U.S. Court of International Trade

Slip Op. 17–102

FORD MOTOR CO., Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett,
Judge Court No. 13–00291
PUBLIC VERSION

[The court finds that the subject imports are properly classified under subheading 8703.23.00, HTSUS, as motor cars and other motor vehicles principally designed for the transport of persons. Accordingly, Plaintiff's Motion for Summary Judgment is granted; Defendant's Cross-Motion for Summary Judgment is denied. Plaintiff's Motion to Quash or Suspend an Administrative Summons is denied.]

Dated: August 9, 2017

Gordon D. Todd, Sidley Austin LLP, of Washington, DC, argued for plaintiff. With him on the brief were *Richard M. Belanger* and *Mark D. Hopson*.

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

OPINION AND ORDER

Barnett, Judge:

Before the court in this classification case are cross-motions for summary judgment. Confidential Pl.'s Mot. for Summ. J. and Confidential Mem. of P. & A. in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s MSJ"), ECF No. 96; Def.'s Mot. for Summ. J. and Def.'s Mem. of Law in Opp'n to Pl.'s Mot. for Summ. J. and in Supp. of Def.'s Cross-Mot. for Summ. J. ("Def.'s XMSJ"), ECF No. 91–1.[1] Plaintiff Ford Motor Company ("Plaintiff" or "Ford") contests the denial of protest number 1303–13–100060 challenging U.S. Customs and Border Protection's ("Customs" or "CBP") liquidation of the subject imports, Model Year ("MY") 2012 ("MY2012") Ford Transit Connect vehicles with vehicle identification numbers ("VINs") containing either a number 6 or 7 in the sixth digit (hereinafter "Transit Connect 6/7"), under subheading 8704.31.00 of the Harmonized Tariff Schedule of the United States

[1] The ECF numbers for the briefs are not in sequential order because amended and corrected versions were filed. The court references the confidential versions of Parties' filings, if applicable, throughout this opinion.

("HTSUS"), as "motor vehicles for the transport of goods." Compl. ¶¶ 7, 10–11, 25, ECF No. 6 (alteration omitted); Pl.'s MSJ at 3; Def.'s XMSJ at 5. There is only one entry at issue, Entry Number 300–8620018–3, which entered at the Port of Baltimore on December 26, 2011 and which Customs liquidated on May 3, 2013. Summons at 1, ECF No. 1.[2]

The court previously denied the pending motions due to the presence of genuine issues of material fact regarding the characteristics of the Transit Connect 6/7's cost-reduced rear seat. *See Ford Motor Co. v. United States*, 40 CIT ___, 181 F. Supp. 3d 1308 (2016). Thereafter, Parties filed a Joint Supplemental Rule 56.3 Statement of Undisputed Material Facts ("Joint Supplement"), *see* Confidential Joint Rule 56.3 Suppl. Statement of Undisputed Material Facts Filed in Conjunction with Pl.'s and Def.'s Mots. For Summ. J. ("Joint Suppl."), ECF No. 132,[3] and asked the court to reconsider the Parties' cross-motions in light of the supplemental facts, *see* Docket Entry, ECF No. 138. *Cf.* USCIT Rule 54(b).[4] The court agreed to reconsider its prior ruling based upon the additional facts and, upon that reconsideration, the court finds that Customs' ruling lacks persuasive force. In order to avoid any confusion as between the prior opinion and this opinion, and because this opinion restates any relevant portions of the prior opinion, the court vacates its prior opinion and order, grants Plaintiff's motion for summary judgment, and denies Defendant's cross-motion for summary judgment.

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[2] Plaintiff contends that "[t]he MY2012 vehicles in the subject entry are similar in all material respects to MY2010-MY2013 Transit Connects, all of which CBP has liquidated consistent with the decision challenged in this case." Pl.'s MSJ at 3 n.1. The case before the court, however, is limited to MY2012 Transit Connect 6/7s and the Court will confine its ruling to the vehicles in the covered entry. *Digidesign, Inc. v. United States*, 39 CIT ___, ___, 44 F. Supp. 3d 1366, 1371 (2015) ("the identification of specific entries in a plaintiff's complaint in part defines the boundaries of the court's subject-matter jurisdiction in a given action"); *Am. Fiber & Finishing, Inc. v. United States*, 39 CIT ___, ___, 121 F. Supp.3d 1273, 1287 n.47 (2015) (the court lacks jurisdiction when the entry is neither listed on the summons nor a part of the underlying protest).

[3] In addition to undisputed material facts concerning the cost-reduced car seat, the Joint Suppl. contained two sections of disputed facts. *See* Joint Suppl. at 17 (Ford's facts disputed by CBP); *id.* at 23 (CBP's facts disputed by Ford).

[4] Pursuant to Rule 54(b), "any order or other decision . . . that adjudicates fewer than all the claims . . . does not end the action as to any of the claims . . . and may be revised at any time before the entry of a judgment adjudicating all the claims . . . . " USCIT Rule 54(b); *see also Beijing Tianhai Industry Co., Ltd. v. United States*, 41 ___, ___, 2017 WL 2875863, at *6 (2017) ("This [c]ourt has held that it may reconsider a prior, non-final decision pursuant to its plenary power, which is recognized by Rule 54(b).") (citations omitted).

BACKGROUND

I. Overview

In the 1960s, the United States and Europe were involved in a "trade war." Def.'s XMSJ at 2 n.1 (citing Def.'s Ex. 5). Europe increased the duty on chicken imported from the United States, and the United States responded by placing a 25% tariff on trucks imported from Europe. *Id.* This retaliatory duty on trucks, colloquially referred to as the "chicken tax," was still in place when Ford began importing the subject merchandise into the United States from its factory in Turkey in 2009. *Id.*; Confidential Def.'s Statement of Material Facts as to Which There Are No Genuine Issues to Be Tried ("Def.'s Facts") ¶ 13, ECF No. 92–7; Confidential Pl. Ford Motor Co.'s Resp. to Def.'s R. 56.3 Statement of Material Facts ("Pl.'s Resp. to Def.'s Facts") ¶ 13, ECF No. 97–12. By contrast, the duty on imports of passenger vehicles is 2.5%. HTSUS Heading 8703; *see also* Summons at 2.

As detailed below,[5] Ford manufactures the Transit Connect 6/7s in Turkey and imports them into the United States. Although these vehicles are made to order and are ordered as cargo vans, Ford manufactures and imports them with a second row seat, declaring the vehicles as passenger vehicles subject to subheading 8703.23.00 and a 2.5% duty.[6] After clearing customs but before leaving the port, Ford (via a subcontractor) removes the second row seat and makes other changes, delivering the vehicle as a cargo van. Defendant United States ("Defendant" or "United States") determined that the inclusion of the second row seat is an improper artifice or disguise masking the true nature of the vehicle at importation and that such vehicle is properly classified under subheading 8704.31.00 and subject to a 25% duty.[7] Ford contends that this is legitimate tariff engineering.[8]

II. Procedural History

The sole entry at issue is Entry Number 300–8620018–3, which entered at the Port of Baltimore on December 26, 2011 and Customs liquidated pursuant to subheading 8704.31.00, with a 25% duty rate on May 3, 2013. Summons at 1. Ford timely and properly protested, claiming that the subject merchandise should have been liquidated

[5] *See infra* Section III.B.

[6] Subheading 8703.23.00, HTSUS, covers "[m]otor cars and other motor vehicles principally designed for the transport of persons."

[7] Subheading 8704.31.00, HTSUS, covers "[m]otor vehicles for the transport of goods."

[8] Legitimate tariff engineering refers to "the long-standing principle[] that merchandise is classifiable in its condition as imported and that an importer has the right to fashion merchandise to obtain the lowest rate of duty and the most favorable treatment." Confidential HQ H220856 (Jan. 30, 2013) ("HQ H220856") at 11, ECF No. 103.

pursuant to subheading 8703.23.00, with a duty rate of 2.5%, asserting that "CBP did not follow 19 U.S.C § 1315(d) or 1625 procedures in changing the classification." *Id.* at 2. CBP denied the protest on June 4, 2013, and, on August 19, 2013, Ford timely commenced this case. *Id*. at 1–2; *see also* HQ H220856 (Customs' explanatory ruling).

After several amendments to the scheduling order, Parties filed cross-motions for summary judgment and the court held oral argument on June 8, 2016. *See* Oral Argument, ECF No. 104. On October 5, 2016, the court denied the cross-motions. *Ford*, 181 F. Supp. 3d at 1321–22. The court explained that Parties had provided insufficient information about the cost-reduced rear seat for the court to properly conduct the analysis required by the Court of Appeals for the Federal Circuit's ("Federal Circuit") decision in *Marubeni Am. Corp. v. United States,* 35 F.3d 530 (1994), which spoke to the distinction between passenger vehicles and cargo vehicles for the purpose of tariff classification. *Ford*, 181 F. Supp. 3d at 1319, 1321. The court concluded that "[a]dditional information and evidence regarding [the cost-reduced car] seat [would] better enable [it] to determine whether the vehicle's intended purpose of transporting persons, as imported, outweighs an intended purpose of transporting goods." *Ford*, 181 F. Supp. 3d at 1321 (citing *Marubeni*, 35 F.3d at 535). Thereafter, following a telephone conference, on October 13, 2016, the court ordered Parties to submit the Joint Supplement regarding the cost-reduced rear seat. Docket Entry, ECF No. 112.[9] As noted above, submission of the Joint Supplement—and the additional undisputed material facts stated therein—has prompted the court to reconsider the Parties' cross-motions for summary judgment.[10]

[9] After several extensions, the court ordered the Joint Supplement to be filed by November 23, 2016. *See* Order (Nov. 17, 2016), ECF No. 116. However, that day, Ford informed the court that it had just discovered fifty-six "inadvertently unproduced documents" relevant to the cost-reduced rear seats and responsive to Defendant's First Requests for Production. Pl.'s Second Consent Mot. to Extend Time to File a Suppl. Joint Statement of Facts at 4, ECF No. 117; *see also* Pl.'s Mot. for a Limited Extension of Fact Discovery ("Pl.'s Discovery Mot.") at 2, ECF No. 121. Ford subsequently moved to reopen discovery, which the court granted in part. Pl.'s Discovery Mot.; Mem. and Order (Jan. 9, 2017), ECF No. 126. Parties filed the Joint Supplement on March 21, 2017. *See* Joint Suppl.

[10] Ford has separately moved to quash or suspend an administrative summons CBP issued to Ford on January 27, 2017. Confidential Pl.'s Mot. to Quash or Suspend Admin. Summons ("Mot. to Quash"), ECF No. 140. The United States opposes the motion. Def.'s Resp. in Opp'n to Pl.'s Mot. to Quash or Suspend Admin. Summons, ECF No. 143. CBP issued the administrative summons pursuant to its authority under 19 U.S.C. § 1509; it seeks documents that were produced during the course of discovery in this case and documents that were not. *See* Mot. to Quash, Ex. 1, ECF No. 140–1. The statutory scheme generally rests enforcement of § 1509 summons with federal district courts. *See* 19 U.S.C. § 1510. Moreover, as previously noted, this court's jurisdiction is limited to the sole entry at issue, Entry Number 300–8620018–3. *See supra* note 2. The court's assessment of the correct classification of Transit Connect 6/7s in the subject entry depends on the material facts not in genuine dispute developed through the discovery that occurred in this case. While the

III. 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." 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). In responsive papers, the opponent "must include correspondingly numbered paragraphs responding to the numbered paragraphs in the statement of the movant." USCIT Rule 56.3(b).

Concurrent with briefing their respective summary judgment motions, Parties submitted separate facts, which contained mixtures of disputed and undisputed phrases or sentences within a numbered paragraph.[11] And, as previously noted, Parties submitted the Joint Supplement containing supplemental facts specific to the cost-reduced rear seat. Upon review of Parties' voluminous separate and joint facts and supporting documents, the court finds the following undisputed and material facts regarding the subject merchandise.[12]

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court's discovery orders control in this case, they do not constrain CBP's independent authority pursuant to § 1509; therefore, Ford's motion will be denied.

[11] The court reviewed each party's separate submissions of facts, supplemental facts, and the responses thereto, line by line, to distill which facts were undisputed by parties. *See generally* Confidential Pl. Ford Motor Co.'s R. 56.3 Statement of Undisputed Material Facts Filed in Conjunction with Pl.'s Mot. for Summ. J. ("Pl.'s Facts"), ECF No. 96–1; Confidential Def.'s Resp. to Pl. Ford Motor Co.'s R. 56.3 Statement of Material Facts ("Def.'s Resp. to Pl.'s Facts"), ECF No. 92–6; Def.'s Facts; Pl.'s Resp. to Def.'s Facts; Confidential Pl.'s Resp. to Def.'s Facts; Pl. Ford Motor Co.'s Supplemental R. 56.3 Statement of Undisputed Material Facts ("Pl.'s Suppl. Facts"), ECF No. 97–1; Confidential Def.'s Resp. to Pl. Ford Motor Co.'s Supplemental R. 56.3 Statement of Material Facts ("Def.'s Resp. to Pl.'s Suppl. Facts"), ECF No. 94–1. Because replies to responses to facts are not contemplated in USCIT Rule 56.3, the court disregards 16 paragraphs of Plaintiff's purported replies to Defendant's responses to Plaintiff's facts in its supplemental fact submission. *See* Pl.'s Suppl. Facts at 1–7.

Additionally, in the statements of undisputed facts and responses thereto, Parties sometimes objected to portions of a statement or the manner in which certain facts were characterized. The court attempted to distill the undisputed facts from these filings and released a draft Background section to the Parties prior to issuing its initial decision. *See* Letter from the Court (July 20, 2016), ECF No. 105. Parties were invited to identify whether any of these facts were, indeed, disputed, and to point to admissible evidence before the court supporting such claim. *See id.* Both Parties provided limited comments, which the court has incorporated. *See* Confidential Defs.' Resp. to the Court's July 20, 2016 Letter and Draft Undisputed Facts, ECF No. 106; Confidential Letter to the Court from Gordon D. Todd, Esq., Counsel for Ford (July 27, 2016), ECF No. 107.

[12] For purposes of this discussion, citations are provided to the relevant paragraph number of the undisputed facts and response, and internal citations generally have been omitted.

A. History of the Subject Merchandise

The subject merchandise consists of Transit Connect 6/7s.[13] Def.'s Facts ¶ 1; Pl.'s Resp. to Def.'s Facts ¶ 1. Ford derived the Transit Connect 6/7s from a line of vehicles designed and manufactured in Europe with the V227 designation. Pl.'s Facts ¶ 2; Def.'s Resp. to Pl.'s Facts ¶ 2. When considering whether to expand the European V227 line to the United States, "Ford researched the European ISV [integrated style vans][14] market for approximately six months, including researching who the competitors were and how big the market was" and explored targeting "both personal and commercial customers—such as cleaning services, florists, newspaper carriers, telephone repair, and food delivery." Pl.'s Facts ¶¶ 15–16; Def.'s Resp. to Pl.'s Facts ¶¶ 15–16. Plaintiff "identified owners of the Chevrolet Astro/Safari, a minivan used for both passengers and cargo but that was no longer in production, as possible customers for the Transit Connect." Pl.'s Facts ¶ 17; Def.'s Resp. to Pl.'s Facts ¶ 17.

Ford initially considered whether it would be feasible to manufacture the vehicles in the United States, but decided to import a vehicle built on the European V227 production line already in use at its Otosan plant in Kocaeli, Turkey, because it was more efficient to use an existing line and the vehicle could be brought to market sooner. Pl.'s Facts ¶ 19; Def.'s Resp. to Pl.'s Facts ¶ 19. "Every Transit Connect manufactured in Turkey was built on the same production line."[15] Pl.'s Suppl. Facts ¶ 258; Def.'s Resp. to Pl.'s Suppl. Facts ¶ 258. Ford's plant in Otosan used the VIN as a plant inventory control number. Pl.'s Facts ¶ 35; Def.'s Resp. to Pl.'s Facts ¶ 35. Transit Connect 6/7s received a VIN "during the manufacturing process . . . then going forward that's how the vehicle [was] managed. That [was] the vehicle identification from that point forward." Def.'s Facts ¶ 31; Pl.'s Resp. to Def.'s Facts ¶ 31.

The vehicles in Ford's European V227 line included the "double-cab-in-van (DCIV)," which was also called the European Tourneo

[13] Transit Connect 9s contain the number 9 in the sixth digit of the VIN. Compl. ¶ 8; Answer ¶ 8. Transit Connect 9s are imported with a three-passenger second row seat. Joint Suppl. ¶ 93 (Transit Connect 9 imported with a three-passenger 60/40 split seat); *see also* Joint Suppl. ¶ 96 (in MY2010 only, the Transit Connect 9 was imported with a two-passenger rear seat). The subject entry contained Transit Connect 9 vehicles; however, only the Transit Connect 6/7s are at issue. Def.'s Facts ¶¶ 1, 22; Pl.'s Resp. to Def.'s Facts ¶¶ 1, 22; Joint Suppl. at 4 n.1.

[14] [While acknowledging that Plaintiff used curly brackets ({}) in its briefs to designate its confidential information, the court uses single square brackets ([ ]) to designate alterations and omissions, or to explain Parties' acronyms, and uses double square brackets ([[ ]]) to designate business proprietary information.]

[15] References to Transit Connects, without the "6/7" thereafter, are references to the product line generally and not limited to the subject imports.

Connect or Transit Connect, "depending on the country where sold," and the "Cargo Van." Pl.'s Facts ¶¶ 9, 11; Def.'s Resp. to Pl.'s Facts ¶¶ 9, 11. Ford based the subject merchandise on its European V227 DCIV, not its Cargo Van. Pl.'s Facts ¶ 21; Def.'s Resp. to Pl.'s Facts ¶ 21. "When Ford began product planning for the Transit Connect it did not know what the 'take rate'—product mix—would be between retail or fleet, and cargo or passenger, sales." Pl.'s Facts ¶ 20; Def.'s Resp. to Pl.'s Facts ¶ 20. Before it could be imported into the United States as the Transit Connect 6/7, the European V227 DCIV had to be modified to meet U.S. safety standards, "including the Federal Motor Vehicle Safety Standards ('FMVSS')." Pl.'s Facts ¶ 25; Def.'s Resp. to Pl.'s Facts ¶ 25. Ford modified the European V227 DCIV to comply with all relevant U.S. safety standards and imported the modified vehicle as the Transit Connect. Pl.'s Facts ¶¶ 26, 32; Def.'s Resp. to Pl.'s Facts ¶¶ 26, 32.[16]

To meet U.S. safety standards, Ford "redesigned the underbody support structure for the second row of seats." Pl.'s Facts ¶ 29; Def.'s Resp. to Pl.'s Facts ¶ 29; Joint Suppl. ¶ 22. Ford also "added a side-impact beam to the sliding side door to meet FMVSS 214" and "a side-impact foam block to the sliding side door to meet [the] Insurance Institute of Highway Safety ('IIHS') standards." Pl.'s Facts ¶ 28; Def.'s Resp. to Pl.'s Facts ¶ 28. Other safety modifications included making changes "to the vehicle lighting, turn signals and vehicle labels." Pl.'s Facts ¶ 27; Def.'s Resp. to Pl.'s Facts ¶ 27. Ford designed the Transit Connect on the Ford Focus platform, which means that it has "the same chassis and drivetrain [as] the Ford Focus passenger vehicle." Pl.'s Facts ¶ 4; Def.'s Resp. to Pl.'s Facts ¶ 4.

During the February 2008 Chicago Auto Show, "Ford displayed Transit Connect models" and "conducted focus groups with potential customers in order to learn their reactions to the Transit Connect." Pl.'s Facts ¶ 90; Def.'s Resp. to Pl.'s Facts ¶ 90. The following year at the same auto show, Ford displayed the following configurations of the Transit Connect: two-passenger, four-passenger,[17] and five passenger. Pl.'s Facts ¶ 91; Def.'s Resp. to Pl.'s Facts ¶ 91. "From May to

[16] Ford also "has its own internal quality, durability[,] and comfort standards that are customized to each vehicle line based on consumer expectations." Joint Suppl. ¶ 1. Those standards apply to the seats in its vehicles. *Id*. ¶ 2.

[17] Plaintiff urges that "in an effort to distinguish and acknowledge the physical differences in the subject merchandise pre-conversion and post-conversion, [Ford] uses the term 'four-passenger wagon' to describe the subject merchandise prior to the removal of the second row seat." Pl.'s Suppl. Facts at 6. However, "Ford's MY2012 Specifications Brochure . . . demonstrated that Ford wagons and vans were different models of the Transit Connect." Def.'s Resp. to Pl.'s Suppl. Facts at 13. Furthermore, the four-passenger configuration was discontinued after MY2010. *See* Def.'s Facts ¶ 23; Pl.'s Resp. to Def.'s Facts ¶ 23; Joint Suppl. ¶ 96.

June 2009, Ford conducted a 13 city tour where potential customers were able to drive Transit Connects," and "[i]n six of the cities, Ford also did a press event for the Transit Connect." Pl.'s Facts ¶ 97; Def.'s Resp. to Pl.'s Facts ¶ 97; Pl.'s Suppl. Facts at 8 (clarification of Pl.'s Fact ¶ 97); Def.'s Resp. to Pl.'s Suppl. Facts at 8–9 (response to clarification of Pl.'s Fact ¶ 97). "Ford advertised the Transit Connects in magazines and on auto shopping websites." Pl.'s Facts ¶ 99; Def.'s Resp. to Pl.'s Facts ¶ 99.

The Transit Connect was "a vehicle that could be readily adapted to suit different customer demands." Pl.'s Facts ¶ 20; Def.'s Resp. to Pl.'s Facts ¶ 20. "Each Transit Connect was built to order." Pl.'s Facts ¶ 33; Def.'s Resp. to Pl.'s Facts ¶ 33. Ford "imported the Transit Connect in two trim series, XL, the base trim series, and XLT, the upgraded trim series." Pl.'s Facts ¶ 34; Def.'s Resp. to Pl.'s Facts ¶ 34. All the differences between the various configurations and trim levels of the Transit Connect 2012 models that were available for sale are identified in the MY2012 Brochure, procured by CBP from the Ford website in February 2012. Pl.'s Facts ¶ 69; Def.'s Resp. to Pl.'s Facts ¶ 69.

B. Description of the Subject Merchandise

The Transit Connect 6/7 "was a multipurpose vehicle manufactured in Turkey and imported into the United States from 2009–2013." Pl.'s Facts ¶ 1; Def.'s Resp. to Pl.'s Facts ¶ 1. The subject imports are "part of Ford's U.S. Transit Connect vehicle line." Def.'s Facts ¶ 11; Pl.'s Resp. to Def.'s Facts ¶ 11. Transit Connect 6/7s were "designated within Ford as the V227N." Pl.'s Facts ¶ 1; Def.'s Resp. to Pl.'s Facts ¶ 1. "The V227N vehicles [were] LWB (long wheel base)." Def.'s Facts ¶ 62; Pl.'s Resp. to Def.'s Facts ¶ 62. The V227N line "included a van model (Transit Connect Van) in two trim levels and a Wagon model (Transit Connect Wagon) in two trim levels," but "only the Transit Connect Vans are at issue in this action."[18] Def.'s Facts ¶¶ 15, 16; Pl.'s Resp. to Def.'s Facts ¶¶ 15, 16. All Transit Connects are imported with second row seats, but the Transit Connect 6/7s are delivered to the customer as a two seat cargo van. Def.'s Facts ¶ 17; Pl.'s Resp. to Def.'s Facts ¶ 17.

As imported into the United States, the subject merchandise had a Gross Vehicle Weight Rating ("GVWR")[19] of 5005 pounds. Def.'s Facts ¶ 45; Pl.'s Resp. to Def.'s Facts ¶ 45; Joint Suppl. ¶ 63. A GVWR of

[18] The court's understanding is that reference to a van is to a cargo model (as delivered to the customer), i.e., a Transit Connect 6/7, and reference to a wagon is to a passenger model, i.e., a Transit Connect 9.

[19] Transportation regulations in effect at the time of importation defined GVWR as "the value specified by the vehicle manufacturer as the maximum design loaded weight of a single vehicle." 49 C.F.R. § 523.2 (2011).

5005 pounds is specific to the two-passenger Transit Connect 6/7s; five-passenger Transit Connect 9 vehicles are assigned a GVWR of 4695 pounds. Joint Suppl. ¶ 63. Every Transit Connect contained a Duratec 2.0L, four cylinder gasoline engine, which is a spark-ignition internal combustion reciprocating piston engine with a cylinder capacity of 1999 cc. Pl.'s Facts ¶ 36; Def.'s Resp. to Pl.'s Facts ¶ 36. In its condition as imported into the United States, every Transit Connect included: a steel unibody construction with an interior volume of approximately 200 cubic feet, which translates to just under $6m^3$; front-wheel drive; rear passenger seats with seat anchors; and underbody bracing. Pl.'s Facts ¶¶ 38–39, 43, 45; Def.'s Resp. to Pl.'s Facts ¶¶ 38–39, 43, 45. The Transit Connects had Macpherson strut front suspension, ground clearance of 8.2 inches, and over 50 inches of space from floor to ceiling in the rear. Pl.'s Facts ¶¶ 41, 54–55; Def.'s Resp. to Pl.'s Facts ¶¶ 41, 54–55.

At the time of importation into the United States, the Transit Connect 6/7s had "swing-out front doors with windows, second-row sliding doors with windows, and swing-out rear doors, some of which had windows." Pl.'s Facts ¶ 49; Def.'s Resp. to Pl.'s Facts ¶ 49. The sliding side doors met federal safety standards for passenger vehicles. Pl.'s Facts ¶ 50; Def.'s Resp. to Pl.'s Facts ¶ 50. At the time of importation into the United States, no Transit Connect 6/7s "had a panel or barrier between the first and second row of seats." Pl.'s Facts ¶ 52; Def.'s Resp. to Pl.'s Facts ¶ 52.

As imported into the United States, the Transit Connect 6/7s included: second row seats; seat belts for every seating position; permanent bracing in the side pillars of the car body; child-locks in the sliding side doors; dome lighting in the front, middle, and rear of the vehicle; a full length, molded cloth headliner; coat hooks in the second row; and a map pocket attached to the rear of the front driver seat. Pl.'s Facts ¶¶ 44, 47–48, 51, 57–60; Def.'s Resp. to Pl.'s Facts ¶¶ 44, 47–48, 51, 57–60. The Transit Connect 6/7s also had "front vents" and "front speakers." Pl.'s Facts ¶ 68; Def.'s Resp. to Pl.'s Facts ¶ 68; Pl.'s Suppl. Facts at 7[20] (clarification of Pl.'s Fact ¶ 68); Def.'s Resp. to Pl.'s Suppl. Facts at 6 (response to clarification of Pl.'s Fact ¶ 68); Def.'s Facts ¶ 118; Pl.'s Resp. to Def.'s Facts ¶ 118.

There were "two cupholders in the center console and a compartment at the rear of the center console to create an optional third

[20] Plaintiff provided revised facts in a section titled "Clarification of Facts Originally Included in Ford's Statement of Undisputed Material Facts." *See* Pl.'s Suppl. Facts at 7–10. While USCIT Rule 56.3 does not address the opportunity to clarify original facts, Defendant did not object to Plaintiff's clarification of its original facts and, in fact, submitted responses thereto. *See* Def.'s Resp. to Pl.'s Suppl. Facts at 2–21. Accordingly, the court has taken into consideration Plaintiff's clarified facts, and Defendant's responses thereto.

cupholder." Pl.'s Suppl. Facts ¶ 255; Def.'s Resp. to Pl.'s Suppl. Facts ¶ 255. The Transit Connect 6/7s had carpeted footwells in front of the second row seat. Pl.'s Facts ¶ 53; Def.'s Resp. to Pl.'s Facts ¶ 53; Pl.'s Suppl. Facts at 7 (clarification of Pl.'s Fact ¶ 53) & ¶ 255; Def.'s Resp. to Pl.'s Suppl. Facts at 5 (response to clarification of Pl.'s Fact ¶ 53) & ¶ 255.

As explained below,[21] the second row seats in the Transit Connect 6/7s did not include "headrests, certain [seatback[22]] wires, a tumble lock mechanism[,] or accompanying labels," and were "wrapped in a cost[-]reduced fabric." Pl.'s Facts ¶ 44; Def.'s Resp. to Pl.'s Facts ¶ 44; *see also* Def.'s Facts ¶ 114; Pl.'s Resp. to Def.'s Facts ¶ 114. The Transit Connect 6/7s did not have rear (behind the front seats) vents, speakers, and handholds. Def.'s Facts ¶¶ 19–21; Pl.'s Resp. to Def.'s Facts ¶¶ 19–21; Def.'s Facts ¶ 118; Pl.'s Resp. to Def.'s Facts ¶ 118. The subject imports did not have side airbags in the area behind the front seats. Def.'s Facts ¶ 18; Pl.'s Resp. to Def.'s Facts ¶ 18.[23] The Transit Connect 6/7s did not come with a cargo mat and the painted metal floor of the cargo area was left exposed. Def.'s Facts ¶ 119; Pl.'s Resp. to Def.'s Facts ¶ 119.

The XL trim line of the Transit Connect 6/7s "did not have front map lights, a CD player, a power equipment group (including windows, locks, exterior mirrors[,] and remote keyless-entry with fobs), 12V powerpoint in the rear[,] or cruise control." Pl.'s Facts ¶ 67; Def.'s Resp. to Pl.'s Facts ¶ 67. Ford also manufactured the XLT (and XLT Premium) trim line of the Transit Connect 6/7 that included such features. Plaintiff's Ex. A ¶ 82 (Ex. 79, T-1227) (Transit Connect Order Guide). The subject entry contained Transit Connect 6/7s in both trim levels. Joint Suppl. ¶ 4.

After importation into the United States, but before leaving the port, the Transit Connect 6/7s "were labeled with Monroney labels, commonly known as window stickers, Smog Labels and Loose Item/Ramp labels." Pl.'s Facts ¶ 75; Def.'s Resp. to Pl.'s Facts ¶ 75; Def.'s Facts ¶ 123; Pl.'s Resp. to Def.'s Facts ¶ 123; Oral Arg. Tr. 91:314 (stipulating "to the fact that Monroney labels, were in fact, attached to the subject Transit Connect 6/7s after they cleared customs, but before they left the port facility").

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[21] *See infra* Section III.C.

[22] Parties (and, thus, the court) had previously referred to these "seatback wires" as "comfort wires." *See, e.g.*, Compl. ¶ 53; Pl.'s Facts ¶ 44; Def.'s Resp. to Pl.'s Facts ¶ 44; *Ford*, 181 F. Supp. 3d at 1321. Recently produced documents drafted by Otosan employees use the term "seatback wires"; thus, Parties have agreed to refer, instead, to that term. Joint Suppl. at 5 n.2.

[23] The Transit Connect 9 also lacked rear vents, armrests, handholds, and side airbags. Def.'s Facts ¶¶ 27–30; Pl.'s Resp. to Def.'s Facts ¶¶ 27–30.

The Transit Connect 6/7s were finally "delivered to customers as two-seat cargo vans." Def.'s Facts ¶ 130; Pl.'s Resp. to Def.'s Facts ¶ 130; *see also* Joint Suppl. ¶ 89.

C. Development of the Cost-Reduced Rear Seat From MY2010 to MY2012

1. The MY2010 Transit Connect 6/7

In 2009, Ford began importing MY2010 Transit Connect 6/7s. Joint Suppl. ¶ 5. At the time of importation, MY2010 Transit Connect 6/7s contained a two-passenger rear seat that "was the same as the '60' portion of the '60/40 three-passenger rear seat in the [MY2012] Transit Connect 9 vehicles." Joint Suppl. ¶¶ 6–7, 97.[24] "The seat structure and folding mechanisms of the [MY2010 Transit Connect 6/7] [r]ear [s]eat were designed to meet Ford's internal durability standards, which are intended to ensure a lifetime of trouble-free use, or approximately 150,000 miles of normal use." *Id*. ¶ 8.

The MY2010 Transit Connect 6/7 rear seat had a seatback frame and a cushion frame (for the bottom of the seat). *Id*. ¶ 9. The rear seatback frame "was constructed of 40mm diameter steel tubing . . . with a vertical tubular reinforcement" that "support[ed] the seatbelt retractor and seat foam." *Id*. ¶ 10. Welded to the seatback frame were: (1) a "retractor mount for the right seating position," (2) a "seatbelt shoulder guide for the right seating position," and (3) a "seatback latch mechanism." *Id*. ¶ 10(a),(b),(d).[25] The seatbelt retractor mount, shoulder guide, and seatback latch mechanism were designed and built to withstand a collision. *Id*. ¶ 10(c)(ii),(d)(ii).

"The seatback frame had seven seatback wires welded to it." *Id*. ¶ 10(e)(footnote omitted). "[S]eatback wires provided lumbar support, passenger comfort, support for cargo when folded flat, and support for the seat foam and fabric." *Id*. ¶ 10(e)(i).[26] The torsion bar assembly and torsion bar mount, which helped to "hold[] the back of the seat down when folded against the seat cushion," were located in the seatback frame, *id*. ¶ 11, along with a "short, eighth wire[,] that worked in conjunction with the torsion bar assembly," *id*. ¶ 10(e)(iii).

The cushion frame "was constructed of formed 25mm diameter steel tubing" with "an additional 25mm steel tube running down the center

[24] Transit Connect 9s are delivered to customers with a three-passenger rear seat. Joint Suppl. ¶ 93.

[25] The seatbelt retractor mount and shoulder guide for the left seat were attached to the vehicle interior. *Id*. ¶ 10(c)(i).

[26] The seatback frame consisted of [[ ]] and [[ ]]. Confidential Joint Ex. B-1.

of the seat." *Id*. ¶ 14. The cushion frame contained "[s]eat bottom wires" that "crisscrossed across the seat cushion frame from top to bottom and side to side" and helped to "keep the seat foam in place and provide support for the passengers." *Id*. ¶ 14(f)-(g). The LATCH system, which enables a LATCH-equipped child car seat to be fitted to the seat, and which satisfies federal motor vehicle safety standards, was welded to the cushion frame. *Id*. ¶ 14(a). Two floor latches secured the seat to the floor. *Id*. ¶ 14(b).

The rear seatback and seat cushion contained high density polyurethane foam. *Id*. ¶ 15. The side of the foam coming into contact with passengers was contoured for lumbar and lateral support; the frame side was contoured to fit into the seat frame. *Id*. ¶ 15(a). The frame contours, seat cushion, seatback wires, and seat cover held the foam in place. *Id*. ¶ 15(b). Other than the rear-facing portion of the back seat, which contained a backrest reinforcement pad,[27] the seatback and cushion were covered in the same flame retardant fabric as the front seats. *Id*. ¶¶ 16, 16(b), 17. The bottom of the rear seat was covered with black mesh fabric. *Id*. ¶ 18. Black paint covered the visible, metal portions of the rear seat. *Id*. ¶ 19.

The rear seat came equipped with seatback pivot brackets, which operated as a hinge enabling the seatback to fold down onto the seat cushion, *id*. ¶ 13, and a tumble lock mechanism, which held the seat in place when it was folded forward against the front seats, *id.*¶ 24(b). The tumble lock mechanism consisted of a cover, strut rod assembly, tumble lock mechanism assembly, and various screws, pins, and labels. *Id*. ¶ 24(a). The rear seat included a label that "illustrate[d] how to flip the seat forward and contained an illustration referencing the owner's manual," and "two red indicator flags on the rear floor latches that showed whether the seat was locked into place." *Id*. ¶¶ 24(c), 25. The rear seat also came equipped with a small rubber pad on the rear leg to decrease noise and vibration around the rear floor latches. *Id*. ¶ 26.

The rear seat had seatbelts for each seating position, *id*. ¶ 27, and "an adjustable head restraint," though "head restraints are not required to satisfy the FMVSS," *id*. ¶¶ 28, 28(a).

[27] The backrest reinforcement pad consisted of "a single piece of foam located under the back fabric to cover the interior foam and framing of the seat for cosmetic purposes." Joint Suppl. ¶ 17.

2. Cost-reduced Seat Version 1

In late 2008, "Ford and Otosan began investigating the creation of a cost[] reduced car seat for use in Transit Connect 6/7 vehicles." *Id*. ¶ 29.[28] During the investigation, the North American V227 Program Manager stated that the "[c]heaper seat still needs to meet all crash requirements. Thought is that, for example, it does not fold or tumble forward. Dont [sic] touch cushion or fabric." *Id*. ¶ 86.

In mid-MY2010, Ford created its first cost-reduced seat ("CRSV-1") for use in Transit Connect 6/7s. *Id*. ¶ 32. The implementation of CRSV-1 resulted in the removal of the head restraints, torsion bar assembly and mount, tumble lock mechanism and associated labels, and backrest reinforcement pad from the MY2010 Transit Connect 6/7 rear seat. *Id*. ¶ 33(a)-(d).

"Ford and Otosan used engineering judgment in lieu of physical testing to assert compliance with all applicable FMVSS." *Id*. ¶ 34. Ford and Otosan determined that physical testing of the CRSV-1 was not necessary because "the main frame of the seat structure [was] not changed," the removed components had "no effect on the compliance of strength tests" associated with certain FMVSS, and compliance with FMVSS 202 is only required when "there [are] head restraint[s]." *Id*. ¶ 34; Confidential Joint Ex. 30, ECF No. 132–3 (letter from Ford/Otosan engineers explaining why engineering judgment was relied upon); *see also* Joint Suppl. ¶ 35 (physical testing was limited to that performed on the original MY2010 rear seat). Ford also did not conduct consumer testing or surveys before installing the CRSV-1 in Transit Connect 6/7s. Joint Suppl. ¶ 37. Ford briefly imported Transit Connect 6/7s with the CRSV-1 installed at the time of importation into the United States. *Id*. ¶ 38.

3. Cost-reduced Seat Version 2

In 2009, "Otosan began considering ways to further reduce the cost" of the Transit Connect 6/7 rear seat. *Id*. ¶ 39. In March 2010, an Otosan engineer sent Michael Andrus, of Ford's Automotive Safety Office, the following email:

> I am D&R engineer of V227 (transit connect) seats in Ford-Otosan Turkey. We have a cost reduction study for 2nd row seats. We have decided to delete some parts at V227 NA vehicle 2nd row seats as cost reduction item which will be scrapped in US. Tumble mechanism, torsion bar and headrests were deleted at the first cost reduction study of 2nd row seats. I want to share some delete part opportunities with you for the second cost

[28] Cost reduction changes were not made to the Transit Connect 9's rear seat. *Id*. ¶ 100.

> reduction study and need your decisions if any test required for these changes. Again I want to remind that, these seats will be scrapped in US, will not be used anytime, however we should send the seats with meeting requirements.

Id. ¶ 41; *see also id*. ¶ 87 (referring to statement by Otosan engineer that seats shipped to the United States should "meet all applicable seat requirements").

In late 2010, Ford created its second cost-reduced seat ("CRSV-2"), *id*. ¶ 42,[29] which incorporated the following changes from CRSV-1: (1) removal of four of the seven seatback wires, including three vertical wires and one horizontal wire, and a fifth short wire associated with the torsion bar assembly, which had been removed in the CRSV-1; (2) wrapping of the seat in a cost-reduced fire-resistant grey woven cover originally used only on the back of the MY2010 Transit Connect 6/7 rear seat, and which is not the same as the fabric used to cover the front seat; (3) replacement of the front leg seat anchor cover, which was designed to attach to the tumble lock mechanism, "with a cover that did not contain a space for the [t]umble [l]ock [m]echanism"; (4) removal of the red indicator flags and housings associated with the tumble lock mechanism "to leave a bare metal lever"; and (5) removal of the small rubber pad from the rear seat leg intended to decrease noise and vibration from around the rear floor latches, *id*. ¶ 44(a)(f). At some time, Ford also removed the fabric mesh covering the rear seat bottom and stopped applying black paint to the visible, metal portions of the seat frame. *Id*. ¶ 45(a)(b).[30] The MY2012 Transit Connect 6/7s at issue in this litigation contained the CRSV-2 installed at the time of importation. *Id*. ¶¶ 43, 88.[31]

"Ford did not conduct consumer testing or surveys" before implementing the CRSV-2. *Id*. ¶ 51. Ford and Otosan used physical testing and engineering judgment to determine that the CRSV-2 did not require additional testing. *Id*. ¶¶ 52, 61. Specifically, Otosan directed the CRSV-2 supplier to conduct "H-Point"[32] testing to determine whether any changes, including the fabric change and removal of

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[29] Otosan bought MY2012 Transit Connect 6/7 rear seats from a third party supplier. *Id*. ¶ 49. Each CRSV-2 cost Otosan about [[ ]] than the MY2012 Transit Connect 9 three-passenger rear seat. *Id.*¶¶ 94–95.

[30] Ford is unable to identify when these changes occurred; however, these changes were reflected in the rear seats contained in the subject merchandise at the time of importation. *Id*. ¶ 45.

[31] However, Transit Connect 6/7s "were offered, ordered, [and] considered sold to customers without the [rear seat installed]." *Id*. ¶ 89.

[32] "H-point" stands for "Hip-Point." *Id*. ¶ 54. "The 'H-Point' is the pivot point where the femur pivots in the ball joint on the hip bone. The H-Point is related to other federal standards, such as where [the] seatbelts are located, and [the] angles [of] and accessibility

seatback wires, resulted in changes to the original hip point. *Id*. ¶¶ 53, 55. If H-Point testing reflected changes from the original hip point, then additional tests or engineering changes may be necessary to confirm FMVSS compliance.[33] *Id*. ¶ 58. Based on the H-Point test results, Otosan engineers concluded that the fabric change and removal of seatback wires did not affect the CRSV-2's FMVSS compliance. *Id*. ¶ 59; *see also id*. ¶ 60 (Otosan engineers stated that removing seatback wires did not affect the strength of the seat); *Id*. ¶ 64 (other than the H-Point test, Ford conducted no other additional physical testing beyond the testing performed on the original seat). Ford affixed a safety certification label to each Transit Connect 6/7 at issue certifying that the vehicle complied with all applicable FMVSS requirements. *Id*. ¶ 62.[34]

D. Post-Importation Processing[35] of Subject Merchandise

After subject imports cleared Customs, but were still within the confines of the port, processing procedures were conducted on all Transit Connects and, additionally, certain features were removed or altered in the Transit Connect 6/7s. "The port processing procedures carried out on all Transit Connect vehicles included removing RapGard, a protective covering during shipment; disengaging Transportation Mode; and checking for low fuel." Pl.'s Facts ¶ 74; Def.'s Resp. to Pl.'s Facts ¶ 74. For Transit Connect 6/7s, additional post-importation processing entailed:

to seat belts." *Id*. H-Point testing utilizes a procedure developed by the Society of Automotive Engineers and designed to measure a "standardized seating reference point for each vehicle." *Id*. ¶ 56.

[33] Several FMVSS applied to the CRSV-2, including FMVSS 207 (seating systems), FMVSS 208 (occupant crash protection), FMVSS 209 (seat belt assemblies), FMVSS 210 (seat assembly anchorages), and FMVSS 225 (child restraint anchor systems). *Id*. ¶ 50(a)-(e).

[34] Defendant disputes Plaintiff's assertion that the MY2012 Transit Connect 6/7, and, specifically, the CRSV-2, in fact met federal safety standards. *See id*. ¶¶ 101–102 (Ford's facts and CBP's responses thereto); *see also id*. ¶ 129 (CBP's fact and Ford's response) (Plaintiff disputes Defendant's assertion that certifying FMVSS compliance does not mean that the vehicle is FMVSS compliant). However, Parties do not dispute the general proposition that changes to the H-Point suggest that further testing may be required to confirm FMVSS compliance, *id*. ¶ 58, and that, in this case, Otosan engineers determined that the changes associated with the CRSV-2 did not affect the seat's H-Point or, therefore, its FMVSS compliance, *id*. ¶ 59.

[35] The court notes that Defendant objects to the term "post-importation processing" as "vague." *See, e.g.,* Def.'s Resp. to Pl.'s Facts ¶ 79. There is, however, no dispute that rear seats are removed, along with other post-importation alterations, after importation but while still at the port. The court utilizes "post-importation processing" throughout this opinion as a short-hand term recognizing the undisputed alterations and the undisputed timing of those alterations.

> the second-row seat was unbolted and removed,[36] along with the associated second row safety restraints. A steel panel was then bolted into the second row footwell to create a flat surface behind the first rows of seats. A molded cargo mat was placed over the floor behind the first row. Scuff plates were added inside the second-row doors. In some vehicles the sliding door windows were replaced with a solid panel.

Pl.'s Facts ¶ 78; Def.'s Resp. to Pl.'s Facts ¶ 78.[37] Prior to the subject merchandise being ordered or manufactured, "Ford had entered into a contract with its port processor" to conduct the post-importation processing. Def.'s Facts ¶ 125; Pl.'s Resp. to Def.'s Facts ¶ 125.

The following features remained in the Transit Connect 6/7s after the post-importation processing: underbody second-row seat support; anchors and fittings for the second-row seat, permanent bracing in the side pillars to support the removed safety restraints; and the beam and foam in the side sliding doors for rear passenger crash protection.[38] Pl.'s Facts ¶ 80; Def.'s Resp. to Pl.'s Facts ¶ 80; Pl.'s Suppl. Facts ¶ 255; Def.'s Resp. to Pl.'s Suppl. Facts ¶ 255; Joint Suppl. ¶ 91.

E. CBP's Investigations of Subject Merchandise

"Between April 17, 2009, and 2013," Ford imported the Transit Connects through the Ports of Baltimore, Maryland, Jacksonville, Florida, Los Angeles-Long Beach, California, and Port Hueneme, California. Pl.'s Facts ¶ 137; Def.'s Resp. to Pl.'s Facts ¶ 137. From March 1, 2010 through November 23, 2012, "there were 477 liquidations of entries containing Transit Connect vehicles classified under subheading 8703.23.00, HTSUS, with 446 entries as bypass liquidations, *i.e.*, unreviewed, and 31 entries reviewed by CBP personnel" without a physical inspection of the goods by an import specialist. Def.'s Facts ¶ 139; Pl.'s Resp. to Def.'s Facts ¶ 139. As part of Customs' compliance validation, Customs reviewed "Ford's entry documents" for at least nineteen entries, and of those nineteen validated entries, eight were "found to be compliant." Pl.'s Facts ¶¶ 142–43; Def.'s Resp. to Pl.'s Facts ¶¶ 142–43.

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[36] [Ford considered returning the rear seats to Turkey for re-use. Joint Suppl. ¶ 82. However, Turkish customs laws precluded the re-importation of the seats, and, thus, the North American V227 Program Manager directed Ford to research a cost-reduced car seat that met "all requirements except [that] it simply [did] not fold and flip." *Id*. ¶¶ 83–84. The removed seats were recycled or otherwise disposed of. *Id*. ¶ 85.]

[37] Transit Connect 9s did not undergo this additional post-importation processing. *Id*. ¶ 93 (the Transit Connect 9 was delivered with a rear car seat).

[38] The anchor holes for the second row seat are plugged and no longer readily accessible after post-importation processing. *Id*. ¶ 92.

In the winter of 2011 to 2012, CBP Supervisory Import Specialist Gerald Stroter and Import Specialists Tamiko Bates and Jeremy Jackson conducted a Trade Compliance Measurement Review as part of Tamiko Bates' training at the Port of Baltimore.[39] Pl.'s Facts ¶ 151; Def.'s Resp. to Pl.'s Facts ¶ 151. One of the entries covered in the Trade Compliance Measurement Review was of a Transit Connect 6/7. Pl.'s Facts ¶ 152; Def.'s Resp. to Pl.'s Facts ¶ 152. Mr. Stroter noticed that "the difference between the passenger version and the cargo version of the Transit Connect appeared to be that the passenger version had a rear seat and the cargo version did not." Pl.'s Facts ¶ 155; Def.'s Resp. to Pl.'s Facts ¶ 155.

As a result of the aforementioned review, Import Specialists "believed that the [Transit Connect 6/7s] were being misclassified." Pl.'s Facts ¶ 157; Def.'s Resp. to Pl.'s Facts ¶ 157; Pl.'s Suppl. Facts at 8–9 (clarification of Pl.'s Fact ¶ 157); Def.'s Resp. to Pl.'s Suppl. Facts at 14 (response to clarification of Pl.'s Fact ¶ 157). On February 6, 2012, Mr. Jackson submitted a QUICS query[40] to the National Import Specialists describing the Transit Connect 6/7 "based on what was shown on Ford's website." Pl.'s Facts ¶¶ 158–59; Def.'s Resp. to Pl.'s Facts ¶¶ 158–59.

On February 9, 2012, Mr. Stroter, Mr. Jackson, and CBP Officer Eric Dausch went to the Port of Baltimore "to physically inspect a [Transit Connect 6/7]," and at this time, Mr. Jackson "noticed that some Transit Connect vehicles had rear windows and some did not." Pl.'s Facts ¶¶ 160–61; Def.'s Resp. to Pl.'s Facts ¶¶ 160–61. Mr. Stroter and Mr. Jackson learned that "vehicles with VIN's containing the characters S6 or S7 . . . were consistently discovered to be 2-passenger cargo vans while those with the characters S9 were identified as 5-passenger vehicles." Pl.'s Facts ¶ 166 (internal quotations omitted); Def.'s Resp. to Pl.'s Facts ¶ 166.

That day, Mr. Jackson "emailed Richard Laman, the National Import Specialist responsible for reviewing Jackson's earlier QUICS message," describing "the vehicles that he physically inspected, and included the pictures that were taken of the vehicles during his visit." Pl.'s Facts ¶ 163; Def.'s Resp. to Pl.'s Facts ¶ 163. Mr. Jackson viewed

[39] The fact that a review took place is not in dispute; however, Parties present two different dates, within a month of each other, indicating when the review occurred. Plaintiff asserted the review was conducted in December 2011, and Defendant asserted the review was initiated on January 17, 2012. Pl.'s Facts ¶ 151 (citing Ex. M 60:11–62:7); Def.'s Resp. to Pl.'s Facts ¶ 151 (citing Def.'s Ex. 20). The court finds that this difference is immaterial to the undisputed fact that a review took place.

[40] A QUICS query is "a mechanism by which import specialists are able to circulate [classification] questions to the National Import Specialists"; however, the "response is advisory and [] not binding." Pl.'s Facts ¶¶ 158–59; Def.'s Resp. to Pl.'s Facts ¶¶ 158–59.

Mr. Laman "as responsible for setting the policy for how the Transit Connect [6/7] would be classified." Pl.'s Facts ¶ 163; Def.'s Resp. to Pl.'s Facts ¶ 163.

On February 22, 2012, the Assistant Special Agent in Charge of U.S. Immigration and Customs Enforcement in Baltimore was notified of the "Investigation into Proper Classification of Ford Connect Vans." Pl.'s Facts ¶ 169; Def.'s Resp. to Pl.'s Facts ¶ 169. On February 23, 2012, the Port of Baltimore notified Ford that CBP had "initiated an investigation into Ford Motor Company importations" and the "declaration of vehicles classified under the Harmonized Tariff Schedule of United States (HTSUS) headings 8704 and 8703." Pl.'s Facts ¶ 172; Def.'s Resp. to Pl.'s Facts ¶ 172.

On February 24, 2012, CBP Officer Benjamin Syzmanski contacted Mr. Stroter and informed him for the first time that cargo vans "are imported in [sic] as passenger vans." Pl.'s Facts ¶ 185; Def.'s Resp. to Pl.'s Facts ¶ 185. Mr. Syzmanski explained that "the Transit Connect vans make entry into the port and then are fully released by CBP. Only after the vans have been released by CBP . . . does Ford move the vans to a facility within the Baltimore Port limits and select vans are gutted/stripped/altered to become cargo vans." Pl.'s Facts ¶ 185 (internal quotations omitted); Def.'s Resp. to Pl.'s Facts ¶ 185.

On June 8, 2012, the Assistant Director for Trade Operations of the Port of Baltimore, Thomas Heffernan, requested Internal Advice from CBP's Office of Regulations and Rulings regarding the proper classification of the Transit Connect 6/7s. Pl.'s Facts ¶¶ 87d, 216; Def.'s Resp. to Pl.'s Facts ¶¶ 87d, 216; Def.'s Facts ¶ 145; Pl.'s Resp. to Def.'s Facts ¶ 145. On January 30, 2013, in response to Mr. Heffernan's request for Internal Advice, CBP Headquarters issued ruling HQ H220856 to the Baltimore Field Office. Pl.'s Facts ¶ 237; Def.'s Resp. to Pl.'s Facts ¶ 237; Def.'s Facts ¶ 146; Pl.'s Resp. to Def.'s Facts ¶ 146. HQ H220856 held that the Transit Connect 6/7s were "properly classifiable as 'Motor vehicles for the transport of goods,' under subheading 8704.31.00, HTSUS, dutiable at the rate of 25% ad valorem." Def.'s Facts ¶ 147; Pl.'s Resp. to Def.'s Facts ¶ 147.

JURISDICTION AND STANDARD OF REVIEW

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(a)(2012).[41] Jurisdiction is uncontroverted in this case. Pl.'s Facts ¶ 244–49; Def.'s Resp. to Pl.'s Facts ¶ 244–49.

The Court may grant summary judgment when "there is no genuine issue as to any material fact," and "the moving party is entitled to

[41] All references to the United States Code are to the 2012 edition, which is the same in all relevant respects as the version in effect at the time of importation.

judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); USCIT R. 56(a). 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); *see also id.* at 1366 (characterizing the first step as "construi[ing] the relevant (competing) classification headings"). Second, it must determine "what the merchandise at issue is," which is a question of fact. *Id.* at 1366. When no factual dispute exists regarding the merchandise, summary judgment is appropriate and resolution of the classification turns solely on the first step. *See id.* at 1365–66; *id.* at 1365 ("The ultimate question in a classification case is whether the merchandise is properly classified under one or another classification heading," which is "a question of law[] . . . because what is at issue is the meaning of the terms set out in the statute . . . .") (citations omitted); *see also Sigma–Tau Health-Science, Inc. v. United States*, 838 F.3d 1272, 1276 (Fed. Cir. 2016) (citations omitted).

The court reviews classification cases on "the basis of the record made before the court." 28 U.S.C. § 2640(a). 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

I. Legal Framework

The General Rules of Interpretation ("GRIs") provide the analytical 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.[42]

"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,* 35 F.3d at 533 (Fed. Cir. 1994)). Courts may rely upon their own understanding of terms or consult dictionaries, scientific authorities, and other reliable information. *Brookside Veneers, Ltd. v. United States,* 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 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.2d 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).

II. Competing Tariff Provisions

Customs liquidated the subject imports as motor vehicles for the transport of goods pursuant to subheading 8704.31.00. *See* HQ H220856 at 13. Defendant contends Customs correctly classified the subject imports, and that Customs' ruling deserves deference. Subheading 8704.31.00 covers:

8704	Motor vehicles for the transport of goods:
	Other, with spark-ignition internal combustion piston engine:
8704.31.00	G.V.W. not exceeding 5 metric tons 25%

Ford contends the subject imports are motor vehicles principally designed for the transport of persons, classifiable under subheading 8703.23.00. That subheading covers:

[42] The court considers chapter and section notes of the HTSUS in resolving classification disputes because they are statutory law, not interpretive rules. *See Arko Foods Int'l, Inc. v. United States*, 654 F.3d 1361, 1364 (Fed. Cir. 2011) (citations omitted); *see also Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 929 (Fed. Cir. 2003) (chapter and section notes are binding on the court). Here, however, there are no chapter or section notes relevant to the classification of MY2012 Transit Connect 6/7s. Accordingly, the court considers the common meaning of the relevant tariff terms. *See Marubeni*, 35 F.3d at 534 (absent legally binding chapter or section notes, the court need only consider the common meaning of relevant tariff terms).

8703	Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars:
	Other vehicles, with spark-ignition internal combustion reciprocating piston engine:
8703.23.00	Of a cylinder capacity exceeding 1,500 cc but not exceeding 3,000 cc 2.5%

When GRI 1 analyses demonstrate that merchandise is *prima facie* classifiable under two or more headings, it will be classified under "[t]he heading [that] provides the most specific description." GRI 3(a). Here, heading 8703 affords the most specific description; thus, if the Transit Connect 6/7s satisfy the requirements of heading 8703, "there is no need to discuss [heading] 8704." *See Marubeni*, 35 F.3d at 536. However, if the Transit Connect 6/7 is not classifiable under heading 8703, it falls within heading 8704.[43]

III. Classification is Based on the Article's Condition at the Time of Importation

Parties agree that the Federal Circuit's test for distinguishing between passenger vehicles and cargo vehicles governs this court's resolution of the instant dispute. *See, e.g.*, Pl.'s MSJ at 25–29; Def.'s XMSJ at 16; *see also Marubeni*, 35 F.3d 530. In *Marubeni*, the court decided the proper classification of the 1989 and 1990, two-door, two-wheel, and four-wheel drive Nissan Pathfinder when the sports utility vehicle first entered the market. 35 F.3d at 532. The *Marubeni* court considered two possible HTSUS headings—8703 and 8704—the same two headings at issue in the instant case, *id.* at 533, and concluded that to be "principally designed for the transport of persons," the vehicle must "be designed 'more' for the transport of persons than goods," *id.* at 534 (citing *Webster's Third New International Dictionary of the English Language, Unabridged*(1986) (defining "principally" as "in the chief place, chiefly," and defining "designed" as "done by design or purposefully"); *see also id.* at 535 (classification under heading 8703 requires "that a vehicle's intended purpose of transporting persons must outweigh an intended purpose of transporting goods."). The *Marubeni* court held that the proper classification of the Nissan Pathfinder was under heading 8703, encompassing motor cars and other motor vehicles principally designed for the transport of persons, and affirmed the Court of International Trade's

[43] Parties do not dispute the assignment of the subject merchandise under an appropriate subheading. If Plaintiff prevails, classification will be under subheading 8703.23.00, based on engine size. If Defendant prevails, classification will be under subheading 8704.31.00, based on weight.

("CIT") decision. *Id*. at 532 (affirming *Marubeni Am. Corp. v. United States*, 17 CIT 360, 821 F. Supp. 1521 (1993)). In so doing, the Federal Circuit spoke to the test to determine "whether a vehicle is principally designed for a particular purpose, not uniquely designed for a particular purpose," by looking "at both the structural and auxiliary design features, as neither by itself are determinative." *Id*. at 535.

Unlike the instant dispute, however, *Marubeni* did not involve post-importation processing of the subject merchandise,[44] concomitant allegations of resort to disguise or artifice to evade higher duties, *see* Def.'s XMSJ at 20–23; Def.'s Corrected Reply Mem. of Law in Opp'n to Pl.'s Mot. for Summ. J. and in Further Supp. of Def.'s Cross-Mot. for Summ. J. ("Def.'s Reply") at 6, 7–9, ECF No. 93–1 (condition of the Transit Connect 6/7s at the time of importation "was a ruse to fool CBP into believing that the vehicles were 'principally designed for the transport of persons'"), or competing claims of legitimate tariff engineering, Pl.'s MSJ at 32–36; Confidential Mem. of P & A in Opp'n to Def.'s Cross-Mot. for Summ. J. and Reply in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Reply") at 10–15, ECF No. 97. Accordingly, the court first discusses the relevance of those legal principles to the test set forth in *Marubeni*, before turning to its *Marubeni* analysis.

It is a well-settled tenet of customs law that "[i]n order to produce uniformity in the imposition of duties, the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." *Worthington v. Robbins*, 139 U.S. 337, 341 (1891). In 1881, the U.S. Supreme Court affirmed the principle that a manufacturer may purposely manufacture goods in such manner as to evade higher duties. *Merritt v. Welsh*, 104 U.S. 694, 701–02, 704 (1881) (a case involving the importation of sugar, which had been darkened with molasses during its manufacture to escape higher duties assigned to lighter-colored sugar). According to the Court, "[s]o long as no deception is practised, so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred." *Id*. at 704.

Seeberger v. Farwell, 139 U.S. 608 (1891) is in accord. In *Seeberger*, the manufacturer produced garments using a mixture of cotton (6%) and wool (94%) to avoid higher tariffs associated with pure wool garments. 139 U.S. at 609–10. The Customs Service (then called the "collector") determined that the small addition of cotton had not changed the character of the goods and the plaintiff's claim to a lower

[44] *See supra* Background Section III.D.

rate of duty "[w]as an attempt to defraud the revenue." *Id.* at 610–11. The trial court disagreed, and the Supreme Court concurred, finding that the manufacturer "had the right to . . . manufacture the goods with only a small percentage of cotton, for the purpose of making them dutiable at the lower rate." *Id.* at 611.

Merritt and *Seeberger* involved permanent alterations to the composition of their respective merchandise; neither case addressed, as occurred here, post-importation alterations to the subject merchandise. In *Citroen*, however, the Supreme Court did not regard the pre- or post-importation condition of the subject import as material to the classification analysis. *United States v. Citroen*, 223 U.S. 407 (1912). *Citroen* concerned the importation from France of 37 unset and unstrung pearls, divided into five separate lots. *Id*. at 413. Prior to importation, the pearls had been strung and worn as a necklace by their eventual owner. *Id*. at 413–14. After importation into the United States and delivery to the owner, the pearls were strung to "form[] the necklace she desired." *Id*. at 414. The Customs Service had classified the pearls under the provision for "pearls set or strung," and the importer appealed. *Id*. at 413.

The Court discussed, and dismissed, the idea that the pre-importation stringing of the pearls or any post-importation plan to string the pearls into a necklace determined the correct classification. *See id.* at 415–16 ("Had these pearls never been strung before importation, no one would be heard to argue that they fell directly within the description of paragraph 434 [applicable to set or strung pearls] because they could be strung, *or had been collected for the purpose of stringing or of being worn as a necklace*.")) (emphasis added); *Id*. at 416 ("Nor can it be said that pearls, imported unstrung, are brought within the description of paragraph 434 because, at some time, or from time to time, previous to importation, they have been put on a string temporarily for purposes of display."). The *Citroen* Court created a bright line test for classification cases: "[d]oes the article, *as imported*, fall within the description sought to be applied?" *Id*. at 415 (emphasis added).

It is also well settled, however, that articles cannot escape a prescribed rate of duty "by resort to disguise or artifice." *Id*. at 415. In other words, when the article is described by a particular tariff provision at the time of importation, "an effort to make it *appear otherwise* is simply a fraud on the revenue, and cannot be permitted to succeed." *Id*. at 415 (emphasis added) (citing *Falk v. Robertson*, 137 U.S. 225, 232 (1890) (a case involving the importation of high quality tobacco hidden in a bale of inferior quality tobacco, in which the importer had tried to classify the entire bale under the provision

applicable to the inferior tobacco)). In contrast, the purposeful manufacture or preparation of an article to avoid higher tariffs is not disguise or artifice; rather, that is legitimate tariff engineering. *See id*. at 415 ("But when the article imported is not the article described as dutiable at a specified rate, it does not become dutiable [at that rate] because it has been manufactured or prepared for the express purpose of being imported at a lower rate.") (citing *Merritt*, 104 U.S at 704, *Seeberger*, 139 U.S. at 611); HQ H220856 at 11 (defining legitimate tariff engineering).

The CIT has previously addressed competing claims of legitimate tariff engineering and disguise or artifice in a case involving post-importation processing. *See Heartland By-Products, Inc. v. United States ("Heartland I"),* 23 CIT 754, 74 F. Supp. 2d 1324 (1999), *rev'd*, 264 F.3d 1126 (Fed. Cir. 2001) *("Heartland II"). Heartland I* concerned the correct classification of sugar syrup to which molasses was added during manufacturing and then extracted after importation. *Heartland I*, 23 CIT at 756, 74 F. Supp. 2d at 1328. The plaintiff, Heartland By-Products, Inc. ("Heartland"), claimed classification under subheading 1702.90.40 of the HTSUS, which covers "sugar syrups . . . containing soluble non-sugar solids [excluding foreign substances] greater than 6 percent by weight of the total soluble solids," and which was not subject to the relevant tariff rate quota,[45] *Id.* at 760, 74 F. Supp. 2d at 1332, "because [the product] contain[ed] more than 6% by weight of soluble, non-sugar solids with no foreign substances," *Heartland II*, 264 F.3d at 1129. Customs initially agreed. *Heartland I*, 23 CIT at 755, 74 F. Supp. 2d at 1327 (citation omitted). However, the domestic sugar industry filed a petition seeking reclassification of the subject merchandise, arguing, *inter alia*, that classification under subheading 1702.90.40 "defeated the purpose of the 6% solids content provision of 1702.90.20 HTSUS[, which] . . . . was adopted to ensure that sugar syrups containing less than 6% non-sugar solids would be subject to the TRQ because such syrups compete directly with sugar." *Heartland II*, 264 F.3d at 1130.

Pursuant to that petition, Customs determined that the molasses constituted a "foreign substance" and should be disregarded in determining the amount of soluble non-sugar solids in the syrup. *Heartland I*, 23 CIT at 762, 74 F. Supp. 2d at 1333 (citation omitted); *Heartland II*, 264 F.3d at 1131. Customs also determined that the addition of molasses was not a "genuine step" in the process of manufacturing the sugar syrup, and, thus, its inclusion constituted disguise or artifice. *Heartland I*, 23 CIT at 767–69, 74 F. Supp. 2d at

[45] "[T]he volume of sugar imported into the United States is controlled by a Tariff Rate Quota." *Heartland II*, 264 F.3d at 1128 (citing Additional U.S. Notes to Chapter 17 (2000)).

1337–38 (citation omitted); *Heartland II*, 264 F.3d at 1131 (citation omitted). Accordingly, Customs revoked its prior ruling, *Heartland I*, 23 CIT at 756, 74 F. Supp. 2d at 1329, and classified Heartland's sugar under subheading 1702.90.10/20, *Heartland II*, 264 F.3d at 1131–32 (citation omitted).[46]

On appeal from Customs' revocation, the CIT concluded that molasses is not a foreign substance because it is "composed of the same chemical ingredients" as raw sugar and the subject sugar syrup, but in different proportions. *Heartland I*, 23 CIT at 762–64, 74 F. Supp. 2d at 1333–35. The CIT also disagreed with Customs' finding that the addition of molasses was not a genuine step in the manufacturing process. *Id.* at 767–69, 773, 74 F. Supp. 2d at 1338–39, 1342 ("The record evidence indicates and does not contradict that combining raw sugar with molasses is a legitimate step in the refining process."). According to the CIT, *Merritt* and its progeny "have accepted artificial steps in the manufacturing process done to obtain the lowest rate of duty." *Id.* at 771, 74 F. Supp. 2d at 1341 ("[T]he motive of the importer in fashioning his or her merchandise is simply not a relevant inquiry. In fact, to the extent motive is relevant, an importer who intends to fashion merchandise solely for the purpose of obtaining the lowest rate of duty is within his or her legal right."). Moreover, following *Worthington* and subsequent cases standing for the proposition that classification is determined based upon the condition of the article at the time of importation, the court faulted Customs for considering post-importation use of the syrup in its revocation decision. *Id.* at 772–73, 74 F. Supp. 2d at 1341–42 ("Plaintiff's operation falls directly within the line of cases which hold that an importer has the right to stop production at the most favorable time for duty purposes.").

The Federal Circuit reversed the CIT on the basis that Customs' determination that the term "foreign substances" in subheading 1702.90.10/20 included the molasses Heartland had added to its sugar syrup merited *Skidmore* deference. *Heartland II*, 264 F.3d at 1134. The majority opinion declined to address the parties' arguments concerning the materiality, if any, of the syrup's post-importation processing to the classification analysis. *See id.* at 1134 (declining to address other arguments raised in the appeal). Those arguments were addressed by Senior Circuit Judge Friedman, who wrote a separate concurring opinion. *Id.* at 1137–39 (Friedman, J., concurring).

[46] Subheading 1702.90.10/20 covers sugar syrups with non-sugar solids in an amount equal to or less than 6% soluble non-sugar solids. *Heartland I,* 23 CIT at 762, 74 F. Supp. 2d 1333; Subheading 1702.90.10/20, HTSUS.

The concurrence opined that record evidence supported Customs' factual finding that the molasses was "added to the sugar in this case to achieve a desired level of soluble non-sugar solids for the avoidance of quota," and its conclusion that the importation of the sugar syrup with molasses was disguise or artifice. *Id.* at 1138–39 (Friedman, J., concurring) (citation omitted). According to the concurrence, because

> the addition and removal of the molasses from the sugar served no manufacturing or commercial purpose, the conclusion is irresistible that the only purpose of this strange arrangement was to create a fictitious product that, because of the temporary presence of the molasses, qualified for the lower rate of duty on sugar imports containing specified amounts of non-sugar solids.

Id. at 1138 (Friedman, J., concurring).

Though recognizing that concurring opinions are not binding on this court, Parties to the instant litigation dispute the application of Judge Friedman's concurrence to this case and the correctness of CBP's reliance on the concurrence in the underlying ruling. *See* Pl.'s MSJ at 32–33; Pl.'s Reply at 11; Def.'s XMSJ at 21–23; *see also* HQ H220856 at 11–13. Plaintiff distinguishes the *Heartland II* concurrence on the basis that, in that case, the sugar syrup "was not a real product *in its condition as imported* because there was no market for molasses-impregnated sugar," whereas here, "there is a very real market for passenger vans." Pl.'s MSJ at 33. Defendant contends the *Heartland II* concurrence squarely applies: "[a]s in *Heartland*, Ford's program constitutes a disguise or artifice by creating a fictitious product to obtain a lower duty rate." Def.'s XMSJ at 22–23 (arguing that "[b]y Ford's own design, [the Transit Connect 6/7] with rear seating is a fiction" because it cannot be ordered by or sold to a customer and, thus, "is not a commercial reality").

The court finds that neither party's respective position on, nor Customs' analysis of, the *Heartland* concurrence is persuasive. For several reasons, however, the court declines to adopt the view espoused in the concurrence.

First, the concurring opinion's focus on the purported lack of "manufacturing or commercial purpose" to the addition and removal of the molasses, *Heartland II*, 264 F.3d at 1138, appears, to the court, to run counter to the Supreme Court's view that "a manufacturer [has the] right to make [its] goods as [it] pleases," *Merritt*, 104 U.S at 701. Second, calling upon CBP to examine the purpose and genuineness of steps in the manufacturing process as part of its classification process would impair the timely and sound administration of the customs

laws. *See id.*, 104 U.S at 702 ("Uncertainty and ambiguity are the bane of commerce. Discretion in the custom-house officer should be limited as strictly as possible."); *Citroen*, 223 US at 414–15 (uniform imposition of duties depends upon classification of the article based on its condition at importation).[47] Finally, the Supreme Court's guidance on disguise or artifice emphasizes changes to the *appearance*, not the physical characteristics, of the article. *See Citroen*, 223 U.S. at 415 (when the article is described by a particular tariff provision at the time of importation, "an effort to make it *appear otherwise* is simply a fraud on the revenue, and cannot be permitted to succeed") (emphasis added). *Cf. Merritt*, 104 U.S. at 704 ("honest[] expos[ure]" of the goods to the customs officers may preclude a finding of fraud). This guidance makes sense in light of the general rule that a manufacturer has the right to *make its goods* as it chooses. *See id.*, 104 U.S. at 701. Parsing manufacturing steps and the reasons behind those steps in an effort to uncover disguise or artifice threatens to turn the concept of legitimate tariff engineering on its head. Unsurprisingly, therefore, the few cases finding disguise or artifice involve post-manufacture, pre-importation efforts to conceal the nature of the imported article. *See Falk*, 137 U.S. at 231–32 (good quality tobacco packed with inferior quality tobacco); *Irwin*, 78 F. at 802–03 (gun stocks and barrels, shipped and imported together, properly classified as complete guns, not parts). *Cf. Merritt*, 104 U.S. at 704–05 (suggesting that the artificial addition of color to sugar after manufacturing, and "especially after being put up in packages," might constitute a "fraud on the revenue" because the sugar would have a different

[47] *United States v. Irwin*, 78 F. 799, 801 (2d Cir. 1897) is in accord with the view "that intent is not an element in determining the proper classification of imported articles, and that merchants are at liberty so to manufacture and so to import their goods as to subject them to the lowest possible duties under the tariff laws." There, however, the Second Circuit held that gunstocks and barrels imported together, on the same ship for the same importer, and claimed to be dutiable as parts, were instead to be assessed duties "as a whole." *Irwin*, 78 F. at 802. The court distinguished the Supreme Court's decision in *United States v. Schoverling*, 146 U.S. 76 (1892). *Id*. at 802–03. In *Schoverling*, an importer entered gunstocks and separately arranged with another importer to enter the barrels necessary to make a complete gun, thereby seeking to avoid the higher duties payable on finished guns. 146 U.S. at 78–79. The Customs Service classified the gunstocks under the provision for completed shotguns. *Id*. at 78. In holding for the importer, the Court cited *Merritt* for the proposition that "the intent of the importers to put the gunstocks with barrels separately imported, so as to make here completed guns for sale, cannot affect the rate of duty on the gunstocks as a separate importation." *Id*. at 81 (citing *Merritt*, 104 U.S. 694). The *Irwin* court distinguished *Schoverling* on the basis that the parts were not shipped together or for the same importer, and there was no evidence the parts had been assembled prior to importation and subsequently disassembled for shipping and importation. *Irwin*, 78 F. at 802–03.

color from when it was manufactured). Parties have not supplied, nor has the court located, any case law tracing disguise or artifice to the manufacturing process.[48]

The question the court must now resolve is how the above-described framework guides the application of *Marubeni* to the facts of this case. As previously noted, determining "whether a vehicle is principally designed for a particular purpose" requires as assessment of both "structural and auxiliary design features." *Marubeni*, 35 F.3d at 535. In reviewing the trial court's findings, the Federal Circuit noted that the CIT considered "design intent and execution" as part of its analysis of structural and auxiliary design features. *Id.* at 536. The Federal Circuit also approved of the CIT's evaluation of "marketing and engineering design goals (consumer demands, off the line parts availability, etc.)." *Id.* at 536 ("It is evident that the CIT carefully applied the proper standards . . . .").

The task that confronted the *Marubeni* trial court, however, differs from the task before this court. There, the trial court addressed whether the Nissan Pathfinder, which "was basically derived from Nissan's Hardbody truck line," but which "was based upon totally different design concepts," reflected sufficient changes from the Hardbody truck so as to be classified as a passenger vehicle and not as a truck. *Id.* at 536. Thus, in the context of that case, the trial court "correctly pointed out [those] differences and, more importantly, the reasons behind the design decisions." *Id.* at 536 (design decisions noted by the CIT included, for example, "the need for speed and economy in manufacturing to capture the changing market").

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[48] Ford cites several Customs rulings for the proposition that disguise or artifice may be found when "the good in its condition as imported was not capable of functioning as the thing it purported to be." Pl.'s MSJ at 35 (citing HQ 089090 (July 10, 1991) (feather dusters classified as feathers based on use), HQ 076411 (July 31, 1986) (overalls classified as shorts because the bib was "an usual element having no apparent actual utility []or commercial reality" when the purchaser would remove and discard the bib), HQ 073219 (Feb. 29, 1984) (body suit with knit crotch brief attached by a single yarn classified as separate pieces because the yarn was removable and Customs determined that the article was not known in commerce or used as a bodysuit), and HQ 964222 (July 7, 2002) (dog-eared fence pickets classified as lumber based on the article's principal use and Customs' finding that cutting a dog-ear on the wood boards at issue "is not a genuine step in manufacturing or producing fence pickets")).

The principle that Ford extracts from Customs' rulings, however, which traces disguise or artifice to the manufacturing stage, does not appear in Customs' reasoning for finding disguise or artifice in those cases. Instead, Customs' general view is that disguise or artifice turns on whether the article is a "commercial reality," i.e., whether it is "sold or otherwise entered into the stream of commerce in the condition as imported." HQ 965751 (Nov. 18, 2002) at 6–7 (discussing Customs' rulings on disguise or artifice, including several cited by Ford). The only authoritative support Customs cites for its view is the *Heartland II* concurrence, which it notes simply agreed with Customs' conclusion that Heartland's actions did not constitute legitimate tariff engineering. HQ 965751 at 6. As discussed, however, the concurrence does not persuade the court that an article's "commercial reality" is an appropriate framework for determining disguise or artifice.

The task before this court is to determine whether the MY2012 Transit Connect 6/7s imported with the CRSV-2 installed at the time of importation but later removed is "principally designed for the transport of persons." The court must perform that analysis against the backdrop of Parties' arguments concerning whether or to what extent Ford's post-importation processing (or rather, its pre-importation intent to perform post-importation processing) informs that analysis. Thus, the court must tread carefully in its consideration of design intent or purpose so as to not run afoul of centuries-old case law on legitimate tariff engineering that permits manufacturing with the intent to minimize customs duties. *See, e.g.*, Citroen at 415. [49]

The United States interprets *Marubeni* as requiring inquiry into a vehicle's "intended purpose, *i.e.*, what the vehicle is used for." Def.'s XMSJ at 20; Def.'s Reply at 5–6, 15. For that reason, Defendant contends, "ephemeral features whose reason for existence is to fool CBP as to a vehicle's true nature and intended purpose should be disregarded." Def.'s XMSJ at 20. Defendant argues that the subject imports are "cargo van[s] from birth," and do not actually undergo a conversion process because the features removed during post-importation processing exist only for the purpose of classification. *Id.* at 18 (pointing to the fact that Transit Connect 6/7s are offered, ordered, and sold without the second row seat, the VIN numbers reflect that they are cargo vans, and the GVWR reflects two-passenger seating). According to Defendant, because "[t]he temporary 'chicken tax' features exist only" to obtain favorable classification and not for the purpose of transporting persons, Ford's "'chicken tax' scheme" constitutes disguise or artifice. *Id.* at 21; Def.'s Reply at 9.

Ford emphasizes *Marubeni*'s discussion of design features, Pl.'s MSJ at 27, and contends that "purpose" is determined by considering "a vehicle's physical features at the point of importation, not subjective intent, post-importation processing, or actual use." Pl.'s Reply at 5. Ford contends that Defendant's disregard of "features that are not consistent with how goods are used or sold . . . merely walks 'intent' and 'actual use' in through the back door." *Id.* at 11.

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[49] Defendant contends that certain Supreme Court opinions concerning legitimate tariff engineering are inapposite because the tariff provisions at issue in those cases did not "implicate[] the principal design of the good." Def.'s Reply at 15–16 (citing, *inter alia, Citroen, Worthington,* and *Schoverling*). According to Defendant, Ford's reliance on those cases constitutes an unavailing "compar[ison of] apples to oranges" because "*Marubeni* provides the proper interpretation of the actual headings at issue here." *Id.* at 17. Defendant is incorrect. That *Marubeni* provides the framework for determining whether the subject imports are properly classified under heading 8703 or 8704 does not give this court license to ignore additional sources of binding case law informing the analysis.

Defendant goes to great lengths to contend—paradoxically—that conducting the *Marubeni* test based on the condition of the Transit Connect 6/7s at the time of importation must account for post-importation processing and Ford's reasons for so doing. Def.'s Reply at 5 (an article's "condition as imported" is not necessarily "based solely on observable physical characteristics"); *Id.*at 5–6 (*Marubeni*'s "intended purpose" language speaks to "the reason why something is done or used," which includes Ford's purported reasons for installing and removing the rear seats). But the Federal Circuit in *Marubeni* did not refer to the *manufacturer's* "intended purpose" in designing a vehicle in a particular way, but to the "*vehicle's* intended purpose of transporting persons" as compared to an "intended purpose of transporting goods." *Marubeni*, 35 F.3d at 535 (emphasis added). The court goes on to state that the vehicle's preeminent "intended purpose" is determined from an examination of the *vehicle's* structural and auxiliary design features. *Id.* at 535. Although the court approved of the CIT's consideration of Nissan's "reasons behind [certain] design decisions," it did not state that the CIT must, in all cases, consider the manufacturer's intent as part of the analysis. *See id.* at 536. When, as here, the relevant intent is the intent to avoid higher duties, the court is bound to follow the Supreme Court's view that such intent is immaterial to an article's classification. *See, e.g., Citroen,* 223 U.S. at 415.

Additionally, Defendant's argument attempts to trace disguise or artifice to the pre-importation manufacturing process. Def.'s Reply at 9 ("By adding the 'chicken-tax' seat and windows . . ., Ford has attempted to use a disguise to make the subject merchandise appear to be something that it is not."). Similarly, Defendant's focus on the Transit Connect 6/7s apparent lack of "commercial reality" as a vehicle with a second row seat, Def.'s XMSJ at 23; Def.'s Reply at 11 n.6, seeks to focus the court on events that occur post-importation. In essence, Defendant urges the court to concentrate on any time other than the time of importation. But the well-settled "time of importation" rule, applied with Supreme Court guidance on the difference between disguise or artifice and legitimate tariff engineering, disfavors Defendant's approach. *See supra* pp. 33–37. Moreover, Ford has not "disguised" anything. Rather, it manufactured a cost-reduced second row seat for the purpose of obtaining the significantly lower (one-tenth) tariff rate assigned to passenger vehicles in the most economical manner. Joint Suppl. ¶¶ 29, 39, 41, 86.[50] That Ford ulti-

[50] Defendant contends, without supporting authority, that the strictness of the "principally designed" test attendant to classification under heading 8703 as compared to the broader "for the transport of goods" requirement under heading 8704 compels "the conclusion that

mately removes that seat after importation is immaterial;[51] what matters is whether, at the time of importation, the subject vehicles were "designed 'more' for the transport of persons than goods." *Marubeni*, 35 F.3d at 534. To make that determination, the court turns to its consideration of the vehicle's structural and auxiliary design features present at the time of importation. *Id.* at 535.

IV. *Marubeni* Analysis

The *Marubeni* court derived its structural/auxiliary design features analysis from a March 1, 1989, Customs memorandum providing guidance on applying headings 8703 and 8704 to sport utility vehicles. *Marubeni*, 35 F.3d at 534. Pursuant to Customs' memorandum, structural design features include a vehicle's "basic body, chassis, [] suspension design, . . .[and] style and structure of the body [control access to rear]." *Id.* at 534 (first and third alterations added). The memorandum did not enumerate certain auxiliary design features, but noted their relevance to the determination. *Id.* at 534.

Applying that guidance, the *Marubeni* court reviewed the CIT's findings regarding relevant structural and auxiliary differences between the Hardbody truck and the Pathfinder. As to structural features, the court focused on the Pathfinder's side rails, front cab design, front and rear suspension, relocation of the gas tank and spare tire to accommodate the rear passenger seat, which reduced cargo space, and cross beams, which were added to accommodate other changes. *Id.* at 536. Additionally, other design features that pointed to a principal design for passengers included: "the spare tire and the rear seat when folded down intrude upon the cargo space; the cargo area is carpeted; [and] a separate window opening in the pop-up tailgate accommodates passengers loading and unloading small pack-

Congress did not want importers to easily avoid the 25[%] *ad valorem* rate of [h]eading 8704." Def.'s Reply at 8 n.5. Regardless of the truth of Defendant's contention, the court's focus on structural and auxiliary design features present at the time of importation does not weaken the classification analysis; rather, it applies *Marubeni* consistently with well-settled binding case law that an article is classified based upon its condition at the time of importation. *See Worthington*, 139 U.S at 341; *Citroen*, 223 U.S. at 415.

[51] To the extent Defendant contends that Ford's intent to remove the CRSV-2 is material, *see* Def.'s XMSJ at 21 ("Ford is asking the Court to draw the illogical conclusion that a vehicle that cannot be ordered or purchased with rear seating and whose marketing speaks in terms of cargo capacity and capability can have an intended purpose of transporting persons that outweighs the purpose of transporting goods."), that intent must be weighed against Ford's undisputed intent to create a vehicle, and cost-reduced rear seat, that meets U.S. federal safety standards, *see* Pl.'s Facts ¶ 27; Def.'s Resp. to Pl.'s Facts ¶ 27; Pl.'s Facts ¶ 28; Def.'s Resp. to Pl.'s Facts ¶ 28; Pl.'s Facts ¶ 29; Def.'s Resp. to Pl.'s Facts ¶ 29; Joint Suppl. ¶¶ 22, 41, 86, 87. However, such subjective balancing of subjective intentions (by the court or CBP) demonstrates the folly of the endeavor and its capacity to undermine the uniform administration of the customs laws. *See Worthington*, 139 U.S at 341; *Merritt*, 104 U.S at 702.

ages without having to lower the tailgate." *Id.* The court noted only "minor" differences between the Hardbody truck and the Pathfinder with respect to the axles and wheels, which was "consistent with the Pathfinder's off-road mission, particularly in the loaded condition." *Id.* at 537. Finally, the court noted that [t]he Pathfinder has the same engine size as the Maxima passenger car." *Id.*

For its auxiliary design analysis, the *Marubeni* court emphasized Nissan's lowering of the vehicle's height, improved seat slides, reclining and comfortable rear seats that fold "fairly flat" to make a "cargo bed but are not removable," and "rear seat stereo outlets, ashtrays, cubbyholes, arm rests, handholds, footwells, seat belts, child seat tie down hooks and operable windows." *Id.*

After the Federal Circuit decided *Marubeni*, the United States proposed amending the Explanatory Notes ("EN") to heading 8703 to enumerate certain design features characteristic of vehicles classifiable under that heading. *See* Pl.'s Ex. 6 at T0257-T-0259, ECF No. 96–3 (World Customs Org., Harmonized Sys. Comm., *Study With a View to Establishing Guidelines for the Classification of Vehicles of Headings 87.02, 87.03, and 87.04* (NC0304E1, Sept. 26, 2000)). As amended, EN 87.03 provides insight into the correct classification of "multipurpose" motor vehicles that may be used to transport persons and goods, including "van-type vehicles." EN 87.03. Design features pointing to classification under heading 8703 include the:

(a) Presence of permanent seats with safety equipment (e.g., safety seat belts or anchor points and fittings for installing safety seat belts) for each person or the presence of permanent anchor points and fittings for installing seats and safety equipment in the rear area behind the area for the driver and front passengers; such seats may be fixed, fold-away, removable from anchor points or collapsible;

(b) Presence of rear windows along the two side panels;

(c) Presence of sliding, swing-out or lift-up door or doors, with windows, on the side panels or in the rear;

(d) Absence of a permanent panel or barrier between the area for the driver and front passengers and the rear area that may be used for the transport of both persons and goods; [and the]

(e) Presence of comfort features and interior finish and fittings throughout the vehicle interior that are associated with the passenger areas of vehicles (e.g., floor carpeting, ventilation, interior lighting, ashtrays).

EN 87.03. While not binding, the ENs may provide interpretative guidance in a classification analysis. *Lynteq,* 976 F.2d at 699.[52]

In this case,[53] the Transit Connect 6/7s share certain structural features with the Transit Connect 9, which is delivered to the customer with its rear seat in place and which was not reclassified under heading 8704. Those structural features include engine size and type, steel unibody construction, interior volume and rear space from floor to ceiling, front-wheel drive, underbody bracing, permanent bracing in the side pillars of the car body, Macpherson strut front suspension, and ground clearance. Moreover, all Transit Connects share the same chassis and drivetrain as the Ford Focus passenger vehicle. *Cf. Marubeni*, 35 F.3d at 534 (citing Customs' March 1, 1989 memorandum, which emphasized suspension design, body type, and chassis as part of a vehicle's structural design). Additional features that point to classification under heading 8703 include the Transit Connect 6/7s second row sliding doors with windows and swing-out rear doors and the absence of a panel or barrier between the first and second row seats. *See* EN 87.03.

According to Defendant, features that disfavor classification under heading 8703 include the Transit Connect 6/7s GVWR of 5005 pounds, as compared to the Transit Connect 9's 4965 pound GVWR, and the presence of the number 6 or 7 in the Transit Connect 6/7s VIN, which designates the vehicles as subject to post-importation removal of the rear seat. *See* Def.'s XMSJ at 18 (contending the Transit Connect 6/7s are "cargo van[s] from birth"). Neither feature weighs heavily in the analysis, however. EN 87.03 contemplates motor vehicles with a GVWR of less than five tonnes, which describes the Transit Connect 6/7s. *See* EN 87.03 ("These features are especially helpful in determining the classification of motor vehicles which generally have a gross vehicle weight rating of less than 5 tonnes . . . ."). The presence of the 6 or 7 in the Transit Connect 6/7's VIN merely reflects Ford's intent to alter the subject merchandise after obtaining favorable tariff treatment, which, as discussed above,[54] is immaterial to the classification analysis.

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[52] Defendant disputes the appropriateness of looking to the ENs for guidance. Def.'s Reply at 13–14; *id.* at 14 ("Resort to the ENs is not necessary here because binding Federal Circuit authority has provided the proper interpretation of Heading 8703."). To be sure, the court considers the ENs as guidance insofar as they are relevant and consistent with binding law. Because *Marubeni* discussed structural and auxiliary design features pertinent to the vehicles at issue in that case, EN 87.03 furnishes general criteria that aid the court's application of the *Marubeni* test to the facts of this case.

[53] The material facts upon which the court relies in its discussion are stated above. *See supra* Background Section III.B-C. For ease of reading, the court's analysis omits citations to Parties' statements of facts.

[54] *See supra* Discussion Section III.

In sum, the Transit Connect 6/7's structural similarity to the Transit Connect 9 passenger wagon and its consistency with relevant parts of EN 87.03 favor a finding that it is principally designed for the transport of persons. Such a finding is supported by an examination of the subject merchandise's auxiliary design features, including the cost-reduced rear seat.

Plaintiff contends that the Transit Connect 6/7s' cost-reduced rear seat satisfies the *Marubeni* test merely because it is included at the time of importation. *See* Pl.'s MSJ at 27–29 (including the rear seat in an auxiliary design list with ground clearance, footwells, dome lighting, seatbelts and child safety features, a cupholder, map pocket, and coat hooks). Defendant responds that the Transit Connect 6/7s' cost-reduced rear seat was never intended to remain in the vehicle, and points to its cost-reduced characteristics as evidence that the seat does not meet the *Marubeni* test. *See* Def.'s XMSJ at 18, 24. Contrary to Parties' respective positions, however, neither the seat's mere presence nor its removal is dispositive.[55] Instead, the court must determine whether the characteristics of the CRSV-2 indicate a principal design for the transport of persons.[56]

The CRSV-2 consists of a seatback frame and cushion frame; it does not contain a headrest, which was removed in the creation of the CRSV-1. The seatback frame contains seatbelts for every seated position, and a seatbelt retractor mount and shoulder guide that are built to withstand a collision. The seatback and seat cushion consist

[55] Presumably in reference to Ford's post-importation processing, Defendant contends the subject merchandise lacks the non-removable rear seats included in the *Marubeni* court's list of auxiliary design features. Def.'s XMSJ at 24; *see also Marubeni* at 537. Reading *Marubeni* in context, however, demonstrates that the court was referring to seats that the Pathfinder's eventual owner could not remove. *See Marubeni*, 35 F.3d at 537 ("Other auxiliary design features that point to transport of passengers include: rear seats that recline, are comfortable, and fold to make a fairly flat cargo bed but are not removable."). The relevant sentence does not speak to a manufacturer's post-importation removal of the seats. Moreover, EN 87.03 suggests that the presence of anchor points and fittings for installing seats, which may be removable, is a sufficient indicator of a principal design for the transport of persons. EN 87.03 is not inconsistent with *Marubeni* because *Marubeni* does not require permanent seats; rather, it noted the presence of a non-removable seat *in the Pathfinder* as one feature that pointed to the transport of persons. Here, there are no facts suggesting that the CRSV-2 could be easily removed by a lay customer. Even after post-importation processing, the Transit Connect 6/7 retains anchor holes for the second row seat, although they are plugged and not readily accessible. Because this refers to the condition of the Transit Connect 6/7 after post-importation processing, the court simply notes this fact, without reliance.

[56] The court discusses the rear seat's features in the context of Ford's cost reduction efforts that resulted in the CRSV-2. Although a finding that the CRSV-2 supports classification under heading 8703 would imply the same with regard to the CRSV-1 and the rear seat installed in the MY2010 Transit Connect 6/7 (which is the same as the rear seat installed in the MY2012 Transit Connect 9), the court is mindful that vehicles with those seats installed are not at issue in this litigation. Thus, the court's ultimate conclusion on the correct classification of the MY2012 Transit Connect 6/7 is not a conclusion on the correct classification of any other vehicle.

of high density polyurethane foam, and are contoured on the passenger side for lumbar and lateral support. The cushion is held in place by the frame contours, cushion, seatback wires, and cover. The cushion frame includes the LATCH system, which enables a LATCH-equipped child car seat to be fitted to the seat.

The entire seat is wrapped in a cost-reduced fire-resistant grey woven cover that does not match the flame retardant fabric covering the front seat. The CRSV-2 also lacks fabric mesh covering the rear seat bottom and black paint that had previously covered the exposed metal portions of the seat frame. However, as Ford contends, tariff classification under heading 8703 depends less on the luxuriousness of the amenities than the degree to which their functionality reflects a principal design for transporting persons. Pl.'s MSJ at 28 (quoting *Pomeroy Collection, Ltd. v. United States*, 32 CIT 526, 544, n. 20, 559 F. Supp. 2d 1374, 1392, n. 20 (2008) ("An automobile's tariff classification does not differ depending on whether it is a stripped-down model designed solely as basic transportation or a high-end luxury sedan supplied with every conceivable option and amenity.") (citing heading 8703 for the purpose of comparing it to heading 9405, which covered the lamps at issue in that case regardless of the degree of ornamentation)). There is no indication that the grey woven cover or other cosmetic changes, including the removal of the backrest reinforcement pad, diminish the seat's utility as a seat.

The seatback frame has pivot brackets enabling it to fold forward; however, the torsion bar assembly and mounts, and associated seatback wire, which secure the seatback when folded against the seat cushion, were removed at the CRSV-1 stage. The tumble lock mechanism, which held the entire seat in place when it was folded against the front seat, was also removed. Because the torsion bar assembly and tumble lock mechanism made it easier to transport goods by securing the seat when the vehicle was being used to transport cargo instead of passengers, the removal of those items does not diminish the seat's ability to transport passengers.[57]

The seatback frame contains three seatback wires. Seatback wires provide lumbar support, passenger comfort, support for cargo when folded flat, and support for the seat foam and fabric. The MY2010 Transit Connect 6/7 seatback contained seven seatback wires; four were removed in the creation of the CRSV-2.[58] There is no evidence

[57] In developing the CRSV-2, Ford also removed a small rubber pad designed to decrease noise and vibration from the rear seat leg. The fact of the pad's removal alone, however, without additional evidence regarding its preventive effect and the degree of noise and vibration generated by its removal, renders it of little weight in the analysis.

[58] The cushion frame contains seat bottom wires that help to keep the foam in place and provide support for passengers. None of those wires were removed.

that the remaining three wires provided insufficient support. Ford did not conduct consumer testing on the CRSV-2; however, it used physical testing and engineering judgment to determine whether the CRSV-2 (in particular, the removal of the seatback wires and use of different fabric) required additional testing to confirm FMVSS compliance. On that score, H-Point testing did not demonstrate any change to the point where the femur pivots in the ball joint on the hip bone; thus, Otosan engineers concluded that the CRSV-2 was FMVSS compliant.

The undisputed facts show that the CRSV-2 is still a seat, albeit a cheaper and, perhaps, less attractive one. There is nothing about the seat (including the cost reduction measures Ford took in designing the CRSV-2) that convinces the court that this version of the seat is less relevant to the analysis. The presence of the LATCH-equipped CRSV-2, taken together with additional auxiliary design features, including carpeted footwells in front of the second row seat, child-locks in the sliding side doors, an optional third cupholder in the rear of the center console, coat hooks in the second row, a map pocket attached to the rear of the front driver seat, and dome lighting throughout the vehicle, support classification pursuant to heading 8703. *Cf. Marubeni*, 35 F.3d at 537 (pointing to rear seats that accommodate child seats, rear seat belts, and footwells); EN 87.03 (pointing to carpeting and lighting).

To be sure, certain auxiliary comfort features are lacking in the subject merchandise. Transit Connect 6/7s have front vents and front speakers, but not rear vents, speakers, or handholds. The subject imports also do not have side airbags in the area behind the front seats or a cargo mat, and the painted metal floor of the cargo area was left exposed. *Cf. Marubeni*, 35 F.3d at 536–37 (pointing to rear stereo outlets, rear handholds, and carpeting of the cargo area). However, the Transit Connect 9, which Customs did not reclassify under heading 8704, also lacked rear vents, armrests, handholds, and side airbags.[59] The court does not find that the absence of those features changes the outcome here.

In sum, the court finds that the Transit Connect 6/7's structural and auxiliary design features point to a principal design for the transport of persons.

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[59] Although in briefing Defendant disputes the relevance of the Transit Connect 9 facts, *see* Def.'s Reply at 13 n.9 (noting the Transit Connect 9s are not at issue), it was Defendant that deemed those facts material to the classification analysis, *see* Def.'s Facts ¶¶ 27–30.

V. Whether the Transit Connect 6/7's Use Properly Informs the Analysis

Parties dispute the propriety of the court's consideration of the use of the subject merchandise. *Compare* Pl.'s MSJ at 36–39 (CBP wrongly considered use), *with* Def.'s XMSJ at 27 n.19 (consideration of use is "integral" to determining classification under heading 8703), *and* Def.'s Reply at 10–11 (intended use is relevant to the analysis).

Eo nomine and use provisions are two distinct types of tariff provisions. *GRK II*, 761 F.3d at 1361 (Reyna, J., dissenting).[60] Further, there are two types of use provisions: principal use and actual use, both of which are governed by the U.S. Additional Rules of Interpretation ("ARI"). *GRK II*, 761 F.3d at 1362 (Reyna, J., dissenting); *see also* ARI 1(a) (principal use "determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong"); ARI 1(b) (actual use determined in accordance with the article's intended use at the time of importation, the goods must be so used, and proof thereof furnished within three years from the date of entry). In a principal use case, courts rely on the *Carborundum* factors to determine the principal use of the subject merchandise.[61] Typical use provisions contain the word "use" or "used" in the text of the subheading. *GRK IV*, 180 F. Supp. 3d at 1267 (footnote omitted). In contrast, "[a]n *eo nomine* provision describes an article by a specific name, not by use, and includes all forms of the named article." *GRK II*, 761 F.3d at 1361–62 (Reyna, J., dissenting).

Ford contends that heading 8703 is an *eo nomine* provision. Pl.'s MSJ at 21, 36. Ford further contends that the *Marubeni* court did not treat heading 8703 as a "principal use" provision, and, thus, neither should this court. *See id.* at 36–37 & n.8.[62] The United States con-

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[60] The court cites four cases involving GRK Canada, Ltd*: GRK Can., Ltd. v. United States ("GRK I"),*37 CIT ___, 884 F. Supp. 2d 1340 (2013), *vacated*, 761 F.3d 1354 (Fed. Cir. 2014) (*"GRK II"), reh'g en banc denied,* 773 F.3d 1282 (Fed. Cir. 2014) (*"GRK III"*), and *GRK Can., Ltd. v. United States ("GRK IV"),*40 CIT ___, 180 F. Supp. 3d 1260 (2016) (opinion on remand).

[61] They include:

> 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 *United States v. Carborundum Co.*, 63 C.C.P.A. 98, 98, 536 F.2d 373, 377 (1976)).

[62] Customs' ruling at issue here does not specify whether it interprets heading 8703 as an *eo nomine* provision, *see* HQ H220856 at 4, though it has previously done so, *see* HQ H010587 at 5 (Nov. 4, 2009) ("We note that heading 8703, HTSUS, is [] an eo nomine

tends that "[h]eading 8703 is not similarly constructed" to other *eo nomine* provisions that describe articles by name because "the words 'principally designed for the transport of persons' changes its complexion to one that is purpose-driven." Def.'s Reply at 10. Defendant proffers, without authoritative support or explanation, that heading 8703 "might best be described as a hybrid" provision. *Id.* at 10.

The court is bound by the Federal Circuit's legal determinations as to questions of law, and specifically as to its interpretation of tariff terms. *Avenues in Leather, Inc. v. United States*, 423 F.3d 1326, 1331 (Fed. Cir. 2005). *Marubeni* did not treat heading 8703 as an actual use provision or a principal use provision requiring consideration of the *Carborundum* factors. Though the *Marubeni* court did not expressly conclude that heading 8703 is an *eo nomine* provision, the court treated it like a typical *eo nomine* provision by defining the relevant terms and then examining the Pathfinder's physical characteristics to determine whether it came within those terms. *See Marubeni*, 35 F.3d at 534–37; *see also GRK III*, 773 F.3d at 1284 (Wallach, J., dissenting) ("In an eo nomine analysis, the court first construes the headings at issue as a matter of law by enumerating and defining each named element of the headings; the court then moves to the second classification step, a factual inquiry, to determine whether the subject merchandise fulfills each element of a properly-construed heading."). The court is bound by *Marubeni*'s determination that "the proper meaning of 'motor vehicle principally designed for the transport of persons' [is] just that, a motor vehicle principally designed for the transport of persons," and its determination that structural and auxiliary design features "must be considered" to ascertain if the subject merchandise is so designed. *Marubeni*, 35 F.3d at 535; *Avenues in Leather*, 423 F.3d at 1331.

provision."). Customs cited *Marubeni* as supplying the proper test for determining whether heading 8703 covers the subject merchandise. HQ H220856 at 4. In contrast, Customs concluded that heading 8704 is a principal use provision governed by ARI 1(a) and the *Carborundum* factors. *Id.* at 5. CBP then appears to import the principal use analysis relevant to heading 8704 into its consideration of whether the subject merchandise falls within heading 8703. *See id.* (stating that, "[p]ursuant to . . . *Marubeni* as well as [ARI] 1(a) and [EN] 87.03, a vehicle of heading 8703 [] must be designed 'more' for the transport of persons than goods"); *id.* at 7 (concluding that "[w]hen all *Carborundum* factors are considered, the [subject merchandise] is not principally designed for the transport of persons, but rather, is a cargo vehicle principally used for the transport of goods"). CBP also appears to consider the Transit Connect 6/7's actual use. *See id.* at 6 ("[A]s sold and used, the instant vehicles do not have rear seating or windows"); *id.* at 8 ("As sold and actually used, it is undisputed that the vans are cargo vehicles of heading 8704[.]"). Defendant concedes this is not an "actual use" case. Def.'s Reply at 20. CBP's application of a principal use analysis to a provision it has previously considered *eo nomine* and its consideration of actual use *vis-à-vis* post-importation alterations severely diminishes its persuasive force. *See Mead*, 533 U.S. at 220 (Customs' rulings "may claim the merit of its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight").

The inquiry could end there. More recently, however, the Federal Circuit held that use may be an appropriate consideration when examining classification under *eo nomine* provisions. *See GRK II*, 761 F.3d at 1358–59. *But cf. Sigma–Tau HealthScience, Inc.,* 838 F.3d at 1277, 1278 (declining to consider the *Carborundum* factors when interpreting an *eo nomine* provision, and noting that a chapter note determined under which of two competing provisions the subject merchandise must be classified). GRK concerned the correct classification of Plaintiff's screws. The CIT determined that Plaintiff's screws were *prima facie* classifiable under multiple tariff provisions describing, respectively, self-tapping and wood screws. *GRK I*, 884 F. Supp. 2d at 1356. Because the tariff terms were equally specific, GRI 3(a)'s rule of specificity did not resolve the issue. *Id.* The CIT ultimately relied on GRI 3(c), which provides for classification under the subheading "which occurs last in numerical order," to classify the screws as self-tapping screws. *Id.* The Federal Circuit reversed on the basis of the CIT's refusal to consider use "at any step of determining the classification of the subject articles." *GRK II*, 761 F.3d at 1355.

The Federal Circuit concluded that use may be considered when determining the commercial meaning of a term in an *eo nomine* provision when the merchandise named in that provision "inherently suggests a type of use," or when determining whether a particular article "fits within the classification's scope." *Id.* at 1358–59 (citations omitted). As to the first inquiry, the court may need to consider ARI 1(a) or 1(b) depending on whether the tariff terms are controlled by actual or principal use. *Id.* at 1359 n.2. Additionally, the court may need to consider use to the extent the commercial meaning of the tariff terms "includes the intended use of articles." *Id.* at 1358–59; *see also GRK IV*, 180 F. Supp. 3d at 1266 (on remand, observing that "[t]he Court of Appeals did not instruct the court as to how use affects the meaning of a tariff term, but its opinion raises two possibilities[:] . . . either the provision may be controlled by use, or the physical characteristics of the putative tariff terms may overlap to the extent that it would be error not to consider the intended use implicated by each term in deciding between the possible classifications"). As to the latter inquiry, the court considers "the subject article's physical characteristics, as well as what features the article has for typical users, how it was designed and for what objectives, and how it is marketed." *GRK II*, 761 F.3d at 1358 (citing *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 136769 (Fed. Cir. 2011), and *Casio, Inc. v. United States,* 73 F.3d 1095, 1098 (Fed. Cir. 1996)). For several reasons, the court does not find that an examination of the Transit

Connect 6/7's use as contemplated by *GRK II* is necessary or helpful to arriving at the correct classification.

First, this is not "a challenging case" in the sense that the court must cast about for an accurate definition of the relevant tariff terms; the Federal Circuit has already supplied the meaning of the phrase "principally designed for the transport of persons," and the court must adhere to its definition. *See Marubeni*, 35 F.3d at 535; *Avenues in Leather*, 423 F.3d at 1331. *Cf. GRK I*, 884 F. Supp. 2d at 1345 ("This is a challenging case. The HTSUS does not specifically define the terms 'other wood screws' or 'selftapping screws.'").

Second, heading 8703 is not controlled by use. The word "use" or "used" does not appear in the heading, and the heading does not describe the article "by the manner in which [it] is used." *Len–Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1308 (Fed. Cir. 2003). Instead, the heading identifies the article according to its principal design (transport of persons), expressly names station wagons and racing cars as classifiable under it, and disaggregates at the subheading level according to engine size. *See* Heading 8703, HTSUS.

A heading that does not include the term "use" may still be controlled by use, however, when the relevant subheadings depend on use and the chapter, section, and explanatory notes suggest the heading is controlled by use. *See StoreWALL, LLC v. United States*, 644 F.3d 1358, 1365 (Fed. Cir. 2011) (Dyk, J., concurring) (a case involving the correct classification of wall panels), *cited in GRK II*, 761 F.3d at 1359 n.2; *GRK IV*, 180 F. Supp. 3d at 1267–68 (discussing *StoreWALL*). In *StoreWALL*, the concurrence opined that the heading at issue (covering "unit furniture") was "unquestionably a use provision" because the controlling chapter note made classification contingent on whether the articles were "designed for placing on the floor or ground," or, in some instances, "designed to be hung." 644 F.3d at 1365 (Dyk, J., concurring) (citing Note 2 to Chapter 94, HTSUS) (emphasis omitted). Likewise, the ENs "state[d] that 'unit furniture' must be 'designed to be hung, to be fixed to the wall or to stand one on the other or side by side, for holding various objects or articles . . . '" *Id.* at 1365 (Dyk, J., concurring) (quoting ENs to Chapter 94 (2002)) (emphases omitted). Because classification under the pertinent subheading "turn[ed] on the manner of use," the concurrence undertook a principal use analysis pursuant to ARI 1(a) to determine whether the subject merchandise was described therein. *Id.* at 1366 (Dyk, J., concurring).

Concurring appellate opinions are, of course, not binding on this court. Moreover, the tariff terms discussed in *StoreWALL* are different from those at issue here. Nonetheless, the court considers the relevance of the concurrence to its interpretation of heading 8703.

The text of heading 8703 does not suggest that classification turns on whether the subject merchandise is *used* to transport persons. Indeed, such a proposition would be both absurd and overbroad (given the current need for, at a minimum, one person to drive the vehicle). Nor does the text suggest that classification turns on whether the subject merchandise is *principally used* to transport persons. Though a principal use of transporting passengers may be implicated in a vehicle whose principal design is to transport passengers, "it is not enough for use to be implicated for a provision to be controlled by use." *GRK IV*, 180 F. Supp. 3d at 1272 (citing *StoreWALL*, 644 F.3d at 1366 (Dyk, J., concurring)).[63] The variety of uses to which a motor vehicle "principally designed for the transport of persons" may be put precludes a finding that any one use is controlling. Instead, classification turns, as discussed above, on the manner of the vehicle's design, which turns on its structural and auxiliary design features. *See generally Marubeni*, 35 F.3d 530.

This is also not a case in which the court must consider intended use to distinguish between tariff provisions whose physical characteristics significantly overlap. *See GRK IV*, 180 F. Supp. 3d at 1266, 1277–78. Indeed, the text of the headings at issue broadcast their differences. Heading 8704 generally covers "motor vehicles for the transport of goods"; heading 8703 more specifically covers "motor vehicles principally designed for the transport of persons." Goods and persons are not the same thing.[64] Further, classification under heading 8703 requires the vehicle to be "designed 'more' for the transport of persons than goods," *Marubeni*, 35 F.3d at 534. A vehicle so designed plainly does not belong under heading 8704. *Id.* at 536.

[63] Defendant seizes on a particular sentence in *Marubeni* to contend that ignoring use "contradicts both the plain language of the heading and the clear and unambiguous guidance of *Marubeni*." Def.'s Reply at 10 ("*Marubeni* evaluated '[a]uxiliary design aspects' from the perspective of whether they 'indicate passenger use over cargo use . . . .'") (quoting *Marubeni*, 35 F.3d at 537). But an analysis of whether a particular feature suggests a certain use is different from an analysis of what the feature-containing subject article itself is used for. The Federal Circuit's passing reference to use is insufficient to persuade the court that the subject article's use drives the analysis, especially when the Federal Circuit did not so find.

[64] Because GRI 3(a) precludes a finding that an article *prima facie* classifiable under headings 8703 and 8704 should be classified under heading 8704, and having found that the subject merchandise is classifiable under heading 8703, the court need not determine whether the subject merchandise is also classifiable under heading 8704. *See Marubeni*, 35 F.3d at 536. However, such an analysis presumably involves an assessment of its goods-carrying, as opposed to passenger-carrying, features.

In sum, because heading 8703 is not controlled by use, and an assessment of intended use is not necessary to distinguish heading 8703 from 8704, the court finds it unnecessary to consider principal or intended use, or the *Carborundum* factors, to define the tariff terms. Additionally, use of the Transit Connect 6/7 does not "define [its] identity" for the purpose of determining whether it fits within the scope of heading 8703. *See GRK II*, 761 F.3d at 1359 (citing *CamelBak Prods.*, 649 F.3d at 1369 (hydration component appended to the subject article's cargo component gave the article a "unique identity and use that remove[d it] from the scope of the *eo nomine* backpack provision"). Instead, the court must, as it has, consider the structural and auxiliary design features of the vehicles as imported. *See Marubeni*, 35 F.3d at 535. Pursuant to that analysis, the court finds that the Transit Connect 6/7 is "principally designed for the transport of persons."[65]

CONCLUSION AND ORDER

For the foregoing reasons, the court holds that Customs incorrectly classified the Transit Connect 6/7 pursuant to heading 8704, and the Transit Connect 6/7 is properly classified pursuant to heading 8703, specifically, subheading 8703.23.00. The court will grant Plaintiff's motion for summary judgment and deny Defendant's cross-motion for summary judgment. The court hereby **DENIES** Plaintiff's motion to quash or suspend an administrative summons (ECF No. 140). Judgment will enter accordingly.

Dated: August 9, 2017
New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT, JUDGE

Slip Op. 17–103

HARTFORD FIRE INSURANCE COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Consol. Court No. 09–00122

[Plaintiff's motion for summary judgment is denied and defendant's cross-motion for summary judgment is granted in part and denied in part.]

Dated: August 10, 2017

[65] Because the court finds that Plaintiff's Transit Connect 6/7s are properly classified pursuant to heading 8703, the court need not reach Plaintiff's alternative arguments regarding prior treatment and established and uniform practice. Pl.'s MSJ at 41–45.

Frederic Deming Van Arnam, Jr., Barnes, Richardson & Colburn, LLP of New York, NY, and *William Horace Jeffress, Jr.*, Baker Botts, LLP of Washington, DC argued for plaintiff.

Edward Francis Kenny, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY argued for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Amy Rubin*, Assistant Director, and *Beverly A. Farrell*, Trial Attorney. Of counsel on the brief was *Beth C. Brotman*, Office of the Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection, of Washington, DC. With them on the reply brief was *Chad A. Readler*, Acting Assistant Attorney General.

OPINION

Katzmann, Judge:

This case concerns a surety company that issued bonds to multiple importers to cover duties imposed, under the United States' customs laws, on entries of the importers' goods into the national commerce. Despite billing the importers premium on these bonds, and accepting premium as to each bond, the surety now challenges the United States Customs agency's demands for payments on the bonds. The surety alleges that, for a variety of reasons, defects in each of the bond forms at issue in this case void those bonds, nullifying Customs' charges and releasing the surety from the obligations it assumed under the bonds. The United States Government, on behalf of Customs, opposes these contentions, and argues that the bonds are valid, and that sovereign immunity bars the surety's defensive theory that its obligations are discharged because its suretyship rights have been impaired.

Before the court are plaintiff Hartford Fire Insurance Company's ("Hartford") motion for summary judgment, in which it seeks refund of $2.2 million paid to United States Customs and Border Protection ("Customs") upon demands on sixty-one Single Entry Bonds ("SEBs" or "bonds"), and Defendant United States' (or "the Government") cross-motion for summary judgment. *See* Pl.'s Mem. in Supp. of the Mot. for Summ. J., July 15, 2016, ECF No. 67 ("Pl.'s Br."); Def.'s Mem. in Supp. of the Cross Mot. for Summ. J., Nov. 3, 2016, ECF No. 92 (Def.'s Br."). The court holds that the bonds at issue are valid, and that while the United States has waived sovereign immunity as to the defensive theory of impairment of suretyship rights in the context of cases contesting the denial of a protest, Hartford's claim in that respect fails.

Hartford is the undisputed surety on these SEBs, which insured several entries, imported on or about December 1, 2003 through December 31, 2006, previously subject to antidumping duty orders. Liquidation on the entries was suspended during the course of various relevant administrative reviews. Following the conclusion of

those reviews Customs made demands on the resulting import duties, but the importers in each case failed to pay. Thus during 2007 and 2008, Customs demanded that Hartford perform on the SEBs. Hartford protested Customs' demands pursuant to 19 U.S.C. § 1514(a)(3) (2006),[1] which Customs denied in each case. Hartford paid Customs in satisfaction of the demands and commenced various lawsuits before the Court of International Trade pursuant to 28 U.S.C. § 1581(a) (2006), eventually consolidated into the thirty-count complaint central to this test case. Hartford seeks, inter alia, that its payments of Customs' demands be refunded with interest as allowed by law. *See* 28 U.S.C. §§ 2643–2644.

UNDISPUTED FACTS

Per USCIT Rule 56.3, Hartford and the Government submitted separate statements of material facts and responses thereto. *See* Statement of Material Facts as to Which no Genuine Issue Exists, July 15, 2016, ECF No. 67 ("Pl.'s Facts"); Def.'s Resp. Pl.'s Statement of Material Facts as to Which no Genuine Issue Exists, Nov. 3, 2016, ECF No. 92 ("Def.'s Resp. Facts"); Def.'s Statement of Material Facts as to Which no Genuine Issue Exists, Nov. 3, 2016, ECF No. 92 ("Def.'s Facts"); Pl.'s Resp. Def.'s Statement of Material Facts as to Which no Genuine Issue Exists, Feb. 6, 2017, ECF No. 101 ("Pl.'s Resp. Facts"). The following facts are not in dispute.

A customs bond or other security is required in order to import merchandise into the United States. Def.'s Facts ¶ 3; Pl.'s Resp. Facts ¶ 3. One permissible type of bond is an SEB, which covers a single import transaction. *See generally* 19 C.F.R. Part 113. Prior to release of imported merchandise into the commerce of the United States, the importer, or a customs house broker acting as the agent of the importer, must submit the SEB to Customs for approval. Pl.'s Facts ¶ 4; Def.'s Resp. Facts ¶ 4. Customs, in accepting SEBs, requires that they be submitted to the agency in writing on Customs Form ("CF") 301. Pl.'s Facts ¶ 2; Def.'s Resp. Facts ¶ 2; Def.'s Facts ¶ 2; Pl.'s Resp. Facts ¶ 2. The SEBs are submitted to Customs as part of an entry package, which also includes a Customs Form 7501, the Entry Summary,[2] and

[1] Unless otherwise noted, all citations to the United States Code are to the official 2012 edition.

[2] The Customs Form 7501 is a summary of the entry. *See* Def.'s Ex. 17 ("CF 7501"). The version of the form present in defendant's exhibit 17 was promulgated in June 2009, but the version submitted with the entries at issue from December 1, 2003 through December 31, 2006, *see* Def.'s Exs. 1–6, is substantially identical. The form requires a declarant's signature as to the following:

> I declare that I am the . . . importer of record . . . I also declare that the statements in the documents herein filed . . . are true and correct . . . . I will immediately furnish to the appropriate customs officer any information showing a different state of facts.

may include a Customs Form 3461, the Entry/Immediate Delivery form.[3] Def.'s Facts ¶ 4; Pl.'s Resp. Facts ¶ 4.

This consolidated action involves sixty-one SEBs submitted to Customs through various ports, for shipments entered during the period of December 1, 2003, through December 31, 2006. Def.'s Facts ¶ 5; Pl.'s Resp. Facts ¶ 5. Hartford, a surety company, was the surety for these SEBs. Consolidated Complaint ¶¶ 3, 7, 34, 47, 59, 71, 84, Jan. 13, 2012, ECF No. 32 ("Compl."); Pl.'s Facts ¶1; Def.'s Resp. Facts ¶ 1; Def.'s Facts ¶ 1; Pl.'s Resp. Facts ¶ 1. During the operative period, Hartford's customs bond business was administered by its General Agent, James Gorman Insurance, Inc. ("JGII"), and JGII's president, James M. Gorman. Def.'s Facts ¶ 6; Pl.'s Resp. Facts ¶ 6. The relationship between JGII and Hartford was set forth in a General Agency Agreement that was entered into on or about September 4, 2002, and renewed on or about September 3, 2004. Def.'s Facts ¶ 8; Pl.'s Resp. Facts ¶ 8; Def.'s Ex. 10 ("GAA"). Hartford terminated the GAA with JGII in 2008, and no longer actively markets Customs bonds. Def.'s Facts ¶ 22; Pl.'s Resp. Facts ¶ 22.

The physical SEBs at issue were originally printed by Hartford's vendor and mirrored the standard Customs Form 301, comprising five parts with different colors: Part 1, the original bond submitted to Customs, which was white; Part 2, the Surety's Copy, which was blue; Part 3, the Principal's Copy, which was yellow; and Parts 4 and 5, two Brokers' Copies. Pl.'s Ex. F ("CF 301"); Def.'s Facts ¶¶ 24–26; Pl.'s Resp. Facts ¶¶ 24–26. These SEBs were designed to allow information written thereon to transfer via carbonless chemical process from the top Part 1 original through to the bottom Part 5 copy. Def.'s Facts ¶ 27; Pl.'s Resp. Facts ¶ 27. Hartford had its printing vendor preprint Hartford's surety address on all five parts, but Gorman's signature, as Hartford's attorney-in-fact, and Hartford's corporate seal, only appeared on the Part 1 original submitted to Customs. Def.'s Facts ¶ 28; Pl.'s Resp. Facts ¶ 28. Gorman also requested that Hartford have its commercial printing vendor imprint a seven-digit unique identifying

A form required to make an entry of goods into the United States, a CF 7501 was included in the entry packages of every transaction at issue in this case. *See* 19 C.F.R. § 142.11 (2003) ("Customs Form 7501 shall be used for merchandise formally entered for consumption . . . .").

[3] The Customs Form 3461 is an application for entry of the merchandise on immediate delivery. *See* Def.'s Ex. 18 ("CF 3461"). The version of the form present in defendant's exhibit 18 was promulgated in October 2009, but the version submitted with the entries at issue, *see* Def.'s Exs. 1–6, is substantially identical. The form tracks the requirements of 19 C.F.R. §§ 142.3, 142.16, 142.22, and 142.24 (2003), and requires information about the import in question. The Form requires an applicant's signature in certification of the following:

> I hereby make application for entry/immediate delivery. I certify that the above information is accurate, the bond is sufficient, valid, and current, and that all requirements of 19 CFR Part 142 have been met.

This form was included in the entry packages of every transaction at issue in this case.

number preceded by the letters "SEB" on the lower left hand margin of all preprinted Hartford bonds. Def.'s Facts ¶ 30; Pl.'s Resp. Facts ¶ 30. Hartford kept track of these unique identifying numbers. Def.'s Facts ¶ 33; Pl.'s Resp. Facts ¶ 33.

JGII distributed[4] the Hartford SEBs to retail insurance brokers, from whom importers, or customs brokers on behalf of importers, obtained them. Def.'s Facts ¶ 23; Pl.'s Resp. Facts ¶ 23. Under the GAA, JGII had a duty to maintain complete copies of all bonds, the term "complete copies" meaning a fully executed copy of the original that was submitted to Customs. Def.'s Facts ¶¶ 13, 14; Pl.'s Resp. Facts ¶¶ 13, 14; GAA at Art. VII. The customs brokers, or importers, were responsible for completing the bonds by providing the importer's information. Def.'s Facts ¶ 31; Pl.'s Resp. Facts ¶ 31. Gorman was responsible for premium billing duties, premium collecting duties, premium accounting duties, and possessed limited underwriting authority with regard to customs bonds issued by JGII for which Hartford was surety.[5] Def.'s Facts ¶ 9; Pl.'s Resp. Facts ¶¶ 9, 12; GAA at Arts. I, II. Gorman maintained a list of hundreds of customs brokers he had approved for the use of the retail insurance brokers beneath him. Def.'s Facts ¶ 39; Pl.'s Resp. Facts ¶ 39. As part of the process of billing customs brokers and importers for premiums on these bonds, JGII generally reviewed the blue surety copy of the multiform CF

[4] The parties debate the verb that correctly describes the movement of bonds from retail insurance brokers to customs brokers or customshouse brokers. Citing the deposition of Robert Scott Cochrane, Hartford's Assistant Vice President of Bond Claims from 2003–05, and Vice President of Bond Claims thereafter, the Government characterizes this movement as a distribution, asserting that "[t]he retail insurance brokers then distributed [the SEBs] to customs brokers who sold the bonds to importers." Def.'s Br. at 5 (citing Def.'s Ex. 7, Deposition of Robert Scott Cochrane, as Hartford's Rule 30(b)(6) designated witness ("Hartford Dep.") at 57). The Government also asserts that "[t]he retail insurance brokers in turn provided [the SEBs] to customshouse brokers such as Vandergrift Forwarding Company, Inc. (Vandergrift) who would then distribute the bonds to customs brokers at ports where Vandergrift was not present." *Id.* at 29. Hartford counters that the Government's characterization is an attempt to depict an agency relationship between the insurance brokers, and thus JGII and Hartford, and the customs brokers. Pl.'s Reply. at 15–16. In reality, argues Hartford, the retail insurance brokers merely sold the bonds to the customs brokers or Vandergrift, who acted instead as attorneys-in-fact for the importers, and who never purported to act on Hartford's behalf. *Id.*; Pl.'s Resp. Facts ¶ 10. The operative citation to the Hartford Dep. at 57 is:

> My understanding is Gorman distributed the bonds to retail -- what we will call retail insurance agents or brokers. Those retail insurance agents or brokers would distribute [the SEBs] and provide them to the importers or the customshouse brokers, where the attorney-in-fact for the importers to complete and submit to Customs for approval and acceptance.

See also Transcript of Oral Argument ("Oral Arg. Tr.") at 185, ECF No. 115. The court does not reach the issue of whether Hartford ratified the actions of its alleged agents under the facts of this case, and so need not opine on the correct terminology as a matter of law.

[5] Gorman performed no underwriting on the bonds at issue in this case, and Hartford maintained no underwriting files for them. Oral Arg. Tr. at 74–75; Def.'s Facts ¶ 18; Pl.'s Resp. Facts ¶ 18.

301, provided by the retail insurance brokers. Def.'s Facts ¶¶ 32, 42; Pl.'s Resp. Facts ¶¶ 32, 42. Gorman testified that during the operative time period, Hartford charged the importer principals $25 per every $1,000 the SEBs covered. Def.'s Ex. 8, Deposition of James M. Gorman ("Gorman Dep.") at 125–29.[6]

Gorman had instructed the customs brokers to complete the bonds in accordance with the applicable federal regulations, but never stopped doing business with a given customs broker because of the broker's failure to complete bonds correctly. Def.'s Facts ¶¶ 41, 47; Pl.'s Resp. Facts ¶¶ 41, 47. On occasion, Gorman would discover a pattern of specific error common to multiple Hartford SEBs issued by a given customs broker, and would call the customs broker to complain about the manner in which they were completing the bond. Def.'s Facts ¶ 43; Pl.'s Resp. Facts ¶ 43. Gorman would also on occasion alert Hartford's Account Representative, Raymond MacMath,[7] if he had noticed a pattern of error common to SEBs issued by a given broker. Def.'s Facts ¶ 44; Pl.'s Resp. Facts ¶ 44. The representative in turn advised Gorman that it was not his responsibility to inform Customs of errors on bonds that the agency had accepted. Def.'s Facts ¶ 45; Pl.'s Resp. Facts ¶ 45. Therefore Hartford billed premium on such bonds even if a pattern of error common to bonds issued by a given customs broker were noticed. Def.'s Facts ¶ 43; Pl.'s Resp. Facts ¶ 43. Hartford billed and was paid premiums for all the bonds at issue in this action. Def.'s Facts ¶ 21; Pl.'s Resp. Facts ¶ 21.

PROCEDURAL HISTORY

The sixty-one SEBs initially at issue cover transactions made on behalf of five different importers, who are also principals on their respective bonds: FastTrack Merchants, Inc. ("FastTrack"), whose five bonds are associated with the Consolidated Complaint Appendix 1 entries;[8] Jinfu Trading (USA), Inc. ("Jinfu"), whose two bonds are associated with the Consolidated Complaint Appendix 2 entries ("Jinfu I bonds")[9] and whose forty-five bonds are associated with the Consolidated Complaint Appendix 3 entries ("Jinfu II bonds");[10]

[6] No contrary evidence having been presented, the court accepts this fact as undisputed.

[7] Gorman testified that MacMath served as liaison between himself and Hartford. Gorman Dep. at 20, 23, 29. Gorman also testified that MacMath was uninterested in the ultimate fate of the blue surety copies of the SEBs that JGII retained for a period of time. *Id.* at 68. The court accepts these facts as undisputed.

[8] Made between the months of April and August 2006 at the ports of Memphis, Tennessee and San Francisco, California. Compl. ¶ 6.

[9] Made on February 18, 2004 and in May 2004 at the ports of Newport News, Virginia and Houston, Texas. Compl. ¶ 33.

[10] Made between January 29, 2004 and November 4, 2004 at the port of Los Angeles, California. Compl. ¶ 46.

Farmland Food Trade, Inc. ("Farmland"), whose six bonds are associated with the Consolidated Complaint Appendix 4 entries;[11] New Century Furniture Manufacturer, Inc. ("New Century"), whose two bonds are associated with the Consolidated Complaint Appendix 5 entries;[12] and SCS Marketing, Inc. ("SCS"), whose one bond is associated with the Consolidated Complaint Appendix 6 entry.[13]

Each of the sixty-one entries associated with an SEB at issue was liquidated by Customs pursuant to an applicable antidumping duty order. Customs demanded payment of duties from the importers, who failed to pay either the antidumping duties assessed on the imports or any interest that had accrued thereon. Compl. ¶¶ 9–11, 36–38, 49–51, 61–63, 73–75, 86–88. Customs therefore sent demand letters to Hartford for payment on the SEBs securing their respective imports. Compl. ¶¶ 12, 39, 52, 64, 76, 89; Def.'s Facts ¶ 48; Pl.'s Resp. Facts ¶ 48. After receiving the formal demands from Customs, Hartford made a Freedom of Information Act ("FOIA") request to the agency, seeking any and all entry documents associated with the underlying entry, including any SEBs submitted to Customs at the time of the entry. Compl. ¶¶ 13, 40, 53, 65, 77, 90. In response, Customs sent Hartford the entry documents associated with each entry, including photocopies of the relevant SEBs, CFs 7501, and, where present, CFs 3461. Compl. ¶¶ 14, 41, 54, 66, 78, 91. Hartford timely protested the demands for payment on the SEBs, and Customs denied Hartford's protests thereafter. Compl. ¶¶ 31, 44, 56, 68, 81, 93; Def.'s Facts ¶ 49; Pl.'s Resp. Facts 49. Hartford then timely paid all charges, fees, and interest demanded by Customs on the bonds. Compl. ¶¶ 32, 45, 57, 69, 82, 94. Having done so, Hartford filed suit before this court to contest the denial of each protest. Def.'s Facts ¶ 49; Pl.'s Resp. Facts ¶ 49.

Hartford brought suit in its lead case on March 13, 2009. Summons, ECF. No. 1. Hartford moved to consolidate several cases posing essentially identical issues, and to file a consolidated complaint, on January 12, 2012. ECF. No. 30. The next day, Hartford's motion was granted, ECF No. 31, and Hartford's Consolidated Complaint was deemed filed. Compl. The Government answered on March 27, 2012. ECF No. 35. On June 28, 2012, Hartford, with the Government's consent, moved to designate the lead case, Consol. Court No. 09–00122, as a test case, under which would be suspended dozens of similar actions containing at least one of the various "bond defect"

[11] Made between March and April 2006 at the port of Boston, Massachusetts. Compl. ¶ 58.

[12] Made on February 7, 2005 and September 27, 2005 at the port of Los Angeles, California. Compl. ¶ 70.

[13] Made on December 6, 2005 at the port of Houston, Texas. Compl. ¶ 83.

arguments raised in the lead case. ECF No. 39. The court granted that motion on July 2, 2012. ECF No. 40.

Hartford filed its motion for summary judgment on July 15, 2016. Hartford now challenges in its motion for summary judgment Customs' demands for payment on the grounds that the SEBs are void due to their noncompliance with certain federal regulations controlling the bonding process under 19 C.F.R. § 113. Alternately, Hartford argues that even if the SEBs remain valid under the Part 113 regulations despite these facial defects, many of the bonds are nonetheless void under traditional concepts of contract law. Finally, Hartford argues that Customs, by accepting SEBs that do not comply with the regulatory regime, has impaired Hartford's suretyship rights against the defaulted importers, and thus Hartford is discharged from its suretyship obligations.

The Government cross-moved for summary judgment on November 3, 2016. The Government argues first that the court lacks jurisdiction over all forty-five Appendix 3 Jinfu II bonds, because Hartford did not raise its instant arguments in its underlying protest as to the charges on those bonds, and, separately, over two bonds, because Hartford failed to pay the total amount demanded by Customs on each pursuant to 28 U.S.C. § 2637. In the event the court possesses jurisdiction over those bonds, and as to the remaining SEBs, the Government argues that technical deficiency on the face of a bond does not void the instrument, as the required paperwork for each import transaction provides the absent information, or establishes a contract between the surety and the principal. The Government argues also that the doctrine of sovereign immunity bars Hartford's claim against the United States for impairment of its suretyship rights.

On November 18, 2016, after the passing of the assigned judge, the case was reassigned to a new judge pursuant to 28 U.S.C. § 253(c) and USCIT Rule 77(e)(4). Order of Reassignment, ECF No. 94. Hartford filed its reply in support of its own motion, and response to the Government's cross-motion, on February 6, 2017. ECF No. 100 ("Pl.'s Reply"). The Government filed its reply on March 2, 2017. ECF No. 104 ("Def.'s Reply"). The court issued to parties on May 25 and June 13, 2017, letters containing questions to be answered and discussed during oral argument. ECF Nos. 107, 108. Oral argument was held before the court on June 20, 2017. ECF No. 110.

DISCUSSION

JURISDICTION AND STANDARD OF REVIEW

Customs' demands against Hartford as surety on the SEBs at issue in this case constitute protestable "charges or exactions of whatever

character within the jurisdiction of the Secretary of the Treasury" under 19 U.S.C. § 1514(a)(3) and accordingly are subject to review under 28 U.S.C. § 1581(a). Hartford has standing to bring this action pursuant to 28 U.S.C. § 2631(a). Jurisdiction over this timely filed action is thus proper under 28 U.S.C. § 1581(a). The court reviews denied protests de novo "upon the basis of the record made before the court." *See* 28 U.S.C. § 2640(a)(1).

As noted, both parties have moved for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see* USCIT Rule 56(a). The standard does not require that no facts be in dispute, as "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The movant bears the burden of demonstrating that there exists no genuine issue of material fact that would warrant a trial. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Meanwhile, the evidence must be considered in a light most favorable to the non-moving party. *Id.*

ISSUES

I. Whether the Court Possesses Jurisdiction over the Forty-Five SEBs Associated with Hartford's Appendix 3 Entries

The Government argued that the court does not possess jurisdiction over the forty-five Appendix 3 Jinfu II bonds, because Hartford did not assert in the underlying protest, No. 2704–07101317, the arguments that it asserts before this court, namely, that the bonds were not signed by the principal or the principal's agent or that the bonds are void by virtue of any facial defects.[14] Def.'s Br. at 11–13; *see* Def.'s Ex. 13 ("Protest No. 2704–07–101317"). Protest No. 2704–07101317, which covers the Jinfu II bonds, does not contain these arguments;

[14] The Government cites *Computime, Inc. v. United States*, 772 F.2d 874, 878 (Fed. Cir. 1985) for the proposition that, though a protest is to be liberally construed, "[t]his does not, however, mean that protests are akin to notice pleadings and merely have to set forth factual allegations without providing any underlying reasoning." The Government connects this admonition to 19 U.S.C. § 1514(c)(1)(C), commanding that "[a] protest must set forth distinctly and specifically . . . the nature of each objection and the reasons therefor . . . ." The Government also points to *Ammex Inc. v. United States*, 27 CIT 1677, 1684–85, 288 F. Supp. 2d 1375, 1381–82 (2003) for the proposition that an action should be dismissed where the underlying protest "did not state reasons for objection or explain the justification for the objection" to Customs' demands. Def.'s Br. at 13.

rather, Hartford therein argued that Customs' claims on the SEBs should be cancelled because those bonds "do not guaranty antidumping compensation under the Byrd Amendment."

Hartford argued in its Reply that the court possesses jurisdiction over the forty-five Jinfu II bonds pursuant to 28 U.S.C. § 2638, which provides:

> In any civil action under [19 U.S.C. § 1515] in which the denial, in whole or in part, of a protest is a precondition to the commencement of a civil action in the Court of International Trade, the court, by rule, may consider any new ground in support of the civil action if such new ground
>
> (1) applies to the same merchandise that was the subject of the protest; and
>
> (2) is related to the same administrative decision listed in [19 U.S.C. § 1514] that was contested in the protest.[15]

However, in response to questions posed in the court's letter to the parties of June 13, 2017, specifically, regarding Hartford's new theory that initials on the bonds do not constitute valid signatures, *see* Pl.'s Br. at 11 n.13, Hartford during oral argument withdrew its merits arguments as to the forty-five Jinfu II bonds in Appendix 3.[16] Oral Arg. Tr. at 12–14. "[W]here, as here, the underlying controversy is

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[15] Citing legislative history and *Dow Chemical Co. v. United States*, 10 CIT 550, 558–59, 647 F. Supp. 1574, 1582 (1986), Hartford reads § 2638(2)'s description of a new ground "related to the same administrative decision listed in [19 U.S.C. § 1514]" as referring to an argument made before the court that derives from the same subsection of § 1514 invoked in the underlying protest. Here, that subsection is § 1514(a)(3), challenges to "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury." Per *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289 (Fed. Cir. 2008) ("*Hartford I*"), challenges to Customs' demands on surety bonds subject to protest come under 19 U.S.C. § 1514(a)(3). Hartford thus argued in its Reply that because its arguments in both the underlying protest and its filings before this court comprise challenges to the Customs' demands on the SEBs, they both come under § 1514(a)(3), and are "related to the same administrative decision" pursuant to 28 U.S.C. § 2638(2). Pl.'s Reply at 22–26.

In its own Reply, the Government counters Hartford's citation to 28 U.S.C. § 2638 on the basis of the Court's analysis of that statute's history in *Atari Caribe, Inc. v. United States*, 16 CIT 588, 799 F. Supp. 99 (1992). Def.'s Reply at 16–17. Specifically the Government presented that case as supporting the proposition that a new ground for argument can only be raised where it was "clear that the basis of the protest was in the mind of the protestant at the time the protest was filed and that the basis of the protest was made known to the Customs officer so that he could have had an opportunity to correct his mistake." 799 F. Supp. at 105. The Government asserts that, in point of procedure, Hartford has failed to, and cannot carry its "burden of showing [it] is properly in court." *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); Def.'s Br. at 13.

[16] The court commends Hartford's counsel for their forthrightness in withdrawing these arguments, and, indeed, commends both parties' counsel for the high quality of briefing, argumentation, and civility they have demonstrated throughout all stages of this case.

clearly moot, the preferred course is to decide mootness, before reaching difficult questions more closely tied to the merits of the underlying controversy, such as subject matter jurisdiction." *Kaw Nation v. Norton*, 405 F.3d 1317, 1323 (Fed. Cir. 2005). The underlying merits arguments being moot, the court need not resolve the jurisdictional question involving the new grounds statute, and declines to do so.[17]

II. Whether the Court Possesses Jurisdiction over the bonds Associated with Hartford's entries JN7–0332527–2 in Appendix 2 and 316–0516897–5 in Appendix 3

A. Parties' Arguments

With respect to two bonds — SEB0137076 covering Entry JN7–0332527–2 in Appendix 2, and SEB0144586 covering Entry 316–0516897–5 in Appendix 3 — the Government contends that this court lacks jurisdiction because Hartford failed to pay the entirety of charges Customs demanded on them prior to commencing this lawsuit. Def.'s Br. at 13–14. Specifically, the Government argues that Hartford has failed to fulfill the jurisdictional prerequisite of 28 U.S.C. § 2637(a), which mandates that

> [a] civil action contesting the denial of a protest . . . may be commenced in the Court of International Trade only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced, except that a surety's obligation to pay such liquidated duties, charges, or exactions is limited to the sum of any bond related to each entry included in the denied protest.

Def.'s Br. at 13–14.

In its Reply, Hartford conceded that its payment, prior to filing its summons, on the bond covering Entry 316–0516897–5 in Appendix 3 did not satisfy the 28 U.S.C. § 2637 requirement, and thus the court has no jurisdiction over it. Pl.'s Reply at 26. But Hartford argues that the court does possess jurisdiction over the bond covering Entry JN7–0332527–2 in Appendix 2. *Id.* Hartford paid $43,494.43 on October 22, 2007, prior to filing its summons four days later, to satisfy

[17] With respect to the new grounds statute, there remains no justiciable "case" or "controversy," the constitutional prerequisite to all Article III jurisdiction, concerning the Appendix 3 Jinfu II bonds. U.S. Const. art. III, § 2, cl. 1; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so."); *see Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) ("It is true that the Court of International Trade, like all federal courts, is a court of limited jurisdiction, and that the party invoking that jurisdiction bears the burden of establishing it.").

Customs' demand on the bond, despite that the penal sum,[18] as the Government alleges, is $44,000. Def.'s Ex. 19. To support its assertion that the penal sum on the SEB was $44,000, the Government furnishes Part 2, considered the "Surety's Copy," of the relevant CF 301, which lists the penal sum on the SEB as $44,000. Def.'s Ex. 9, Deposition of Bruce Ingalls ("Ingalls Dep.") at 94; Def.'s Ex. 2 at 12; Def.'s Br. at 14. By contrast, the corresponding Part 1, considered "Customs' copy," lists no penal sum whatsoever. Def.'s Ex. 2 at 11; Def.'s Br. at 14. Regardless of this facial disparity, which Hartford highlights, Pl.'s Reply at 26–30, the Government emphasizes that "the evidence reflects that Customs sought payment of the full amount of the bond ($44,000), and Hartford only paid $43,494.43." Def.'s Reply at 18 (citing Def.'s Ex. 19). By failing to pay the full penal sum, the Government argues, Hartford has failed to satisfy the jurisdictional predicate of § 2637(a), and thus the court lacks jurisdiction over Hartford's claims as to SEB 0137076.

Hartford points to the Ingalls Dep. at 73–74, in which Customs' representative explained that in situations where a bond does not show a penal sum, Customs would treat the bond's penal sum as the specific amount listed on the Form 7501 included in the entry package. Pl.'s Reply at 27. Customs "do[es] not round up" from that amount to the nearest thousand. *Id.* (quoting Ingalls Dep. at 73–74). Hartford emphasizes that Part 1 is that which is submitted to Customs, while "[Parts] 2–4 are for people other than CBP." *Id.* at 28 n.76 (citing Ingalls Dep. at 94).

Hartford explains that upon importer's default, sureties receive a "612 Report" from Customs listing the debt owed by the importer on entries secured by the surety's bonds.[19] Pl.'s Reply at 29. The amount Customs demands of the surety is the amount owed by the importer, plus interest accrued as of the date of the 612 Report. *Id.* Hartford further explains that "to ascertain the limit of its *own* obligation to

[18] The penal sum on an SEB is the dollar amount which the surety is obligated to cover in the event that the importer, as principal on the bond, fails to pay Customs' demands. *See* 19 U.S.C. § 1623(b)(1) ("Whenever a bond is required or authorized by a law, regulation, or instruction which . . . the Customs Service is authorized to enforce, the Secretary of the Treasury may . . . fix the amount of penalty thereof, whether for the payment of liquidated damages or of a penal sum . . . ."). On the CF 301, this value is represented as the "limit of liability." Def.'s Facts ¶¶ 16, 88; Pl.'s Resp. Facts ¶¶ 16, 88; Pl.'s Br. at 21 (referring to "the limit of liability/penal sum of the bond").

[19] "Each month, the Revenue Division sends each surety a report listing their open bills by importer name. The report, known as the 612 Report, provides the surety with specific entry, bill, and protest information as reflected in [the Automated Commercial System] at the end of the month." *Surety Inquiries*, U.S. CUSTOMS AND BORDER PROTECTION, https://www.cbp.gov/trade/priority-issues/revenue/surety-inquiries (last visited Aug. 7, 2017).

Customs," the surety consults the penal sum on the bond, *see* § 2637(a) ("a surety's obligation to pay . . . is limited to the sum of any bond related to each entry"), and obtains a copy of the SEB's Part 1 submitted to Customs at entry via the FOIA. *Id.* Because the copy so obtained listed no penal sum, Hartford asserts that the amount to which it was obligated was the cash deposit amount specified on the Form 7501 accompanying the entry JN7–0332527- 2, $43,494.43, which Hartford paid in full. *Id.*; Compl. ¶ 45.

B. Analysis

The statute, and precedent, offer no berth for discretion. "Case law unambiguously holds that the requirements of § 2637(a) are strictly applied and the statute precludes any exercise of discretion by the Court." *Great Am. Ins. Co. of N.Y. v. United States*, 34 CIT 523, 527, 710 F. Supp. 2d 1346, 1350–51 (2010).

The Government asserts that "Customs sought payment of the full amount of the bond ($44,000)." Def.'s Reply at 18. Hartford states that it referred to the SEB's Part 1, lacking penal sum, via the FOIA in order to determine its own limit of liability. Pl.'s Reply at 29. Hartford therefore paid only the assessed cash deposit amount, as it is the minimum amount that any bond must cover. *Id.* Militating against Hartford, however, is the fact that the SEB's Part 2 is intended for sureties. Gorman Dep. at 122 ("Q: And in the normal course of business, you would receive a surety copy? A: It's the blue accounting copy, yes."); Def.'s Facts ¶ 31; Pl.'s Resp. Facts ¶ 31. This Part 2, containing the penal sum of $44,000, would have found its way to Hartford's general agent, who maintained Parts 2 and used them to bill importer's premium. Gorman Dep. at 129 (explaining that JGII would be unable to bill premium on an SEB lacking penal sum), 126 ("It's a charge per thousand dollars of risk. Okay? So Hartford gets $25 per 14 thousand."); Def.'s Facts ¶ 21 ("Hartford does not dispute that premium was paid on each of the sixty-one bonds at issue."); Pl.'s Resp. Facts ¶ 21 ("Admits."); *see also* Ingalls Dep. at 260–62.

The jurisdictional predicate imposed by § 2637(a) is strictly applied and is not subject to excuse based upon the assertion of equitable principles. *Great Am. Ins.*, 710 F. Supp. 2d at 1350–51; *Dazzle Mfg., Ltd. v. United States*, 21 CIT 827, 828, 971 F. Supp. 594, 596 (1997) ("The condition is to be strictly applied and the statute precludes any exercise of discretion by the court." (citing *Penrod Drilling Co. v. United States*, 13 CIT 1005, 1007, 727 F. Supp. 1463, 1465 (1989), *reh'g denied,* 14 CIT 281, 740 F. Supp. 858 (1990), *aff'd*, 925 F.2d 406 (Fed. Cir. 1991)); *Nature's Farm Prod., Inc. v. United States*, 819 F.2d 1127 (Fed. Cir. 1987). The court is unpersuaded by Hartford's sug-

gestions that the facial disparity between the Parts 1 and 2 indicates the necessity of holding Customs to regulatory procedures encapsulated in Part 113. Pl.'s Reply at 29 ("When presented with a bond, Customs's responsibilities are clear–it must determine if the bond is in proper form . . . . If the bond is missing essential terms–as it was here–then 'CBP should have rejected it . . . .'" (citing Pl.'s Ex. B, Department of Homeland Security Office of Inspector General Report ("OIG Report")[20] at 5)). Hartford was obligated to pay "all liquidated duties, charges, or exactions . . . limited to the sum of any bond related to each entry included in the denied protest" prior to obtaining judicial review before this court. In short, the court lacks jurisdiction over Hartford's claims as to this bond.

III. Whether the SEBs are Enforceable Under the Part 113 Regulations

As has been noted, Hartford has withdrawn its arguments as to the forty-five bonds associated with the Appendix 3 entries, and the court lacks jurisdiction over the bond associated with entry JN7–0332527–2 in Appendix 2. Accordingly, what remains for the court is the consideration of the parties' arguments on the merits as to fifteen of the original sixty-one bonds in this case.[21] The court turns first to their validity under the Part 113 regulations.[22]

A. Parties' Arguments

Hartford argues that each of the SEBs at issue is incomplete in that it lacks information required by a regulation under Part 113, and thus all are unenforceable against Hartford. Pl.'s Br. at 14. Hartford emphasizes that Customs must ensure the bonds are "in proper form," and that a surety posting the bond must submit the bond "on Customs Form 301." Pl.'s Br. at 14; 19 C.F.R. § 113.11. Section 113.21 sets out "information required on the bond": names, addresses of the principal places of business and legal designations of corporate principals and sureties "must appear," § 113.21(a), on the CF 301; a bond is to "bear the date it was actually executed," § 113.21(b); the bond

[20] The OIG Report, published June 27, 2011 with the expectation that "this report will result in more effective, efficient, and economical operations," is formally titled "Efficacy of Customs and Border Protection's Bonding Process." OIG Report at Preface. It "addresses the efficacy of U.S. Customs and Border Protection's bonding processes. It is based on interviews with employees and officials of relevant agencies and institutions, direct observations, and review and testing of applicable documents." *Id.*

[21] All bonds covering entries in Appendices 1, 4, 5, and 6, and the one remaining Appendix 2 bond.

[22] The court analyzes the versions of each Part 113 regulation in force at the time Customs accepted the SEBs at issue.

"shall be stated in figures," § 113.21(c). Pl.'s Br. at 15. Section 113.33 meanwhile states that the bonds of corporate principals "shall be signed by an authorized officer or attorney . . . ." *Id.* Section 113.37 states that bonds executed by a corporate surety "must be signed" by an authorized officer or attorney of the corporation. *Id.* Hartford asserts that these regulatory provisions require, through "mandatory terms," such as "must" or "shall," that these elements be included. Pl.'s Br. at 15. Hartford argues that Customs had "no discretion to disregard these regulatory requirements." *Id.* (citing *United States v. Utex Int'l, Inc.*, 857 F.2d 1408, 1413 (Fed. Cir. 1988) ("[t]he bond can not [sic] be interpreted contrary to law and regulations") (citations omitted); OIG Report at 5 ("[f]ederal regulations provide specific information that STBs *must* include prior to CBP's approval"); Ingalls Dep. at 33–34). Accordingly Hartford contends that Customs "should be required to cancel the improper charges and demands made against the bonds and return those payments to Hartford." Pl.'s Br. at 16 (citing *Sioux Honey Ass'n v. United States*, 34 CIT 1077, 1100, 722 F. Supp. 2d 1342, 1364 (2010) (recognizing Customs' "longstanding authority" to cancel bonds charges); *Union of Concerned Scientists v. Atomic Energy Comm'n*, 499 F.2d 1069, 1082 (D.C. Cir. 1974) (recalling the "well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action")).

Hartford further characterizes the rejection of bonds technically incomplete or noncompliant with Part 113 as Customs' "long-standing practice," to which the agency should be required to adhere in this case.[23] Pl.'s Br. at 17 (citing Pl.'s Exs. L, M, N). Hartford also points to its Exhibit H, Customs' Entry/Summary Rejection Sheets, which document Customs' practice of rejecting customs bonds missing essential elements, according to Hartford's characterization. Pl.'s Br. at 18. Hartford adds that "Customs should not be permitted to take the

[23] In its Reply, Hartford emphasizes Customs' regulatory obligations, pointing to its Ex. J at 6–8, a Standard Operating Procedure document provided at the Long Beach Seaport in 2010, wherein Customs instructed its officials that "the entry package must be rejected" if certain items are "missing or incomplete," including principal name and address. Pl.'s Reply at 6. Another Standard Operating Procedure document, Ex. J at 23–24, issued in May 2007 in San Francisco, admonishes that "bonds must be accurate," as "[t]he surety is entitled to stand upon the strict terms of its agreement and it can be bound in no other way." Pl.'s Reply at 6–7. Hartford also points to a Field Operations Public Bulleting, Ex. J at 9–10, issued in December 2010 in Los Angeles and regarding "Single Transaction Bond Guidelines for Entry Release," in which the agency explained that it "verifies all [bond] data elements against the information from the entry package," and "if discrepancies are found, the entry package must be rejected for correction and resubmission." Pl.'s Reply at 6. Hartford then characterizes Customs' attempt in 2010 to amend 19 C.F.R. § 113.21 to allow the agency to "presume, without verification, that submitted bond applications . . . are in full compliance with all applicable law," as an indication that Customs at that time recognized its obligation to review and approve only compliant bonds. Pl.'s Reply at 7 (citing Notice of Proposed Rulemaking, 75 Fed. Reg. 266, 269 (Jan. 5, 2010)).

diametrically opposite position in this litigation . . . . Government agencies are bound by law and regulation, not whim and circumstance." *Id.*

The Government argues that Hartford was obligated to ensure completeness of the bonds, which it distributed and for which it billed premium, under the regulations.[24] Def.'s Br. at 16. From that view, Hartford failed to satisfy its own burden under the regulatory scheme, despite that it received premium on the bonds. *Id.*; Def.'s Ex. 11, Plaintiff's Response to Defendant's First Interrogatories ¶¶ 10, 11. As to Customs' obligations under the regulations, the Government argues that the Part 113 regulations are directory rather than mandatory.[25] Def.'s Br. at 18. The Government notes that the Federal Circuit has concluded that 19 C.F.R. § 113.37(g), governing the use and content of Customs Form 5297,[26] regarding powers of attorney for the agent or attorney of the surety, protects Customs, not the surety, and that this court should make the analogous conclusion as to the remaining Part 113 provisions. *Id.* (citing *United States v. Great Am. Ins. Co. of NY*, 738 F.3d 1320, 1334 (Fed. Cir. 2013)). Thus the Government asserts that Customs had only the right, but not the obligation, to reject the SEBs at issue,[27] also construing the OIG Report as being concerned with the possibility that Customs might be sued by aggrieved sureties for accepting noncompliant bonds, rather than representing any longstanding practice to which the agency should now be bound. Def.'s Br. at 18–19.

B. Analysis

The court finds that the relevant subsections of Part 113, as regards the contents of a valid and enforceable bond, are directory, procedural

[24] The Government also articulates an obligation on the part of Hartford "to inform Customs that the Form 301 submitted was incomplete or did not constitute a contract" upon receiving the Part 2 Surety element of the SEB. Def.'s Br. at 16 (citing Customs Form 7501's direction to the surety or the surety's agent to "immediately furnish to the appropriate CBP officer any information showing a different statement of facts").

[25] The Government argues that the Part 113 regulations "do not affect the rights of the parties," but rather "serve as a guide or checklist to Customs to assist it in determining whether the principal and surety intended to be bound by a bond submitted to Customs." Def.'s Br. at 18. The Government emphasizes that Hartford presents no legal basis for the prospect that failure to comply with Part 113 Regulations voids the noncompliant bond. Def.'s Reply at 6–7.

[26] Specifically, corporate sureties "may execute powers of attorney to act in their behalf" by filing Customs Form 5297 with Customs. 19 C.F.R. § 113.37(g)(1), (2). "Corporate surety powers of attorney will continue in force and effect until revoked." *Id.* at (4).

[27] The Government characterizes Hartford's collected prior Customs Rulings, Pl.'s Exs. L, M, N, and the Ex. H Entry/Summary Rejection Sheets as either containing materially different facts or memorializing situations in which serious questions arose as to whether surety and importer intended to contract, and if so, whether the bonded amount was sufficient. Def.'s Br. at 19–20.

regulations, such that the bonds' noncompliance to them does not necessarily void subsequent agency action.

The court looks first to the plain text of the regulations. As applied to the Government, this Court has held that the word "shall" is to be construed as "may," unless a contrary intention is clear.[28] *Eagle Cement Corp. v. United States*, 17 CIT 624, 626 (1993) (citing *Barnhart v. United States,* 5 CIT 201, 203, 563 F. Supp. 1387, 1389 (1983)), *aff'd*, 26 F.3d 137 (Fed. Cir. 1994)). There is no clear contrary intention in the plain text of the regulations. Reading them as a whole and for their structure, the court finds none explicitly commands action or certain behavior by Customs, but rather speaks directly to the contents of bonds submitted to Customs. *E.g.* 19 C.F.R. § 113.21(a)(1) ("In the case of a corporate principal or surety, its legal designation . . . shall appear [on the bond]."); § 113.21(b) ("Each bond shall bear the date it was actually executed."); § 113.33(b) ("The bond of a corporate principal shall be signed by an authorized officer or attorney of the corporation . . . ."); § 113.33(a) ("The name of a corporation executing a Customs bond as a principal, may be printed or placed thereon . . . ."); § 113.37(e) ("A bond executed by a corporate surety shall be signed by an authorized officer or attorney of the corporation . . . .").

With that context, the court gives weight to the Government's analogy likening the instant regulations to 19 C.F.R. § 113.37(g), which the Federal Circuit has held protects Customs, not the surety. *See Great Am. Ins.*, 738 F.3d at 1334 ("[Section 113.37(g) (2013)] is not even written as a directive to Customs to reject certain bonds. Rather . . . it protects Customs against any later denial of actual authority by the corporate surety . . . ."). That provision, which covers "Power of attorney for the agent or attorney of the surety," regulates submission of a particular official form, CF 5297, to Customs. *Id.* Here too the relevant regulations speak to the content of a form submitted to Customs, CF 301, rather than the agency's behavior. *Compare United States v. UPS Customhouse Brokerage, Inc.*, 575 F.3d 1376, 1382–83 (Fed. Cir. 2009) (holding that 19 C.F.R. § 111.1 (2000), which lists "factors which [Customs] will consider," is mandatory, not discretionary, and that "any interpretation of § 111.1 that does not require [Customs'] consideration of the listed factors is clearly inconsistent with the plain language of the regulation").

Moreover, even assuming the Part 113 regulations were so written, it would be difficult to read them as mandatory where their plain text

[28] The usage of the word "shall" could mandate action where Customs elsewhere in the same section uses the permissive "may." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) ("When a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty."). However, that reading is not dispositive of the inquiry before the court for the reasons discussed *infra*.

does not contain "consequential language" explaining repercussions of the agency's ostensible noncompliance with the highlighted "shall" language. *Hitachi Home Elecs. (Am.), Inc. v. United States*, 661 F.3d 1343, 1347 (Fed. Cir. 2011) (citing *Canadian Fur Trappers Corp. v. United States*, 884 F.2d 563, 566 (Fed. Cir. 1989)). No such consequence is found in the Part 113 regulations, as both parties agreed at oral argument. Oral Arg. Tr. at 44–46, 115.

The court looks also to the history of Part 113 and CF 301, which buttresses the conception that they are intended to simplify bonding transactions rather than modify rights in private parties. As summarized in Customs' 1983 Notice of Proposed Rulemaking:

> The bond . . . guarantees that proper entry summary, with payment of estimated duties and taxes when due, will be made for imported merchandise and that any additional duties and taxes subsequently found to be due will be paid. The bond also guarantees redelivery of imported merchandise to Customs custody for examination or inspection if found not to comply with applicable laws and regulations.

48 Fed. Reg. 11,032 (Mar. 14, 1983) ("*Proposed Rule*"); *see also id.* at 11,041 ("Refusal to accept bonds from a surety which is deemed to be non-responsible is a temporary measure designed to protect the Government from cumbersome contracts."), 11,071 ("A major aspect of any revision in the Customs bond system is the extent to which the system can be modernized or streamlined in such a way that costs to the importing community (and ultimately to U.S. consumers) are minimized while still protecting the revenue and other Customs enforcement responsibilities."); Proposed Revision of the Customs Bond Structure and Solicitation of Comments, 46 Fed. Reg. 28,172 (May 26, 1981) ("*ANPRM*") ("A computerized bond control system would be implemented in conjunction with the Customs bond proposal. . . . The computerized system would provide increased revenue protection and improve the timely availability of information to authorized officials on a 'need to know' basis."). The *Final Rule*, 49 Fed. Reg. 41,152, implementing CF 301, evidences this intent. Indeed, the summaries of the *ANPRM*, the *Proposed Rule*, and the *Final Rule* each explain: "The purpose of the revision is to simplify transactions between Customs and the importing public and to facilitate establishment of an efficient computerized bond control system." Accordingly Customs is the party intended to be protected, and the national revenue the object to be protected, by the resulting regime. These materials also demonstrate an expectation that private parties would carry a bur-

den to comply with the obligations. *See, e.g., Final Rule* at 41,160 ("[C]ustodians of Customs bonded merchandise . . . and the other persons who use Customs bonds know what is required of them under the regulations. While many importers may not be familiar with bond obligations or regulations requirements, they are not filing the entry. They generally use a broker who is or should be familiar with bond obligations and the regulations.").

Hartford's frequent citations to the OIG Report, *see supra* n.20, and its phraseology concerning bond defects, are unavailing. *See* OIG Report at 5 ("From FY 2007 through FY 2010, CBP has written off $46.3 million in revenue because of inaccurate, incomplete, or missing bonds." (citing 19 C.F.R. § 113.21 (2010)). As an initial point, in regard to the issue as Hartford frames it before this court, the OIG Report is an opinion document that does not "reflect [Customs'] fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462.[29] Nor does the court take the OIG Report to represent a strict or authoritative interpretation of the Part 113 Regulations. *See* Pl.'s Br. at 9. Rather, it patently represents concern that "major omissions or errors . . . may create collection challenges" or "noncollection." OIG Report at 5. This language, as well as the fact that the Report arose from "concerns about alleged deficiencies in U.S. Customs and Border Protection's revenue collection program," *id.* at 1, only supports the Government's contention that the Part 113 regulatory regime is intended to protect the agency and the national revenue.[30]

Viewing this case through the lens of administrative procedure, the court would also "be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake."[31] *Great Am. Ins.*, 738 F.3d at 1329 (quoting *Brock v. Pierce Cty.*, 476 U.S. 253, 260 (1986)); *Dixon Ticonderoga Co. v. United States*, 468 F.3d 1353, 1355 (Fed. Cir. 2006). Rather, the "great prin-

[29] The report "is based on interviews with employees and officials of relevant agencies and institutions, direct observations, and review and testing of applicable documents." OIG Report Preface.

[30] Some of Hartford's other exhibits demonstrate the same. "Failure to ensure that all data elements are properly completed and verified *leaves [Customs] vulnerable to a loss of revenue*, as a surety may refuse to insure an improperly filed bond." Ex. I, *cited in* Pl.'s Br. at 16 (emphasis added).

[31] Counsel for Hartford at oral argument contended that all of the relevant Part 113 regulations, and all of the contents of the CF 301, including the bond instructions from which a number of Hartford's arguments derive, carry the force of law such that their violation voids subsequent agency action, because they were all promulgated through notice and comment procedures. Oral Arg. Tr. at 35–37. The argument sweeps too broadly. Precedent gives no such rule. That a regulation, or the initial completion instructions on the CF 301, were so promulgated does not necessarily render them mandatory in that sense. *See*

ciple of public policy, applicable to all governments alike, . . . forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *Oy v. United States*, 61 F.3d 866, 871 (Fed. Cir. 1995) (quoting *Brock*, 476 U.S. at 260); *see Intercargo Ins. Co. v. United States*, 83 F.3d 391, 396 (Fed. Cir. 1996) ("The public interest in the administration of the importation laws should not 'fall victim' to the [procedural] failure by the Customs Service . . . if the oversight has not had any prejudicial impact on the plaintiff."); 5 U.S.C. § 706.

The Part 113 regulations are procedural in nature.[32] "[A] 'critical feature of [a procedural rule] is that it covers agency actions that do not themselves alter the rights or interests of parties, although [it] may alter the manner in which the parties present themselves or their viewpoints to the agency.'" *Tafas v. Doll*, 559 F.3d 1345, 1356 (Fed. Cir. 2009) (quoting *JEM Broad. Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994)), *reh'g en banc granted, opinion vacated,* 328 Fed. Appx. 658 (Fed. Cir. 2009).[33] As discussed *supra*, the regulations are meant to protect Customs in furtherance of its mission to protect revenue of the United States, and do not clearly alter the rights of the

infra; *see also, e.g., Mitsubishi Polyester Film, Inc. v. United States*, 41 CIT ___, ___, 228 F. Supp. 3d 1359, 1382 (2017) ([I]nvalidation is not warranted because the time period in [19 C.F.R. § 351.225(c)(2)] is directory, not mandatory, as it does not specify a consequence for failure to comply with the provision." (citing *Canadian Fur Trappers Corp. v. United States*, 12 CIT 612, 615, 691 F. Supp. 364, 367 (1988), *aff'd*, 884 F.2d 563 (Fed. Cir. 1989))).

[32] The court restricts its analysis of the procedural nature of Part 113 to only those regulations which are at issue.

[33] In *JEM*, the D.C. Circuit reviewed "hard look" rules adopted by the Federal Communications Commission in response to the submission of a significant number of "carelessly prepared and speculative applications" for broadcasting licenses. 22 F.3d at 327. The D.C. Circuit found those rules "did not change the *substantive standards* by which the FCC evaluates license applications," but instead "may alter the manner in which the parties present themselves or their viewpoints to the agency," in line with the procedural exception to the notice and comment requirements of the Administrative Procedure Act. *Id.* at 326–27 (quoting *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)); 5 U.S.C. § 553(b)(A) (1988). Thus, while the hard look rules could result in the loss of substantive rights, they were nonetheless procedural because they did not "foreclose effective opportunity to make one's case on the merits." *Id.* at 327–28 (quoting *Lamoille Valley R.R.* Co. v. Interstate Commerce Comm'n*,* 711 F.2d 295, 328 (D.C. Cir. 1983)).

The Federal Circuit in *Tafas* applied the *JEM* precepts in concluding that four Final Rules promulgated pursuant to notice and comment procedure by the United States Patent and Trademark Office were procedural, as "they govern the timing of and materials that must be submitted with patent applications." 559 F.3d at 1356. The Rules may "alter the manner in which the parties present . . . their viewpoints" to the agency, said the Federal Circuit, but they do not patently "foreclose effective opportunity" to present patent applications for examination. *Id.* (quoting *JEM*, 22 F.3d at 326, 328). Like *JEM* and *Tafas*, the instant case sees the court reviewing regulations that moderate the contents of an item submitted to an agency for review, the CF 301. Part 113 simply "alter[s] the manner in which the parties present . . . their viewpoints" to Customs. *JEM*, 22 F.3d at 326. Though the regulatory regime could feasibly "result in the loss of substantive rights," *Tafas*, 559 at 1356, the intrinsic nature of the scheme as one which moderates private parties' presentation of themselves to the agency cannot be denied.

private parties engaging in the bonding procedure. The implementation of CF 301, and the amendment of several Part 113 regulations, in 1984 was intended to:

> (1) modernize the Customs bond structure by reducing and consolidating the number of bond forms in use, (2) modify the archaic bond language, (3) simplify transactions between Customs and the importing community, and (4) facilitate establishment of an efficient computerized bond control system . . . .

Final Rule at 41,152. The regulatory scheme thus "alters the manner in which the parties present themselves or their viewpoints to the agency" by revising and improving prior bonding procedures. *JEM*, 22 F.3d at 326. Nowhere in the regulatory history behind the implementation of Form 301, or the revision of the corresponding Part 113 Regulations, did Customs provide for the creation of new rights in sureties. *See generally Final Rule*; *Proposed Rule*.

Errors as to procedural rules void subsequent agency action only if they cause the challenging party "substantial prejudice." *Am. Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970); *see Great Am. Ins*, 738 F.3d at 1329 ("[T]he suspension in this case could be invalidated only if Great American showed that the agency's procedural error caused it substantial prejudice[.]" (citing *Shinseki v. Sanders*, 556 U.S. 396, 406 (2009); 5 U.S.C. § 706)); *Intercargo Ins.*, 83 F.3d at 394; *PAM S.p.A. v. United States*, 463 F.3d 1345, 1348–49 (Fed. Cir. 2006) (holding that a challenger must show substantial prejudice regardless of whether the agency rule confers important procedural benefits). This is because "[i]t is always within the discretion of . . . an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." *Am. Farm Lines*, 397 U.S. at 539.

Insofar as Customs' acceptance of the bonds constitutes violation of a "procedural requirement," *Great Am. Ins.*, 738 F.3d at 1329, Hartford has demonstrated no prejudice caused thereby, and the court can locate no evidence of prejudice in the record. As a matter of law, "[p]rejudice, as used in this setting, means injury to an interest that the statute, regulation, or rule in question was designed to protect." *Intercargo Ins.*, 83 F.3d at 396. As stated *supra*, the regulations are designed to protect Customs, not the surety; Hartford fails to establish otherwise.[34] The record indicates the sum of Hartford's alleged

[34] The court does not, and need not, answer the hypothetical inquiry of whether a surety could demonstrate prejudice as a result of a demand by customs to pay on a bond after an importer principal's default, where the CF 301 in question is completely blank. *See* Pl.'s

injury is that it had to pay Customs for demands on bonds noncompliant to Part 113, which "Customs should be required to cancel." Pl.'s Br. at 16. The court is unpersuaded that, on this record, this constitutes prejudice. Counsel at oral argument agreed that no prejudice can be shown as to any of the individual bonds, but submitted instead that prejudice to Hartford and sureties generally is of a more abstract, systemic nature. Oral Arg. Tr. at 54–56. Yet the record does not indicate that Hartford lacked in opportunity to stop doing business with the customs brokers on these SEBs, to deny premium payments, or to alert Customs of the defects it now characterizes as fatal. Quite the contrary: over a course of years, JGII, Hartford's general agent, reviewed copies of the SEBs, occasionally contacting brokers to discuss the facial omission of information,[35] and billed the importer principals premium on each of the bonds. Def.'s Facts ¶¶ 6–16, 21, 31, 32, 43; Pl.'s Resp. Facts ¶¶ 6–16, 21, 31, 32, 43. Hartford denies that "in every instance" the Part 2 Surety copy of the CF 301 was returned to JGII for billing premium, but admits both that "for the SEBs at issue in this consolidated case, JGII would bill the premium once it received back from the retail insurance broker the blue, Part 2, surety copy," and that it "does not dispute that premium was paid on each of the sixty-one bonds at issue." Def.'s Facts ¶¶ 21, 31, 32; Pl.'s Resp. Facts ¶¶ 21, 31, 32. JGII had a duty to maintain complete copies of all bonds under its agency agreement, yet Hartford had no formal policy or procedure for reviewing whether the agent was complying with the GAA. Def.'s Facts ¶¶ 12, 13; Pl.'s Resp. Facts ¶¶ 12, 13; GAA at Art. VII. Thus, altogether, Hartford does not convincingly explain how specifically it was prejudiced here, in the pertinent sense, by Customs' acceptance of bonds noncompliant with Part 113, where the charges on the suretyship obligation arise from the importer principals' defaults regardless of technical compliance.

In summary, in determining that the SEBs here are not void, the court is persuaded by: a lack of promulgated consequences for noncompliance; language regulating bond content and presentation of

Reply at 4 ("The Government does not even rule out the possibility that a *blank* bond could serve as an enforceable contract, if Customs can find a discernable intent to contract from extrinsic evidence."); Oral Arg. Tr. at 190–91.

[35] In response to the government's assertion that, "[i]f Mr. Gorman or his JGII staff saw an error or omission on a surety copy of a bond, Mr. Gorman would call the customs broker to complain about the manner in which the bond was completed and then bill premium on that bond," Hartford "[a]vers that Mr. Gorman testified he called customs brokers a couple of times to complain about the manner by which they were completing the bond, but only if Gorman discovered a pattern of a specific error common to multiple bonds issued by that customs broker." Def.'s Facts ¶ 43; Pl.'s Resp. Facts ¶ 43. The regularity with which Gorman called the relevant customs broker to complain about their procedure does not alter the undisputed fact that Hartford through its agent had the ability and opportunity to complain.

parties to the agency rather than agency behavior; regulatory history showing intent to protect Customs and not to create important substantive rights in private parties; and a lack of substantial prejudice suffered by Hartford. Customs' acceptance of the SEBs at issue in this case did not void them under the Part 113 regulations.

IV. Whether the SEBs are Enforceable Contracts

A. Parties' Arguments

Hartford argues that even if the bonds are valid under the Part 113 regulatory regime, many of the bonds are regardless unenforceable for lack of essential terms under "traditional principles of contract law." Pl.'s Br. at 19. Hartford points to the necessity of sufficient definitiveness granted by essential terms which create a binding contract. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 33 (AM.LAW INST. 1981) ("Restatement of Contracts")). Citing *United States v. Boecker*, 88 U.S. 652 (1874), Hartford argues that the lack of an essential term, such as an address, removes a surety from liability. Pl.'s Br. at 20. Hartford also argues, on the basis of *Bell & Grant v.* Bruen, 42 U.S. 169 (1843), that "[s]urety bond contracts are strictly construed in favor of the surety and only bind the surety to the obligation it clearly intended to assume." Pl.'s Br. at 20.

The essential contract terms here implicated, as selected by Hartford, include "the identification of the particular transaction (the entry number),[36] the transaction date, and the limit of liability/penal sum of the bond." Pl.'s Br. at 21. Hartford argues these terms encompass the "letter, spirit, or meaning of the bond," *Boecker*, 88 U.S. at 656, and circumscribe the surety's obligations. Pl.'s Br. at 21 (citing *Miller v. Stewart*, 22 U.S. 680, 702–03 (1824)). In summary, Hartford asserts that Customs' acceptance of SEBs lacking these essential terms rendered Hartford's obligations "open and undefined," and thus deprived the SEBs of validity and enforceability. *Id.*

Hartford alternately argues that the SEBs are rendered unenforceable for failure to satisfy the "Statute of Frauds."[37] Pl.'s Br. at 19, 22. Hartford quotes the RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY, ch. 2, § 11 (AM.LAW INST. 1996) ("Restatement of Suretyship"), for the proposition that "[p]ursuant to the Statute of Frauds, a contract

[36] The "entry number," in this context, is a value appearing on the face of the CF 301. It is titled in full as "Identification of transaction secured by this bond (e.g., entry no., seizure no., etc.)." CF 301. The entry number should not be confused with the "SEB number" found at the bottom of each bond in this case, used by Hartford as a unique identifier to aid in billing. Def.'s Facts ¶¶ 30, 33; Pl.'s Resp. Facts ¶¶ 30, 33.

[37] Hartford levies statute of frauds arguments as to all remaining bonds at issue. Compl. ¶¶ 96, 102–07, 114, 120–24, 128, 131–38, 146, 149–56, 166, 170–77, 185, 188–95, 203, 207–14, 221, 225–33, 240, 244–52, 259, 263–70.

creating a secondary obligation is unenforceable as a contract to answer for the duty of another unless a written memorandum satisfying the Statute of Frauds or an exception applies."[38] Pl.'s Br. at 22. Hartford defines "written memorandum" according to the Restatement of Contracts § 131:

> Unless additional requirements are prescribed by the particular statute, a contract within the Statute of Frauds is enforceable if it is evidenced by any writing, signed by or on behalf of the party to be charged, which
>
> (a) reasonably identifies the subject matter of the contract,
>
> (b) is sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and
>
> (c) states with reasonable certainty the essential terms of the unperformed promises in the contract.

Hartford asserts that "Congress or an agency can also impose a Statute of Frauds in specific areas," Pl.'s Br. at 23, and that, per the United States Court of Federal Claims, regulations impose a statute of frauds if they are "explicit in requiring that every contract . . . 'be reduced to writing, and signed by the contracting parties.'" *Lublin Corp. v. United States*, 84 Fed. Cl. 678, 686 (Fed. Cl. 2008). That established, Hartford argues that Customs' regulations–19 C.F.R. §§ 113.11, 113.21, 113.33, and 113.37, as well as the CF 301 itself–collectively impose such a statute of frauds, as they function to demand a signed writing containing essential terms. Pl.'s Br. at 23.

Hartford concludes with a tetrapartite argument that Customs cannot look to extrinsic evidence to repair deficient contracts, first because the SEBs are statutory bonds, promulgated pursuant to 19 U.S.C. §§ 66, 1623, and thus are contingent upon compliance with all applicable statutes and regulations. Pl.'s Br. at 24 (citing *United States v. DeVisser*, 10 F. 642, 648 (S.D.N.Y. 1882)). Hartford asserts second that "the SEBs expressly incorporate the custom bond regulations," and thus regulatory requirements must be satisfied for bond enforceability. *Id.* at 25 (citing *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1057 (Fed. Cir. 2012); *S. Cal. Edison Co. v. United States*, 226 F.3d 1349, 1353 (Fed. Cir. 2000)). Hartford appears to argue that, because, under its reading, the Part 113 regulations are

[38] Hartford notes that this Court has referred to the Restatement of Suretyship in determining the rights and obligations of parties under customs bonds in other cases. Pl.'s Br. at 22 n.18 (citing *United States v. Great Am. Ins. Co. of NY*, 35 CIT ___, 791 F. Supp. 2d 1337 (2011), *aff'd in part, rev'd in part, Great Am. Ins.*, 738 F.3d 1320).

incorporated into CF 301, the regulatory regime broadly "requires that each bond constitutes the complete and final contract between the parties." *Id.* Third, Hartford argues that the Federal Circuit in *Sun Studs, Inc. v. Applied Theory Assocs. Inc.*, 772 F.2d 1557 (Fed. Cir. 1985), "rejected Customs' argument that extrinsic evidence can be used to correct an incomplete or deficient contract." Pl.'s Br. at 25. According to Hartford, the Court in that case held that a signed transmittal letter could not cure a deficiency in the operative settlement agreement between the parties, which was void for lack of a party's signature. *Id.* Finally, Hartford reasserts that "no statutes or regulations authorize Customs' use of extrinsic evidence to 'complete' bonds that are otherwise missing essential information." *Id.* at 26 (citing Ingalls Dep. at 38–39, 279–80).

The Government argues that the bonds are valid contracts. Def.'s Br. at 21. Preliminarily, the Government asserts that when applying ordinary principles of contractual interpretation to determine whether a contract exists, *NRM Corp. v. Hercules, Inc.*, 758 F.2d 676, 681 (D.C. Cir. 1985), a court should look to context, per Restatement of Contracts § 212 cmt. b, and also extrinsic evidence. Def.'s Br. at 21. The Government states generally that under "long-standing principles of contract interpretation," Customs was entitled to rely on other documents in the entry package to assess contractual intent between the parties.[39] *Id.* at 22.

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[39] The Government argues that reformation could apply where "a mistake of both parties as to the contents or effect of the writing" results in an imperfectly expressed agreement. Def.'s Br. at 21 (citing Restatement of Contracts § 155). The Government also argues that Hartford ratified all the bonds and is thus liable on them regardless of whether missing information on the face of an SEB would remove a surety's liability. Def.'s Br. at 28 (quoting RESTATEMENT (SECOND) OF AGENCY § 82 (AM.LAW INST. 1958), *quoted in Schism v. United States*, 316 F.3d 1259, 1289 (Fed. Cir. 2002)). The Government asserts that "[a]ccepting the benefits from the acts of an apparent agent confirms the agent's authority and will estop a principal from denying the obligations flowing from the acts." *Id.* (citing RESTATEMENT (THIRD) OF AGENCY § 4.01 cmt. b (AM.LAW INST. 2006) ("Restatement of Agency") ("The sole requirement for ratification is a manifestation of assent or other conduct indicative of consent by the principal.")).

Hartford counters by arguing, first, that neither the customs broker on each bond nor Customs acted as agents of Hartford. Pl.'s Reply at 16 (citing Restatement of Agency § 4.03). Hartford second argues that ratification is absent because "Hartford lacked actual knowledge of the defects in the bonds accepted by Customs," thus falling short of the standard in Restatement of Agency § 4.06. Pl.'s Reply at 16–17. As to mutual mistake and reformation, Hartford argues that there was not, and exists no record evidence of, a mistake of fact in Customs' acceptance of the SEBs, which, it asserts, would be required under Restatement of Contracts § 155. Pl.'s Reply at 19; *see Nat'l Austl. Bank v. United States*, 452 F.3d 1321, 1329 (Fed. Cir. 2006).

In its Reply, the Government adds that the customs brokers who completed the SEBs did so with the approval of and based on instructions from JGII, Pl.'s Resp. Facts ¶¶ 38, 41, and that JGII's General Agency Agreement with Hartford permitted the former to delegate authority and obligations to sub-producers who were licensed customs brokers. GAA at Art. V. Here, the Government argues, JGII delegated authority to the customs brokers when it provided pre-signed bonds to them; therefore, they were agents of Hartford, who "exercised

The Government notes in its Reply that Gorman never stopped doing business with customs brokers who failed to comply with the Customs regulations, Pl.'s Resp. Facts ¶¶ 46, 47, that Hartford never alerted a principal that it believed any bonds containing errors were unenforceable, *id.* ¶ 50, and that Hartford never refunded the premium to any principals on supposedly defective bonds, *id.* ¶ 52. Def.'s Reply at 10–11. The Government too disputes Hartford's claim that complete and accurate bonds increase the likelihood that Customs will collect from the importer, Pl.'s Reply at 8–9, since the construction of a bond does not affect the likelihood that an importer will be called upon for payment. Def.'s Reply at 11. The Government stresses that the Part 113 regulations exist to "insure that the revenue is adequately protected," 19 C.F.R. § 113.11 (2016), not to protect the surety. Def.'s Reply at 12.

B. Analysis

The SEBs are valid and enforceable contracts between Customs, the importer principals, and Hartford. In evaluating the documents at issue under the circumstances produced by the parties, the court applies ordinary principles of contract construction as would be applicable to any contract action between private parties. *United States v. Winstar Corp.*, 518 U.S. 839, 870–71 (1996); *Priebe & Sons v. United States*, 332 U.S. 407, 411 (1947). Thus the court's duty in construing the contracts at issue is to give effect to the mutual intentions of the parties. *See NRM Corp.*, 758 F.2d at 681.

1. The Appendix 1, 2, 4, and 6 SEBs

The court first considers contractual principles regarding alleged defects common to the SEBs in Appendices 1, 2, 4, and 6 before scrutinizing each alleged defect. Hartford's unenforceability argument focuses largely on formation, or rather lack thereof due to absence of allegedly essential terms on the bonds.[40] Pl.'s Br. at 19. On a suretyship agreement, the offeror is typically the surety, as is

sufficient control over the customs broker to support a finding of agency." Def.'s Reply at 14. As explained *infra*, the court does not reach these arguments.

[40] As the court has noted, despite Hartford's instant arguments, it both billed and accepted premium through its general agent JGII, who reviewed Part 2 surety copies, on every bond in this case, including those which it alleges were not reasonably certain and did not contain essential terms "which define the scope of liability and the subject matter of the contract." Pl.'s Br. at 19. The court considers the validity of the bonds identified in this section under principles of contract law, but as a matter of equity, Hartford could well be estopped from asserting non-formation and unenforceability after having behaved as if the bonds are enforceable by billing and accepting premium. *See, e.g., Am. Sur. Co. of N.Y. v. City of Akron*, 95 F.2d 966, 969 (6th Cir. 1938) ("[T]he acceptance of renewal premiums by the sureties of the Central Bank from the successor bank constituted recognition of the successor bank as principal, and estopped such sureties from denying liability under their bonds. . . . We think

Hartford here. *See Hartford Fire Ins. Co. v. United States*, 36 CIT ___, ___, 857 F. Supp. 2d 1356, 1362 (2012) ("*Hartford II*") ("Customs' acceptance of the surety's offer is necessary to the formation of the surety agreement." (citing Restatement of Suretyship § 8 cmt. a ("An offer to become a secondary obligor[41] commonly invites the offeree to accept by advancing money, goods, or services on credit."))). The facts clearly show that Hartford, as secondary obligor, manifested its willingness to contract with Customs, as obligee,[42] on these SEBs by becoming the surety to multiple principals across the operative three-year time period, December 1, 2003 through December 31, 2006. Compl. Appendices 1–6; Restatement of Contracts § 24 ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."). The basic entry bond conditions, 19 C.F.R. § 113.62(a)(1)(ii), which are expressly "incorporated by reference into the bond," § 113.61, require that the importer and surety jointly and severally agree to "[p]ay, as demanded by Customs, all additional duties, taxes, and charges subsequently found due, legally fixed, and imposed on any entry secured by this bond." Other facts in the record establish a course of dealings which allow the court to characterize Hartford's conduct in each case as the making of an offer, to Customs, to become secondary obligor: Hartford's relationship with JGII, memorialized in the GAA, began on or about September 4, 2002, more than a year before the first of the SEBs at issue were submitted to Customs, and was renewed almost a year into that process, on or about September 3, 2004, Hartford Dep. at 15, 18; during the operative time, JGII distributed pre-printed bonds to retail insurance brokers, containing Gorman's facsimile signature,

this ruling is correct."). By the same token, the court is not persuaded by any argument that Hartford relied on Customs to approve only compliant bonds in the formation of a valid and enforceable contract. *See* Pl.'s Reply at 12 ("Hartford and other sureties *relied* on the benefits to them that arise from having only compliant bonds approved, and that potential benefit was *a condition of Hartford's agreement to act as surety*. To the extent Customs approved non-compliant bonds, . . . Hartford's intent to contract was never consummated and an enforceable contract against Hartford was never created.") (emphasis added). Insofar as Hartford is claiming that technical correctness in the CF 301 is "a condition of Hartford's agreement to act as surety," Pl.'s Reply at 12, that condition was waived here by Hartford's awareness that Customs approved bonds that Hartford believed contained errors, JGII's review of Part 2 Surety copies of the multiform CF 301, and its subsequent billing and acceptance of premium from principal importers on each bond. *See* Pl.'s Resp. Facts ¶¶ 38, 41, 43, 44; Restatement of Contracts § 246(1) ("[A]n obligor's acceptance or his retention for an unreasonable time of the obligee's performance, with knowledge of or reason to know of the non-occurrence of a condition of the obligor's duty, operates as a promise to perform in spite of that non-occurrence . . . .").

[41] An obligor is "[s]omeone who has undertaken an obligation; a promisor or debtor." *Obligor*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[42] An obligee is "[o]ne to whom an obligation is owed; a promisee, creditor, or donor beneficiary." *Obligee*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Def.'s Facts ¶¶ 15, 28, Pl.'s Resp. Facts ¶¶ 15, 28; and Hartford operated a complicated business outfit, in which the bonds issued through JGII included the surety's preprinted billing identification number, printed in specific locations on chemically designed, multi-part CF 301 forms, to aid in the collection of premium. Hartford Dep. at 31–34, 38–41; CF 301; Def.'s Facts ¶¶ 27, 42; Pl.'s Resp. Facts ¶¶ 27, 42; *see* Restatement of Contracts § 223(1) ("A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.").

An offer to contract cannot be accepted unless the terms of the contract are reasonably certain. Restatement of Contracts § 33(1); *see Pac. Gas & Elec. Co. v. United States*, 838 F.3d 1341, 1355–56 (Fed. Cir. 2016), *petition for cert. filed*, (U.S. July 6, 2017) (No. 17–57). Reasonably certain terms must provide a basis for determining the existence of breach and for giving an appropriate remedy. Restatement of Contracts § 33(2). Generally, the court may look to factual implication to supply missing terms. Restatement of Contracts § 33 cmt. a. The court may also look to other writings to supply missing terms, as "all writings that are part of the same transaction are interpreted together." *Id.* § 202(2). "'[A] contract may arise as a result of the confluence of multiple documents' so long as there is 'a clear indication of intent to contract[,] and the other requirements for concluding that a contract was formed' are met." *Suess v. United States*, 535 F.3d 1348, 1359 (Fed. Cir. 2008) (quoting *D & N Bank v. United States*, 331 F.3d 1374, 1378 (Fed. Cir. 2003)). The facts show that the multiple Customs Forms in the entry package are memoranda of the same transaction. Def.'s Exs. 1–6; CF 7501; CF 3461;[43] Gorman Dep. at 77, 124–25. Applicable regulations bind these documents together into the entry package. *See* 19 C.F.R. §§ 142.11(a) (2003) ("The entry summary shall be on Customs Form 7501 unless a different form is prescribed elsewhere in this chapter."), 142.3 (2003) (requiring CF 3461 unless the merchandise is imported from a contiguous country or the entry summary is filed at the time of entry), 142.4 (2003) ("[M]erchandise shall not be released . . . [when] Customs receives the entry documentation or the entry summary documentation which serves as both the entry and the entry summary . . . unless a single entry or continuous bond on Customs Form 301 . . . has been filed."). "Words and other conduct are interpreted in the light of all the circumstances," Restatement of Contracts § 202(1), and

[43] As stated *supra* nn.2–3, every bond under scrutiny in this section was accompanied by both a CF 3461 and a CF 7501 in its respective entry package.

the submission of an entry package containing information also absent from the face of one constituent element of that package does not preclude the court from ascertaining the parties' intent to contract in each case. The court perceives no reason, and sees no convincing argument, that consistent additional terms cannot be applied to the SEBs by virtue of the context surrounding each transaction. *See id.* § 204.

Having outlined these applicable principles, the court analyzes in turn the alleged defects identified by Hartford as constituting essential contract terms. Pl.'s Br. at 19.

a. The Principal's Signature

In formulating its argument as to missing "essential terms--which define the scope of liability and the subject matter of the contract," Hartford does not include signatures. Pl.'s Br. at 19. Yet, earlier in its motion, Hartford appears to imply that signatures are terms essential to formation and enforceability. *See* Pl.'s Br. at 1 ("[A] bond must include certain essential terms, *e.g.*,. . . the 'entry number' . . . the 'transaction date' . . . the 'penal sum' . . . and the identification and signature of the parties, in order to be enforceable."). To the extent that Hartford implies the bonds are invalid contracts because the absent signatures are essential terms, the court analyzes that contention.

Found in Appendices 1 and 4, the seven SEBs lacking a principal's signature, or the signature of its attorney-in-fact customs broker,[44] were submitted by the customs broker on behalf of the importer as an element of the entry package, thus demonstrating the principal's intent to be bound. *See* 19 C.F.R. § 142; Pl.'s Ex. G (stating the intent, via their respective customs brokers, of Farmland [as to the six Appendix 4 bonds], SCS marketing [as to the single Appendix 6 bond], and Fasttrack Merchants, Inc. [as to one of the Appendix 1 bonds], to "be bound to the terms of the bond"). The entry package for each of these SEBs contained both a CF 7501, signed by the customs broker on behalf of the importer, and a CF 3461, documents which require affirmations from importers or their attorneys-in-fact. Def.'s Exs. 1, 4; *see* CF 7501 at 1 ("I declare that I am the . . . importer of record . . . . I also declare that the statements in the documents herein filed . . . are true and correct . . . ."); CF 3461 at 1 ("I certify that the above information is accurate, the bond is sufficient, valid, and current, and that all requirements of 19 CFR Part 142 have been met."); 19 C.F.R.

[44] In Appendix 1: SEB0431814 covering entry ARV-0661848–7; SEB0431632 covering entry ARV-0661754–7; SEB0431846 covering entry ARV-0662172–1; and SEB0372602 covering entry ARV-0662370–1. In Appendix 4: SEB0431564 covering entry 038–0608659–5; SEB0431563 covering entry 038–0608658–7; SEB0431565 covering entry 038–0608657–9.

§ 142.4. To the extent that the principal's signature represents an intent to be bound, that intent is clear from the facts surrounding each of the seven bonds. *See* Restatement of Contracts § 24.

b. The Date of Transaction

Two bonds, one found in Appendix 1 and the other in Appendix 4, lack the date of transaction.[45] As to formation, the "date of transaction" value characterizes the surety's offer, and functions to invite acceptance from Customs. *See* 19 C.F.R. § 113.26(b) ("A single transaction bond is effective on the date of the transaction identified on the [CF 301]."); *Hartford II*, 857 F. Supp. 2d at 1362 n.5 ("[T]he effective date of the bond instrument is not the same as formation. The effective date tells Customs that a bond offer is outstanding and invites Customs acceptance by entering the goods, thereby creating the obligation that is the subject matter of the bond."); Restatement of Contracts §§ 24, 32. This reading is further supported by the customs broker's certification on each entry package's signed *and dated* CF 3461 Entry/Immediate Delivery form that "the bond is sufficient" and that "all requirements of 19 CFR Part 142 have been met." Def.'s Exs. 1, 4; CF 3461. As explained *supra*, the circumstances surrounding each bond's entry show that Customs accepted a sufficiently certain suretyship offer, negating any contention that a missing "date of transaction" itself vitiates the contract.

c. The Entry Number

The entry number is missing from five of the bonds, four of them found in Appendix 1 and the fifth found in Appendix 2.[46] Each of these bonds was accompanied by a CF 7501 containing the entry number.[47] Hartford nowhere alleges that as a matter of fact, it is unclear which CF 7501 matches which entry package and bond.

Hartford generally has not demonstrated, on the facts before the court, that these pieces of data are material to the SEBs such that their absence blocks formation for uncertainty, *see* Restatement of Contracts § 33, or enforceability for any other doctrinal reason. Quite the contrary: Hartford indisputably accepted premium on each bond, the billing for which required review of copies of the bonds by JGII,

[45] In Appendix 1: SEB0372602 covering entry ARV-0662370–1. In Appendix 4: SEB0431563 covering entry 038–0608658–7.

[46] In Appendix 1: SEB0431814 covering entry ARV-0661848–7; SEB0431632 covering entry ARV-0661754–7; SEB0431846 covering entry ARV-0662172–1; and SEB0372602 covering entry ARV-0662370–1. In Appendix 2: SEB0144529 covering entry 316–0604450–6.

[47] The CF 301 is stapled to the remaining entry documents, clearly covering the given entry. Def.'s Attach. 1 at 1–3. Moreover, the unique identification SEB number on each bond, a value separate from the entry number and preprinted by Hartford's commercial vendor, appears on each relevant Appendix 1 bond's respective CF 7501. *See* Def.'s Ex. 1.

Hartford's general agent. The offer to contract as to each bond identified by Hartford thus having been reasonably certain, Customs' acceptance of those offers formed valid contracts. *See Hartford II*, 857 F. Supp. 2d at 1362 ("Customs' approval [of the bond] functions as an acceptance necessary to formation of the contract . . . ."); Restatement of Contracts § 50(1)[48] ("Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.").

Hartford's case law citations are unavailing. In *Boecker*, 88 U.S. 652, the Supreme Court held that the United States could not recover against a surety for the principal's default on taxes owed on his distillery at a particular location, when the bond incorrectly identified the distillery as having a different location in the same town. The Court opined that "this term of the bond is of the essence of the contract," and because the locative term characterized the surety's liability, "[t]here could consequently be no liability within the letter or meaning of the contract." *Boecker*, 88 U.S. at 656. Here, by contrast, there was no confusion as to Hartford's liability that would have prevented formation; its liability was limited to the bond's penal sum, and even assuming that the date of transaction and the entry number went to the spirit of Hartford's suretyship obligation, they were readily ascertainable in the context of each entry. *Interstate Rock Products, Inc. v. United States*, 50 Fed. Cl. 349 (Ct. Cl. 2001), *aff'd per curiam*, 48 Fed. Appx. 331 (Fed. Cir. 2002), meanwhile speaks to enforceability of a bond that lacked a penal sum. Pl.'s Br. at 20–21. As explained *supra*, the court does not have jurisdiction over the sole bond in this case lacking a penal sum certain, SEB0137067 covering entry JN7–0332527–2.[49]

In summary, as the facts in the record show, the contracts are sufficiently definite with respect to the essential terms, as Hartford characterizes them, being present either on the face of the SEBs or in the entry package, such that the court can ascertain with certainty the identities of the contracting parties, their intent, and their obligations. *See* Pl.'s Ex. G; Def.'s Exs. 15, 16; *compare Pac. Gas*, 838 F.3d at 1356 ("There is no basis here for determining the groups that are supposed parties to the contracts at any particular time or the particular obligations that each group owes to the other. . . . [or] the duration or other material terms of the alleged agreement(s). The certainty required for the existence of a contract is simply lacking.").

[48] *See also id.* § 50(2) ("Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.").

[49] Under the circumstances here, the court need not, and does not, opine on the essential nature of a bond's penal limit as a matter of contract law.

2. The Appendix 5 Bonds

The two Appendix five bonds[50] are sui generis in that they lack Hartford's signature as surety on the bond.[51] [52] Unlike all other bonds under consideration, these bonds are represented by "Part[s] 3 –Principal" copies. Def.'s Ex. 5. Neither party is able to furnish Parts 1 of the two bonds or explain why Customs was in possession of Parts 3, rather than Parts 1. Oral Arg. Tr. at 90–91, 93–96, 181–83. Nonetheless, the court finds that summary judgment remains appropriate as to these bonds. Any potential factual dispute regarding their origin and procession through the bonding process is not material because it would not change the outcome of the court's analysis. *See Liberty Lobby*, 477 U.S. at 249–50.

The lack of Hartford's signatures on these bonds does not defeat formation or enforceability. Hartford cannot plausibly argue on the facts in the record that it did not intend to contract on these bonds,[53] being that it billed and received premium on them. Def.'s Facts ¶ 21; Pl.'s Resp. Facts ¶ 21. A surety that bills premium signals that it is the surety on the instrument in question. *See* Restatement of Contracts § 19(1) ("The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act."). Hartford's efforts to avoid its responsibilities under the bonds are defeated by its performance, namely, its acceptance of premiums.

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[50] SEB 0421676 covering entry ES2–0053112–8; SEB033[]379 covering entry ES2–0041927–4.

[51] As with those bonds lacking the principal's signature, *see supra* Section IV.B.1.a., Hartford largely predicates the unenforceability of these two bonds on the premise that the statute of frauds bars surety contracts not signed by both parties. Pl.'s Br. at 19, 23 ("The U.S. Court of Federal Claims has explained that statutes or regulations impose a Statute of Frauds if they are 'explicit in requiring that every contract . . . be reduced to writing, and signed by the contracting parties.'" (quoting *Lublin Corp.*, 84 Fed. Cl. at 686)). The court likewise analyzes these bonds, to the extent that Hartford argues the bonds are invalid contracts because the lack of a principal's signature robs them of certainty. *See* Restatement of Contracts § 33.

[52] As explained in regard to bonds in the other appendices, *supra* n.40, Hartford may well be estopped from arguing unenforceability of a contract on which it has accepted premium; the court again resolves the question of formation and enforceability as a matter of law.

[53] Even were Hartford to affirmatively contend it was unaware that these bonds were being distributed, Hartford in that scenario would simply be the recipient of an offer, by the customs broker, to serve as secondary obligor on each of the two bonds. *See* Restatement of Contracts § 24. Hartford could have rejected this offer, *id.* § 38, but instead accepted it by billing importers premium. *Id.* at §§ 19(1) ("The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act."), 22, 30. Hartford then billed and retained premium. Def.'s Facts ¶ 43, 52; Pl.'s Resp. Facts ¶ 43, 52. Customs was the beneficiary of these bonds. *See Sioux Honey*, 672 F.3d at 1057 ("The contracts also incorporate federal regulations indicating that the Government is the beneficiary." (citing 19 C.F.R. § 113.62)).

See id. §§ 389(2) ("The power of a party to avoid a contract for mistake or misrepresentation is lost if after he knows or has reason to know of the mistake or of the misrepresentation if it is non-fraudulent . . . he manifests to the other party his intention to affirm it."), *id.* cmt. a ("[T]he affirming party is bound as from the outset and the other party continues to be bound."), 246 ("[A]n obligor's acceptance or his retention for an unreasonable time of the obligee's performance, with knowledge of or reason to know of the non-occurrence of a condition of the obligor's duty, operates as a promise to perform in spite of that non-occurrence . . . .").

3. The Statute of Frauds

Hartford's statute of frauds argument too is unavailing. The court is not persuaded by the proposition that a constellation of regulatory and statutory dictates implicitly imposes a common law statute of frauds, Pl.'s Br. at 23, where neither Congress nor the agency has explicitly made that declaration. *See Lublin Corp.*, 84 Fed. Cl. at 686 ("Certainly, Congress knows how to write a statute of frauds, if it wants to[.]"). Indeed, the court reads *Lublin Corp.* not to suggest that the ability of Congress to impose a statute of frauds means that one is so imposed where the legislative structure at issue enumerates requirements resembling those of the statute of frauds as defined in the Restatement of Contracts § 110, as Hartford argues. Pl.'s Br. at 23. Rather, the court looks at the analysis clearly provided in that opinion, which advises against searching for "some sort of stealth statute of frauds" that would "reinstate in looser terms the very explicit statute of frauds that had been repealed in 1941." 84 Fed. Cl. at 686–87 (referring to Act of June 2, 1862, § 1, 12 Stat. 411 (repealed 1941)). The court applies that same reasoning to agency rulemaking, and reiterates the impropriety of finding that a regulatory regime "obliquely imposes a federal statute of frauds." *Id.* at 688.

"[T]he Federal law of Government contracts dovetails precisely with general principles of contract law." *NRM Corp.*, 758 F.2d at 681 (citation omitted). That being said, contrary to Hartford's arguments, in no way do the relevant Part 113 regulations "and CF 301 itself, expressly incorporate a statute of frauds." Pl.'s Br. at 23. While pointing to the platonic ideal of the statute of frauds found in Restatement of Contracts § 110, Hartford presents no text in either the regulations or CF 301 expressly incorporating it or any statute of frauds. Pl.'s Br. at 22–24. The court will not place a common law gloss upon a federal regulatory regime by finding additional requirements, absent textual support, and particularly not where those regulations are procedural

and directory.[54] *See City of Milwaukee v. Ill. & Mich.*, 451 U.S. 304, 319 (1981) ("The establishment of such a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law.").

The court, having found the SEBs to be valid and enforceable contracts as a matter of law,[55] need not consider the Government's arguments as to mutual mistake, reformation, and a principal's ratification of its alleged sub-agent's actions. Def.'s Br. at 21–23, 28–32 (citing Restatement of Agency § 4.01); Def.'s Reply at 12–15 (citing Restatement of Agency § 101).

V. Impairment of Hartford's Suretyship Rights

A. Parties' Arguments

Hartford argues that should the court remain unpersuaded by its prior arguments, it is still entitled to summary judgment because Customs "impaired Hartford's suretyship rights by accepting defective bonds." Pl.'s Br. at 27. Citing the Restatement of Suretyship, Hartford characterizes Customs' acceptance of facially deficient bonds as an act that "impaired Hartford's recourse against importers," *id.*, because it "increases the secondary obligor's risk of loss by increasing its potential cost of performance or decreasing its potential

[54] Hartford's argument as to the statute of frauds appears initially as a rephrasing of its primary contractual argument, which is that certain of the SEBs at issue lack essential terms stated with reasonable certainty, and are thus unenforceable under general principles of contract law. Pl.'s Br. at 22–24 (citing Restatement of Contracts § 131(c) (noting that a signed writing satisfying the statute of frauds must "state[] with reasonable certainly the essential terms of the unperformed promises in the contract.")). However the thrust of this argument is in alleging bond invalidity as a technical matter, rather than as one which goes to the question of whether the court can ascertain the contracting parties' intent in light of certain missing terms. *Id.* at 24 ("Because the SEBs were not signed by the parties and/or were missing essential terms, they fail to comply with the Statute of Frauds, and are therefore unenforceable."). Yet even viewing the statute of frauds as a creature of the Restatement, the framework therein permits satisfaction of the statute by reference to multiple simultaneous writings, which would be available to the court's analysis in each case in the form of the entry package documents that accompanied the SEBs at the time of acceptance. Restatement of Contracts § 132 ("The memorandum may consist of several writings if one of the writings is signed and the writings in the circumstances clearly indicate that they relate to the same transaction."). Therefore in addition to its reticence to impse procedural requirements uncalled for by the regulatory text or directly applicable principles of contract law, the court here declines to endorse an argument emphasizing technical failures over substantial contractual principles, in seeming contradiction of the ancient maxim that the law abhors a forfeiture.

[55] See generally Restatement of Suretyship §§ 71(1) ("A legally mandated bond is a secondary obligation required by law . . . . The law requiring the secondary obligation may be legislation, administrative act or regulation, or court rule."), 72 ("When the law requiring a legally mandated bond . . . also requires either that . . . (b) the secondary obligation be in a particular form . . . the fact that such requirements were not fulfilled is not a defense to the secondary obligation.").

ability to cause the principal obligor to bear the cost of performance." § 37(1). Hartford asserts that "[d]ue to Customs' errors and omissions in accepting defective SEBs, if Hartford tried to pursue action against the importer/principals," in order to achieve subrogation, "the company would not be able to recover the amounts it is owed." Pl.'s Br. at 29 (citing Restatement of Suretyship § 27). Hartford contends that to the extent acceptance of those bonds by Customs, the obligee, would cause the surety a loss, the surety may be discharged from its obligation. Restatement of Suretyship § 44.

In its Reply, Hartford disputes the applicability of the doctrine of sovereign immunity to block Hartford's impairment of suretyship claim, as the Government argues it does. Pl.'s Reply at 30; Def.'s Br. at 32. Hartford characterizes the Government's chief-case in that regard, *Lumbermens Mut. Cas. v. United States*, 654 F.3d 1305 (Fed. Cir. 2011), as standing not for the proposition that sovereign immunity blocks all impairment of suretyship claims against the United States, but rather for a construction of the Tucker Act, 28 U.S.C. § 1491 (2006), which waives sovereign immunity over any express or implied contracts between the government and the suing party, as disallowing suits over "implied-in-law contract[s]." Pl.'s Reply at 30–31. By contrast, Hartford argues, the instant case finds a waiver of sovereign immunity in 28 U.S.C. § 1581(a), the court's jurisdictional provision, which waives sovereign immunity for denied protests that challenge Customs' charges or exactions. *Id.* Hartford cites *Hartford I*, 544 F.3d at 1293, to assert that challenges against a bond's enforceability are based on common law surety and contract theories, and are subject to protest under 19 U.S.C. § 1514(a)(3). Pl.'s Reply at 31. Thus its claim is simply a "theory of defense" to a charge, which may be brought under § 1514(a)(3).

The Government argues that claims for impairment of suretyship against the United States are barred by the doctrine of sovereign immunity. Def.'s Br. at 32 (citing *Lumbermens*, 654 F.3d at 1316–17; *Hartford II*, 857 F. Supp. 2d at 1369). In its Reply, the Government argues that the Federal Circuit's recognition, 544 F.3d at 1293–94, of the protestability, under 19 U.S.C. § 1514(a)(3), of a surety's claims regarding bond unenforceability, even if based on common law surety and contract law theories, does not also mean that the United States has waived sovereign immunity, through 28 U.S.C. § 1581, as to claims for impairment of suretyship with respect to a Customs bond. Def.'s Reply at 18. The Government emphasizes that a waiver of sovereign immunity must be strictly construed. *Id.* (citing *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992)).

B. Analysis

The court concludes that the United States has waived sovereign immunity as to Hartford's claim for impairment of suretyship in support of its protest. For Hartford's claim to survive, there must be "a clear statement from the United States waiving sovereign immunity," and the claim must fall within the terms of that waiver. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 498 (2006). The court will construe ambiguities in the waiver of sovereign immunity effected by § 1581 strictly in favor of immunity. *United States v. Williams,* 514 U.S. 527, 531 (1995); *Netchem, Inc. v. United States*, 38 CIT ___, ___, 961 F. Supp. 2d 1336, 1340 (2014). In concluding that sovereign immunity is waived as to Hartford's claim here, the court is persuaded by the jurisdictional grant resulting from protest denial effected by 19 U.S.C. § 1514(a)(3) and 28 U.S.C. § 1581(a), in contrast to the more restrictive residual jurisdiction granted by § 1581(i).

"In the trade context, the government 'unequivocally' consented to suit for certain actions, such as when an importer contests the denial of a protest." *Int'l Custom Prods., Inc. v. United States*, 791 F.3d 1329, 1335 (Fed. Cir. 2015) (quoting *Humane Soc'y of United States v. Clinton*, 236 F.3d 1320, 1328 (Fed. Cir. 2001) ("[We] conclude that § 1581 not only states the jurisdictional grant to the [Court of International Trade], but also provides a waiver of sovereign immunity over the specified classes of cases.")), *cert. denied*, 136 S. Ct. 2408 (2016). The statute, in relevant part, provides that this Court "shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515]." 28 U.S.C. § 1581(a). Section 1515 provides that Customs, "within two years from the date a protest was filed in accordance with section 1514 of this title, shall review the protest and shall allow or deny such protest in whole or in part." 19 U.S.C. § 1515(a). Section 1514 and its subsection (a)(3), where challenges to Customs' demands on bonds properly lie, *Hartford I*, 544 F.3d at 1293, identify the following as protestable: "any clerical error, mistake of fact, or other inadvertence, . . . adverse to the importer, in any entry, . . . and, decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury." 19 U.S.C. § 1514(a)(3). Under a plain reading of this framework, alongside the understanding that protests to bond demands are challenges to charges, the statutes waive sovereign immunity over "any civil action" contesting the denial of a protest of, relevantly, "decisions of the Customs Service," "as to all charges" on a bond.

The Federal Circuit in *Lumbermens* considered an affirmative suit in the context of the Tucker Act, 28 U.S.C. § 1491, which, while waiving sovereign immunity as to "any express or implied contracts" between the government and suing party, did not permit, under longstanding precedent, suits against the government for contracts "implied-in-law." *Lumbermens*, 654 F.3d at 1316 (citing *Hercules Inc. v. United States*, 526 U.S. 417, 423 (1996)). "[T]he problem here," said the Federal Circuit, "is that Lumbermens is asserting the theory of impairment of suretyship not as a defense, but as an affirmative cause of action." *Id.* at 1314. The Federal Circuit found the surety's impairment argument, an affirmative claim which had evolved from the state law defensive theory of impairment of suretyship rights, to be "based on a noncontractual state law cause of action, or at most an implied-in-law contract theory." *Id.* at 1317. The Court thus found "no waiver of sovereign immunity that unambiguously consents for the government to be sued based on" those equitable principles. *Id.* at 1316.

Lumbermens does not address the situation at issue here, regarding this Court's jurisdiction under 28 U.S.C. § 1581(a) over a civil action filed by a surety challenging the denial of a protest filed pursuant to 19 U.S.C. § 1514(a)(3). The claim before the court differs procedurally, functionally, and jurisdictionally from that in *Lumbermens*. Hartford does not frame its impairment of suretyship argument as an affirmative claim, but rather as a defense to Customs' charges on the bonds. Compl. ¶¶ 108–12, 139–43, 157–61, 178–82, 196–200, 215–219, 234–38, 253–57, 271–75. Here, "[t]he true nature of the action is that Hartford seeks to avoid the payment of the demand." *Hartford I*, 544 F.3d at 1293. Per the Federal Circuit's analysis in *Hartford I*, Hartford's argument is not, in essence, an affirmative claim for impairment of suretyship rights, but "merely a theory of defense upon which Customs may grant the relief of cancelling a charge." *Id.*

The Government now relies, Def.'s Reply at 19–20, on *Hartford II* for the proposition that "§ 1581 should not be read to waive sovereign immunity for a claim that is barred in other contexts," specifically, in that case, "a state common law claim sounding in contract that is not waived by the Tucker Act." 857 F. Supp. 2d at 1370. Relevant to the sovereign immunity waiver analysis in that case, the surety brought its claim under § 1581(i) after the protest period had expired. *Hartford Fire Ins. Co. v. United States*, 648 F.3d 1371, 1372 (Fed. Cir. 2011) (holding that this Court had jurisdiction over surety's claim under § 1581(i) under the circumstances); *see Hartford II*, 857 F. Supp. 2d at 1369. However, *Hartford II*, a case concerned with jurisdiction under

§ 1581(i) rather than (a), does not discuss the *Hartford I* holding that a common law surety claim like impairment of suretyship would constitute a "theory of defense" to a charge, protestable under 19 U.S.C. § 1514(a)(3).[56] *Hartford II*, 857 F. Supp. 2d at 1369. Section 1581 waives sovereign immunity "over the specified classes of cases" contained therein. *Humane Soc'y*, 236 F.3d at 1328.[57] Unlike the scenario in *Hartford II* and in *Lumbermens*, where a surety attempted to affirmatively claim impairment of its suretyship rights against the government, the instant case sees the surety "challenging a charge," pursuant to 19 U.S.C. 1514(a)(3). *Hartford I*, 544 F.3d at 1293. The denial of a protest made under § 1514(a)(3) triggers review under 28 U.S.C. § 1581(a), not (i). The statutory framework providing the protest mechanism, and its review before this Court under § 1581(a), accommodate an impairment of suretyship theory of defense to Customs' charge.[58]

In summary, the case now before the court is not controlled by the Federal Circuit's analysis in *Lumbermens*, regarding the waiver of sovereign immunity effected by the Tucker Act, 28 U.S.C. § 1491, or this Court's analysis thereof in *Hartford II*, considering the waiver effected by § 1581, and specifically subsection (i), as to affirmative

[56] The court in *Hartford II* did "not reach the issue of whether Hartford may raise impairment of suretyship as a defense to a collection action instituted by Customs for recovery on the bonds," 857 F. Supp. 2d at 1370 n.17, but noted that "an affirmative claim for impairment of suretyship . . . may remain open to Hartford as a defense to the enforcement action on the bond." *Id.* at 1370.

[57] The court notes that the underlying proceeding in *Humane Soc'y* was brought before the Court of International Trade pursuant to § 1581(i). 236 F.3d at 1323, *aff'g Humane Soc'y of United States v. Clinton*, 23 CIT 127, 44 F. Supp. 2d 260 (1999).

[58] Were the court to accept the Government's arguments that sovereign immunity bars a surety from defensively raising an impairment of suretyship rights claim under § 1581(a), then, arguably, in order to make such a claim, sureties would be left in the position of declining to respond to Customs' payment demands and awaiting a potential enforcement action brought by the United States under 28 U.S.C. § 1582. Sureties have properly raised impairment of suretyship rights as an affirmative defense before this court in those cases. *See Great Am. Ins.*, 791 F. Supp. 2d 1337, 1359, *aff'd in part, rev'd in part*, *Great Am. Ins.*, 738 F.3d 1320, 1332 ("Great American also argues that Customs, by failing to provide notice pursuant to section 1504(c), impaired Great American's suretyship, *i.e.*, fundamentally altered its risk of loss, with the result that it is discharged from liability under the bonds."); Restatement of Suretyship § 49 cmt. b ("A suretyship defense is essentially an affirmative defense."). It is unnecessary to prescribe that scenario when there exists no statutory bar to a surety raising its argument after paying Customs' demanded charges, filing a protest, and challenging that protest denial before this Court. *Cf. Brother Int'l Corp. v. United States*, 27 CIT 1, 8, 246 F. Supp. 2d 1318, 1325 (2003) ("[A]n importer does not need to withhold payment and wait for Customs to initiate a suit under 28 U.S.C. § 1582 to seek judicial review of its claim. . . . Brother may pay the full amount requested by Customs under protest and seek review with this Court." (citing *Trayco, Inc. v. United States*, 994 F.2d 832, 839 (Fed. Cir. 1993))).

suits for impairment of suretyship similar to that in *Lumbermens*. The instant scenario is essentially different in character, where a party's claim is to the effect of "challenging a charge" which is subject to protest under 19 U.S.C. § 1514(a)(3) and 28 U.S.C. § 1581(a). *Hartford I*, 544 F.3d at 1293.

Having determined that sovereign immunity does not bar this court from entertaining Hartford's claim that Customs impaired its suretyship rights, the court now does so, and finds Hartford's argument unavailing. The court looks to the Restatement of Suretyship to examine the claim. *Great Am. Ins.*, 738 F.3d at 1332. Integral to Hartford's theory is the assertion that Customs, through an "act or omission that impairs . . . the secondary obligor's right of restitution or subrogation," here the acceptance of ostensibly deficient bonds, "decreas[ed] [Hartford's] potential ability to cause the principal obligor to bear the cost of performance," Restatement of Suretyship § 37(3), (1), through which it would otherwise be able to recover against the principal. *See id.* §§ 37 cmt. a ("Suretyship status gives the secondary obligor both the right to have the principal obligor bear the cost of performance owed to the obligee and several mechanisms of recourse against the principal obligor to effectuate that right."), 44 cmt. a ("[T]his section provides that any act resulting in such impairment gives rise to the concomitant discharge of the secondary obligor.").

Broadly, Hartford's claim fails on the record before the court for two reasons. First, Hartford alleges no facts–let alone material facts lacking genuine dispute such that summary judgment would be appropriate to its claim–in support of the argument that Customs' acceptance of the SEBs renders Hartford unable to collect against its importer principals. Pl.'s Br. at 29. "[T]he burden of persuasion with respect to loss or prejudice caused by an obligee's act impairing the secondary obligor's recourse against the principal obligor" lies with the secondary obligor who "is in the business of entering into secondary obligations," meaning commercial sureties such as Hartford. Restatement of Suretyship § 49(2); *id.* cmt. a ("[I]f the act is an impairment of the secondary obligor's recourse (§ 37(3)), the act must harm the secondary obligor."); *id.* cmt. b ("[A] person in the business of entering into secondary obligations, such as a surety company, needs no special assistance."). But rather than persuade as to harm or increased difficulty in pursuing recourse against the importer principals, Hartford summarily asserts that, because of Customs' acceptance of the allegedly deficient bonds, "if Hartford tried to pursue action against the importer/principals, the company would not be able to recover the amounts it is owed." Pl.'s Br. at 29. Hartford does

no more than briefly restate its prior mixture of legal and factual argumentation: that the bonds are defective, and Customs, unauthorized to accept them, should have instead rejected them. *Id.*; *see Great Am. Ins.*, 738 F.3d at 1332 (dismissing impairment of suretyship defense due to surety's failure to allege sufficient facts); *Wash. Int'l Ins. Co. v. United States*, 25 CIT 207, 224, 138 F. Supp. 2d 1314, 1330–31 (2001). More generally, as noted *supra* pp. 28–30, Hartford has not demonstrated on the record before the court any substantial prejudice resulting from Customs' actions. Moreover, this court holds that the bonds were not defective under either the regulations or contract law. *See supra* Sections III, IV.

Second, assuming arguendo that Hartford successfully demonstrated Customs' acceptance of the bonds impaired its recourse against the importer principals, the court finds that Hartford consented to that act and thus waived its suretyship impairment claim in the case of each SEB. *See* Restatement of Suretyship § 48(1) ("The secondary obligation is not discharged pursuant to . . . § 44 to the extent that, *in the contract creating the secondary obligation* or otherwise, the secondary obligor *consents to acts that would otherwise be the basis of the discharge* . . . . Consent may be express or implied from the circumstances.") (emphasis added). The court points again to Hartford's activities in the context of the three-party relationship established by the bonds. *See Hartford II*, 857 F. Supp. 2d at 1363 ("[T]he surety bears the burden of making inquiries and informing itself of the relevant state of affairs of the party for whose conduct it has assumed responsibility." (quoting *Cam–Ful Indus., Inc. v. Fid. & Deposit Co. of Md.,* 922 F.2d 156, 162 (2d Cir.1991))); *Ins. Co. of the W. v. United States*, 243 F.3d 1367, 1370 (Fed. Cir. 2001) ("A surety bond creates a three-party relationship, in which the surety becomes liable for the principal's debt or duty to the third party obligee (here, the government)." (citing *Balboa Ins. Co. v. United States*, 775 F.2d 1158, 1160 (Fed. Cir. 1985))). As explained *supra*, Hartford, in step with customs brokers acting on behalf of the importer principals, offered the bonds for acceptance by Customs, and upon their acceptance, Hartford reviewed, through its general agent, copies of the submitted SEBs, billed the importer principal premium on each of them, and retained that premium. *See* Restatement of Suretyship § 7 ("The requisites of contract formation apply generally to formation of a contract creating a secondary obligation."). The record does not provide that Hartford, either sua sponte or through its general agent, expressed concern over the enforceability of these bonds; it certainly did not cease transactions on the bases it alleges in this action. These facts establish Hartford's consent to the act that would, allegedly,

otherwise serve as the basis of the discharge. *See* Restatement of Suretyship § 48 cmt. b ("Consent may be express or it may be implied from the circumstances."); *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 369 F.3d 34, 61 (2d Cir. 2004) ("[T]he Sureties' contention that they did not consent . . . is belied by the Sureties' refusal to object to any of the changes once the Obligees had informed the Sureties that the changes had been implemented. . . . the Sureties . . . simply stood by, took no action, and offered no opinion . . . ."); *see also* Restatement of Contracts § 287(1) ("If a party, knowing of an alteration that discharges his duty, manifests assent to the altered terms, his manifestation is equivalent to an acceptance of an offer to substitute those terms.").

For the foregoing reasons, Hartford has not established that Customs impaired its suretyship rights.

CONCLUSION

Hartford's motion for summary judgment is denied, and the Government's cross-motion for summary judgment is granted in part and denied in part. Judgment will be entered accordingly.

Dated: August 10, 2017
New York, New York

/*s*/ *Gary S. Katzmann*
JUDGE

Slip Op. 17–104

UNITED STATES, Plaintiff, v. RUPARI FOOD SERVICES, INC., Defendant.

Before: Gary S. Katzmann, Judge
Consol. Court No. 10–00119

[The Plaintiff's 19 U.S.C. § 1592 action is exempt from the automatic stay effected by 11 U.S.C. § 362(a) pursuant to 11 U.S.C. § 362(b)(4).]

Dated: August 10, 2017

Mikki Cottet, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Plaintiff. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, of Washington, DC. Of counsel on the brief was *Brian J. Redar*, Office of Associate Chief Counsel, U.S. Customs and Border Protection, of Long Beach, CA.

Lawrence M. Friedman, Barnes Richardson & Colburn, of Chicago, IL, for Defendant. With him on the brief was *Peter A. Quinter*, Gray Robinson, P.A., of Miami, FL.

OPINION

Katzmann, Judge:

The issue now before this court appears to be one of first impression: does the automatic stay in bankruptcy, effected by 11 U.S.C. § 362(a) (2012),[1] stay an action for a civil penalty brought by the United States against the bankrupt party pursuant to 19 U.S.C. § 1592[2] for alleged fraudulent, negligent, or grossly negligent misrepresentations made in the course of importing goods into the commerce of the country? Or, is that civil penalty action exempt from the automatic stay in bankruptcy because it is "an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power" pursuant to 11 U.S.C. § 362(b)(4)? The court concludes that this 19 U.S.C. § 1592 civil penalty action is exempt from the automatic stay in bankruptcy under 11 U.S.C. § 362(b)(4), insofar as it constitutes an action for the entry, rather than the enforcement, of a money judgment.

BACKGROUND

The facts of this case span approximately two decades and need not be recited in full here. The relevant portions are as follows: defendant Rupari Food Services, Inc. ("Rupari") is a Florida corporation that purchased crawfish from abroad and sold it to restaurants in the United States. *United States v. Am. Cas. Co. of Reading Pa.*, 39 CIT ___, ___, 91 F. Supp. 3d 1324, 1327 (2015), *as amended* (Aug. 26, 2015) ("*Rupari I*"); First Amended Complaint ¶ 3, Aug. 31, 2015, ECF No. 110 ("Compl."). Plaintiff, the United States, on behalf of Customs and Border Protection ("the Government"), alleges that in the summer of 1998, Rupari attempted to enter five containers of Chinese crawfish tail meat by means of documents falsely claiming that the crawfish tail meat originated in Thailand. *Rupari I*, 91 F. Supp. 3d at 1332; Compl. ¶¶ 43–64. Customs examined and seized these attempted entries. Compl. ¶ 42. On April 9, 2001, Customs issued a pre-penalty notice to Rupari proposing a monetary penalty on the basis of fraud and in an amount equal to the domestic value of the five seized entries, and four entered entries, of Chinese crawfish tail meat.

[1] All citations to the United States Code are to the official 2012 edition.

[2] Section 1592(a) declares, in relevant part:

> [N]o person, by fraud, gross negligence, or negligence—
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of--
>
> (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material, or
>
> (B) may aid or abet any other person to violate subparagraph (A).

Compl. ¶ 65. On November 21, 2001, Customs issued a penalty notice to Rupari, assessing, pursuant to 19 U.S.C. § 1592(c),[3] a civil penalty for fraud for the violation of § 1592(a). Compl. ¶ 66. The Government maintains that Rupari has not paid the penalties it seeks in this action. Compl. ¶ 69.

On June 20, 2011, the Government filed a complaint against Rupari for violations of 19 U.S.C. § 1592(a).[4] *Rupari I*, 91 F. Supp. 3d at 1332. An amended complaint was filed on August 31, 2015. Compl. The Government asks this court to "enter judgment for the United States against Rupari for a penalty in the amount of $2,784,636.18[5] for fraudulent violations of 19 U.S.C. § 1592(a)," or in the alternative, "the maximum amount for" grossly negligent or negligent violations of 19 U.S.C. § 1592(a). *Rupari I*, 91 F. Supp. 3d at 1332; Compl. ¶ 78. The Government filed its motion for summary judgment on January 15, 2015. ECF No. 79. Rupari filed its response and cross-motion for summary judgment on February 24, 2016. ECF No. 119. Further briefing on the motions for summary judgment has been stayed multiple times since April 15, 2016. *See* ECF No. 131.

Since January 2017, the parties have filed, and the court has granted, several motions to stay proceedings, in which the parties represented that they were attempting, in good faith, to resolve this action by way of settlement. ECF Nos. 139–47. However, on April 10, 2017, Rupari filed for Chapter 11 bankruptcy protection. *See In re Rupari Food Servs., Inc.*, No. 17–10794 (Bankr. D. Del. filed Apr. 10, 2017). The court maintained the stay on briefing, and ordered that parties report to the court their joint position or, in the absence of a

[3] Section 1592(c) prescribes maximum civil penalties that Customs may impose for fraudulent, grossly negligent, and negligent violations of § 1592(a). "A fraudulent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise." 19 U.S.C. § 1592(c)(1). Violations that are grossly negligent are punishable by a civil penalty in an amount not to exceed the lesser of either the domestic value of the merchandise, or four times the lawful duties, taxes, and fees of which the United States is or may be deprived; if the violation did not affect the assessment of duties, then the amount may not exceed 40 percent of the dutiable value of the merchandise. *Id.* § 1592(c)(2). Violations that are negligent are punishable by a civil penalty in an amount not to exceed the lesser of either the domestic value of the merchandise, or two times the lawful duties, taxes, and fees of which the United States is or may be deprived; if the violation did not affect the assessment of duties, then the amount may not exceed 20 percent of the dutiable value of the merchandise. *Id.* § 1592(c)(3).

[4] The United States also filed actions against William Vincent "Rick" Stilwell, individually, for recovery of civil penalties for violations of 19 U.S.C. § 1592(a), and American Casualty Co. of Reading Pennsylvania ("American Casualty"), to recover, under bonds, unpaid customs duties. However, all parties agreed to dismiss all claims as to Stilwell and American Casualty with prejudice and without costs, fees, and expenses on July 17, 2015, and March 21, 2016, respectively. Stipulation of Partial Dismissal, July 17, 2015, ECF No. 104; Stipulation of Partial Dismissal, March 21, 2016, ECF No. 121.

[5] Per the Government, $2,784,636.18 is the domestic value of the merchandise that Rupari attempted to enter into the United States. *Rupari I*, 91 F. Supp. 3d at 1332; Compl. ¶ 78.

joint position, their respective positions regarding the applicability to this proceeding of the automatic stay effected by 11 U.S.C. § 362(a), or recommend what further action, if any, be taken in this action prior to the resolution of the bankruptcy proceeding. ECF No. 149. The Government reported its position on July 3, 2017, maintaining that it was seeking entry, but not execution of a monetary judgment, and that the civil penalty action pursuant to 19 U.S.C. § 1592(a), commenced to enforce police or regulatory powers, was exempt from the automatic stay provision of the bankruptcy statute. ECF No. 154 ("Pl.'s Mem."). Rupari reported its opposing position on July 27, 2017. ECF No. 160 ("Def.'s Mem.").

As in the underlying action, the court possesses jurisdiction pursuant to 28 U.S.C. § 1582.[6]

DISCUSSION

Bankruptcy petitions initiated by debtors such as Rupari, which are not individual natural persons, are governed by Chapters 7 and 11 of the Bankruptcy Code. *See* 11 U.S.C. §§ 1101–1174. "In Chapter 11, debtor and creditors try to negotiate a plan that will govern the distribution of valuable assets from the debtor's estate and often keep the business operating as a going concern." *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 978 (2017). In general, the filing of a bankruptcy petition operates to stay the continuance of any judicial

[6] Where a party has filed for bankruptcy pursuant to Chapter 11, the non-bankruptcy court in which other litigation is pending possesses concurrent jurisdiction to determine the applicability of a stay. *See Chao v. Hosp. Staffing Servs.,Inc.*, 270 F.3d 374, 384 (6th Cir. 2001) ("Not surprisingly, courts have uniformly held that when a party seeks to commence or continue proceedings in one court against a debtor or property that is protected by the stay automatically imposed upon the filing of a bankruptcy petition, the non-bankruptcy court properly responds to the filing by determining whether the automatic stay applies to (*i.e.*, stays) the proceedings."); *In re Baldwin –United Corp. Litig.*, 765 F.2d 343, 347 (2d Cir. 1985) ("Whether the stay applies to litigation otherwise within the jurisdiction of a district court or court of appeals is an issue of law within the competence of both the court within which the litigation is pending . . . and the bankruptcy court . . . ."); *SEC v. Thrasher*, 2002 WL 523279, at *1 (S.D.N.Y. 2002); *see, e.g.*, *Brock v. Morysville Body Works, Inc.*, 829 F.2d 383, 387 (3d Cir. 1987) ("We have no difficulty deciding that we may determine the applicability of the automatic stay."); *U.S. Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Virginia, Inc.*, 64 F.3d 920, 927 n.11 (4th Cir. 1995); *Hunt v. Bankers Trust Co.*, 799 F.2d 1060, 1069 (5th Cir. 1986) ("While section 362 of the Bankruptcy Code stays the continuation of a judicial proceeding that was commenced before a commencement of the bankruptcy case, the Texas district court had jurisdiction to determine its applicability to the case pending in the Texas district court . . . ."); *NLRB. v. Cont'l Hagen Corp.*, 932 F.2d 828, 832 (9th Cir. 1991); *United States v. Wash. Int 'l Ins. Co.*, 25 CIT 1239, 1247, 177 F. Supp. 2d 1313, 1321 (2001) (deciding that § 362(a) would not apply to a surety who is not the debtor subject of the bankruptcy proceeding).

proceeding against a debtor. 11 U.S.C. § 362(a).[7] *See Dominic's Rest. Of Dayton, Inc. v. Mantia*, 683 F.3d 757, 760 (6th Cir. 2012). "The purpose of the automatic stay is to 'give[] the debtor a breathing spell from his creditors. . . . It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him to bankruptcy.'" *In re Robinson*, 764 F.3d 554, 559 (6th Cir. 2014) (quoting H.R. REP. No. 95–595, at 340 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–97).

However, significantly and directly on point here, "the automatic stay protection does not apply to all cases; there are statutory exemptions, and there are non-statutory exceptions." *Dominic's Rest.*, 683 F.3d at 760; *see. e.g., Seiko Epson Corp. v. Nu-Kote Int'l, Inc.*, 190 F.3d 1360, 1364 (Fed. Cir. 1999) ("[P]roceedings that do not threaten to deplete the assets of the debtor need not be stayed."), *reh'g denied* (Oct. 19, 1999). One such statutory exception to the automatic stay, enumerated in 11 U.S.C. § 362(b)(4), relates to the enforcement of the Government's police or regulatory powers. In order to prevent abuse by debtors improperly seeking refuge under the bankruptcy laws, Congress provided that certain governmental actions, including the "continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power," are exempt from the automatic stay provisions of 11 U.S.C. § 362(a). *Id.* § 362(b)(4); *see United States v. Nicolet, Inc.*, 857 F.2d 202, 207 (3d Cir. 1988); 3 COLLIER ON BANKRUPTCY ¶ 362.05[5][a] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2017). "[T]he policy behind § 362(b)(4) is 'to prevent the bankruptcy court from becoming a haven for wrongdoers.'" *SEC v. Towers Fin. Corp.*, 205 B.R. 27, 30 (S.D.N.Y. 1997) (quoting *SEC v. Elmas Trading Corp.*, 620 F. Supp. 231, 240 (D. Nev. 1985), *aff'd*, 805 F.2d 1039 (9th Cir. 1986)); *see also In re Bilzerian*, 146 B.R. 871, 873 (M.D. Fla. 1992) (citing the legislative history of § 362(b)(4) for the same).

To ascertain whether the proceeding at issue falls within the scope of § 362(b)(4), courts have applied two "related, and somewhat overlapping" tests: the pecuniary purpose test and the public policy test. *In re Nortel Networks, Inc.*, 669 F.3d 128, 139 (3d Cir. 2011) (quoting

[7] Section 362(a) of Title 11 provides, in relevant part:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title[.]

Lockyer v. Mirant Corp., 398 F.3d 1098, 1108 (9th Cir. 2005)). The Court of Appeals for the Third Circuit has summarized these tests as follows:

> The pecuniary purpose test asks whether the government primarily seeks to protect a pecuniary governmental interest in the debtor's property, as opposed to protecting the public safety and health. The public policy test asks whether the government is effectuating public policy rather than adjudicating private rights. If the purpose of the law is to promote public safety and welfare or to effectuate public policy, then the exception to the automatic stay applies. If, on the other hand, the purpose of the law is to protect the government's pecuniary interest in the debtor's property or primarily to adjudicate private rights, then the exception is inapplicable. The complementary tests "are designed to sort out cases in which the government is bringing suit in furtherance of either its own or certain private parties' interest in obtaining a pecuniary advantage over other creditors."[8]

Id. at 139–40 (citing *Chao*, 270 F.3d at 385, 389). The legislative history of § 362(b)(4) provides that "where a governmental unit is suing a debtor to prevent or stop violation of fraud, . . . or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." *Id.* at 141 (quoting S. REP. NO. 95–989 at 49 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5838).

Police power proceedings that fall within the scope of § 362(b)(4) are limited in that while "the exception extends to permit an injunction and enforcement of an injunction, and to permit the *entry* of a money judgment, [it] does not extend to permit enforcement of a money judgment." *Nicolet*, 857 F.2d at 208 (quoting S. REP. NO. 95–989, at 52 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5838; H.R. REP. No. 95–595, at 343 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6299). "As the legislative history explicitly notes, the mere *entry* of a money judgment by a governmental unit is not affected by the automatic stay, provided of course that such proceedings are related to that government's police or regulatory powers." *Penn Terra Ltd. v.* Dep*'t of Envtl. Res., Com. of Pa.*, 733 F.2d 267, 275 (3d Cir. 1984) (citation omitted). The reasoning behind permitting entry of money judgments

[8] The Court of Appeals for the Third Circuit has stated that "[i]t is unclear whether the government action must meet both tests to fall within the police power exception." *Nortel Networks*, 669 F.3d at 139 n.12. The court's analysis *infra* does not hinge on either test alone, and so the court does not attempt to resolve the question of whether only one, or both, tests must be satisfied to allow the action at issue.

despite the automatic stay is that "[b]y simply permitting the government's claim to be reduced to a judgment, no seizure of property takes place." *Nicolet*, 857 F.2d at 209; *see In re Mystic Tank Lines Corp.*, 544 F.3d 524, 527 (3d Cir. 2008). By contrast, an action for enforcement of a money judgment is manifested "when, having obtained a judgment for a sum certain, a plaintiff attempts to seize property of the defendant in order to satisfy that judgment." *Penn Terra*, 733 F.2d at 275 (citation omitted).

Once a civil penalty action has been commenced by the United States for a violation of 19 U.S.C. § 1592(a), "all issues, including the amount of the penalty, shall be tried de novo." 19 U.S.C. § 1592(e). Thus, the Court determines whether a violation has been committed for purposes of fixing a civil penalty, *United States v. Pan Pac. Textile Grp., Inc.*, 29 CIT 1013, 1027–28, 395 F. Supp. 2d 1244, 1256–57 (2005), and determines the amount of the penalty for a violation of section 1592(a) de novo. *See United States v. Dantzler Lumber & Exp. Co.*, 16 CIT 1050, 1057, 810 F. Supp. 1277, 1284 (1992) ("[T]he actual amount to be paid, if any, is determined only at the end of a full and fair exposition of the transactions challenged.").

The Government argues before the court that its "action against Rupari does not involve a governmental pecuniary interest in Rupari's property, and it is not designed to adjudicate any private rights." Pl.'s Mem. at 10. The Government contends that "a penalty action that was commenced to fix monetary penalties for Rupari's fraudulent violation of 19 U.S.C. § 1592(a), . . . is precisely the type of proceeding contemplated by the exceptions to the automatic stay set forth in [11 U.S.C. § 362 (b)(4)]."[9] *Id.*

Rupari responds that "based on the specific facts before this Court, at this stage in the proceeding, [the Government] is pursuing the instant litigation solely for its own pecuniary benefit, which takes this proceeding outside the ambits of the exceptions of 11 U.S.C. § 362(b)(4)." Def.'s Mem. at 1. Rupari submits that an aspect of pecuniary purpose test is an inquiry into whether the "specific acts the government wishes to carry out . . . would result in an economic advantage to the government or its citizens over third parties in relation to the debtor's estate." Def.'s Mem. at 5–6 (quoting *In re Commonwealth Cos., Inc.*, 913 F.2d 518, 523 (8th Cir. 1990)). Rupari asserts that the Government "no doubt, seeks an economic advantage over other creditors in relation to [Rupari's] estate," and thus is not

[9] The Government states that this action falls within the exceptions of 11 U.S.C. § 362(b)(5) as well as the exceptions of 11 U.S.C. §362(b)(4). Pl.'s Mem. at 1. However, 11 U.S.C. § 362 was amended in 1998, combining paragraphs (b)(4) and (b)(5) into one paragraph, (b)(4). Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105–277, § 603(1), 112 Stat. 2681–886.

"pursuing this litigation to protect the public safety and health." Def.'s Mem. at 6. Rupari argues that because it is undergoing liquidation, rather than a corporate reorganization sans liquidation, "there are no more bad actors of which the [Government] to make an example."[10] Def.'s Mem. at 6. Rupari further asserts that Customs "already has an entitlement to file a proof of claim in the Bankruptcy Case, just like any other unsecured creditor of the Debtor," because it previously assessed a $2 million penalty in administrative proceedings. Def.'s Mem. at 7.

Rupari in conclusion asserts that the Government, upon obtaining a money judgment in this case, would liquidate the presently unliquidated, contingent claim it has submitted in the bankruptcy proceeding,[11] and so "win[] by default at a time when [Rupari] has actively defended against [the Government's] efforts in this litigation for over seven years." Def.'s Mem. at 7. In summary, Rupari asserts that if this action were allowed to proceed, then the Government would "win[] by default, obtain[] a liquidated claim to which [the Government] may not otherwise be entitled to, and obtain[] a larger pro rata portion of any distribution to unsecured creditors in the Bankruptcy Case as a result, to the detriment of others." *Id.*

The court is not persuaded by Rupari's contentions that the civil penalty action here should be stayed. The animating purpose of 19 U.S.C. § 1592 is to prevent fraud in the entry of merchandise into the stream of United States commerce. "[Section 1592] is intended to encourage accurate completion of the entry documents upon which Customs must rely to assess duties and administer other customs laws." S. REP. NO. 95–778, at 17 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2211, 2229. The thrust of the statute is not the protection of the pecuniary interest of the United States. Indeed, § 1592(a) operates "[w]ithout regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby." As the Court of Appeals for the Federal Circuit has made clear, "the plain language of the statute supports [the] position that the damages

[10] Rupari also points out that "the incidents complained of . . . occurred over fifteen years ago," that "[m]ajority ownership of the Debtor has changed at least once since [then,]" and that the "employee who allegedly made the false statements on behalf of [Rupari] to [Customs] passed away during these proceedings." Def.'s Mem. at 6 n.3.

[11] The Government explains that

> [o]n June 27, 2017, Customs mailed a proof of claim to the United States Bankruptcy Court for the District of Delaware, Case No. 17–10794 (KJC), Rupari Food Services, Inc., debtor. Customs' claim identifies the penalty as being "contingent" in the amount of $2,784,636.18. In the event that we obtain a judgment that fixes the amount of the penalty, then Customs will amend its proof of claim to identify it as being liquidated/non-contingent in the fixed amount and, thereafter, Customs will follow the procedures that are applicable to collecting the penalty in bankruptcy court.

Pl.'s Mem. at 7 n.1.

authorized by § 1592(c) are punitive." *United States v. Nat'l Semiconductor Corp.*, 547 F.3d 1364, 1369–70 (Fed. Cir. 2008). In addition, "Congress's decision to tie the maximum penalty to the culpability of the violator further suggests that '§ 1592 is driven primarily by considerations of deterrence rather than compensation.'" *Id.* at 1370 (quoting *United States v. Complex Mach. Works Co.*, 23 CIT 942, 950, 83 F. Supp. 2d 1307, 1315 (1999)).

As regards § 1592, it is clearly the "purpose of the law . . . to promote public safety and welfare or to effectuate public policy." *Nortel Networks*, 669 F.3d at 140. An action under § 1592 accordingly is one where the Government is "effectuating public policy rather than adjudicating private rights." *Id.* On the facts before the court, the Government is not now "primarily seek[ing] to protect a pecuniary interest in the debtor's property," but is "attempting to fix damages for violation of [fraud]." *Id.* at 139–41 (quoting S. REP. NO. 95–989 at 49 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5838).

The court is also not persuaded by Rupari's arguments that the specific facts of this case yield an opposite conclusion. Rupari's suggestion that the court should inquire into whether this action "would result in an economic advantage to the government or its citizens over third parties in relation to the debtor's estate" does not advance its claim here. Def.'s Mem. at 5–6 (quoting *Commonwealth Cos.*, 913 F.2d 518). For Rupari, this citation is at best inapposite; in reality, it supports the Government's position. In *Commonwealth Cos.*, the Court of Appeals for the Eighth Circuit agreed that "§ 362(b)(4) does not include governmental actions that would result in a pecuniary advantage to the government vis à vis other creditors of the debtor's estate," but stated also that this limitation "is consistent with Congress' rationale for not extending the exception to permit the *enforcement* of a money judgment." 913 F.2d at 523 (emphasis added). By contrast, when the Government "is attempting only to obtain the *entry* of a money judgment against the debtors for their alleged violation" of the statute, that outcome would not "otherwise give the government a pecuniary advantage over other creditors of the debtors' estate." *Id.* at 524 (emphasis added). "The entry of judgment would simply fix the amount of the government's unsecured claim against the debtors." *Id.* That is the situation here. The Government seeks only to fix the amount of the penalty in this action, not to execute a judgment. *See* Pl.'s Mem. at 7 n.1.

Rupari's argument that the punitive and deterrent qualities of § 1592 are inapplicable because "there are no more bad actors of which the Plaintiff to make an example" is likewise unpersuasive. Def.'s Mem. at 6. There is no reason for this court to find that liquidation of

the corporate entity, or substitution and loss of personae involved at earlier stages of this proceeding, would nullify or render nugatory the § 1592 purpose of "encourage[ing] accurate completion of the entry documents upon which Customs must rely to assess duties and administer other customs laws." S. REP. NO. 95–778, at 17 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2211, 2229. Nor is the vintage of the factual background in this case a basis for finding that the Government has ceased effectuating public policy at some point along the way.

Finally, it is instructive that courts across the country have applied § 362(b)(4) to prevent stays from being effected in cases where the Government is concurrently pursuing a fraud claim against a defendant who has filed for bankruptcy.[12] To the extent that Rupari suggests that continuing proceedings to enter judgment would as a practical matter be a waste of resources as the civil penalty sum is already, in some form, before the Bankruptcy Court, Def.'s Mem. at 7, that question is not within the province of this court. Under the framework of the separation of powers, such prosecutorial decisions are matters for the executive, not the judiciary. *See Mullins v. U.S. Dep't of Energy*, 50 F.3d 990, 993 (Fed. Cir. 1995).

In sum, as the Government's civil penalty action here is rooted in its enforcement of the United States customs laws to interdict and remedy the fraudulent importation of merchandise, it falls squarely within the scope of 11 U.S.C. § 362(b)(4). Therefore, insofar as the Government seeks only the entry of a money judgment, its action is exempt from the automatic stay effected by 11 U.S.C. § 362(a) and shall proceed accordingly.

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[12] *See, e.g.*, *Commonwealth Cos.*, 913 F.2d at 525 ("[T]he legislative history of § 362(b)(4) explicitly recognizes that a fraud law is a police or regulatory law. The [False Claims Act] is certainly a fraud law."); *In re Universal Life Church, Inc.*, 128 F.3d 1294, 1298 (9th Cir. 1997) ("[A] civil suit brought pursuant to the Federal False Claims Act is sufficient to satisfy the section 362(b)(4) exception."), *as amended on denial of reh'g* (Dec. 30, 1997); *United States ex rel. Green v. Inst. of Cardiovascular Excellence, PLLC*, 2016 WL 2866567, at *2 (M.D. Fla. 2016) ("FCA actions are exempt from the automatic stay through the entry of judgment."); *id.* at *2 n.1 ("The Court previously considered and declined to follow the holding of *In re Bicoastal Corporation* [, 118 B.R. 854 (M.D. Fla. 1990)] in light of the more persuasive rationale from [*Commonwealth Cos.*] and Judge Paskey's subsequent and contrary ruling in *In re Bilzerian*."); *Bilzerian*, 146 B.R. at 873 (finding an exception to the automatic stay for an SEC action seeking injunctive relief and disgorgement); *Towers Fin. Corp.*, 205 B.R. at 30 ("The SEC's prosecution of a civil fraud action is excepted from the automatic stay under [§ 362(b)(4)]."); *In re First Alliance Mortgage Co.*, 263 B.R. 99, 110 (9th Cir. 2001) (holding state's prosecution of restitution claims in its consumer fraud action were not stayed); *In re Mickman*, 144 B.R. 259 (E.D. Pa. 1992) (considering complaint that included claims for common law fraud, inducement of breach of fiduciary duties, unjust enrichment, payment under mistake of fact, fraudulent conveyances, and the use of corporations as alter egos); *United States v. X, Inc.*, 246 B.R. 817 (E.D. Va. 2000).

SO ORDERED.
Dated: August 10, 2017
New York, New York

/s/ Gary S. Katzmann
JUDGE