). The sunflower seeds in all varieties of Plaintiff's imported merchandise are of the common sunflower, *Helianthus annuus*, and the seeds used by Plaintiff are used, as is, for human consumption and not for the extraction of edible or industrial oils or fats. Def.'s Statement Facts ¶¶ 5–7; Pl.'s Resp. Def.'s Facts ¶¶ 5–7.

All of the varieties of Plaintiff's imported merchandise are initially processed by being machine and hand selected for quality, size, and purity. Def.'s Statement Facts ¶¶ 3(i), 4(i); Pl.'s Resp. Def.'s Facts ¶¶ 3(i), 4(i). Following selection, the sunflower seeds for Plaintiff's "Spiced Flavor" and "Coconut Flavor" varieties are further processed by being "immersed in water, sweeteners, spice and/or flavoring at 248 degrees Fahrenheit (120 degrees Celsius) for approximately 120 minutes." Def.'s Statement Facts ¶ 4(ii); Pl.'s Resp. Def.'s Facts ¶ 4(ii). The seeds for the "Spiced Flavor" and "Coconut Flavor" varieties are then dried. Def.'s Statement Facts ¶ 4(iii); Pl.'s Resp. Def.'s Facts ¶ 4(iii). Following selection for the "All Natural Flavor" variety and following drying for the "Spiced Flavor" and "Coconut Flavor" varieties, the seeds in all varieties of Plaintiff's imported merchandise are then further processed by being heated in an oven to 302 degrees Fahrenheit (150 degrees Celsius) for approximately 65 minutes. Def.'s Statement Facts ¶¶ 3(ii), 4(iv); Pl.'s Resp. Def.'s Facts ¶¶ 3(ii), 4(iv). Salt is added to the seeds during this heating process for all varieties. Def.'s Statement Facts ¶¶ 3(ii), 4(iv); Pl.'s Resp. Def.'s Facts ¶¶ 3(ii), 4(iv). The sunflower seeds in all of Plaintiff's imported merchandise are then cooled, and those in unbroken shells are packaged into finished product bags sold for consumption and imported. Def.'s Statement Facts ¶¶ 3(iii), 3(iv), 4(v), 4(vi); Pl.'s Resp. Def.'s Facts ¶¶ 3(iii), 3(iv), 4(v), 4(vi).

Plaintiff's imported merchandise is "not fungible or interchangeable with raw sunflower seeds." Def.'s Statement Facts ¶ 8; Pl.'s Resp. Def.'s Facts ¶ 8. Nor is Plaintiff's imported merchandise "fungible or interchangeable with sunflower seeds that [: (1)] "only undergo heat treatment designed to ensure better preservation of the seeds (e.g., by inactivating lipolytic enzymes and eliminating moisture"; (2) "only undergo heat treatment to inactivate anti-nutritional factors"; (3) "only undergo heat treatment to facilitate their use"; or (4) "are not roasted, salted and flavored." Def.'s Statement Facts ¶¶ 9–12; Pl.'s Resp. Def.'s Facts ¶¶ 9–12. The sunflower seeds in Plaintiff's im-

ported products “do not undergo heat treatment designed mainly for the purpose of de-bittering.” Def.’s Statement Facts ¶ 13; Pl.’s Resp. Def.’s Facts ¶ 13.

## *DISCUSSION*

### **I. The Meaning of the Competing Tariff Terms**

The dispute concerns the proper classification of Plaintiff’s roasted, salted, and/or flavored sunflower seeds. Plaintiff argues that its entry of imported merchandise, as a matter of law, is classifiable under subheading 1206.00.00, HTSUS, which covers “sunflower seeds, whether or not broken . . . Free.” Pl.’s Br. Supp. X-Mot. SJ and Resp. 5; *see also* Heading 1206, HTSUS. Defendant counters that Plaintiff’s imported merchandise was correctly classified under subheading 2008.19.90, HTSUS which covers:

2008	Fruit, nuts, and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included:	
	. . .	
2008.19	Other, including mixtures:	
	. . .	
2008.19.90	Other.	17.9%.

Subheading 2008.19.90, HTSUS.

#### **A. Subheading 1206.00.00, HTSUS**

Plaintiff argues that the phrase of “sunflower seeds” in subheading 1206.00.00, HTSUS includes roasted, salted, and/or flavored sunflower seeds.<sup>4</sup> Pl.’s Br. Supp. X-Mot. SJ and Resp. 11–19. Defendant contends that the relevant sources define “sunflower seeds” as seeds of the common sunflower plant, *Helianthus annuus*, irrespective of any treatment or use, and the Explanatory Note to the Harmonized Commodity Description Coding System (“EN”)<sup>5</sup> clarifies that subheading 1206.00.00, HTSUS only encompasses seeds of the *Helianthus annuus* that are minimally processed. Def.’s Resp. Pl.’s Cross-Mot. Summ. J. and Reply Supp. Def.’s Mot. Summ. J. 2–3, and 5, Dec. 14, 2016, ECF No. 35 (“Def.’s Resp. X-Mot. and Reply Br.”); Def.’s SJ Br. 6–8.

<sup>4</sup> Neither party argues that the term “whether or not broken” is relevant to determining whether Plaintiff’s imported merchandise falls within Heading 1206, HTSUS.

<sup>5</sup> All citations to the ENs are to the 2007 version, the most recently promulgated edition at the time of importation.

Determining the correct classification of merchandise involves two steps. First, the court determines the proper meaning of the tariff provisions, a question of law. See *Link Snacks, Inc. v. United States*, 742 F.3d 962, 965 (Fed. Cir. 2014). Second, the court determines whether the subject merchandise properly falls within the scope of the tariff provisions, a question of fact. *Id.* Where no genuine “dispute as to the nature of the merchandise [exists], then the two-step classification analysis collapses entirely into a question of law.” *Link Snacks*, 742 F.3d at 965–66 (citation omitted). Customs classification is governed by the General Rules of Interpretation (“GRI”), which are part of the HTSUS statute. *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011). When determining the correct classification for merchandise, a court first construes the language of the headings in question “and any relative section or chapter notes.” GRI 1. The “terms of the HTSUS are construed according to their common commercial meanings.” *BenQ Am.*, 646 F.3d at 1376 (internal quotation omitted).

The tariff term “sunflower seeds” encompasses seeds of the *Helianthus annuus* that are minimally further processed only to an extent that leaves the seeds suitable for general uses, including sowing and oil extraction. Neither party disputes that the meaning of the tariff term “sunflower seeds” includes the seeds of the common sunflower plant, *Helianthus annuus*. See Pl.’s Br. Supp. X-Mot. SJ and Resp 19; Def.’s Resp. X-Mot. and Reply Br. 3. All of the dictionary and encyclopedia sources offered and relied upon by Plaintiff define “sunflower seeds” as the seeds of the plant, *Helianthus annuus*, or as the seeds of the “sunflower” or “common sunflower” plant. See Pl.’s SJ Br. 11–15;<sup>6</sup> Mem. Law and Authorities Supp. Well Luck Company Inc.’s Cross-Mot. Summ. J. and Resp. Def.’s Mot. Summ J. Ex. H, Oct. 10, 2016, ECF No. 32–8. These same sources, which are all reference works concerned specifically with food, also indicate that “sunflower seeds” can be, or are usually, dried or roasted to be eaten as a

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<sup>6</sup> Plaintiff’s cites the following sources containing definitions of “sunflower seeds” that are seeds from the sunflower plant *Helianthus annuus* : (1) John F. Mariani, *The Dictionary of American Food & Drink* 307 (Hearst Books 1994); (2) L. Patrick Coyle, *The World Encyclopedia of Food* 661 (1982); (3) Theodora Fitzgibbon, *The Food of the Western World* 460 (1976); (4) Alan Davidson, *The Oxford Companion to Food* 770 (1999); (5) Herbert W. Ockerman, *Food Science Sourcebook: Terms and Descriptions, Part I* 737–38 (2d ed. 1991); (6) Charles G. Sinclair, *International Dictionary of Food & Cooking* 527 (1998); (7) Joyce Rubash, *Master Dictionary of Food and Wine* 319 (1990); (8) Steven Labensky et al. eds., *Webster’s New World Dictionary of the Culinary Arts* 388 (1997); (9) Charles Sinclair, *Dictionary of Food* 561 (2d ed. 2005); and (10) *Dictionary of Food Science and Nutrition* 231 (2006)). See Pl.’s SJ Br. 11–15; see also Mem. Law and Authorities Supp. Well Luck Company Inc.’s Cross-Mot. Summ. J. and Resp. Def.’s Mot. Summ J. Ex. H, Oct. 10, 2016, ECF No. 32–8.



snack.<sup>7</sup> See Mem. Law and Authorities Supp. Well Luck Company Inc.'s Cross-Mot. Summ. J. and Resp. Def.'s Mot. Summ J. Ex. I, Oct. 10, 2016, ECF No. 32–9. The general dictionaries consulted by the court define the terms “sunflower” and “seeds” separately, and they also highlight the fertilized or ripened ovule of the plant *Helianthus annuus*.<sup>8</sup> See *Webster's Third New International Dictionary* 2055, 2291 (Philip Babcock Gove, Ph. D. and Merriam-Webster Editorial Staff eds. 1993). These general definitions also emphasize the capa-

<sup>7</sup> Plaintiff's cites the following sources containing definitions of “sunflower seeds” that refer to the fact that seeds of the sunflower plant *Helianthus annuus* can be prepared to be eaten: (1) John F. Mariani, *The Dictionary of American Food & Drink* 307 (Hearst Books 1994) (defining “sunflower” as “any variety of plants in the genus *Helianthus*, especially the ‘common sunflower’ (*H. annuus*) . . . bearing seeds that are dried or roasted to be eaten as a snack); (2) L. Patrick Coyle, *The World Encyclopedia of Food* 661 (1982) (describing sunflower sides as seeds of the plant, *Helianthus annuus*, whose “seeds are usually the size of watermelon or pumpkin seeds. They are black or gray and occasionally dark-striped. Dried or roasted and salted, they are eaten as a snack.”); (3) Theodora Fitzgibbon, *The Food of the Western World* 460 (1976) (describing “sunflower seeds” as of a plant (*Helianthus annuus*) “whose seeds are dried and roasted . . . and eaten . . . They are also sold roasted by a nut vendor”); (4) Alan Davidson, *The Oxford Companion to Food* 770 (1999) (“sunflowers” as “*Helianthus annuus*, an annual plant of the daisy (Compositae) family, grown mainly for the valuable oil obtained from the seeds . . . [the seeds] are also a popular and nutritious snack food, raw or roasted and salted”); (5) The New Food Lover's Companion 607 (2001) (describing “sunflower seeds” as seeds of the sunflower plant, “hav[ing] a hard black-and-white striped shell that must be removed. Sunflower seeds can be dried or roasted (either in or out of the shell, and are sold either plain or salted.”); (6) Herbert W. Ockerman, *Food Science Sourcebook: Terms and Descriptions, Part I* 737–38 (2d ed. 1991) (describing “sunflower” as a plant (*Helianthus annuus*) grown for seed, animal feed and oil” whose “parched seed may be consumed; used for human food, to produce oil, and as poultry feed”); (7) Charles G. Sinclair, *International Dictionary of Food & Cooking* 527 (1998) (defining “sunflower seeds” as the seeds of the sunflower (which it defines as “a tender annual *Helianthus annuus*”) “eaten raw or roasted as a snack or used in salads”); (8) Joyce Rubash, *Master Dictionary of Food and Wine* 319 (1990) (defining “sunflower seeds” as “seeds of the sunflower plant; used roasted and eaten like nuts”); (9) Steven Labensky et al. eds., *Webster's New World Dictionary of the Culinary Arts* 388 (1997) (defining “sunflower seeds” as “seeds of the sunflower plant; have a hard black-and-white striped shell that is removed before eating; usually eaten dried or roasted, with or without salt”); (10) Charles Sinclair, *Dictionary of Food* 561 (2d ed. 2005) (defining “sunflower seeds” as “[t]he seeds of the sunflower, eaten raw or roasted as a snack or used in salads”); and (11) *Dictionary of Food Science and Nutrition* 231 (2006) (defining “sunflower seeds” as “the large seeds of the sunflower, eaten raw, roasted as a snack and used in salads”). See Pl.'s SJ Br. 11–15; see also Mem. Law and Authorities Supp. Well Luck Company Inc.'s Cross-Mot. Summ. J. and Resp. Def.'s Mot. Summ J. Ex. H, Oct. 10, 2016, ECF No. 32–8.

<sup>8</sup> The court consulted the following general dictionary definitions of the terms “sunflower” and “seed,” respectively:

*Sunflower*: 1. A plant of the genus *Helianthus*. 2. *Heliotrope*. 3. Any of various plants that either bear a superficial likeness to the common sunflower or open in the sunshine. *Webster's Third New International Dictionary* 2291 (Philip Babcock Gove, Ph. D. and Merriam-Webster Editorial Staff eds. 1993).

*Seed*: n. **1a**. Something that is sown or to be sown . . . **b**. the fertilized and ripened ovule of a seed plant comprising a miniature plant usu. Accompanied by a supply of food (as endosperm or perisperm), enclosed in a protective seed coat, often accompanied by auxiliary structures (as an aril or caruncle), and capable under suitable conditions of independent development into a plant similar to the one that produced it. *Webster's Third New International Dictionary* 2055 (Philip Babcock Gove, Ph. D. and Merriam-Webster Editorial Staff eds. 1993).

bility of sowing seeds. *Id.* at 2291. Published industry sources provided by Plaintiff reflect that “sunflower seeds” may be eaten as a snack either raw, roasted, or seasoned.<sup>9</sup> Pl.’s Br. Supp. X-Mot. SJ and Resp 15–19; *see also* Mem. Law and Authorities Supp. Well Luck Company Inc.’s Cross-Mot. Summ. J. and Resp. Def.’s Mot. Summ J. Ex. I, Oct. 10, 2016, ECF No. 32–9. The food-focused lexicographic sources provided by Plaintiff therefore indicate the commercial meaning of “sunflower seeds” may include seeds of the plant *Helianthus annuus* that are relatively unprocessed and for general use as well as those that are further processed by roasting, salting, and/or flavoring suitable to be eaten as a snack.

The General EN to Chapter 12 clarifies that the definition of the tariff term “sunflower seeds” refers to sunflower seeds that have been minimally processed such that they are suitable for general use. General EN Chapter 12. The EN indicates that Headings 1201 through 1207

cover seeds and fruits of a kind used for the extraction (by pressure or by solvents) of edible or industrial oils and fats, whether they are presented for that purpose, for sowing or for other purposes. These headings **do not**, however, **include**. . . certain seeds and fruits from which oil may be extracted but which are primarily used for other purposes.

. . .

[The seeds and fruits covered by the heading] may also have undergone heat treatment designed mainly to ensure better preservation (e.g., by inactivating the lipolytic enzymes and eliminating part of the moisture), for the purpose of de-bittering, for inactivating antinutritional factors or to facilitate their use. However, such treatment is permitted only if it does not alter the character of the seeds and fruits as natural products and does not make them suitable for a specific use rather than for general use.

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<sup>9</sup> Plaintiff cites the web page of the National Sunflower Association “About Sunflower Seeds and Kernals,” which describes “sunflower seeds” as “[n]ormally roasted and seasoned and eaten as a snack”. Pl.’s Br. Supp. X-Mot. SJ and Resp. 16; *see also* Mem. Law and Authorities Supp. Well Luck Company Inc.’s Cross-Mot. Summ. J. and Resp. Def.’s Mot. Summ J. Ex. I, Oct. 10, 2016, ECF No. 32–9. Plaintiff also cites the U.S. Department of Agriculture’s Plant Guide, which describes the uses of sunflower seeds by stating they “were and still are eaten raw, roasted, cooked, dried, and ground, and used as a source of oil.” Pl.’s Br. Supp. X-Mot. SJ and Resp. 16–17; *see also* Mem. Law and Authorities Supp. Well Luck Company Inc.’s Cross-Mot. Summ. J. and Resp. Def.’s Mot. Summ J. Ex. I, Oct. 10, 2016, ECF No. 32–9.

*Id.*<sup>10</sup> Thus, the EN defines included seeds as those “used for extraction . . . of edible or industrial oils and fats, whether they are presented for that purpose, for sowing, or for other purposes.” See General EN Chapter 12. Although one might argue that the phrase “other purposes” would capture seeds that are suitable for snacking, the EN makes clear that any processing must leave them suitable for general use, which includes oil extraction, sowing, and other purposes. See *id.* The EN specifies that seeds processed so as to make them suitable only for a specific use are not included in Chapter 12, HTSUS. See General EN Chapter 12. Seeds that have undergone processing that leaves them suitable only for snacking are suitable only for a specific use.

The overall structure of the HTSUS indicates that Chapter 12 includes less processed plant matter whereas Chapter 20, advocated by Defendant, includes plant matter that has been processed to a greater extent. The Customs Cooperation Council, in introducing the HTSUS system, indicated that:

[a]s a general rule, goods are arranged in order of their degree of manufacture: raw materials, unworked products, semi-finished products, finished products. For example, live animals fall in Chapter 1, animal hides and skins in Chapter 41 and leather footwear in Chapter 64. The same progression also exists within other Chapters and headings.

Customs Co-Operation Council, *Introducing the International Convention on the Harmonized Commodity Description and Coding System* 32 (1987); see also Lawrence J. Bogard, *2 Customs Law and Administration: Commentary* § 7:9 (November 2016 Update). Therefore, based upon the words of the tariff and the intent of the drafters as to the meaning of those words reflected in the EN, as well as the structure of the tariff, the court concludes that “sunflower seeds,” as used in Heading 1206, HTSUS, are seeds of the common sunflower plant, *Helianthus annuus*, that are not processed in a way that renders them unsuitable for extraction of edible or industrial oils and fats, sowing, and other purposes.

Plaintiff argues that the common and commercial meaning of “sunflower seeds” in Heading 1206, HTSUS, unambiguously includes sunflower seeds without limitation. Pl.’s Reply Mem. Further Supp. Cross-Mot. Summ. J. and Opp’n Def.’s Cross-Mot. Summ. J. 9, Jan. 3, 2017, ECF No. 36 (“Pl.’s Reply Def.’s SJ Mot.”). Plaintiff therefore

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<sup>10</sup> Although not controlling, the Harmonized Description and Coding System’s Explanatory Notes are persuasive so long as they do not contradict the commercial meaning of an ambiguous term. *StoreWALL, LLC v. United States*, 644 F.3d 1358, 1363 (Fed. Cir. 2011) (citations omitted).

contends that a definition that limits “sunflower seeds,” as used in Heading 1206, HTSUS, solely to minimally processed sunflower seeds contradicts the common and commercial meaning of the term, as supplied by the lexicographic and industry sources it provided.<sup>11</sup> *Id.* at 10. However, the lexicographic and industry sources provided by Plaintiff include a broad definition of seeds of the common sunflower plant, *Helianthus annuus*, that may refer to either less processed sunflower seeds suitable for general purposes or more processed prepared sunflower seeds suitable for specific purposes. Nothing in the language of the HTSUS heading itself clarifies whether this broad definition or a narrower definition applies. However, the EN to Chapter 12 and the structure of the HTSUS support a narrower interpretation of this language.

Plaintiff also argues that Congress expressed no intent to exclude sunflower seeds that are further processed for human consumption because Heading 1206, HTSUS contains no restrictive language limiting the heading only to raw or minimally processed sunflower seeds.<sup>12</sup> Pl.’s Br. Supp. X-Mot. SJ and Resp. 22–23. As an initial matter, the definition as stated by the court does not exclude all sunflower seeds processed for human consumption, merely those processed in a manner that renders the seeds unsuitable for general use. This definition comports with the clarification of the tariff term provided by the ENs. *See* EN Chapter 12. Plaintiff contrasts the example of Heading 1202, HTSUS, which specifically excludes “roasted or otherwise cooked” peanuts, with Heading 1206, HTSUS, which lacks specific exclusionary language. Pl.’s Br. Supp. X-Mot. SJ and Resp. 22–23. Exclusionary language is not necessary to determine that a more restrictive definition is meant to apply in a particular tariff heading. The fact that another provision has exclusionary language does not undermine the court’s conclusion that the term “sunflower

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<sup>11</sup> Plaintiff also argues that Heading 1206, as an *eo nomine* provision, covers all forms of “sunflower seeds” because the language of the subheading does not contain limiting language. Pl.’s Reply Def.’s SJ Mot. 13. However, Plaintiff cites no authority that bars a court from considering ENs that do not contradict the meaning of a tariff term provided in the statute as persuasive authority as to the meaning of an ambiguous tariff term where lexicographic sources do not clarify the ambiguity.

<sup>12</sup> Plaintiff argues that Defendant’s classification impermissibly imposes a use limitation drawn from the ENs to an *eo nomine* provision where none exists in Heading 1206, HTSUS. Pl.’s Br. Supp. X-Mot. SJ and Resp. 28. Defining the tariff term “sunflower seeds” so as to clarify the meaning of this broad blanket term that, in common and commercial use, may apply both to minimally processed seeds suitable for sowing and oil extraction and more processed salted, roasted, and/or flavored seeds does not impose a use limitation, as Plaintiff suggests. Neither the term “sunflower seeds” in Heading 1206, HTSUS, nor the ENs suggests that this is a tariff provision that is controlled by use. Therefore, the court does not consider the intended or actual use of Plaintiff’s imported merchandise in defining the tariff term. *See GRK Canada, Ltd. v. United States*, 761 F.3d 1354, 1359 (Fed. Cir. 2014) (citations omitted).

seeds” could encompass both minimally processed and further processed seeds. The ENs, which reflect the intent of the drafters, clarify that the tariff term is meant to refer to sunflower seeds that are only minimally processed. Plaintiff points to no contradictory source of legislative intent indicating that “sunflower seeds,” as used in Heading 1206, HTSUS, includes roasted, salted, and/or flavored sunflower seeds. Evaluating the tariff provision in the context of the HTSUS as a whole, the meaning of the tariff term “sunflower seeds” in Heading 1206, HTSUS, is limited to products that have not been processed in a way that make them unsuitable for general use.

### B. Subheading 2008.19.90, HTSUS

Subheading 2008.19.90, HTSUS provides for:

2008	Fruit, nuts, and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included:
	. . .
2008.19	Other, including mixtures:
	. . .
2008.19.90	Other.

Subheading 2008.19.90, HTSUS. Although neither party offers lexicographic sources to define the tariff terms of this heading, the court has consulted several dictionary definitions of the terms “edible,” “prepared,” and “preserved” for guidance in discerning their common and commercial meanings. The dictionary definitions of “edible” emphasize suitability for eating, particularly for consumption by human beings.<sup>13</sup> The relevant dictionary definitions of “prepared” emphasize making an item ready or suitable beforehand for eating.<sup>14</sup> The rel-

<sup>13</sup> The court consulted the following definitions of the term “edible”:

*Edible*: suitable by nature for use as food esp. for human beings.

*Webster’s Third New International Dictionary* 722 (Philip Babcock Gove, Ph. D. and Merriam-Webster Editorial Staff eds. 1993).

*Edible*: Fit to be eaten.

*The American Heritage Dictionary of the English Language* 568 (Fourth Ed. 2000).

*Edible*: A. *adj.* Eatable, fit to be eaten . . . B. An eatable substance, an article of food. 5 *The Oxford English Dictionary* 70 (J.A. Simpson and E.S.C. Weiner eds., 2nd ed. 1989).

<sup>14</sup> The court consulted the following definitions for “prepared” or “prepare”:

*Prepared*: made ready, fit, or suitable beforehand treatment.

*Webster’s Third New International Dictionary* 1791 (Philip Babcock Gove, Ph. D. and Merriam-Webster Editorial Staff eds. 1993).

*Prepare*: *vt.* 1a: to make ready for eating.

*Id.* at 1790.

*Prepare*: *v.*—pared, -paring, -pares —*tr.* . . . 2. To put together or make by combining various elements or ingredients; manufacture or compound.

*The American Heritage Dictionary of the English Language* 1386 (Fourth Ed. 2000).

evant dictionary definitions of “preserved” emphasize the function of preparing food for future use, especially to prevent spoilage.<sup>15</sup>

The EN to Heading 2008 clarifies the sorts of preservation and preparation contemplated by Heading 2008, HTSUS:

This heading covers fruit, nuts and other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise than by any of the processes specified in other Chapters or in the preceding headings of this Chapter.

It includes, *inter alia*:

(1) Almonds, ground-nuts, areca (or betel) nuts and other nuts, dry-roasted or fat-roasted, whether or not containing or coated with vegetable oil, salt, flavours, spices or other additives.

...

The products of this heading are generally put up in cans, jars or airtight containers, or in casks, barrels or similar containers.

EN, Heading 2008. Thus, subheading 2008.19.90, HTSUS covers parts of plants made ready or suitable in advance for eating, such as by dry-roasting or fat roasting, whether or not containing or coated with vegetable oil, salt, flavors, spices or other additives, and made fit for future use in a manner to prevent spoilage.

## II. Plaintiff’s Sunflower Seeds

Plaintiff’s sunflower seeds are not classified in subheading 1206.00.00 HTSUS because it is undisputed that they are not suitable for general use. In order for Plaintiff’s imported seeds to fall within Heading 1206, HTSUS, they must be suitable for general use rather

*Prepared*: 5. To make ready (food, a meal) for eating . . . 7. a. To make, produce, or form for some purpose; in mod. use *esp.* “to make by regular process”.

12 *The Oxford English Dictionary* 376 (J.A. Simpson and E.S.C. Weiner eds., 2nd ed. 1989).

<sup>15</sup> The court consulted the following dictionary definitions for “preserved” or “preserve”:

*Preserve*: 3a: to keep or save from decomposition (as by refrigeration, curing, or treating with a preservative).

*Webster’s Third New International Dictionary* 1794 (Philip Babcock Gove, Ph. D. and Merriam-Webster Editorial Staff eds. 1993).

*Preserve*: v. 4. To prepare (food) for future use as by canning or spoiling . . . — *intr.* 1. To treat fruit or other foods so as to prevent decay.

*The American Heritage Dictionary of the English Language* 1388 (Fourth Ed. 2000).

*Preserve*: [3a.] To prepare (fruit, meat, etc.) by boiling with sugar, salting, or pickling so as to prevent its decomposition or fermentation.

12 *The Oxford English Dictionary* 405 (J.A. Simpson and E.S.C. Weiner eds., 2nd ed. 1989).

*Preserved*: 2. *spec. a.* Treated so as to resist putrefaction.

*Id.*

than a specific use.<sup>16</sup> It is undisputed that the “Spiced Flavor” and “Coconut Flavor” varieties of imported merchandise are wet-cooked in water, sweeteners, spice and/or flavoring at 248 degrees Fahrenheit (120 degrees Celsius). Def.’s Statement Facts ¶ 4(ii); Pl.’s Resp. Def.’s Facts ¶¶ 4(ii). It is likewise undisputed that the seeds in all varieties of Plaintiff’s imported merchandise are heated in an oven to 302 degrees Fahrenheit (150 degrees Celsius) for approximately 65 minutes. Def.’s Statement Facts ¶¶ 3(ii), 4(iv); Pl.’s Resp. Def.’s Facts ¶¶ 3(ii), 4(iv). Salt is added to the seeds during this heating process for all varieties. Def.’s Statement Facts ¶¶ 3(ii), 4(iv); Pl.’s Resp. Def.’s Facts ¶¶ 3(ii), 4(iv). There is unrefuted evidence offered by Defendant that heating sunflower seeds at temperatures of 302 degrees Fahrenheit (150 degrees Celsius) adversely affects the harvest, viability, preservation, and storage of the seeds. *See* Def.’s Mem. Supp. Mot. Summ. J. Ex. G, Sept. 1, 2016, ECF No. 29–6 (including a study indicating that a drying temperature of greater than 53 degrees Celsius should not be used if seed viability is to be maintained); Def.’s Mem. Supp. Mot. Summ. J. Ex. H, Sept. 1, 2016, ECF No. 29–6 (including another study indicating that sunflowers to be used for seed should not be dried at temperatures over 110 degrees Fahrenheit).<sup>17</sup> Therefore, it is undisputed that heating the sunflower seeds to 150 Degrees Celsius for approximately 65 minutes renders Plaintiff’s imported merchandise unsuitable for sowing, one of the general uses listed in the General EN to Chapter 12. Plaintiff recognizes that “baking at 150°C (302°F) may adversely affect the use of oil-type seeds for extraction,” *see* Pl.’s Br. Supp. X-Mot. SJ and Resp. 34, and Plaintiff offers no affirmative evidence that its seeds are suitable for oil extraction.<sup>18</sup> Thus, the sunflower seeds in Plaintiff’s imported

<sup>16</sup> It is undisputed that Plaintiff’s imported merchandise contains seeds of the common sunflower plant, *Helianthus annuus*. Def.’s Statement Facts ¶ 5; Pl.’s Resp. Def.’s Facts ¶ 5. It is likewise undisputed that Plaintiff’s imported products contain sunflower seeds that are in unbroken shells. Def.’s Statement Facts ¶¶ 1–2; Pl.’s Resp. Def.’s Facts ¶¶ 1–2.

<sup>17</sup> Plaintiff concedes that the sunflower seeds in its imported merchandise are not fungible or interchangeable with raw sunflower seeds or those that only undergo heat treatment: (1) to ensure better preservation of the seeds (*e.g.*, by inactivating lipolytic enzymes and eliminating moisture); (2) to inactivate anti-nutritional factors; (3) to facilitate their use; or (4) designed mainly for the purpose of de-bittering. Def.’s Statement Facts ¶¶ 8–11, 13; Pl.’s Resp. Def.’s Facts ¶¶ 8–11, 13.

<sup>18</sup> Plaintiff argues that the fact that its sunflower seeds may not be suitable for oil extraction is irrelevant to classifying its seeds, which are confectionary-type sunflower seeds that are baked at 150 degrees Celsius (302 degrees Fahrenheit), because baking does not affect their suitability for their intended use (*i.e.*, for human consumption as a snack). *See* Pl.’s Br. Supp. X-Mot. SJ and Resp. 34. Plaintiff implies that the industry understands that only “oil-type seeds” are used for oil extraction. *See id.* This argument also fails because Heading 1206, HTSUS, does not distinguish between “oil-type” seeds and “confectionary” seeds. *See* Heading 1206, HTSUS.

Plaintiff’s argument ignores the meaning of Heading 1206, HTSUS, which excludes “sunflower seeds” processed in a manner that makes them suitable for a specific use rather

merchandise are not prima facie classifiable as “sunflower seeds,” as that term is used in Heading 1206, HTSUS, because the seeds in Plaintiff’s imported merchandise are not suitable for general use because they are processed in a way that makes them unsuitable for all uses.<sup>19</sup>

Plaintiff’s imported roasted, salted and/or flavored sunflower seeds are “seeds” Not Elsewhere Specified or Included Within Subheading 2008.19.90, HTSUS. Both parties concede that, as seeds of the common sunflower plant, *Helianthus annuus*, Plaintiff’s imported merchandise are parts of plants. Def.’s Statement Facts ¶ 5, Pl.’s Resp. Def.’s Facts ¶ 5. It is likewise undisputed that Plaintiff’s imported merchandise is used, as is, for human consumption. Def.’s Statement Facts ¶ 6, Pl.’s Resp. Def.’s Facts ¶ 6. Thus, Plaintiff’s merchandise is an edible part of a plant.

Both parties concede that all varieties of Plaintiff’s merchandise are heated in an oven at 302 degrees Fahrenheit for approximately 65 minutes. Def.’s Statement Facts ¶¶ 3(ii), 4(iv); Pl.’s Resp. Def.’s Facts ¶¶ 3(ii), 4(iv). It is undisputed that all varieties of Plaintiff’s imported merchandise are roasted and salted. Def.’s Statement Facts ¶¶ 3(ii), 3(iv), 4(iv), 4(vi); Pl.’s Resp. Def.’s Facts ¶¶ 3(ii), 3(iv), 4(iv), 4(vi). Therefore, Plaintiff’s imported merchandise is prepared or preserved by dry-roasting and salting. Plaintiff points to no other section of the HTSUS other than subheading 2008.19.90, HTSUS that might otherwise include sunflower seeds processed in the manner that Plaintiff’s imported merchandise is processed. The court cannot locate any competing tariff provision that covers edible seeds from plants processed in the manner that Plaintiff processes its imported sunflower

than for general use. See General EN Chapter 12. Even if Plaintiff’s imported merchandise is suitable for snacking, an “other purpose,” Plaintiff offers no evidence that they are suitable for sowing or oil extraction. On the other hand, Defendant offers uncontroverted evidence that Plaintiff’s seeds are not suitable for sowing because heating the seeds to the temperatures Plaintiff does affects their viability for sowing. See Def.’s Mem. Supp. Mot. Summ. J. Ex. G, Sept. 1, 2016, ECF No. 29–6 (including a study indicating that a drying temperature of greater than 53 degrees Celsius should not be used if seed viability is to be maintained); Def.’s Mem. Supp. Mot. Summ. J. Ex. H, Sept. 1, 2016, ECF No. 29–6 (including another study indicating that sunflowers to be used for seed should not be dried at temperatures over 110 degrees Fahrenheit).

Plaintiff also implies that the heating to which its seeds are subjected “is moderate heat designed mainly to ensure better preservation, inactivate lipolytic enzymes, and remove moisture.” See Pl.’s Br. Supp. X-Mot. SJ and Resp. 34–35. However, Plaintiff concedes that its seeds are not fungible or interchangeable with seeds that undergo heat treatment for any of these purposes. See Def.’s Statement Facts ¶¶ 9–13; Pl.’s Resp. Def.’s Facts ¶¶ 9–13.

<sup>19</sup> Plaintiff maintains that even if its imported merchandise is prima facie classifiable under both Heading 1206, HTSUS, and subheading 2008.19.90, HTSUS, it is more properly classifiable in HTSUS heading 1206 because Heading 1206, HTSUS, describes Plaintiff’s merchandise with far more precision and accuracy and encompasses a narrower range of items. Pl.’s Br. Supp. X-Mot. SJ and Resp. 35–38 (citing GRI Rule 3(a)). The court need not reach GRI 3(a) because Plaintiff’s merchandise is not prima facie classifiable as “sunflower seeds” under Heading 1206, HTSUS.



seed snacks. Therefore, as a matter of law, Plaintiff's imported roasted, salted, and/or flavored sunflower seed snack products are seeds that are prepared or preserved not elsewhere specified or included within the meaning of subheading 2008.19.90, HTSUS.

Plaintiff argues that its "roasted, salted, and flavored sunflower seeds in the shell eaten as a snack" are "sunflower seeds" within the meaning of Heading 1206, HTSUS, because snacking is an "other purpose." Pl.'s Br. Supp. X-Mot. SJ and Resp. 33–35. However, as already discussed, Heading 1206, HTSUS, excludes "sunflower seeds" processed in a manner that does not make them suitable for all uses. Sunflower seeds suitable for general use must be suitable for sowing and oil extraction, not just suitable for snacking. *See* General EN Chapter 12. Roasted, salted, and/or flavored sunflower seeds are not suitable for sowing. *See* Def.'s Mem. Supp. Mot. Summ. J. Ex. G, Sept. 1, 2016, ECF No. 29–6 (including a study indicating that a drying temperature of greater than 53 degrees Celsius should not be used if seed viability is to be maintained); Def.'s Mem. Supp. Mot. Summ. J. Ex. H, Sept. 1, 2016, ECF No. 29–6 (including another study indicating that sunflowers to be used for seed should not be dried at temperatures over 110 degrees Fahrenheit). Plaintiff recognizes that "baking at 150°C (302°F) may adversely affect the use of oil-type seeds for extraction," *see* Pl.'s Br. Supp. X-Mot. SJ and Resp. 34, and Plaintiff offers no affirmative evidence that its seeds are suitable for oil extraction. Therefore, Plaintiff's imported merchandise is not suitable for general purposes and is not "sunflower seeds" within the meaning of Heading 1206, HTSUS.

### **CONCLUSION**

For the foregoing reasons, the roasted, salted, and/or flavored sunflower seeds at issue in this case are properly classifiable as "Nuts, peanuts (ground nuts) and other seeds, whether or not mixed together: Other including mixtures: Other" under subheading 2008.19.90, HTSUS. Therefore, Defendant's motion for summary judgment is granted, and Plaintiff's motion for summary judgment is denied. Judgment will be entered accordingly.

Dated: February 15, 2017

New York, New York

*/s/ Claire R. Kelly*

CLAIRE R. KELLY, JUDGE

