U.S. Customs and Border Protection

Slip Op. 13–106

ALBEMARLE CORP., Plaintiff, and NINGXIA HUAHUI ACTIVATED CARBON CO., LTD., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and CALGON CARBON (TIANJIN) CO., LTD., CALGON CARBON CORP. AND NORIT AMERICAS INC., Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 11–00451

[Remanding to the U.S. Department of Commerce the final results of an administrative review of an antidumping duty order on certain activated carbon from the People's Republic of China]

Dated: August 15, 2013

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OPINION AND ORDER

Stanceu, Judge:

In this consolidated action,[1] three plaintiffs challenge the determination ("Final Results") the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude the third periodic administrative review of an antidumping duty order on imports of certain activated carbon (the "subject merchandise")[2] from the People's Republic of China ("China" or the "PRC"). *Certain Activated Carbon from the People's Republic of China: Final Results and Partial Rescission of Third Antidumping Duty Administrative Review*, 76 Fed. Reg. 67,142 (Oct. 31, 2011) ("*Final Results*"); Issues & Decision Mem., A-570–904, ARP 3–10 (Oct. 24, 2011) ("Decision Mem."). The third review covers entries of subject merchandise made between April 1, 2009, and March 31, 2010 (the "period of review" or "POR").

Before the court are three motions for judgment on the agency record brought under USCIT Rule 56.2. Plaintiff Albemarle Corporation ("Albemarle") is supported in its Rule 56.2 motion by plaintiff-intervenor Ningxia Huahui Activated Carbon Co., Ltd. ("Huahui"). Mot. for J. upon the Agency R. pursuant to Rule 56.2 by Pl. Albemarle Corporation and Intervenor-Pl. Ningxia Huahui Activated Carbon Co., Ltd. (May 18, 2012), ECF No. 43 ("Albemarle Rule 56.2 Mot."). The two other Rule 56.2 motions are brought by plaintiff Shanxi DMD Corporation ("Shanxi DMD"), and plaintiffs Cherishmet Inc., Ningxia Guanghua Cherishmet Activated Carbon Company, Ltd. ("GHC") and Beijing Pacific Activated Carbon Products Company, Ltd. ("BPAC") (collectively, "Cherishmet"), respectively. Mot. for J. on the Agency R. (May 18, 2012), ECF No. 42 ("Shanxi DMD Rule 56.2

[1] The actions consolidated under Consol. Court No. 11–00451, *Albemarle Corp. v. United States*, are *Ningxia Guanghua Cherishmet Activated Carbon Company, Ltd. v. United States*, Court No. 11–00468 and *Shanxi DMD Corp. v. United States*, Court No. 11–00475. Order (Jan. 26, 2012), ECF No. 34.

[2] Activated carbon is a powdered, granular, or pelletized carbon product obtained by heat "activating" various carbon-containing materials, such as wood or coal, with steam or carbon dioxide gas. *See Notice of Antidumping Duty Order: Certain Activated Carbon From the People's Republic of China*, 72 Fed. Reg. 20,988 (Apr. 27, 2007) ("*Order*"). The activating process removes organic materials and creates a porous inner surface in the material. *See Certain Activated Carbon from China*, Inv. No. 731-TA-1103, USITC Pub. 3913, at 3 (Apr 2007) (Final) ("*ITC Report*"). Excluded from the scope of the antidumping duty order is "chemically-activated" carbon. *Order*, 72 Fed. Reg. at 20,988. Chemically-activated carbon is produced by treating the raw materials with chemicals to achieve a similar result through chemical rather than physical means. *ITC Report* at 3. Activated carbon is commonly used in water filtration, food and chemical purification, and emissions filtration. *Id.*

Mot."); Consol. Pls.' Rule 56.2 Mot. for J. upon the Agency R. (May 18, 2012), ECF No. 44 ("Cherishmet Rule 56.2 Mot.").

Opposing the Rule 56.2 motions are defendant United States and defendant-intervenors Calgon Carbon Corporation and Norit Americas, Inc. (collectively "CCC"), and Calgon Carbon (Tianjin) Co., Ltd. ("CCT"). Def.'s Resp. to Pl.'s, Consol. Pls.', and Pl.-Intervenor's Mots. for J. upon the Agency R. (July 30, 2012), ECF No. 57 ("Def.'s Resp."); Def.-Intervenor's Br. in Resp. to Pls.' Mots. for J. on the Agency R. (July 30, 2012), ECF No. 53 ("CCC's Resp."); Def.-Intervenor Calgon Carbon (Tianjin) Co., Ltd.'s Br. in Opp'n to Pls.' Rule 56.2 Mot. for J. upon the Agency R. (July 30, 2012), ECF No. 56 ("CCT's Resp.").

For the reasons discussed herein, the court will order a remand for reconsideration of certain aspects of the Final Results.

I. BACKGROUND

A. The Parties to the Consolidated Action

Plaintiff Albemarle is a U.S. importer of subject merchandise. Compl. ¶ 5 (Nov. 18, 2011), ECF No. 6 ("Albemarle Compl."); *Certain Activated Carbon From the People's Republic of China: Prelim. Results of the Third Antidumping Duty Administrative Review, and Prelim. Rescission in Part*, 76 Fed. Reg. 23,978, 23,979 (Apr. 29, 2011) ("*Preliminary Results*"). During the POR, Albemarle imported activated carbon from plaintiff-intervenor Huahui, a Chinese exporter. Albemarle Compl. ¶ 16; Consent Mot. to Intervene as a Matter of Right as Pl.-Intervenor 1 (Dec. 2, 2011), ECF No. 13 ("Huahui Mot. to Intervene"). Plaintiff Shanxi DMD is also a Chinese exporter of activated carbon. Compl. ¶ 5 (Dec. 5, 2011), ECF No. 9 (Court No. 11–00475) ("Shanxi DMD Compl."). Plaintiffs GHC and BPAC are producers and/or exporters of subject merchandise, and plaintiff Cherishmet, Inc. is the U.S. importer affiliate of GHC and BPAC. Compl. ¶ 3 (Nov. 23, 2011), ECF No. 6 (Court No. 11–00468) ("Cherishmet Compl.").

Defendant-intervenor CCT is a Chinese producer and exporter of activated carbon, and defendant-intervenor CCC, the parent company of CCT, is a domestic activated carbon producer and the petitioner. Consent Mot. to Intervene as of Right 2 (Dec. 6, 2011), ECF No. 18; Mot. for Leave to Intervene as of Right 2 (Dec. 15, 2011), ECF No. 24; *Final Results*, 76 Fed. Reg. at 67,143.

B. Procedural History

On April 27, 2007, Commerce issued the antidumping order on certain activated carbon from China. *Notice of Antidumping Duty Order: Certain Activated Carbon From the People's Republic of China*, 72 Fed. Reg. 20,988 (Apr. 27, 2007). Commerce initiated the third administrative review of that order on May 28, 2010. *Initiation of Antidumping & Countervailing Duty Administrative Reviews*, 75 Fed. Reg. 29,976 (May 28, 2010).

Commerce published the preliminary results of the review on April 29, 2011 after selecting Jacobi Carbons AB ("Jacobi") and CCT as the only mandatory respondents, and after identifying India as the primary surrogate country for the purpose of valuing the factors of production ("FOPs"). *Preliminary Results*, 76 Fed. Reg. at 23,981. Commerce determined a preliminary margin of $0.05 per kilogram for CCT and a preliminary *de minimis* margin for Jacobi. *Id.* Commerce also preliminarily assigned a margin of $0.05 per kilogram ("$/kg") to the unexamined respondents who had demonstrated entitlement to a rate that was separate of that assigned to the PRC entity (the "separate rate" respondents), which included Huahui, Shanxi DMD, BPAC, and GHC. *Id.*

In the Final Results, issued October 31, 2011, Commerce determined *de minimis* margins for both mandatory respondents, Jacobi and CCT. *Final Results*, 76 Fed. Reg. at 67,145. Huahui was assigned a margin of $0.44/kg, the margin Commerce assigned to it in the previous (second) administrative review of the order, while the other separate rate respondents were assigned a margin of $0.28/kg, the rate Commerce assigned to the separate rate respondents in the previous review. *Id.*

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a(a)(2)(B)(iii), including an action contesting the Department's issuance, under section 751 of the Tariff Act, 19 U.S.C. § 1675(a), of the final results of an administrative review of an antidumping duty order.[3] In reviewing the final results, the court will hold unlawful any finding, conclusion, or determination that is not support by substantial evidence on the record or that is

[3] Unless otherwise indicated, all statutory citations herein are to the 2006 edition of the U.S. Code and all citations to regulations are to the 2011 edition.

otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

B. Claims Asserted in this Litigation

There are four claims in this consolidated action. First, both Albemarle and Shanxi DMD challenge the Department's valuation of CCT's coal-based carbonized materials using Indian Harmonized Tariff Schedule ("Indian HTS") subheading 4402.90.10, "Coconut Shell Charcoal." Mem. of P. & A. in Supp. of Rule 56.2 Mot. for J. on the Agency R. by Pl. Albemarle Corp. and Intervenor-Pl. Ningxia Huahui Activated Carbon Co., Ltd. 11, 19–23 (May 21, 2012), ECF No. 45 ("Albemarle Rule 56.2 Mem."); Pl.'s Rule 56.2 Mem. in Support of Mot. for J. upon the Agency R. 2–3 (May 18, 2012), ECF No. 42–2 ("Shanxi DMD Rule 56.2 Mem."). Second, Albemarle challenges the Department's valuation of CCT's "coal and fines" by-products, claiming this valuation is unlawful because it is based on findings unsupported by substantial evidence and, contrary to Department policy, is significantly higher than the Department's surrogate value for the coal-based carbonized materials. Albemarle Rule 56.2 Mem. 15–18. Third, Albemarle challenges the $0.44/kg margin that Commerce assigned to Huahui in the Final Results, while Shanxi DMD and Cherishmet challenge the Department's assignment of a $0.28/kg "separate rate" margin to Shanxi DMD, BPAC and GHC, respectively.[4] Albemarle Rule 56.2 Mem. 24–29; Shanxi DMD Rule 56.2 Mem. 8–17; Brief in Supp. of Consol. Pls.' Rule 56.2 Mot. for J. upon the Agency R. 14–18 (May 18, 2012), ECF No. 44 ("Cherishmet Rule 56.2 Mem."). Fourth, Shanxi DMD claims that Commerce erred in assigning it a specific, *i.e.*, U.S. dollar per kilogram, assessment and cash deposit rate rather than an *ad valorem* rate. Shanxi DMD Rule 56.2 Mem. 17–25.

As discussed herein, the court decides that on remand Commerce must reconsider (1) the surrogate values it determined for carbonized materials and coal and fines by-products; (2) the rate it assigned to certain separate-rate respondents who are parties to this litigation; and (3) its decision to use a per-unit rather than an *ad valorem* rate for the cash deposit and assessment rates applicable to Shanxi DMD.

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[4] The separate-rate claim is the only claim plaintiffs Cherishmet Inc., Ningxia Guanghua Cherishmet Activated Carbon Company, Ltd. ("GHC") and Beijing Pacific Activated Carbon Products Company, Ltd. ("BPAC") (collectively, "Cherishmet") asserted in their Rule 56.2 motion. Consolidated Pls.' Rule 56.2 Mot. for J. upon the Agency R. (May 18, 2012), ECF No. 44. Other claims asserted in Cherishmet's complaint are not addressed in the motion and therefore are abandoned. Compl. ¶¶ 15–19 (Nov. 23, 2011), ECF No. 6 (Court No. 11–00468).

C. On Remand, Commerce Must Reconsider the Surrogate Values for CCT's Carbonized Materials and Coal and Fines By-Products

When determining the normal value of subject merchandise from a nonmarket economy country such as China, Commerce, applying section 773(c)(1) of the Tariff Act, ordinarily determines "surrogate" values for "the factors of production utilized in producing the merchandise" and does so "based on the best available information regarding the values of such factors in a market economy country or countries" that Commerce considers appropriate. 19 U.S.C. § 1677b(c)(1). The surrogate values Commerce determined for CCT's use of coal-based "carbonized material" in producing subject merchandise, and for CCT's "coal and fines" by-products derived from processing the coal-based carbonized material, are at issue in this litigation. Defendant has submitted voluntary remand requests under which Commerce would reconsider both surrogate values, which requests CCT opposes. For the reasons discussed below, the court will order Commerce to reconsider both surrogate values.

1. The Surrogate Value for CCT's Coal-Based Carbonized Material

Carbonized material, the principal material used in producing activated carbon, consists of "most any solid material that has a high carbon content," including "coal, wood, coconut shells, olive stones, and peat." *Certain Activated Carbon from China*, Inv. No. 731-TA-1103, USITC Pub. 3913, at I-5 (Apr. 2007) (Final). Coal is the material most commonly used in producing activated carbon in the United States and China. *Id.*

In the Preliminary Results, Commerce calculated the surrogate value of CCT's coal-based carbonized material using Global Trade Atlas ("GTA") import data for Indian HTS subheading 2704.00.90, "Other Cokes of Coal," which yielded an average unit value ("AUV") of 13,865.83 Rupees per metric ton ("Rs/MT"). *Decision Mem.* 14; *Mem. from Int'l Trade Specialist to the File* 2 (Apr. 22, 2011) (Admin. R.Doc. No. 2138). In the Final Results, Commerce substantially reduced its surrogate value to 3,796.54 Rs/MT, which reflected an AUV Commerce obtained from GTA import data for Indian HTS subheading 4402.90.10, "Coconut Shell Charcoal," submitted by Jacobi. *Letter from Jacobi to the Sec'y of Commerce* Ex. 1 (May 19, 2011) (Admin-.R.Doc. No. 2164).

Commerce changed its decision in response to comments that mandatory respondent Jacobi, who is not a party to this action, submitted to Commerce in a case brief. In that brief, Jacobi argued that "[t]he

Department should value Jacobi's use of carbonized materials using coconut shell charcoal classified under HTS 4402.90.10 because 'other cokes of coal' is not used to produce activated carbon." *Letter from Jacobi to the Sec'y of Commerce* 1 (June 14, 2011) (Admin.R.Doc. No. 2204) ("*Jacobi Case Br.*"). Citing the Department's Draft Remand Determination for the first administrative review of the Order,[5] Jacobi argued, further, that "coconut shell charcoal shares similar properties with carbonized material," namely, "porosity and adsorption," and that "those similar properties are essential in the production of activated carbon." *Id.* at 3–4 (citation omitted).

Agreeing with Jacobi's argument, Commerce valued both Jacobi's and CCT's carbonized materials using import statistics for Indian HTS subheading 4402.90.10 ("Coconut Shell Charcoal") and the associated AUV of 3,796.54 Rs/MT. *Decision Mem.* 14. Citing the Department's Final Remand Redetermination for the first administrative review of the Order, Commerce found that "Other Cokes of Coal" was not specific to substances that are carbonized, and that the subheading for "Coconut Shell Charcoal" is more product-specific because it pertains to a material with properties of adsorption and porosity similar to those of carbonized material and essential in the production of subject merchandise. *Id*. at 14–15 (citing *Final Remand Redetermination in the First Administrative Review* 10–11 (July 26, 2011) (Consol. Court No. 09–00524)).[6] Commerce also noted that the coconut shell charcoal import data were contemporaneous with the POR and exclusive of tax and duty, consistent with the Department's preferences when selecting surrogate values. *Id*. at 14.

Albemarle and Shanxi DMD claim that the Department's revised surrogate value cannot be sustained because there is no record evidence to support a finding that the determination was based on the best available information. Albemarle Rule 56.2 Mem. 19–23; Shanxi DMD Rule 56.2 Mem. 2–3.

At oral argument held on December 13, 2012, the court noted that the record as filed by Commerce appeared to lack the evidence on which Commerce relied in determining its surrogate value for carbonized materials, specifically, the evidence on which the Department relied in the Final Remand Redetermination in the First Review. Oral Tr. 87–88 (Dec. 13, 2012), ECF No. 84. Defendant agreed to submit

[5] The Department's Draft Remand Determination in the first administrative review of the Order on certain activated carbon from the People's Republic of China was issued pursuant to this Court's Opinion and Order in *Calgon Carbon Corp. v. United States*, 35 CIT __, Slip Op. 11–21 (Feb. 17, 2011).

[6] In *Hebei Foreign Trade and Advertising Corp. v. United States*, 35 CIT __, __, 807 F. Supp. 2d 1317, 1319 (Oct. 24, 2011), this Court sustained the redetermination of the surrogate value for carbonized material value in the first administrative review, *id.* at n.2.

the missing materials, and the court entered an order with dates for that submission and for submission of additional briefing by the parties on the carbonized material surrogate value issue. Order (Dec. 12, 2012), ECF No. 73. Rather than submit additional record materials in accordance with the order, defendant moved for a voluntary remand, under which Commerce would reconsider its surrogate value for CCT's carbonized material input and also submit the missing record materials. Def. Mot. for a Voluntary Remand 2–3 (Dec. 19, 2012), ECF No. 74. Defendant stated as its reason for requesting a voluntary remand that, the court having ordered the completion of the administrative record, "the proper course of action at this point is for the Government to seek a voluntary remand to place the evidence on the administrative record and for the agency to accept comments from the parties regarding the evidence and to address those comments in a remand." *Id.* at 2. Defendant, accordingly, requested that "the Court vacate its December 13, 2012 order to the extent that it requires the agency to supplement the record with the evidence related to the surrogate value for carbonized material," and that "[i]n the instant proceeding, Commerce [] be allowed to place the evidence on the record and consider comments from the parties in the first instance." *Id.*

CCT filed a response in opposition to defendant's voluntary remand motion. Def.-Intervenor Calgon Carbon (Tianjin) Co., Ltd.'s Resp. in Opp'n to Def.'s Mot. for Voluntary Remand (Dec. 20, 2012), ECF No. 75 ("CCT's Opp'n to Def.'s Mot."). CCT argued that a voluntary remand on the Department's valuation of its carbonized materials is inappropriate because the court, by requesting that Commerce supplement the record submitted, "has already fashioned the appropriate procedure to address the carbonized material claims" and "it is not the proper role of this Court to effectively delegate to Commerce to decide, after the fact, whether its contested final decision was supported by substantial evidence." *Id.* at 1, 4. CCT also argued that plaintiffs' claims regarding the surrogate value of CCT's carbonized material input "should be dismissed on exhaustion grounds pursuant to 28 U.S.C. § 2637(d)" because no party before Commerce commented in opposition to Jacobi's advocating a change from Indian HTS subheading 2704.00.90, "Other Cokes of Coal," to Indian HTS subheading 4402.90.10, "Coconut Shell Charcoal," for valuation of CCT's carbonized material input. *Id.* at 2; CCT's Resp. 15–16.

An agency generally should be allowed a voluntary remand to reconsider its position provided that "the agency's concern is substantial and legitimate." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028–30 (Fed. Cir. 2001). Here, however, the rationale defendant put

forth to explain the basis for the Department's concern is opaque. Reconsideration of the carbonized material surrogate value does not necessarily follow merely from the fact that the agency erred in failing to include in the administrative record submitted to the court the evidence on which it relied. Defendant offers no reason related to the merits of the decision it wants Commerce to have the opportunity to reconsider, nor does defendant provide a convincing explanation of why the order the court issued upon oral argument is not sufficient. That order directed the completion of the record and allowed the parties to submit briefing that may address the additional evidence. In this respect, CCT's objection to the voluntary remand request has some merit. However, the court finds reasons to order reconsideration of the carbonized material surrogate value despite the shortcomings in defendant's motion.

Although sparse in its justification, defendant's motion indicates at least that Commerce desires to reconsider its decision, thus placing CCT in the unfavorable posture of taking a position on a voluntary remand request that is contrary to the current position of defendant United States, the party on whose behalf CCT has intervened. Furthermore, as discussed later in this Opinion and Order, the court sees a need for a remand on the other surrogate value at issue in this case, which pertains to coal and fines by-products. As the court explains, the two surrogate value issues are related with respect to an assertion that the Department has a policy of disfavoring valuations for downstream by-products that exceed those of the upstream material input.

Finally, the court does not find merit in CCT's objection grounded in the requirement to exhaust administrative remedies. As CCT concedes, whether and how the exhaustion requirement is applied is a matter for the court's discretion. CCT's Resp. 15; 28 U.S.C. § 2637(d) ("the [court] shall, where appropriate, require the exhaustion of administrative remedies."); *Corus Staal BV v. United States*, 502 F.3d 1370, 1379–80 (Fed. Cir. 2007) (stating that "applying exhaustion principles in trade cases is subject to the discretion of the judge of the Court of International Trade"). Here, the Department's change in position on the carbonized material surrogate value was announced in the Final Results, after the submission of case briefs. *See Decision Mem.* 14; 19 C.F.R. § 351.309(c)(2) (requiring a party to submit a case brief "present[ing] all arguments that continue in [its] view to be relevant to [the Department's] final determination or final results").

2. The Surrogate Value for CCT's Coal and Fines By-Products

In the Preliminary Results, Commerce determined that CCT was eligible for by-product offsets for "non-activated by-products, such as pressroom powder and non-activated fines." *Preliminary Results*, 76 Fed. Reg. at 23,989. CCT submitted proposed surrogate value information based on Indian HTS data, which Commerce accepted, resulting in a surrogate value for its "coal by-product" of 4,860.88 Rs/MT and a surrogate value for its "fines by-product" of 11,319.90 Rs/MT.[7] *Mem. from Case Analyst to the File* 5, Ex. 1 (Apr. 22, 2011) (Admin.R.Doc. No. 2144). No party having objected to or commented on these determinations, Commerce left these two by-product surrogate values unchanged in the Final Results. *Decision Mem.* 1–2. As a result, the Decision Memorandum did not address issues pertaining to these surrogate values. *Id.*

Albemarle claims that the by-product surrogate value determinations are unsupported by substantial evidence and run counter to agency policy "because they result in an unreasonable and inappropriate inversion" in which the downstream by-products are valued considerably higher than the upstream carbonized material. Albemarle Rule 56.2 Mem. 3–4, 15. Pointing to the Department's revised surrogate value of 3,796.54 Rs/MT for carbonized materials, Albemarle argues that Commerce should correct the value inversion by reverting to Indian HTS subheading 2704.00.90, "Other Cokes of Coal," with a value of 13,865.83 Rs/MT, to value CCT's carbonized material input, as was done in the Preliminary Results. *Id*. at 18. Defendant, while not confessing error, seeks a voluntary remand so that Commerce may reconsider the surrogate values it assigned to CCT's coal and fines by-products. Def.'s Resp. 19–20.

CCT seeks to raise various arguments against defendant's request for a voluntary remand and moves for the filing of its brief in opposition. Def.-Intervenor Calgon Carbon (Tianjin) Co., Ltd.'s Mot. for Leave to File Resp. in Opp'n to Def.'s Req. for Voluntary Partial Remand 3 (Sept. 25, 2012), ECF No. 67 ("CCT's Opp'n to Def.'s Remand Request"). No party having objected to CCT's motion to file its brief, the court grants CCT's motion and deems the accompanying brief filed as of September 25, 2012. The court, however, does not agree with the arguments CCT puts forth.

[7] According to Calgon Carbon (Tianjin) Co., Ltd ("CCT"), the fines by-product "is subject merchandise that is simply smaller in size and thus is generally not sold to customers, but instead is recycled and used by CCT to produce subject merchandise." *Letter from CCT to the Sec'y of Commerce: CCT Sections C and D Questionnaire Resp.* 19 (Pub. Version) (Nov. 23, 2010) (Admin.R.Doc. No. 2018) (Section D, Factors of Production Resp.).

CCT opposes defendant's remand request on the grounds that (1) Albemarle did not exhaust its administrative remedies on the issue of surrogate values for coal and fines by-products; (2) defendant has offered no reason for requesting a remand; (3) a remand is not warranted unless error is shown; and (4) a voluntary remand would further delay and complicate the court's proceedings, causing a delay of at least the 60 days for the requested remand and complicating the court's appellate review "such that the Court likely would have to deal with two different determinations by the Department (the original final results and the remand results)." CCT's Opp'n to Def.'s Remand Request 2–5. The court is not persuaded by these arguments and will order a remand in response to defendant's request.

As discussed *supra*, decisions pertaining to exhaustion of administrative remedies are matters for the court's discretion. Here, the court does not consider it appropriate to dismiss Albemarle's challenge to the by-product surrogate values for failure to exhaust. The ground on which Albemarle brings that challenge—a value inversion relative to the value of carbonized material—did not become apparent until issuance of the Final Results, when Commerce announced that it had changed its surrogate value for the carbonized material based on the argument made by Jacobi.

The court also disagrees with CCT's assertion that defendant offered no reason for seeking a remand. In requesting the remand, defendant stated as follows:

> Albemarle and Huahui contend that the surrogate values currently assigned to the coal and fine by-products do not constitute the best information available for these factors of production and that Commerce's determination runs counter to agency practice. Upon reviewing plaintiffs' motion and without confessing error, we respectfully request a partial remand for Commerce to reexamine the values assigned to the by-products.

Def.'s Resp. 19–20 (citations omitted). The court reasonably may infer from the quoted language that Commerce wishes to reconsider its surrogate values in light of the arguments put forth by Albemarle, including the argument that the "value inversion" is contrary to the Department's practice.

CCT's third argument, that a remand is not appropriate unless error is shown, is not a correct statement of the law. An agency need not confess error to obtain a voluntary remand. *SKF*, 254 F.3d at 1029.

CCT's final objection is also without merit. Although a voluntary remand takes some time, it carries the potential of saving time in that

it might avoid a remand later in the proceeding. The objection that the voluntary remand would complicate the proceeding by requiring the court to deal with two decisions is not a valid one, as the agency either will reach the same decision on remand that it reached before or it will reach a different one. In either event, only one decision will be before the court.

D. On Remand, Commerce Must Reconsider Its Separate Rate Methodology as Applied to Unexamined Respondents Shanxi DMD and BPAC and GHC

Albemarle challenges the $0.44/kg margin that Commerce assigned to Huahui in the Final Results, which was based on Huahui's individual rate in the previous (second) administrative review. Albemarle Rule 56.2 Mem. 4. Albemarle argues that "[i]t makes no sense for Commerce to consider older rates to reasonably reflect margins for the current period while at the same time rejecting current rates as not representative of the dumping margins of the separate rate companies." Albemarle Rule 56.2 Mem. 29.

Both Shanxi DMD and Cherishmet contest the Department's assignment of a $0.28/kg margin, which was based on the "separate rate" calculated in the second review, to unexamined respondents Shanxi DMD and BPAC and GHC, respectively. Shanxi DMD Rule 56.2 Mem. 2; Cherishmet Rule 56.2 Mem. 2. Shanxi DMD contends that the rate is unreasonable because Commerce "failed to establish why past data is [*sic*] more relevant than current data of mandatory respondents." Shanxi DMD Rule 56.2 Mem. 15. Similarly, Cherishmet challenges the $0.28/kg margin assigned to BPAC and GHC on the ground that "the Department has presented no evidence or reason for diverting from the well-established premise that the Final Results of a proceeding should be based solely on the facts on the record *in that proceeding*." Cherishmet Rule 56.2 Mem. 14, 16. Albemarle, Shanxi DMD, and Cherishmet request that the issue be remanded to Commerce so that Commerce may reconsider the margins applied to unexamined respondents Huahui, Shanxi DMD, and BPAC and GHC, respectively.

When Commerce limits the number of individually examined respondents in an administrative review, as it did here, it must establish a rate for the remaining cooperative, but unexamined, respondents who have demonstrated eligibility for a separate rate. The Tariff Act does not address how Commerce must calculate this separate rate. However, in an investigation, section 735(c)(5) of the Tariff Act directs Commerce, initially, to determine the separate rate by weight-averaging the individual rates calculated for the investigated

respondents, excluding *de minimis* or zero rates and rates based on facts available. 19 U.S.C.§ 1673d(c)(5)(A). If, pursuant to section 735(c)(5)(A), all individually investigated respondents' dumping margins are zero, *de minimis*, or based on facts available, section 735(c)(5)(B) directs Commerce to "use any reasonable method to establish the estimated all others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated." *Id.* § 1673d(c)(5)(B). Because Congress has not given explicit instructions for calculating the separate rate in periodic administrative reviews, Commerce has a measure of discretion in determining what methodology to employ. This discretion is not unlimited, however, and Commerce must "articulate a satisfactory explanation" for its choice of methodology. *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013) ("*Bestpak*").

In the Preliminary Results, Commerce noted that Huahui, Shanxi DMD, BPAC, and GHC were among eight firms who met the criteria for separate rate status. *Preliminary Results*, 76 Fed. Reg. at 23,979. Commerce assigned the qualifying separate rate respondents a rate of $0.05/kg based on the rate calculated for CCT. *Id.* at 23,990. Commerce did not include in the separate rate calculation the *de minimis* margin assigned to Jacobi. *Id*. In the Final Results, Commerce assigned a *de minimis* margin to both Jacobi and CCT. *Final Results*, 76 Fed. Reg. at 67,145. Commerce assigned Huahui the same margin it determined in the second review, *i.e.*, $0.44/kg, because Huahui was individually examined in that review. *Decision Mem*. 4, 7. Commerce assigned the separate rate respondents other than Huahui a $0.28/kg margin that also was based on the previous (second) administrative review. *Id.* at 4–7. This margin was the margin Commerce calculated for the unexamined respondents in the second review, which Commerce had calculated as a simple average. *Id*.

Noting that the statute is silent on the method to be employed, the Decision Memorandum submits that the Department's method of determining a rate for the separate rate respondents (other than Huahui) is "reasonable" because it represents a "contemporaneous examination of individually-reviewed respondents exclusive of zero, *de minimis* and facts available margins, and reasonably reflects potential dumping margins for the non-selected companies." *Id.* at 5. Further, the Decision Memorandum reasons that the Department's methodology is appropriate because there is no record evidence to determine whether Jacobi and CCT's pricing behavior in the POR for

the third review was representative of that of the separate rate companies. *Id*.

The court concludes that Commerce must reconsider the margin it assigned to Shanxi DMD, BPAC, and GHC. The $0.28/kg margin was not based on data pertaining to any pricing behavior that occurred in the third POR. Nor was it based on any data pertaining to these respondents; instead, Commerce reverted to a margin it determined in *another* review for *other* respondents. This margin does not reflect commercial reality with respect to Shanxi DMD, BPAC, and GHC and is, in that sense, arbitrary. The Department's statement that this margin is based on a "contemporaneous examination of individually-reviewed respondents exclusive of zero, *de minimis* and facts available margins, and reasonably reflects potential dumping margins for the non-selected companies," *Decision Mem.* 5, is factually incorrect when viewed in the context of the record evidence of the third review. There is nothing "contemporaneous" about the margin, and, having no factual relationship to the pricing behavior of the respondents who received it, the $0.28/kg margin cannot be said to "reasonably reflect potential dumping margins" in the third POR. Moreover, the Department's decision is not justified by its rationale, as stated in the Decision Memorandum, that that there was no record evidence with which to determine whether Jacobi and CCT's pricing behavior in the third POR was representative of that of the separate rate companies. There is no record evidence to support a finding or a reasonable inference that the $0.28/kg margin was representative of the separate rate companies' pricing behavior in the third POR. While the *de minimis* margins assigned to Jacobi and CCT at least reflect commercial realities prevailing in the pertinent POR, the same cannot be said for the margin Commerce assigned to Shanxi DMD, BPAC, and GHC.

The Department's overriding purpose in administrating the antidumping laws must be "to calculate dumping margins as accurately as possible." *Bestpak*, 716 F.3d at 1379; *see also SNR Roulement v. United States*, 402 F.3d 1358, 1363 (Fed. Cir. 2005) ("Antidumping laws intend to calculate antidumping duties on a fair and equitable basis."). Commerce selected Jacobi and CCT as the mandatory respondents because it found that these two respondents were the largest producer/exporters of subject merchandise during the POR.[8]

[8] Commerce asserted these facts in its respondent selection memoranda. *See Mem. to the File (Selection of Resp'ts for Individual Review)* 6 (Pub. Version) (July 21, 2010) (Admin.R-.Doc. No. 1873) (selecting Jacobi Carbons AB as a mandatory respondent and stating that Jacobi "is either the largest or second largest exporter by volume of total U.S. entries during

In this respect, the *de minimis* margins must be considered more representative of industry-wide pricing behavior during the POR than the $0.28/kg calculation from the previous review, which bears no rational relationship to the POR. Commerce ordinarily gives considerable weight to the contemporaneity of data when conducting periodic administrative reviews. S*ee Decision Mem.* 13. As shown by a comparison with the Preliminary Results, the apparently controlling reason Commerce did not do so here was that the margins Commerce assigned to the mandatory respondents in the Final Results were *de minimis*.

Defendant argues that the margin Commerce assigned to the separate rate respondents was permissible because Commerce has "broad discretion to select any reasonable methodology." Def.'s Resp. 21. Defendant is correct that Commerce may exercise considerable discretion in assigning a margin to the separate rate respondents in a review; however, the court disagrees that the margin Commerce chose was permissible. Where, as here, Commerce actually examined the sales of what it considered to be the two most representative respondents in the POR, and no others, that discretion does not permit the arbitrary assignment of a margin that has no rational relationship to any pricing behavior during the POR or to the likely pricing behavior of the recipients of the margin.

Defendant also points to the Department's finding that there were no data on the record to determine whether the separate rate respondents' pricing behavior was comparable to that of the examined respondents during the third administrative review, arguing that this finding supports the conclusion that the rates calculated during the second review are the most reliable on the record. *Id*. at 29 (citing *Decision Mem.* 6). Defendant further argues that the separate rate respondents who are plaintiffs in this case have never been assigned a *de minimis* margin and therefore are not entitled to one here. *Id*. at 29. These arguments impliedly acknowledge that the only reason Commerce changed its methodology from the Preliminary Results was the fact that both mandatory respondents received a *de minimis* margin. These arguments are unpersuasive because there are no record data about the pricing behavior of the separate rate respondents in the third review from which it could be reasonably inferred that the margin would, or would not, be a *de minimis* margin. Moreover, the state of the record is not the fault of the separate rate

the POR of certain activated carbon from the PRC under review."); *Mem. to the File (Selection of Additional Mandatory Resp't)* 5 (Pub. Version) (Sept. 29, 2010) (Admin.R.Doc. No. 1928) (selecting CCT as a mandatory respondent and stating that "the largest producer/exporter is CCT.").

respondents. The available data pertaining to the POR for the third review were limited by the Department's decision to individually examine only two mandatory respondents. *See Mem. to the File (Selection of Resp'ts for Individual Review)* 6 (July 21, 2010) (Admin.R-.Doc. No. 1873) (selecting Jacobi as a mandatory respondent); *Mem. to the File (Selection of Additional Mandatory Resp't)* 5 (Sept. 29, 2010) (Admin.R.Doc. No. 1928) (selecting CCT as a mandatory respondent). Commerce made this decision despite its general statutory obligation to examine all respondents for which a review was requested. *See* 19 U.S.C §§ 1675(a); 1677f-1(c)(2) (providing only a narrow exception where Commerce is authorized to limit the number of individually examined respondents "[i]f it is not practicable to make individual weighted average dumping margin determinations . . . because of the large number of exporters or producers involved in the . . . review.").[9] Here, there were eight respondents, including Shanxi DMD, BPAC, and GHC, who qualified for a separate rate.

The margin Commerce assigned to Huahui, like the margin assigned to the other plaintiffs, was not based on sales during the POR. However, unlike those margins, it is grounded in actual sales by Huahui, albeit sales during the previous (second) POR. The court reserves any decision on whether the margin assigned to Huahui was permissible. Commerce may or may not decide to assign Huahui a different margin based on other decisions it makes upon remand, and this Opinion and Order does not preclude Commerce from reconsidering the $0.44/kg margin assigned to Huahui in the Final Results. The court will consider this question anew upon reviewing the remand redetermination required by this Opinion and Order.

Defendant-intervenor CCC argues that the Department's methodology is permissible because "[p]laintiffs have not demonstrated with substantial evidence that assigning them a zero average margin would be reasonable, when none of the Plaintiffs has ever had a zero margin before" and that plaintiffs have not met their burden of "establish[ing] that assigning margins from previous

[9] Paragraph (2) of 19 U.S.C. § 1677f-1(c) provides:

> If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—
>
> (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

19 U.S.C. § 1677f-1(c)(2).

periods—especially for Huahui which received a margin based upon its own data from the immediately prior review—is inherently unreasonable." CCC's Resp. 17–18. CCC also contends that "each of the Plaintiffs affirmatively sought to participate in the third administrative review as a separate rate respondent and, therefore, had no expectation of receiving a precisely calculated, company-specific margin." *Id*. at 15.

The court is not persuaded by CCC's arguments as they apply to the $0.28/kg separate rate margin assigned to Shanxi DMD, BPAC, and GHC. The court must review the Department's decision according to the substantial evidence standard of review; it would be unsound to attempt to shift the evidentiary burden to plaintiffs in the way that CCC suggests. The implied premise underlying CCC's argument is that Commerce may not assign a *de minimis* margin to an unexamined respondent unless that respondent demonstrates with record evidence a reasonable likelihood that it would have received a *de minimis* margin had it actually been examined. In determining a margin for unexamined respondents, Commerce is subject to no such restriction but instead must employ a reasonable method for which it provides a rational explanation. *See Bestpak*, 716 F.3d at 1378.

E. Commerce Must Reconsider its Decision to Apply a Per-Unit Cash Deposit and Assessment Rate To Shanxi DMD

Under the applicable regulation, Commerce "normally will calculate an assessment rate for each importer of subject merchandise covered by the review." 19 C.F.R. § 351.212(b)(1). The regulation states, further, that Commerce "normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes."[10] *Id*. Thus, the normal method as prescribed by the regulation results in an *ad valorem* assessment rate.

In the Final Results of the previous (second) review, Commerce deviated from the normal method by changing "the cash deposit and assessment methodology from an *ad valorem* to a per-unit basis,"

[10] 19 C.F.R. § 351.212(b)(1) provides that:

> If the Secretary has conducted a review of an antidumping order . . . the Secretary normally will calculate an assessment rate for each importer of subject merchandise covered by the review. The Secretary normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes. The Secretary then will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise.

19 C.F.R. § 351.212(b)(1).

thereby stating margins in dollars per kilogram. *Certain Activated Carbon From the People's Republic of China: Final Results and Partial Rescission of Second Antidumping Duty Administrative Review*, 75 Fed. Reg. 70,208, 70,209 (Nov. 17, 2010) ("*Final Results AR2*"); Issues & Decision Mem., A-570–904, ARP 3–09, at 11–12 (Nov. 9, 2010) ("*Decision Mem. AR2*"). The Department made this decision upon a finding that Jacobi, a mandatory respondent and the largest Chinese exporter of subject merchandise in the second POR, was absorbing antidumping duties. *Id*. Specifically, Commerce had found that the domestic net unit price for Jacobi's entries of certain activated carbon was significantly higher than the entered value reported to U.S. Customs and Border Protection ("CBP"). *Final Results AR2*, 75 Fed. Reg. at 70,209; *Decision Mem. AR2* 10–11. Commerce concluded that "while [Jacobi's presumed duty absorption] does not prevent the Department from calculating appropriate assessment rates," a per-unit rate is preferable because duty absorption "can result in the undercollection of duties by CBP if the Department were to issue cash deposit instructions on an *ad valorem* basis." *Decision Mem. AR2* 11–12. Commerce further determined that this decision would be applied "to the order in its entirety" such that per-unit rates will "be applied to all respondents in this particular administrative review and all future reviews of the order." *Id.* at 12.

During the third review, Shanxi DMD filed an administrative case brief challenging the Department's continued use of a per-unit methodology. Shanxi DMD argued, *inter alia*, that "the per-unit rate benefit[s] companies who sell premium goods at higher costs while low cost goods are penalized." *Letter from Shanxi DMD to the Sec'y of Commerce* 9 (June 13, 2011) (Admin.R.Doc. No. 2201) ("*Shanxi DMD Case Br.*"). Shanxi DMD also submitted that "the Department does not actually resolve the issue at assessment because the Separate Rate Companies are not assessed antidumping duty margins based on their own data," and that, therefore, there is "no rationale" for deviating from the normal practice of establishing the assessment rate as an *ad valorem* rate. *Id.*

In the Final Results, Commerce continued to apply per-unit assessment and cash deposit rates to all respondents, whether or not individually examined. *Final Results*, 76 Fed. Reg. at 67,145. As support for this decision, the Department, referencing its Decision Memorandum from the second administrative review, stated that "it would be extremely burdensome to determine whether to apply an *ad valorem* or a per-unit rate on a company-specific basis," and that "[t]he change in methodology to per-unit assessment rates will not negatively im-

pact these companies because the total duties due will not change; they will only be allocated over quantity instead of over entered value." *Decision Mem.* 7 (quoting *Decision Mem. AR2* 12) (internal quotations omitted). In response to Shanxi DMD's objections, Commerce stated in the Decision Memorandum that Shanxi DMD failed to provide any record evidence to rebut the presumption of continued underselling by Jacobi or to support its claim that the per-unit methodology unfairly penalizes companies that sell more low-cost subject merchandise. *Id.* at 8.

Shanxi DMD claims that it was unlawful for Commerce to assign it a per-unit assessment and cash deposit rate in the third administrative review, invoking the same grounds stated in its case brief. Shanxi DMD Rule 56.2 Mem. 17–25. The court agrees, concluding that the decision to assign a per-unit margin is unlawful in three respects and must be remanded to the Department.

First, Commerce impermissibly grounded its decision in a finding of duty absorption that not only pertained solely to Jacobi but also pertained to data from a previous review. *Decision Mem.* 7–8 (stating that Jacobi's "behavior was the basis for the Department to use per-unit assessment rates" in the Final Results of the previous (second) administrative review). Commerce did not find that Shanxi DMD had engaged in the practice of duty absorption, and it failed to base its decision to assign Shanxi DMD a per-unit rate based on findings of fact grounded in the record of the third review. Second, Commerce attempted to justify its decision upon a finding that Shanxi DMD would not be prejudiced in any way by a per-unit rate. *Id.* at 7 (citations omitted) (stating that the "change in methodology to per-unit assessment rates will not negatively impact [separate rate] companies because the total duties due will not change; they will only be allocated over quantity instead of over entered value"). The court is aware of no evidence on the record of the third review to support a finding that importers of Shanxi DMD's subject merchandise will not, under any circumstances, pay higher deposits and not be assessed higher duties than would occur under an *ad valorem* assessment rate.

Third, Commerce found, without an adequate evidentiary foundation, that "it would be extremely burdensome to determine whether to apply an ad valorem or a per-unit rate on a company-specific basis." *Decision Mem.* 7 (citations omitted). The court fails to *see* why determining Shanxi DMD's rate as an *ad valorem* rate would impose a significant burden. Even if some burden resulted, that burden would not justify a decision that is unsupported by findings of fact grounded in the record of the third review.

Defendant supports the Department's determination, arguing that the plain language of the statute, 19 U.S.C. § 1673e(a)(1), and the accompanying regulation, 19 C.F.R. § 351.212(b)(1), do not require Commerce to calculate assessment and cash deposit rates in a particular manner or limit per-unit rates to particular factual circumstances. Def.'s Resp. 36–37. According to Defendant, Commerce acted within its discretion in the second administrative review when it made the global change to per-unit assessment and cash deposit rates and continued to "properly follow[] its practice" in doing the same in the third review. *Id.* at 36–37, 40 (citing *Decision Mem.* 7–8). Defendant also points to several Court of Appeals decisions upholding Commerce's departure from the *ad valorem* methodology under certain circumstances. *Id*. at 36–37 (citing *Koyo Seiko Co. v. United States*, 258 F.3d 1340 (Fed. Cir. 2001); *Thai Pineapple Canning Indus. v. United States*, 273 F.3d 1077 (Fed. Cir. 2001)).

Defendant's arguments are unconvincing. The cases upon which defendant relies do not establish the principle that Commerce has unfettered discretion to apply per-unit cash deposit and assessment rates. To the contrary, the Department's discretion is not so broad as to sustain an arbitrary decision to apply a per-unit rate to Shanxi DMD, one that was not grounded in any findings pertinent to Shanxi DMD or any findings supported by evidence in the third review. Finally, defendant's argument that Commerce properly followed its "practice" is unavailing. The "normal" method established by the regulation, 19 C.F.R. § 351.212(b)(1), is to determine *ad valorem* assessment rates. Here, Commerce departed from the normal practice and did so in a way that was arbitrary with respect to Shanxi DMD.

III. CONCLUSION AND ORDER

For the reasons discussed above, the court concludes that: (1) Commerce must reconsider and redetermine the surrogate values it applied to CCT's carbonized materials and coal and fines by-products; (2) Commerce must reconsider its method of determining the margins for Shanxi DMD, BPAC, and GHC, respectively, and redetermine those margins; and (3) Commerce must reconsider its assignment of a per-unit cash deposit and assessment rate as applied to Shanxi DMD.

Upon consideration of all papers and proceedings in this case and upon due deliberation, it is hereby

ORDERED that the Motion for Leave to File Response in Opposition to Defendant's Request for Voluntary Partial Remand, filed September 25, 2012, ECF No. 67, by Defendant-Intervenor Calgon Carbon (Tianjin) Co., Ltd. ("CCT") be, and hereby is, granted, and that

the accompanying Memorandum in Opposition to Defendant's Request for Voluntary Remand, be, and hereby is, deemed filed on September 25, 2012; it is further

ORDERED that *Certain Activated Carbon from the People's Republic of China: Final Results and Partial Rescission of Third Antidumping Duty Administrative Review*, 76 Fed. Reg. 67,142 (Oct. 31, 2011), be, and hereby is, remanded to the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") for reconsideration and redetermination in accordance with this Opinion and Order; it is further

ORDERED that Commerce must redetermine, in accordance with this Opinion and Order, the surrogate values that it applied to CCT's carbonized materials and coal and fines by-products; it is further

ORDERED that Commerce must reconsider its method of determining the margins for Shanxi DMD Corporation ("Shanxi DMD"), Ningxia Guanghua Cherishmet Activated Carbon Company, Ltd., and Beijing Pacific Activated Carbon Products Company, Ltd., and redetermine those margins in accordance with this Opinion and Order; it is further

ORDERED that Commerce shall reconsider its decision to assign a per-unit cash deposit and assessment rate to Shanxi DMD and redetermine that rate in accordance with this Opinion and Order; and it is further

ORDERED that Commerce shall file its remand redetermination within ninety (90) days of the date of this Opinion and Order, that each plaintiff and defendant-intervenor shall have thirty (30) days from the filing of the remand redetermination in which to file with the court comments on the remand redetermination, and that defendant shall have fifteen (15) days from the date of the last filing of such comments in which to file with the court any responses to the comments of other parties.

Dated: August 15, 2013
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE

Slip Op. 13–107

SPRINGS CREATIVE PRODUCTS GROUP, Plaintiff, v. UNITED STATES, Defendant.

Richard W. Goldberg, Senior Judge
Court No. 10–00067

[Judgment for Plaintiff.]

Dated: August 16, 2013

Robert J. Leo and *Ralph H. Sheppard*, Meeks, Sheppard, Leo & Pillsbury LLP of New York, NY, argued for plaintiff.

Amy M. Rubin, International Trade Field Office, U.S. Department of Justice, of New York, NY, argued for defendant.

OPINION AND ORDER

Goldberg, Senior Judge:

Plaintiff Springs Creative Products Group ("SCPG") challenges the United States Bureau of Customs and Border Protection's ("Customs" or "CBP") classification of its Make-it-Yourself Fleece Throw Kits under Subheading 6001.22.00 of the Harmonized Tariff Schedule of the United States ("HTSUS"), 19 U.S.C. § 1202 (2006). The evidence at trial supports a conclusion that the subject merchandise is properly classified under HTSUS 9503.00.00.[1] Based upon the Findings of Fact and Conclusions of Law below, the court enters final judgment in favor of SCPG.

BACKGROUND

SCPG imports Make-it-Yourself No-Sew Fleece Throw Kits ("the imported merchandise," "NSF throw kits" or "kits"). These kits contain all the material needed to make a finished fleece throw and the instructions on how to assemble the throw. The two entries at issue in this case were imported in 2009 through the Port of Charlotte, North Carolina. Customs classified the entries as fabric under subheading 6001.22.00, which provides:

> 6001 Pile fabrics, including "long pile" fabrics and terry fabrics, knitted or crocheted: [. . . .]
>
> Looped pile fabrics:
>
> 6001.22.00: Of man-made fibers . . . 17.2%

6001.22.00 HTSUS. Accordingly, Customs assessed a tariff of 17.2 percent *ad valorem.* Plaintiff protested the classification of the subject merchandise, asserting that Customs should have classified the merchandise under subheading 9503.00.00, HTSUS, which provides:

> 9503.00.00 Tricycles, scooters, pedal cars and similar wheeled toys; dolls' carriages; dolls, other toys; reduced-scale ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof . . .

[1] All references to the HTSUS provisions are 2009.

This subheading has a corresponding duty rate of zero percent *ad valorem*. Customs denied SCPG's protest.

Upon denial of its protest, SCPG appealed to this Court, seeking reliquidation of the entries under 9503.00.00 and a full refund of duties paid, as well as interest as provided by law. In the alternative, SCPG contends the throw-kits are classifiable as "other made up articles" under HTSUS 6307.90.9889, which carries an *ad valorem* duty rate of 7 percent. The court held a bench trial on September 12, 2012. The court enters judgment for SCPG pursuant to the following Findings of Fact and Conclusions of Law.

STANDARD OF REVIEW

Customs classification rulings are usually accorded deference based on their "power to persuade." *See United States v. Mead Corp.* 533 U.S. 218, 219–20 (2001); *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944). The degree of deference depends on the thoroughness evident in the classification ruling; the validity of the reasoning that led to the classification; consistency of the classification with earlier and later pronouncements; the formality with which the particular ruling was established; and other factors that supply power to persuade. *See Skidmore*, 323 U.S. at 140.

However, in this case, Customs summarily denied SCPG's protests of the classification without issuing an official ruling. Therefore, the Court will consider the parties' arguments without deference. *See Hartog Foods Int'l, Inc. v. United States*, 291 F.3d 789, 791 (Fed. Cir. 2002) (noting that, because Customs denied the protest without an official ruling, the court extends no *Skidmore* deference and considers the parties' arguments without deference)

FINDINGS OF FACT

A. Facts Uncontested by the Parties and Agreed to in the Pretrial Order

1. This action involves a challenge to the denial of protest number 1512–09–100144 by Customs.
2. SCPG timely filed the administrative protests underlying this action and paid all liquidated duties and fees on the entries in issue.
3. Protest number 1512–09–100144 encompasses import entry numbers 231–6452930–0 and 231–6452927–6 made through the Port of Charlotte, North Carolina in September 2009.
4. The merchandise at issue in this action consists of SCPG's NSF throw kits.

5. Customs classified the imported merchandise as "pile fabrics . . . Looped pile fabrics: of man-made fibers," under subheading 6001.22.00, HTSUS, with a duty rate of 17.2 percent *ad valorem*.
6. SCPG contends that the imported merchandise is classifiable as "other toys" under subheading 9503.00.00, HTSUS, which is duty free.
7. Alternatively, SCPG claims that the imported merchandise is classifiable as "other made-up articles" under subheading 6307.90.98, HTSUS.
8. The subject NSF throw kits are imported already packaged and ready for retail sale.
9. Except for a pair of scissors, each NSF throw kit contains all of the materials needed to make a finished fleece throw blanket.
10. Each of the subject NSF throw kits contains one 48" by 60" solid color panel of polyester fleece printed panel.
11. Each of the subject NSF throw kits also contains one 48" by 60" polyester fleece printed panel.
12. Most of the printed panels in the imported kits depict a character or figure from a cartoon, comic book, children's book or children's movie.
13. The protested entries cover the following NSF throw kits: Entry Number 231–6452930–0: "Curious George Banana Yellow Hat," "Princess Castle," "Tink Pixie," "Spider-Man" (two versions), "Sponge Bob," "Tink Butterfly," "Winnie the Pooh," "Cars," and "Princess Frog"; Entry Number 231–6452927–6: "JD [John Deere] Tractors in Pink Paisley."
14. At importation into the United States, SCPG packages the NSF throw kits with a cardboard belly band wrapped around the package and a small plastic carrying handle at the top.
15. The front of the packaging includes an image of the licensed character and design depicted on the printed panel.
16. The front of the packaging also states "ages 5+" and "CAUTION: Adult supervision required when cutting fabric."
17. The fabric in the NSF throw kits can be machine washed and machine dried.
18. Instructions for making the NSF throw kits are printed directly on the product packaging as follows:

Instructions

Step 1: Cut! Layer printed panel on top of solid panel, wrong sides together. Cut a square out of both layers at each corner along printed cutting lines.

Step 2: Fringe!
Create fringe by cutting along printed lines through both layers around all four sides.

Step 3: Tie!
Join fabric layers by knotting the fringe together, using one strip from the printed panel and its corresponding strip from the solid panel.

B. Facts Established At Trial

1. The kits include two fabric panels: a 48" by 60" polyester fleece printed panel (featuring a print or an image of a licensed design or character) and a solid colored fabric panel of the same type of fleece fabric and of equal size. Trial Transcript ("Tr.") 6, Sept. 12, 2012. One panel is pre-printed with measured cutting lines, which compose the "pattern" for cutting the fringes. Tr. 153 (testimony of National Import Specialist ("NIS") M. Dunajski).
2. Consumers assemble the NSF throw kits into finished throws that measure 43" x 55," excluding the fringe, and 48" x 60," including the fringe. Samples; Tr. 16; Plaintiff's Exhibit ("Pl.'s Ex. ") 12 at 167; Pl.'s Ex. 11 at 123.
3. Most NSF throw kits have prints of licensed characters (Spider Man, Curious George, etc.) related to children's media. Tr. 8, 20, 32, 92.
4. SCPG designed and intended the NSF kits to be assembled primarily by children ages five and older or by children and adults together. Tr. 12, 31, 70–71, 89, 90, 92.
5. As imported, the fleece panels' edges will not unravel due to the heat set process performed on the fleece prior to importation and after the fleece is printed. Tr. 21–22.
6. The price of the NSF throw kits ranges from $16.44 to $27.99. The price of a comparable finished fleece throw ranges from $8 to $15. Therefore, the court finds that the ultimate purchaser pays a price premium for the NSF throw kit, compared to the price of a finished throw or similar quality fleece material. *See* Tr. 27–28, 31, 91.

7. SCPG markets the NSF throw kits with images and videos of a parent (or adult) and child having fun while assembling the throw together. Tr. 12, 31, 88, 89.
8. The NSF kits at issue here are designed for someone with a low skill level and adults may use them to introduce a child to crafts. Tr. 10, 18, 19, 30, 64, 82, 91.
9. The NSF kits promote the development and education of young children by helping a child develop skills such as manual dexterity, cutting, tying, and counting. Tr. 18, 19, 70, 71.
10. The NSF kits give children and adults a sense of pride in their accomplishment when they complete the throw. Tr. 18, 19, 70, 71.
11. The durability of the completed NSF throw depends on the skill level of the person cutting and tying the knots. Tr. 23, 64, 72.
12. The retailers choose where to display the NSF kits. Tr. 26, 103.
13. Customers recognize that the NSF kits are not finished throws, but that they contain all of the material necessary to assemble a completed throw. Tr. 12, 22, 31, 41.
14. The fleece in the products at issue is a loop pile fabric. Tr. 144; invoices in entry papers.
15. Inspection of the samples reveals that the edges of the fleece panels are not hemmed or otherwise worked.
16. All of SCPG's NSF throw kits are identical in composition and construction and are also identical in how they are used to create a finished throw. The only difference is in the image appearing on the printed fabrics and the color scheme. Tr. 49–50, 102–03.
17. In addition to the NSF throw kits, SCPG sells bolts of fabric that depict licensed characters from children's media, including the characters depicted on the products at issue. Tr. 55–58; Government Exhibit B ("Gov't Ex.").
18. The process of assembling SCPG's NSF throw kits is always the same. The only variable is that the user can determine how the knots are tied. Tr. 71–72.
19. Children have fun assembling the fleece throws. *See* Tr. 88–90 (testimony of Theresa Lynn Thom that her daughter enjoyed putting together the fleece throws, that she liked it so much that she "made them for her whole kindergarten class that year for Christmas, eighteen of them," and that she has gone on from that simple craft activity to making jewelry and more complicated crafts as a teenager).

20. Government witness NIS James Forkan is responsible for classifying goods under Chapter 95, HTSUS, including toys, games and sporting goods. Tr. 165:2–5.
21. In determining whether a product is classifiable as a toy, Customs considers whether the product is principally designed for amusement. Customs applies this test regardless of whether the product is described as a toy, a craft kit, or something else. Tr. 175:16–20.
22. NIS Forkan has personally classified several craft kits as toys. Tr. 171. In each case, NIS Forkan classified the kits as "toys" following a determination that they were principally designed for amusement more than for utilitarian value. Tr 172:10–14.
23. In New York Ruling N044840 (Dec. 5, 2008), Customs classified a product called "My Super-Knot-a-Quilt" under the "toy" provision, expressly noting that it classified the kit in that provision because "[t]he kit's amusement value is greater than the utilitarian value of the constructed quilt." At trial, NIS Forkan, the author of this ruling, explained that the kit came with a lot of fabric squares in various colors and, in using that kit, the child could lay out the pieces in whatever pattern he or she wanted and also create a tassel and/or affix decorations onto the assembled quilt. Government's Exhibit J confirms NIS Forkan's description of the "My Super-Knot-a-Quilt" kit. Moreover, the reviews attached to this exhibit describe the fabric in the kit with such terms as "flimsy," "not warm," "paper thin," "low quality," "not satisfactory," and "not durable."
24. At trial, the parties discussed other craft kits that Customs has classified as toys. For example, the Government presented testimony regarding the products at issue in New York Ruling L88404 (Oct. 27, 2005) (Rose Art Weaving Loom) (Pl.'s Ex. 18; Gov't Ex. M). SCPG's witness, Ms. Short, described the process by which consumers used this kit to create potholders. She noted that she had personally used the kit many years earlier and she testified that, in using the kit, the pieces could be arranged in any manner she chose and that she learned the basics of weaving from using the kit. Tr. 112–13. She also states that she gave the finished product to her mother, but she did not know if it protected her mother's hands from hot pots. Tr. 113–14. NIS Forkan testified that he was involved in classifying the merchandise and reviewed a sample of the potholder kit. NIS Forkan determined that the amusement value of creating the potholders was greater than the utility of

the finished potholders because the user have the freedom to choose whatever colors or pattern he or she liked. Also, the consumer was unlikely to use the end product as a potholder because the material was flimsy and a person using the finished product as a potholder would likely get burned. Tr. 172–73.

25. NIS Forkan also described "catwalk creation," another craft kit that he had classified as a toy. The components of this kit included a miniature plastic mannequin or dress form, fabric squares, ribbons, and sequins. The user (presumably a child) would pretend to be a fashion designer and create fashion items for miniature doll figures by selecting different color fabrics and wrapping them around the mannequin as tops and bottoms and ribbons and sequins could also be added, if desired. Tr. 172–73.
26. Two of the principal purchasers of SCPG's NSF throw kits are Walmart and Jo-Ann Fabric and Craft Stores. Tr. 97.
27. After reviewing the product packaging (including the assembly instructions), the product samples, the advertisements, the testimony, and the videos produced as trial exhibits, the evidence establishes that the ultimate purchaser would expect to spend at least an hour to assemble the throw.
28. Inspection of the product samples reveals that the fleece panels included in the subject merchandise, by themselves, are not thick enough to be considered a fleece throw or blanket, but the consumer could use them as a piece of fleece fabric.
29. Comparison of the fleece panels included in the subject merchandise kits with other trial exhibits of ready-made fleece throws reveals that the fleece panels are generally of a lower quality—they are lighter or more flimsy and not as soft as the fleece throws sold ready-made.
30. If any of these Findings of Fact are more properly denominated Conclusions of Law they shall be deemed to be so.

CONCLUSIONS OF LAW

1. The court has jurisdiction over this dispute pursuant to 28 U.S.C. § 1581(a). Plaintiff timely commenced this action within 180 days of Customs' denial of its protest, and timely paid all liquidated duties and charges.
2. The Court has a duty to find the correct classification of the subject merchandise. *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). To fulfill this duty, the Court uses a two-step process to classify the imported merchandise.

Sports Graphics, Inc. v. United States, 24 F.3d 1390, 1391 (Fed. Cir. 1994). First, the Court ascertains the meaning of the terms in the tariff provision, which is a question of law. *Deckers Corp. v. United States*, 532 F.3d 1312, 1315–16 (Fed. Cir. 2008). Second, the Court makes a determination of whether the merchandise falls within the description of those properly construed terms which is a question of fact. *Id.*

3. The meaning of a tariff term, a matter of statutory interpretation, is a question of law. *Mead Corp.*, 185 F.3d at 1306 (Fed. Cir. 1999). The Court does not give *Chevron*[2] deference to a Customs classification ruling that implicitly interprets an HTSUS provision. *Id.* at 1306–08. Instead, the "court construes a tariff term according to its common and commercial meanings, which it presumes are the same." *Id.* at 1308. The Court may consult "dictionaries, scientific authorities, and other reliable information sources" to determine a tariff term's common meaning. *Id.*
4. Customs' classification decisions are presumed to be correct, and SCPG has the burden of proving otherwise. *See* 28 U.S.C. § 2639(a)(1). Plaintiff must prove by a preponderance of the evidence that a Customs classification decision is incorrect. *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997).
5. To succeed in its classification claim, SCPG must prove, by a preponderance of the evidence, that CBP's classification under HTSUS subheading 6001.22.00 is incorrect and that classification under HTSUS subheading 9503.00.00 or an alternative provision is correct. *See Fabil Mfg. Co. v. United States*, 237 F.3d 1335, 1340–41 (Fed. Cir. 2001).
6. The elements of proof for classification under HTSUS heading 9503 can be summarized as follows: (1) the goods are classifiable under heading 9503; (2) If also determined to be classifiable under subheading 6001 or some other provision in HTSUS Section XI, HTSUS section XI Note 1(t) expressly provides that such section "does not cover . . . [a]rticles of chapter 95 (for example, toys . . .").
7. Classification of goods under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs") and the Additional U.S. Rules of Interpretation ("ARIs"). In relevant part, GRI 1 instructs that "classification shall be deter-

[2] *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

mined according to the terms of the headings [of the tariff schedule] and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to [the subordinate GRIs]."

8. The scope of goods classified under heading 9503 is broad. Although certain items classified in this provision are *eo nomine*[3] provided for, classification under the residual provision of 9503.00.00 ("other toys") does not carry specific *eo nomine* designations of what an "other toy" is. Consequently, judicial decisions, HTSUS Explanatory Notes ("EN"), and customs rulings have delineated the scope of goods classified under heading 9503.
9. The EN for heading 9503, EN 95.03 states, in relevant part, that the scope of "other toys" is:

(D) Other toys

This group covers toys intended essentially for the amusement of persons (children or adults). However, toys which, on account of their design, shape, or constituent material, are identifiable as intended exclusively for animals, e.g., pets, do not fall in this heading, but are classified in their own appropriate heading. This group includes:

All toys not included in (A) to (C). Many of the toys are mechanically or electrically operated.

These include:

(iii) Constructional toys (construction sets, building blocks, etc.)

…

(xviii) Educational Toys (e.g., toy chemistry, printing, sewing and knitting sets).

…

Collections of articles, the individual items of which if presented separately would be classified in other headings in the Nomenclature, are classified in this heading when they are put up in a form clearly indicating their use as toys (e.g., instructional toys such as chemistry, sewing, etc., sets).

(emphasis added).

[3] Unlike principal and actual use provisions, which classify goods by use, "[a]n *eo nomine* classification provision is one which describes a commodity by a specific name." *Clarendon Mktg., Inc. v. United States*, 144 F.3d. 1464, 1467 (Fed. Cir.1998).

10. EN 95.03 states that "[c]ollections of articles, the individual items of which if presented separately would be classified in other headings in the Nomenclature, are classified in this heading **when they are put up in a form clearly indicating their use as toys (e.g., instructional toys such as chemistry, sewing, etc., set)**." (emphasis added). Thus, the court considers the form the good is sold in and whether that form clearly indicates its use as a toy, even if the "individual items of" the kit may be classifiable in a different heading.
11. Although the EN to Chapter 95, HTSUS, indicate that Chapter 95 covers all kinds of toys, whether designed to amuse children or adults, the term "toy" is not statutorily defined.
12. The Court construes statutorily undefined terms in accordance with their common and commercial meaning, which the court presumes to be the same. *E.M. Chems. v. United States*, 920 F.2d 910, 913 (Fed. Cir. 1990).
13. The common meaning of a tariff term is a question of law which the Court may answer by relying upon its own understanding of the term, and by consulting dictionaries, lexicons, scientific authorities, and other reliable sources as an aid. *Medline Indus. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995). "[T]he meaning of a tariff term is presumed to be the same as its common or dictionary meaning." *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988) (citations omitted), *cert. denied*, 488 U.S. 943 (1988).
14. *Webster's Third New International Dictionary of the English Language Unabridged*

    (1981) at 2419, provides, in relevant part, that "toys" are:

    > 3a: something designed for amusement or diversion rather than practical use b: an article for the playtime use of a child either representational (as persons, creatures, or implements) and intended esp. to stimulate imagination, mimetic activity, or manipulative skill or nonrepresentational (as balls, tops, jump ropes) and muscular dexterity and group integration. . . .

15. *Merriam Webster's Collegiate Dictionary* (1998) at 41, defines "amusement," in relevant part," as: "3: a pleasurable diversion."
16. This common meaning of toy—an object primarily designed and used for pleasurable diversion—is consistent with its judicial interpretation. *See Processed Plastic Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006) (noting that the principal use of a "toy" is amusement, diversion, or play value

rather than practicality); *Minnetonka Brands, Inc. v. United States*, 24 CIT 645, 651, ¶37, 110 F. Supp. 2d 1020, 1026 (2000) (noting that for purposes of Chapter 95, HTSUS, "an object is a toy only if it is designed and used for amusement, diversion or play, rather than practicality").

17. Although neither heading 9503 nor the relevant chapter notes explicitly state that an item's classification as a "toy" is dependent upon how it is used, the court finds inherent in the above definitions the concept that an object is a toy only if it is designed and used for diversion, amusement, or play, rather than for practical purposes. The court concludes that heading 9503, HTSUS, is a "principal use" provision as it pertains to "toys." *See Minnetonka Brands, Inc.*, 110 F. Supp. 2d at 1026, ¶ 37 (construing 9503 as a "principal use" provision).[4]
18. Because heading 9503, in relevant part, is a "principal use" provision, classification under this provision is controlled by the principal use of goods of that class or kind to which the imported goods belong in the United States at or immediately prior to the date of importation, and the controlling use is the principal use. ARI 1(a). This Court has stressed that it is the principal use of the "class or kind of goods to which the imports belong[ed]," at or immediately prior to the dates of importation, "and not the principal use of the specific imports[,] that is controlling under the Rules of Interpretation." *Grp. Italglass U.S.A., Inc. v. United States*, 17 CIT 1177, 1177, 839 F. Supp. 866, 867 (1993).
19. "Principal use" is defined as the use "which exceeds any other single use of the article." Conversion of the Tariff Schedules of the United States Annotated Into the Nomenclature Structure of the Harmonized System: Submitting Report at 34–35 (USITC Pub. No. 1400) (June 1983). Merchandise cannot have two principal uses for purpose of classification, one for amusement as a toy and another for something else. *See B & E Sales Co. v. United States*, 12 CIT 96, 99 (1988).

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[4] This conclusion is also consistent with the definition of the term "toy" under the predecessor to the HTSUS, the Tariff Schedules of the United States. *See Pima W., Inc. v. United States*, 20 CIT 110, 116–17, 915 F. Supp. 399, 404–05 (1996). Schedule 7, part 5, subpart E, headnote 2 of TSUS defined a "toy" as "any article chiefly used for the amusement of children or adults." *See J.C. Penney Purchasing Corp. v. United States*, 10 CIT 727, 728 (1986) (noting that a "toy" is defined as "any article chiefly used for the amusement of children or adults"); *see also Ideal Toy Corp. v. United States*, 78 Cust. Ct. 28, 33, C.D. 4688 (1977) ("When amusement and utility become locked in controversy, the question becomes one of determining whether the amusement is incidental to the utilitarian purpose, or the utility purpose incidental to the amusement.").

20. Thus, the court finds that the "class or kind" of articles considered to be "toys" under heading 9503 are articles whose principal use is for amusement, diversion, or play of children or adults. This use must exceed any other single use of that class or kind of article, such as practicality or utility.
21. Customs has classified craft kits, including those in the rulings cited below, as toys by virtue of EN 95.03 ("Collections of articles, the individual items of which if presented separately would be classified in other headings in the Nomenclature, are classified in this heading when they are put up in a form clearly indicating their use as toys (e.g., instructional toys such as chemistry, sewing, etc., sets)."). Generally, craft kits have been considered "educational toys" or "instructional toys" classifiable under Chapter 95, because they are principally used for the amusement of children. *See, e.g.*, HQ 959401 (Apr. 14, 1997); HQ 958267 (May 21, 1996); NY B80233 (Jan. 10, 1997); NY 817691 (Jan. 22, 1996); and NY 851970 (May 7, 1990).
22. Under ARI 1(a), HTSUS classification is to be determined "in accordance with the use in the United States at, or immediately prior to, the date of importation, . . ." Because the NSF kits are imported as a kit intended to be assembled by children or adults, the basis for classification is not the finished product, but rather the kit as a whole. Thus, the court determines the principal use of the product as it is intended to be used, considering both the assembly and the finished product.
23. There is no time requirement or difficulty level requirement for a craft kit to be classified under heading 9503. Tr. 195 (testimony of NIS Forkan); EN 95.03.
24. An article does not have to be called a "toy" or marketed as a "toy" to be classified under heading 9503. *Minnetonka,* 110 F. Supp. 2d at 652, ¶ 42.
25. To determine whether the subject imports are of the "class or kind" of merchandise whose principal use is amusement, diversion, or play, as SCPG claims, or utility and practicality, as the United States claims, the court examines all pertinent circumstances. *See United States v. Carborundum Co.*, 63 CCPA 98, 102, C.A.D. 1172, 536 F.2d 373, 377 (1976). In making this determination, courts have considered factors such as (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchasers; (3) the channels, class, or kind of trade in which the merchandise moves; (4) the environment of the sale (i.e., accompanying accessories and

the manner in which the merchandise is advertised and displayed); (5) usage, if any, in the same manner as merchandise that defines the class; (6) the economic practicality of so using the import; and (7) the recognition in the trade of the use. *Id.*; *see also Minnetonka*, 24 CIT at 652, ¶ 40, 110 F. Supp. 2d at 1027 (listing cases applying *Carborundum* factors).

26. When considering the first *Carborundum* factor (general physical characteristics of the merchandise), samples are potent witnesses and have great probative effect respecting the purpose for which they are designed. *Janex Corp. v. United States*, 80 Cust. Ct. 146, 148, C.D. 4748 (1978). The evidence at trial showed that the physical characteristics and the expectations of the purchaser are consistent with other items that Customs has classified as "toys" under heading 9503.
27. Based on the foregoing Findings of Fact, the court finds the subject merchandise to be of the class or kind of merchandise whose principle use is amusement, diversion, or play, rather than the practicality of a fleece throw. The unique physical characteristics of the merchandise, the design and marketing of the merchandise as craft kits and as items of amusement (rather than as finished fleece throws or as fleece material), the expectation of the ultimate purchaser that these items will be used to create a fleece throw, the regular use of the merchandise by children for amusement purposes, the fact that the merchandise sells at a significant price premium to finished fleece throws, and other facts revealed at trial support this conclusion. This decision is consistent with the court's determination in *Minnetonka*. *See* 24 CIT at 651–52, 110 F. Supp. 2d at 652, ¶¶ 40–41 (applying *Carborundum* factors to determine that bubble bath containers designed in the image of cartoon characters were properly classified as a "toy" under 9503).
28. Accordingly, SCPG has rebutted the presumption of correctness (28 U.S.C. § 2639(a)) that attaches to Customs' classification.
29. The court rejects Defendant's argument that, because SCPG is not a toy company and the kits are not sold in the toy departments, the principal use of the merchandise cannot be as a "toy." There is no requirement that the importer or manufacturer be considered a "toy" company for its product to be classified under heading 9503. *Minnetonka*, 24 CIT at 652, 110 F. Supp. 2d at 1028, ¶ 43; Tr. 61, 177 (testimony of NIS specialist for toys).

30. Although the craft kits contain two pieces of fleece material that could be used as they are or knotted into a throw, it would be an inefficient use of the product for this purpose in terms of both quality and price. Moreover, evidence demonstrates that the value of the merchandise comes from its utility as a source of play and amusement while assembling the blanket, rather than from the completed throw itself.
31. Although some of the NSF throw kits feature well-known characters on the packaging and panels, the court finds that this factor is not dispositive in classifying the article as a "toy" under heading 9503.
32. The trial evidence demonstrates that all of SCPG's NSF throw kits, including the specific styles at issue, belong to the same class or kind of merchandise. For tariff classification purposes, there is no distinction between NSF throw kits in which the printed panel depicts a licensed character or other design that might appeal to children and those that are not intended to appeal to children.
33. Customs has previously classified as toys similar craft kits designed for children to create, produce, or assemble articles. This includes sets for the production of items of fabric for the home, including quilt kits and pillow kits. *See* NY N044840 (Dec. 5, 2008) ("My Super Knot-a-Quilt"); NY N004742 (Jan. 22, 2007) ("Begin to Crochet Kit" to make a stuffed pillow, and "Crochet Fun Kit" to make a handbag or scarf); and NY J89344 (Oct. 7, 2003) ("Make Your Own Fleece Pillow"). Pl.'s Exs. 7, 16, 17.
34. The NSF kits are designed to be used in the same manner as the kits in these rulings. Tr. 108–14 (testimony of Ms. Short).
35. Customs has also classified as toys other craft kits designed for children in which constituent materials (fabrics or yarns) were made up into finished articles having utilitarian value. *See, e.g.*, NY L88404 (Oct. 27, 2005) (craft kit with weaving loom and fabric loops used to make potholders and other articles); NY 857769 (Nov. 27, 1990) (child's lace and tapestry craft sets). Pl.'s Exs. 18–19.
36. Implicit within all these rulings is a finding that the practicality of the finished products is secondary to the play value of creating them, which is a mandatory requirement for classification as a toy. The court finds that the play value of creating a fleece throw blanket is not any less than the play or amusement value of creating a quilt or a pillow from an instructional craft kit.

37. Although the completed throw is durable and of high quality, the court finds that the principal reason that the ultimate purchaser would purchase and use the NSF throw kit is for the amusement and diversion of assembling the throw.
38. Because the evidence shows that the subject merchandise belongs to the class or kind of merchandise whose principal use is amusement, diversion, or play, the court finds that the merchandise is properly classified as "toys" under HTSUS heading 9503.
39. By finding that the subject merchandise is properly classified under heading 9503, the subject merchandise cannot be classified under HTSUS heading 6001 or some other provision in HTSUS Section XI. HTSUS section XI Note 1(t) expressly provides that such section "does not cover . . . [a]rticles of Chapter 95 (for example, toys . . .)."

CONCLUSION AND ORDER

In accordance with the foregoing Findings of Fact and Conclusions of Law, the court concludes that the NSF throw kits at issue are properly classified as "toys" under HTSUS subheading 9503.00.00. This case having been heard at trial and submitted for decision, and the court, after due deliberation, having rendered a decision herein, now in conformity with said decision, it is

ORDERED, **ADJUDGED**, and **DECREED** that the imported items at issue in this case are properly classified under HTSUS subheading 9503.00.00, free of duty; and it is further

ORDERED, **ADJUDGED**, and **DECREED** that the appropriate Customs officials shall reliquidate the subject entries and refund all duties paid thereon with such interest as is due by law.

Dated: August 16, 2013
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG SENIOR JUDGE