

U.S. Customs and Border Protection



19 CFR PART 177

REVOCAION OF ONE RULING LETTER AND REVOCAION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF DIETARY SUPPLEMENT PRODUCTS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of one ruling letter and revocation of treatment relating to the tariff classification of “Amway Immunity Gummies” and “Amway Sleep Gummies” dietary supplement products.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning the tariff classification of “Amway Immunity Gummies” and “Amway Sleep Gummies” dietary supplement products under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 10, on March 17, 2021. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 4, 2021.

FOR FURTHER INFORMATION CONTACT: Tatiana Salnik Matherne, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0351.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 10, on March 17, 2021, proposing to revoke one ruling letter pertaining to the tariff classification of "Amway Immunity Gummies" and "Amway Sleep Gummies" dietary supplement products. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In New York Ruling Letter ("NY") N314621, dated October 1, 2020, CBP classified the "Amway Immunity Gummies" and "Amway Sleep Gummies" dietary supplement products in heading 2106, HTSUS, specifically in subheading 2106.90.9500, HTSUSA, which provides for "Food preparations not elsewhere specified or included: Other: Other: Other: Other: Articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17: Described in additional U.S. note 8 to chapter 17 and entered pursuant to its provisions." CBP has reviewed NY N314621 and has determined the ruling letter to be in error. It is now CBP's position that the dietary supplement products at issue are properly classified in heading 2106, HTSUS, specifically in subheading 2106.90.9897, HTSUSA,

which provides for “Food preparations not elsewhere specified or included: Other: Other: Other: Other: Other: Other: Other: Other: Other: Other: Containing sugar derived from sugar cane and/or sugar beets.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N314621 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H316413, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

For

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

Attachment

HQ H316413

April 20, 2021

OT:RR:CTF:FTM H316413 TSM

CATEGORY: Classification

TARIFF NO.: 2106.90.9897

MR. GEORGE C. LOVEQUIST
ACCESS BUSINESS GROUP INTERNATIONAL LLC
7575 FULTON STREET EAST
ADA, MI 49355

Re: Revocation of NY N314621; Tariff classification of dietary supplements from Colombia

DEAR MR. LOVEQUIST:

This is in reference to New York Ruling Letter (“NY”) N314621, issued to Access Business Group International LLC, on October 1, 2020. In that ruling, U.S. Customs and Border Protection (“CBP”) classified products described as “Amway Immunity Gummies” and “Amway Sleep Gummies” under subheading 2106.90.9500, Harmonized Tariff Schedule of the United States (Annotated) (“HTSUSA”), which provides for “Food preparations not elsewhere specified or included: Other: Other: Other: Other: Other: Articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17: Described in additional U.S. note 8 to chapter 17 and entered pursuant to its provisions.” We have reviewed NY N314621 and found it to be incorrect. For the reasons set forth below, we are revoking NY N314621.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625 (c)(1)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published in the *Customs Bulletin*, Volume 55, No. 10, on March 17, 2021, proposing to revoke NY N314621, and revoke any treatment accorded to substantially identical transactions. No comments were received in response to the notice.

FACTS:

In NY N314621, the products at issue were described as follows:

The first product, “Amway Immunity Gummies”, is said to contain organic sugar, organic tapioca syrup, water, vitamin C, glycerin, elderberry extract, agar, flavors consisting of elderberry, lemon and masking flavors, zinc, lactic acid and citric acid.

The second product, “Amway Sleep Gummies”, is said to contain organic sugar, organic tapioca syrup, water, magnesium, glycerin, agar, lactic acid, citric acid, blueberry and lavender flavors, magenta color, melatonin, and passion flower extract.

Ingredients breakdowns, a manufacturing flowchart and photocopies of the packaging were provided to CBP for consideration.

ISSUE:

What is the tariff classification of the dietary supplement products at issue?

LAW AND ANALYSIS:

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation (“GRIs”). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The 2021 HTSUSA provisions under consideration are as follows:

| | |
|--------------|---|
| 2106 | Food preparations not elsewhere specified or included: |
| 2106.90 | Other: |
| | Other: |
| | Other: |
| | Other: |
| | Other: |
| | Articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17: |
| 2106.90.9500 | Described in additional U.S. note 8 to chapter 17 and entered pursuant to its provisions |
| | * * * |
| 2106.90.98 | Other: |
| | * * * |
| | Other: |
| | * * * |
| | Other: |
| | * * * |
| | Other: |
| | * * * |
| 2106.90.9897 | Containing sugar derived from sugar cane and/or sugar beets |
| | * * * |

Additional U.S. Note 3 to Chapter 17, HTSUS, reads the following:

For the purposes of this schedule, the term “articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17” means articles containing over 10 percent by dry weight of sugars derived from sugar cane or sugar beets, whether or not mixed with other ingredients, except (a) articles not principally of crystalline structure or not in dry amorphous form, the foregoing that are prepared for marketing to the ultimate consumer in the identical form and package in which imported; (b) blended syrups containing sugars derived from sugar

cane or sugar beets, capable of being further processed or mixed with similar or other ingredients, and not prepared for marketing to the ultimate consumer in the identical form and package in which imported; (c) articles containing over 65 percent by dry weight of sugars derived from sugar cane or sugar beets, whether or not mixed with other ingredients, capable of being further processed or mixed with similar or other ingredients, and not prepared for marketing to the ultimate consumer in the identical form and package in which imported; or (d) cake decorations and similar products to be used in the same condition as imported without any further processing other than the direct application to individual pastries or confections, finely ground or masticated coconut meat or juice thereof mixed with those sugars, and sauces and preparations therefor.

* * *

Additional U.S. Note 8 to Chapter 17, HTSUS, reads the following:

The aggregate quantity of articles containing over 10 percent by dry weight of sugars described in additional U.S. note 3 to chapter 17, entered under subheadings 1701.91.54, 1704.90.74, 1806.20.75, 1806.20.95, 1806.90.55, 1901.90.56, 2101.12.54, 2101.20.54, 2106.90.78 and 2106.90.95 during the 12-month period from October 1 in any year to the following September 30, inclusive, shall not exceed 64,709 metric tons (articles the product of Mexico shall not be permitted or included under this quantitative limitation and no such articles shall be classifiable therein).

* * *

In understanding the language of the HTSUS, the Explanatory Notes (“ENs”) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although neither dispositive nor legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the Harmonized System at the international level. See T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989). The EN to heading 2106, HTSUS, states, in pertinent part, the following:

Provided that they are not covered by any other heading of the Nomenclature, this heading covers:

- (A) Preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk, etc.), for human consumption.
- (B) Preparations consisting wholly or partly of foodstuffs, used in the making of beverages or food preparations for human consumption. The heading includes preparations consisting of mixtures of chemicals (organic acids, calcium salts, etc.) with foodstuffs (flour, sugar, milk powder, etc.), for incorporation in food preparations either as ingredients or to improve some of their characteristics (appearance, keeping qualities, etc.) (see the General Explanatory Note to Chapter 38).

* * *

The heading includes, *inter alia*:

* * *

- (16) Preparations, often referred to as food supplements or dietary supplements, consisting of, or based on, one or more vitamins, minerals, amino acids, concentrates, extracts, isolates or the like of substances found within foods, or synthetic versions of such substances, put up as a supplement to the normal diet. It includes such products whether or not also containing sweeteners, colours, flavours, odouriferous substances, carriers, fillers, stabilisers or other technical aids. Such products are often put up in packaging with indications that they maintain general health or well-being, improve athletic performance, prevent possible nutritional deficiencies or correct sub-optimal levels of nutrients.

* * *

In NY N314621, CBP classified the “Amway Immunity Gummies” and “Amway Sleep Gummies” under subheading 2106.90.9500, HTSUSA, which provides for “Food preparations not elsewhere specified or included: Other: Other: Other: Other: Articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17: Described in additional U.S. note 8 to chapter 17 and entered pursuant to its provisions.”

Heading 2106, HTSUS, provides for “Food preparations, not elsewhere specified or included.” Thus, in order for a product to fall under heading 2106, HTSUS, two criteria must be met. First, the product must be a food preparation, and second, the food preparation must not be classified in the tariff more specifically elsewhere. See *R.T. Foods, Inc. v. United States*, 887 F. Supp. 2d 1351, 1358 (C.I.T. 2012) (stating that heading 2106 was an “expansive basket heading that only applies in the absence of another applicable heading”). The terms “food,” “preparation,” and “food preparation” are not defined in the HTSUS. EN 21.06 provides two definitions for the phrase “food preparation”. See EN (A) and EN (B) to 21.06. The first definition for the phrase “food preparation” is “Preparations for use, either directly or after processing ... for human consumption”. See EN (A) 21.06.

In *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1994), the Court of Appeals for the Federal Circuit (CAFC) stated that:

Inherent in the term “preparation” is the notion that the object involved is destined for a specific use. The relevant definition from *The Oxford English Dictionary* defines “preparation” as “a substance specially prepared, or made up for its appropriate use or application, e.g. as food or medicine, or in the arts or sciences.” (internal citations omitted.)

Upon review, we find that the “Amway Immunity Gummies” and “Amway Sleep Gummies” products at issue are “food preparations” of heading 2106, HTSUS, because they contain substances with nutritive value and are preparations for human consumption that provide general health and well-being benefits not meant to treat or prevent any specific diseases. Accordingly, they are of the kind of preparations described in EN 21.06 (A)(16) and not more specifically classified elsewhere. However, the products at issue are not classified under subheading 2106.90.9500, HTSUSA, because they fall within one of the exceptions to Additional U.S. Note 3 to Chapter 17.

Additional U.S. Note 3 to Chapter 17 provides in relevant part that the term “‘articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17’ means articles containing over 10 percent by dry weight of sugars derived from sugar cane or sugar beets, whether or not mixed with other ingredients, except (a) articles not princi-

19 CFR PART 177

MODIFICATION OF TWO RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF COTTON CORE-SPUN YARNS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of modification of two ruling letters, and of revocation of treatment relating to the tariff classification of cotton core-spun yarns.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying two ruling letters concerning the tariff classification of cotton core-spun yarns under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 9, on March 10, 2021. One comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 4, 2021.

FOR FURTHER INFORMATION CONTACT: Marie Durane, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0984.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 9, on March 10, 2021, proposing to modify two ruling letters pertaining to the tariff classification of cotton core-spun yarns. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In New York Ruling Letter ("NY") N304396, dated June 12, 2019, CBP classified cotton core-spun yarn in heading 5606, HTSUS, specifically in subheading 5606.00.00, HTSUS, which provides for "[g]limped yarn, and strip and the like of heading 5404 or 5405, gimped (other than those of heading 5605 and gimped horsehair yarn); chenille yarn (including flock chenille yarn); loop wale-yarn." CBP has reviewed NY N304396 and has determined the ruling letter to be in error. It is now CBP's position that the cotton core-spun yarn is properly classified in heading 5205, HTSUS, specifically in subheading 5205.12.10, HTSUS, which provides for "[c]otton yarn (other than sewing thread), containing 85 percent or more by weight of cotton, not put up for retail sale: Single yarn, of uncombed fibers: Exceeding 14 nm but not exceeding 43 nm: Unbleached, not mercerized."

In NY N304440, CBP classified cotton core-spun yarn in heading 5606, HTSUS, specifically in subheading 5606.00.00, HTSUS, which provides for "[g]limped yarn, and strip and the like of heading 5404 or 5405, gimped (other than those of heading 5605 and gimped horsehair yarn); chenille yarn (including flock chenille yarn); loop wale-yarn." CBP has reviewed NY N304440 and has determined the ruling letter to be in error. It is now CBP's position that the cotton core-spun yarn is properly classified in heading 5206, HTSUS, specifically in subheading 5206.32.00, HTSUS, which provides for "[c]otton yarn (other than sewing thread), containing less than 85 percent by weight

of cotton, not put up for retail sale: Multiple (folded) or cabled yarn, of uncombed fibers: Exceeding 14 nm but not exceeding 43 nm per single yarn.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N304396 and NY N304440 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H311461, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

For

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

Attachment

HQ H311461

April 19, 2021

OT:RR:CTF:FTM H311461 MJD

CATEGORY: Classification

CLASSIFICATION: 5205.12.10; 5206.32.00

MR. MIGUEL ARISTIZABAL
FABRICATO S. A.
CARRERA 50 # 38-320
BELLO
COLOMBIA

RE: Modification of NY N304396 and NY N304440; tariff classification of yarn

DEAR MR. ARISTIZABAL,

This is to inform you that U.S. Customs and Border Protection (“CBP”) has reconsidered New York Ruling Letter (“NY”) N304396, issued to you on June 12, 2019, and NY N304440, issued to you on June 17, 2019, regarding the tariff classification of certain yarn from Colombia. In these rulings, CBP determined the yarns were gimped yarns, classified in subheading 5606.00.0010, Harmonized Tariff Schedule of the United States Annotated (“HTSUSA”), which provides for “[g]imped yarn, and strip and the like of heading 5404 or 5405, gimped (other than those of heading 5605 and gimped horsehair yarn); chenille yarn (including flock chenille yarn); loop wale-yarn: Containing elastomeric filaments.” CBP also found that the yarn in NY N304396 and NY N304440, qualified for preferential tariff treatment under the United States-Colombia Trade Promotion Agreement (“CTPA”).

We have reviewed NY N304396 and NY N304440, and determined that it contains an error pertaining to the classification of the yarn in both rulings. This ruling serves to modify NY N304396 and NY N304440 with regard to the classification of the yarns. CBP’s determination with respect to the preferential tariff treatment of the yarns under the CTPA is not affected by this action.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on March 10, 2021, in Volume 55, Number 9, of the Customs Bulletin. One comment was received in response to this notice, supporting CBP’s modification of NY N304396 and NY N304440.

FACTS:

In NY N304396, the yarn is described as follows:

[A] polyurethane elastomeric yarn core covered with either natural, synthetic or artificial fibers or their blends. The yarn is composed of 2-12 percent of polyurethane elastomeric (spandex) fibers and 88 - 98 percent of natural, synthetic or artificial fibers. The gimped yarn is used in the production of fabrics for jeans, sports and outdoor apparel.

In NY N304440, the yarn is described as follows:

[A] blend of polybutylene terephthalate (PBT) and polyurethane elastomeric filament yarn core covered with either natural, synthetic or artificial fibers or their blends. The yarn is composed of 4 percent of polyure-

thane elastomeric (spandex) fibers combined with 16 percent PBT fibers, and 80 percent of natural, synthetic or artificial fibers. The gimped yarn is used in the production of fabrics for jeans, sports and outdoor apparel.

Subsequent to the issuance of NY N304396 and NY N304440, CBP sent samples of the yarns from these two rulings to the CBP New York Laboratory. Laboratory report no. NY20200232, dated April 7, 2020, for the sample submitted with NY N304440, indicated the following regarding the sample:

The sample, a core-spun yarn marked FABRICATO S.A., has a linear density of 581.8 dTex, and is constructed of non-twisted spandex monofilament wrapped with non-bleached cotton fibers that do not appear to be combed or mercerized. There is no apparent evidence of ring or compact spinning.

The overall fiber content by weight:

| | Percent |
|---------|---------|
| Cotton | 96.4 |
| Spandex | 3.6 |

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The NY laboratory amended laboratory report no. NY20200232 with the issuance of laboratory report no. NY20200232A, dated May 29, 2020, indicating the following regarding the sample:

The sample, a yarn marked FABRICATO S.A., has a linear density of 581.8 Dtex or 17.18 Nm.

It is constructed of one spandex monofilament that is wrapped with one multifilament polyester yarn. This spandex/polyester yarn is then wrapped with cotton fibers that do not appear to be combed, bleached or mercerized. There is no apparent evidence of ring or compact spinning.

The overall fiber content by weight:

| | Percent |
|-----------|---------|
| Cotton | 79.4 |
| Polyester | 17.0 |
| Spandex | 3.6 |

...

Lastly, CBP laboratory report no. NY20200233, dated April 7, 2020, for the sample submitted with NY N304396, indicated the following regarding the sample:

The sample, a core-spun yarn marked FABRICATO S.A., has a linear density of 401.1 dTex, and is constructed of a non-twisted spandex monofilament wrapped with unbleached cotton fibers that do not appear to be combed or mercerized. There is no apparent evidence of ring or compact spinning.

The overall fiber content by weight:

| | Percent |
|---------|---------|
| Cotton | 93.8 |
| Spandex | 6.2 |

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ISSUE:

What is the proper classification under the HTSUS for the subject merchandise?

LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) is made in accordance with the General Rules of Interpretation (“GRI”). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The 2019 HTSUS provisions under consideration are as follows:

- 5205** Cotton yarn (other than sewing thread), containing 85 percent or more by weight of cotton, not put up for retail sale.
- 5206** Cotton yarn (other than sewing thread), containing less than 85 percent by weight of cotton, not put up for retail sale.
- 5606** Gimped yarn, and strip and the like of heading 5404 or 5405, gimped (other than those of heading 5605 and gimped horsehair yarn); chenille yarn (including flock chenille yarn); loop wale-yarn.

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the “official interpretation of the Harmonized System” at the international level. *See* 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989). While neither legally binding nor dispositive, the ENs “provide a commentary on the scope of each heading” of the HTSUS and are “generally indicative of [the] proper interpretation” of these headings. *See id.*

The EN to 56.06 states in pertinent part, the following:

These products are composed of a core, usually of one or more textile yarns, around which other yarn or yarns are wound spirally. Most frequently the covering threads completely cover the core, but in some cases the turns of the spiral are spaced; in the latter case, the product may have somewhat the appearance of certain multiple (folded), cabled or fancy yarns of **Chapters 50 to 55**, but may be distinguished from them by the characteristic of gimped yarn that the core does not itself undergo a twisting with the cover threads.

The core of the gimped yarn of this heading is usually of cotton, other vegetable fibres or man-made fibres and the covering threads are usually finer and more glossy (e.g., silk, mercerised cotton or man-made fibres).

Gimped yarns with cores of other materials are not necessarily excluded **provided** the product has the essential character of a textile article.

Gimped yarns are used as a trimming and also very largely for the manufacture of such trimmings. Some, however, are also suitable for other uses, for example, as buttonhole cord, in embroidery or for tying parcels.

In NY N304396 and NY N304440, CBP classified the yarns in subheading 5606.00.0010, HTSUSA, which provides for “[g]limped yarn, and strip and the like of heading 5404 or 5405, gimped (other than those of heading 5605 and gimped horsehair yarn); chenille yarn (including flock chenille yarn); loop wale-yarn: Containing elastomeric filaments.” Upon further consideration, we have found this classification to be incorrect and that the yarns are instead classified as cotton core-spun yarns.

CBP has held that gimped yarns and core-spun yarns are different and should be classified in different headings. *See* NY 866313, dated August 28, 1991 (stating the core spun yarns are not considered to be gimped yarns). Pursuant to EN to 56.06, a gimped yarn consists of a yarn, around which is wrapped spirally another yarn or filament or strip. It is distinguished from a twisted yarn in that the core yarn does not twist with the yarn that is wrapped around it; the surrounding yarn could be unwrapped and the core yarn would remain intact.

Core-spun yarns are often confused with gimped yarns. They differ in that they consist of a core (usually a monofilament or multifilament yarn), around which fibers (not yarns) are wrapped. A common example is a spandex filament core with a wrapping of cotton fibers. Since it is sometimes difficult for the unaided eye to distinguish fibers wrapped around a core from yarn wrapped around a core, it may be necessary to request laboratory analysis to identify such yarns. Core-spun yarns are not classified as gimped yarns but rather as basic yarns in the appropriate provisions in chapters 50–55 (depending on chief weight, generally). *See* CBP’s Informed Compliance Publication (“ICP”), What Every Member of the Trade Community Should Know About: Classification of Fibers and Yarns under the HTSUS, dated September 2011. The Dictionary of Fiber & Textile Technology also describes core-spun yarn as “a yarn made by twisting fibers around a filament or a previously spun yarn, thus concealing the core.” *See* Dictionary of Fiber & Textile Technology, 44 (1999).

The difference between gimped yarn and core-spun yarn is that core-spun yarn consist of a core (usually a monofilament or multifilament yarn), around which fibers (not yarns) are wrapped. The laboratory report no. NY20200233, which tested the sample from NY N304396, stated that the yarn is a core spun yarn constructed of 93.8 percent cotton and 6.2 percent spandex, and that the “non-twisted spandex monofilament [is] wrapped with unbleached cotton fibers.” Moreover, the laboratory report stated that the yarn is not bleached, combed, mercerized, or has any evidence of ring or compact spinning. Therefore, based on the laboratory test, we find that the yarn from NY N304396 is a cotton core-spun yarn classified in heading 5205, HTSUS, specifically subheading 5205.12.1000, HTSUSA, which provides for “[c]otton yarn (other than sewing thread), containing 85 percent or more by weight of cotton, not put up for retail sale: Single yarn, of uncombed fibers: Exceeding 14 nm but not exceeding 43 nm: unbleached, not mercerized.”

Similarly, the amended laboratory report no. NY20200232A for the yarn in NY N304440, states that the yarn, constructed of 79.4 percent cotton, 17.0 percent polyester, and 3.6 percent spandex, has “one spandex monofilament that is wrapped with one multifilament polyester yarn,” and the “spandex/

polyester yarn is then wrapped with cotton fibers that do not appear to be combed, bleached or mercerized.” This, like the sample in NY N304396, is in line with the definition of a core-spun yarn. Furthermore, the laboratory report stated that the yarn has “unbleached cotton fibers that do not appear to be combed or mercerized,” and “there is no apparent evidence of ring or compact spinning.” As a result, based on the laboratory test, we find that the yarn in NY N304440 is classified in heading 5206, HTSUS, specifically subheading 5206.32.0000, HTSUSA, which provides for “[c]otton yarn (other than sewing thread), containing less than 85 percent by weight of cotton, not put up for retail sale: Multiple (folded) or cabled yarn, of uncombed fibers: Exceeding 14 nm but not exceeding 43 nm per single yarn (300).”

One comment was received in response to the proposed ruling. The commenter agreed with CBP’s determination to classify the yarn in NY N304440 and NY N304396 as cotton core-spun yarn classified in heading 5206, HTSUS, and heading 5205, HTSUS, respectively. However, the commenter argued that the conclusion made in both NY N304440 and NY N304396, that the yarns are eligible for preferential treatment under the CTPA, has been misapplied and improperly extended to garments made with these yarns. The commenter wants to ensure that CBP distinguishes between the preferential rules of origin for the subject yarns under the CTPA and the preferential rules of origin for garments made from the subject yarns under the CTPA. This comment, however, goes beyond the scope of the initial NY rulings and this decision. This decision only pertains to the classification of the yarns at issue. As stated above, CBP’s determination in NY N304440 and NY N304396 with respect to the preferential tariff treatment of the yarns under the CTPA is not affected by this action. Furthermore, NY N304440 and NY N304396 do not pertain to the preferential tariff treatment of garments under the CTPA.

Accordingly, based on CBP laboratory test results, we find that the yarns in NY N304440 and NY N304396 were incorrectly classified as gimped yarns in heading 5606, HTSUS. Instead, the yarns in NY N304440 and NY N304396 are cotton core-spun yarns classified in heading 5206, HTSUS, and heading 5205, HTSUS, respectively.

HOLDING:

By application of GRI 1 and 6, the yarn in NY N304440 is classified in heading 5206, HTSUS, specifically subheading 5206.32.0000, HTSUSA, which provides for “[c]otton yarn (other than sewing thread), containing less than 85 percent by weight of cotton, not put up for retail sale: Multiple (folded) or cabled yarn, of uncombed fibers: Exceeding 14 nm but not exceeding 43 nm per single yarn (300).” The yarn in NY N304396 is classified in heading 5205, HTSUS, specifically subheading 5205.12.1000, HTSUSA, which provides for “[c]otton yarn (other than sewing thread), containing 85 percent or more by weight of cotton, not put up for retail sale: Single yarn, of uncombed fibers: Exceeding 14 nm but not exceeding 43 nm: unbleached, not mercerized.”

EFFECT ON OTHER RULINGS:

NY N304396, dated June 12, 2019, and NY N304440, dated June 17, 2019 are hereby **MODIFIED** in accordance with the above analysis.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Sincerely,
For
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division



19 CFR PART 177

**MODIFICATION OF ONE RULING LETTER AND
REVOCATION OF TREATMENT RELATING TO THE
COUNTRY OF ORIGIN FOR MARKING PURPOSES OF AN
ELECTRONIC DRUM KIT**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of modification of one ruling letter and of revocation of treatment relating to the country of origin for marking purposes of an electronic drum kit.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying one ruling letter concerning the country of origin for marking purposes of an electronic drum kit. Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 9, on March 10, 2021. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 4, 2021.

FOR FURTHER INFORMATION CONTACT: Marie Durane, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0984.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the

trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 9, on March 10, 2021, proposing to modify one ruling letter pertaining to the country of origin for marking purposes of an electronic drum kit. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In New York Ruling Letter ("NY") N202375, dated February 28, 2012, CBP determined that the electronic drum kit, made of parts from China, Taiwan, and Sweden, and packaged together in Sweden without the need for further processing, was a product of China for country of origin marking purposes. It is now CBP's position that the country of origin marking of the electronic drum kit is China, Taiwan, and Sweden.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N20237 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H309494, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

For
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H309494

April 19, 2021

OT:RR:CTF:FTM H309494 MJD

CATEGORY: Origin

Ms. CAROLYN LESKI
BCB INTERNATIONAL
1010 NIAGARA STREET
BUFFALO, NY 14213

Re: Modification of NY N202375; Country of origin of an electronic drum kit

DEAR Ms. LESKI:

This is in reference to New York Ruling Letter (“NY”) N202375, dated February 28, 2012, which was issued to you, on behalf of your client, Efkay USA Music Ltd. In that ruling, U.S. Customs and Border Protection (“CBP”) found that the 2box DrumIt Five, item number 11000, electronic drum kit, was classified in subheading 9207.90.0080, Harmonized Tariff Schedule of the United States Annotated (“HTSUSA”), which provides for “[m]usical instruments, the sound of which is produced, or must be amplified, electrically (for example, organs, guitars, accordions): Other: Other.” CBP also found that pursuant to the application of the North American Free Trade Agreement (“NAFTA”) Marking Rules, contained in 19 C.F.R. Part 102, the country of origin of the electronic drum kit was China.

We have reviewed NY N202375, and determined that it contains an error pertaining to the country of origin of the electronic drum kit, since the country of origin for marking purposes should not have been determined under the NAFTA Marking Rules. This ruling serves to modify NY N202375 with regard to the country of origin. CBP’s determination with respect to the classification of the electronic drum kit in NY N202375 is not affected by this action.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on March 10, 2021, in Volume 55, Number 9, of the Customs Bulletin. CBP did not receive any comments in response to this notice.

FACTS:

NY N202375 described the electronic drum kit as follows:

The merchandise under consideration is the 2box DrumIt Five, item number 11000. The DrumIt Five is an electronic drum kit comprised of various integrated components, including drum pads, cymbals, pedals, stands, and a control unit. From the information you provided, the user strikes the drum pads and other components as one would an analog drum kit; however, this signal is sent through wires to the control unit, referred to as the “Brain Box,” and is made audible through headphones and/or other audio output connected to the Brain Box. The Brain Box also allows the user to choose the sounds each component plays when struck, as well as providing a practice metronome and various other customizable options.

The electronic drum kit consist of various parts that are packaged together in Sweden without the need for further processing. The instrument is imported to the United States from Sweden unassembled. The electronic drum kit consist of the following parts from China, Taiwan, and Sweden:

[The] part number 10021 10" DrumIt drum pad Mk2, part number 10014 12" DrumIt drum pad Mk2, part number 10026 14" DrumIt kick assembly Mk2, part number 10144 DrumIt stand w/o pedals Mk2, part number 10250 upgrade standkit to Mk2, part number 10203 cymbal set, which includes part numbers 10222 Hi-hat cymbal and 10200 ride cymbal, and part number 11002 cable set of 4x4 pcs are all made in China, while part number 10246 pedal set with snare stand is made in Taiwan, and part number 11001 DrumIt Five Unit Brain is made in Sweden. Also included is a power source made in China for which a part number is not given.

In NY N202375, CBP found that the country of origin of the electronic drum kit was China by applying the NAFTA Marking Rules set forth in 19 C.F.R. Part 102. As the electronic drum kit is made primarily from Chinese, Taiwanese, and Swedish components, packaged together as an unassembled drum kit in Sweden, the NAFTA Marking Rules do not apply to this case. Instead, Part 134, Customs Regulations (19 C.F.R. Part 134), implementing the country of origin marking requirements and exceptions of section 304 of the Tariff Act of 1930, as amended (19 U.S.C. § 1304), provide the appropriate rules in determining the country of origin marking of the electronic drum kit. Accordingly, since 19 C.F.R. Part 102 applies only to goods from Mexico, Canada, and the United States, we are modifying NY N202375.

ISSUE:

What is the country of origin marking of the electronic drum kit in question?

LAW AND ANALYSIS:

The marking statute, section 304, Tariff Act of 1930, as amended (19 U.S.C. § 1304) provides that, unless excepted, every article of foreign origin imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such a manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. § 1304 was that the ultimate purchaser should be able to know by an inspection of the markings on the imported goods the country of which the good is the product. "The evident purpose is to mark the goods so at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." *United States v. Friedlaender & Co.*, 27 C.C.P.A. 297 at 302 (1940).

The country of origin marking requirements and the exceptions of 19 U.S.C § 1304 are set forth in Part 134, Customs Regulations (19 C.F.R. Part 134). Section 134.1(b), Customs Regulations (19 C.F.R. § 134.1 (b)), defines "country of origin" as "the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of this part." A substantial transformation is said to have occurred

when an article emerges from a manufacturing process with a name, character, and use, which differs from the original material subjected to the process. *United States v. Gibson-Thomsen Co.*, 27 C.C.P.A. 267 (C.A.D. 98) (1940); *Texas Instruments v. United States*, 681 F.2d 778, 782 (1982).

In determining whether the combining of parts or materials constitutes a substantial transformation, the determinative issue is the extent of the operations performed and whether the parts lose their identity and become an integral part of the new article. *Belcrest Linens v. United States*, 6 CIT 204, 573 F. Supp. 1149 (1983), *aff'd*, 741 F.2d 1368 (Fed. Cir. 1984). If the manufacturing or combining process is a minor one that leaves the identity of the imported article intact, a substantial transformation has not occurred. *Uniroyal, Inc. v. United States*, 3 CIT 220, 542 F. Supp. 1026 (1982), *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983). In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, or use are primary considerations in such cases. No one factor is determinative.

In the instant case, all of the components of the electronic drum set are made in China except for the part number 10246 pedal set with snare stand made in Taiwan, and part number 11001 DrumIt Five Unit Brain which is made in Sweden. The electronic drum kit is packaged together in Sweden as an unassembled drum kit without further processing. These components are not assembled. Mere packaging of components does not substantially transform any of the components. As such, the main components from China, Taiwan, and Sweden are not substantially transformed in Sweden as they do not emerge with a new name, character, and use. Thus, each component retains its original origin. See Headquarters Ruling Letter ("HQ") H309106, dated April 15, 2020; HQ 733301, dated August 8, 1990 ("... packaging alone is not a substantial transformation . . ."); and, HQ 733729, dated January 2, 1991. Therefore, we find that the country of origin marking of the electronic drum kit is China, Taiwan, and Sweden.

HOLDING:

Based on the facts provided, the country of origin marking of the unassembled electronic drum set, packaged in Sweden, are China, Taiwan, and Sweden.

EFFECT ON OTHER RULINGS:

NY N202375, dated February 28, 2012, is hereby MODIFIED.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Sincerely,

For

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division



19 CFR Chapter I

NOTIFICATION OF TEMPORARY TRAVEL RESTRICTIONS APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES SERVICE BETWEEN THE UNITED STATES AND CANADA

AGENCY: Office of the Secretary, U.S. Department of Homeland Security; U.S. Customs and Border Protection, U.S. Department of Homeland Security.

ACTION: Notification of continuation of temporary travel restrictions.

SUMMARY: This document announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border. Such travel will be limited to “essential travel,” as further defined in this document.

DATES: These restrictions go into effect at 12 a.m. Eastern Daylight Time (EDT) on April 22, 2021 and will remain in effect until 11:59 p.m. EDT on May 21, 2021.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202–325–0840.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, DHS published notice of its decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel,” as further defined in that document.¹ The document described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak and con-

¹ 85 FR 16548 (Mar. 24, 2020). That same day, DHS also published notice of its decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel,” as further defined in that document. 85 FR 16547 (Mar. 24, 2020).

tinued transmission and spread of the virus associated with COVID–19 within the United States and globally, DHS had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Canada posed a “specific threat to human life or national interests.” DHS later published a series of notifications continuing such limitations on travel until 11:59 p.m. EDT on April 21, 2021.²

DHS continues to monitor and respond to the COVID–19 pandemic. As of the week of April 12, 2021, there have been over 135 million confirmed cases globally, with over 2.9 million confirmed deaths.³ There have been over 31 million confirmed and probable cases within the United States,⁴ over one million confirmed cases in Canada,⁵ and over 2.2 million confirmed cases in Mexico.⁶

Notice of Action

Given the outbreak and continued transmission and spread of COVID–19 within the United States and globally, the Secretary has determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Canada poses an ongoing “specific threat to human life or national interests.”

U.S. and Canadian officials have mutually determined that non-essential travel between the United States and Canada poses additional risk of transmission and spread of the virus associated with COVID–19 and places the populace of both nations at increased risk of contracting the virus associated with COVID–19. Moreover, given the sustained human-to-human transmission of the virus, returning to previous levels of travel between the two nations places the personnel staffing land ports of entry between the United States and

² See 86 FR 14812 (Mar. 19, 2021); 86 FR 10815 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83432 (Dec. 22, 2020); 85 FR 74603 (Nov. 23, 2020); 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020). DHS also published parallel notifications of its decisions to continue temporarily limiting the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel.” See 86 FR 14813 (Mar. 19, 2021); 86 FR 10816 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83433 (Dec. 22, 2020); 85 FR 74604 (Nov. 23, 2020); 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020).

³ WHO, Coronavirus disease 2019 (COVID–19) Weekly Epidemiological Update (Apr. 13, 2021), available at <https://www.who.int/publications/m/item/weekly-epidemiological-update-on-covid-19-13-april-2021>.

⁴ CDC, COVID Data Tracker (accessed Apr. 13, 2021), https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days.

⁵ WHO, COVID–19 Weekly Epidemiological Update (Apr. 13, 2021).

⁶ *Id.*

Canada, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID–19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),⁷ I have determined that land ports of entry along the U.S.-Canada border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Canada border shall be limited to “essential travel,” which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (*e.g.*, to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (*e.g.*, individuals working in the farming or agriculture industry who must travel between the United States and Canada in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (*e.g.*, government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID–19 or other emergencies);

⁷ 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,” is authorized to “[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. *See* 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities “related to Customs revenue functions” were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. *See* Treas. Dep’t Order No. 100–16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that “[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.” Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

- Individuals engaged in lawful cross-border trade (*e.g.*, truck drivers supporting the movement of cargo between the United States and Canada);
- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of “essential travel” for purposes of this Notification—

- Individuals traveling for tourism purposes (*e.g.*, sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Canada, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Canada. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EDT on May 21, 2021. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat.⁸

The Commissioner of U.S. Customs and Border Protection (CBP) is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

ALEJANDRO N. MAYORKAS,
Secretary,
U.S. Department of Homeland Security.

[Published in the Federal Register, April 22, 2021 (85 Fr 21188)]

⁸ DHS is working closely with counterparts in Mexico and Canada to identify appropriate public health conditions to safely ease restrictions in the future and support U.S. border communities.

19 CFR Chapter I

NOTIFICATION OF TEMPORARY TRAVEL RESTRICTIONS APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES SERVICE BETWEEN THE UNITED STATES AND MEXICO

AGENCY: Office of the Secretary, U.S. Department of Homeland Security; U.S. Customs and Border Protection, U.S. Department of Homeland Security.

ACTION: Notification of continuation of temporary travel restrictions.

SUMMARY: This document announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border. Such travel will be limited to “essential travel,” as further defined in this document.

DATES: These restrictions go into effect at 12 a.m. Eastern Daylight Time (EDT) on April 22, 2021 and will remain in effect until 11:59 p.m. EDT on May 21, 2021.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202–325–0840.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, DHS published notice of its decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel,” as further defined in that document.¹ The document described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID–19 within the United States and globally, DHS had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico posed a “specific threat to human life or national interests.” DHS later

¹ 85 FR 16547 (Mar. 24, 2020). That same day, DHS also published notice of its decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel,” as further defined in that document. 85 FR 16548 (Mar. 24, 2020).

published a series of notifications continuing such limitations on travel until 11:59 p.m. EDT on April 21, 2021.²

DHS continues to monitor and respond to the COVID–19 pandemic. As of the week of April 12, 2021, there have been over 135 million confirmed cases globally, with over 2.9 million confirmed deaths.³ There have been over 31 million confirmed and probable cases within the United States,⁴ over one million confirmed cases in Canada,⁵ and over 2.2 million confirmed cases in Mexico.⁶

Notice of Action

Given the outbreak and continued transmission and spread of COVID–19 within the United States and globally, the Secretary has determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico poses an ongoing “specific threat to human life or national interests.”

U.S. and Mexican officials have mutually determined that non-essential travel between the United States and Mexico poses additional risk of transmission and spread of the virus associated with COVID–19 and places the populace of both nations at increased risk of contracting the virus associated with COVID–19. Moreover, given the sustained human-to-human transmission of the virus, returning to previous levels of travel between the two nations places the personnel staffing land ports of entry between the United States and Mexico, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID–19. Accordingly, and consistent with the authority granted in

² See 86 FR 14813 (Mar. 19, 2021); 86 FR 10816 (Feb. 23, 2021); 86 FR 4967 (Jan. 19, 2021); 85 FR 83433 (Dec. 22, 2020); 85 FR 74604 (Nov. 23, 2020); 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020). DHS also published parallel notifications of its decisions to continue temporarily limiting the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel.” See 86 FR 14812 (Mar. 19, 2021); 86 FR 10815 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83432 (Dec. 22, 2020); 85 FR 74603 (Nov. 23, 2020); 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020).

³ WHO, Coronavirus disease 2019 (COVID–19) Weekly Epidemiological Update (Apr. 13, 2021), available at <https://www.who.int/publications/m/item/weekly-epidemiological-update-on-covid-19-13-april-2021>.

⁴ CDC, COVID Data Tracker (accessed Apr. 13, 2021), https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days.

⁵ WHO, COVID–19 Weekly Epidemiological Update (Apr. 13, 2021).

⁶ *Id.*

19 U.S.C. 1318(b)(1)(C) and (b)(2),⁷ I have determined that land ports of entry along the U.S.-Mexico border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Mexico border shall be limited to “essential travel,” which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (*e.g.*, to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (*e.g.*, individuals working in the farming or agriculture industry who must travel between the United States and Mexico in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (*e.g.*, government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID–19 or other emergencies);
- Individuals engaged in lawful cross-border trade (*e.g.*, truck drivers supporting the movement of cargo between the United States and Mexico);

⁷ 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,” is authorized to “[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. *See* 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities “related to Customs revenue functions” were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. *See* Treas. Dep’t Order No. 100–16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that “[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.” Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of “essential travel” for purposes of this Notification—

- Individuals traveling for tourism purposes (*e.g.*, sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Mexico, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Mexico. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EDT on May 21, 2021. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat.⁸

The Commissioner of U.S. Customs and Border Protection (CBP) is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

ALEJANDRO N. MAYORKAS,
Secretary,
U.S. Department of Homeland Security.

[Published in the Federal Register, April 22, 2021 (85 FR 21189)]

⁸ DHS is working closely with counterparts in Mexico and Canada to identify appropriate public health conditions to safely ease restrictions in the future and support U.S. border communities.

**COPYRIGHT, TRADEMARK, AND TRADE NAME
RECORDATIONS
(No. 03 2021)**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

SUMMARY: The following copyrights, trademarks, and trade names were recorded with U.S. Customs and Border Protection in March 2021. A total of 183 recordation applications were approved, consisting of 11 copyrights and 172 trademarks. The last notice was published in the Customs Bulletin Vol. 55 No. 15

Corrections or updates may be sent to: Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street, NE., 10th Floor, Washington, D.C. 20229-1177, or via email at iprrquestions@cbp.dhs.gov.

FOR FURTHER INFORMATION CONTACT: Christopher Hawkins, Paralegal Specialist, Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade at (202) 325-0295.

ALAINA VAN HORN

Chief,

*Intellectual Property Enforcement Branch
Regulations and Rulings, Office of Trade*

CBP IPR RECORDATION — APRIL 2021

| Recordation No. | Effective Date | Expiration Date | Name of Cop/Tmk/Tnm | Owner Name | GM Restricted |
|-----------------|----------------|-----------------|------------------------------|--|---------------|
| TMK 01-00072 | 03/08/2021 | 06/28/2030 | HURLEY | HRLY BRAND HOLDINGS LLC | No |
| TMK 01-00400 | 03/09/2021 | 03/18/2031 | ARM AND AXE Design | LEUNG KAI FOOK MEDICAL CO. PTE LTD | No |
| TMK 01-00484 | 03/08/2021 | 03/11/2031 | BMW | BAYERISCHE MOTOREN WERKE AKTIENGESELLSCHAFT STOCK COMPANY | No |
| TMK 02-00432 | 03/18/2021 | 03/27/2031 | ACCUTRON | Citizen Watch Company of America, Inc. | No |
| TMK 02-01000 | 03/29/2021 | 07/30/2031 | ASTROS | HOUSTON ASTROS, LLC | No |
| TMK 03-00201 | 03/08/2021 | 07/10/2030 | HALLOUMI | MINISTRY OF ENERGY, COMMERCE AND INDUSTRY GOVERNMENT AGENCY CYPRUS | No |
| TMK 03-00570 | 03/21/2021 | 01/10/2031 | DRUM | Tbp Tobacco L.P. | No |
| TMK 03-00788 | 03/08/2021 | 02/21/2031 | H Logo | HRLY BRAND HOLDINGS LLC | No |
| TMK 05-00211 | 03/22/2021 | 05/31/2030 | TORONTO RAPTORS | MAPLE LEAF SPORTS & ENTERTAINMENT PARTNERSHIP | No |
| TMK 05-00401 | 03/21/2021 | 10/25/2030 | FULLER | EATON CORPORATION | No |
| TMK 08-00027 | 03/18/2021 | 03/12/2031 | GC FUJI II LC | TRADEMARK HOLDINGS OF ILLINOIS LLC | No |
| TMK 09-00940 | 03/21/2021 | 12/05/2030 | Configuration of metal hinge | KASON INDUSTRIES, INC. | No |
| TMK 10-00176 | 03/18/2021 | 12/14/2024 | MICROTOUCH | Ideavillage Products Corp. | No |

CBP IPR RECORDATION — APRIL 2021

| Recordation No. | Effective Date | Expiration Date | Name of Cop/Tmk/Tnm | Owner Name | GM Restricted |
|-----------------|----------------|-----------------|-----------------------------|---|---------------|
| TMK 10-00272 | 03/24/2021 | 04/12/2030 | FAG | Schaeffler Technologies AG & Co. KG | No |
| TMK 10-00315 | 03/29/2021 | 12/22/2029 | M MOROCCANOIL & DESIGN | MOROCCANOIL, INC. | No |
| TMK 10-00653 | 03/25/2021 | 03/05/2031 | BIG BAMBU (STYLIZED) | BAMBU SALES, Inc. | No |
| TMK 10-00824 | 03/09/2021 | 04/09/2031 | DIXIE | GPCP IP HOLDINGS LLC | No |
| TMK 10-01103 | 03/24/2021 | 10/13/2030 | MICROSD (STYLIZED) | SD-3C, LLC | No |
| TMK 11-00235 | 03/25/2021 | 03/19/2031 | ALIMTA | Eli Lilly and Company | No |
| TMK 11-00342 | 03/09/2021 | 03/28/2031 | KING-DEVICK TEST | KING-DEVICK TEST, INC. | No |
| TMK 11-00380 | 03/18/2021 | 06/22/2031 | LAUREN RALPH LAUREN | PRL USA Holdings, Inc. | No |
| TMK 11-00524 | 03/24/2021 | 10/22/2029 | HERMES | HERMES INTERNATIONAL | No |
| TMK 11-00684 | 03/17/2021 | 02/23/2031 | OKC THUNDER & DESIGN | The Professional Basketball Club, LLC | No |
| TMK 11-00691 | 03/18/2021 | 06/16/2030 | AUTO METER | Auto Meter Products, Inc. | No |
| TMK 11-00697 | 03/08/2021 | 03/21/2031 | LA VACHE CREME | Greenland Trading Corp. | No |
| TMK 11-00733 | 03/18/2021 | 10/25/2030 | PRO-LITE | AUTO METER PRODUCTS, INC. | No |
| TMK 11-00738 | 03/18/2021 | 02/17/2030 | STACK | Auto Meter Products, Inc. | No |
| TMK 11-00792 | 03/08/2021 | 06/24/2031 | WIFFLE | WIFFLE BALL, INC., | No |
| TMK 11-00805 | 03/03/2021 | 11/24/2030 | CROCS | CROCS, INC. | No |
| TMK 11-00931 | 03/21/2021 | 01/10/2031 | SPEED STACKS | SPEED STACKS, INC. | No |
| TMK 11-01110 | 03/25/2021 | 04/09/2031 | RADIOMIR | OFFICINE PANERAI A.G. | No |
| TMK 11-01136 | 03/08/2021 | 11/29/2030 | Pink Fiberglass DESIGN ONLY | OWENS CORNING INTELLECTUAL CAPITAL, LLC | No |

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| Recordation No. | Effective Date | Expiration Date | Name of Cop/Tmk/Tnm | Owner Name | GM Restricted |
|-----------------|----------------|-----------------|--|---|---------------|
| TMK 11-01158 | 03/08/2021 | 11/29/2030 | Pink (color mark) on insulation. (DESIGN ONLY) | OWENS CORNING INTELLECTUAL CAPITAL, LLC | No |
| TMK 11-01170 | 03/21/2021 | 07/13/2030 | USPS | UNITED STATES POSTAL SERVICE | No |
| TMK 11-01282 | 03/25/2021 | 09/19/2031 | INSURRECTION | Y.Z.Y., INC. | No |
| TMK 11-01347 | 03/25/2021 | 06/29/2031 | NIVEA CREME (stylized) in White appearing three times on the surface of a Blue jar | Beiersdorf AG | No |
| TMK 12-00204 | 03/25/2021 | 03/21/2031 | SUPERSPEED CERTIFIED USB & DESIGN SIGN | USB IMPLEMENTERS FORUM, INC. | No |
| TMK 12-00945 | 03/08/2021 | 02/27/2031 | HUGO BOSS | HUGO BOSS TRADE MARK MANAGEMENT GMBH & CO. | No |
| TMK 12-01363 | 03/09/2021 | 03/14/2031 | RAG & BONE | Rag & Bone Holdings, LLC | No |
| TMK 12-01394 | 03/04/2021 | 02/10/2030 | Grader (STYLIZED) | U.S. Department of Homeland Security | No |
| TMK 12-01471 | 03/17/2021 | 06/08/2031 | GATOR GRIP TECHNOLOGY | Performance Fabrics, Inc. | No |
| TMK 13-00123 | 03/18/2021 | 03/21/2031 | GILENYA | Novartis AG | No |
| TMK 13-00308 | 03/22/2021 | 03/07/2031 | P. PARIS HILTON AND DESIGN | Hilton, Paris | No |
| TMK 13-01106 | 03/21/2021 | 11/08/2030 | Celgene and Design | CELGENE CORPORATION | No |
| TMK 14-00222 | 03/25/2021 | 03/05/2031 | SAFeworks | Safeworks, LLC | No |
| TMK 14-01165 | 03/18/2021 | 03/28/2031 | LACTOBACILLUS CASEI SHIROTA | Kabushiki Kaisha Yakult Honsha TA Yakult Honsha Co., Ltd. | No |

CBP IPR RECORDATION — APRIL 2021

| Recordation No. | Effective Date | Expiration Date | Name of Cop/Tmk/Tnm | Owner Name | GM Restricted |
|-----------------|----------------|-----------------|--------------------------|--|---------------|
| TMK 15-00083 | 03/29/2021 | 04/04/2031 | 3W7Z-12029-AA | Ford Motor Company | No |
| TMK 15-00210 | 03/29/2021 | 03/28/2031 | F5RZ-9F955-AB | Ford Motor Company | No |
| TMK 15-00211 | 03/29/2021 | 03/28/2031 | F7TZ-12K073-B | Ford Motor Company | No |
| TMK 15-00237 | 03/29/2021 | 03/28/2031 | 3C3Z-6731-AA | Ford Motor Company | No |
| TMK 15-00435 | 03/25/2021 | 04/02/2031 | C (STYLIZED) | CHONG CHENG FASTENER | No |
| TMK 15-01255 | 03/08/2021 | 08/24/2031 | RED PEARL AND DESIGN | Societe Parisienne de Parfums et Cosmetiques | No |
| TMK 16-00503 | 03/24/2021 | 03/26/2031 | KOOLABURRA | DECKERS OUTDOOR CORPORATION | No |
| TMK 16-00601 | 03/21/2021 | 12/07/2030 | CONFIGURATION OF A CHAIR | Vitra Patente AG | No |
| TMK 16-00610 | 03/18/2021 | 07/28/2031 | GLYDANT | LONZA, LLC | No |
| TMK 16-00923 | 03/08/2021 | 04/30/2031 | DIGIMAG | MAGNUM MAGNETICS CORPORATION | No |
| TMK 16-01465 | 03/22/2021 | 02/23/2031 | OKC THUNDER & DESIGN | The Professional Basketball Club, LLC | No |
| TMK 17-01285 | 03/24/2021 | 02/03/2030 | Bee (Abeille) Design | GUERLAIN S.A. | No |
| TMK 18-00549 | 03/08/2021 | 03/28/2031 | YULEYS | PERFORMANCE FABRICS, INC. | No |
| TMK 19-00160 | 03/21/2021 | 06/23/2030 | AFFRESH | Whirlpool Properties, Inc. | No |
| TMK 19-00441 | 03/12/2021 | 03/28/2031 | THE FLEX ARMS | SLENDERTONE DISTRIBUTION INC. | No |
| TMK 20-00168 | 03/12/2021 | 07/27/2030 | LUMINESS | MATADI, INC. | No |
| TMK 21-00223 | 03/01/2021 | 08/14/2029 | SLIM SHIELD | Allstar Marketing Group, LLC | No |
| TMK 21-00224 | 03/01/2021 | 11/08/2027 | SNUGGHE TAILS | Allstar Marketing Group, LLC | No |
| TMK 21-00225 | 03/01/2021 | 05/16/2031 | TAC-P | Microtech Knives, Inc. | No |

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|-----------------|----------------|-----------------|-------------------------|---|---------------|
| TMK 21-00226 | 03/01/2021 | 10/03/2028 | SOCK SLIDER | Allstar Marketing Group, LLC | No |
| TMK 21-00227 | 03/01/2021 | 12/15/2030 | SOCKET SHELF | Allstar Marketing Group, LLC | No |
| TMK 21-00228 | 03/03/2021 | 09/16/2030 | THERMACOMFORT | Allstar Marketing Group, LLC | No |
| TMK 21-00229 | 03/03/2021 | 02/28/2028 | TRUE TOUCH | Allstar Marketing Group, LLC | No |
| TMK 21-00230 | 03/03/2021 | 01/13/2031 | VASTA | Allstar Marketing Group, LLC | No |
| TMK 21-00231 | 03/03/2021 | 11/11/2030 | POKEMON SHIELD | Nintendo Co., Ltd. | No |
| TMK 21-00232 | 03/03/2021 | 03/29/2031 | FLEX TAPE & DESIGN | Swift IP, LLC | No |
| TMK 21-00233 | 03/03/2021 | 04/19/2031 | SMILODON & DESIGN | AMERICAN PARTS & SERVICES OF FLORIDA, INC | No |
| TMK 21-00234 | 03/03/2021 | 04/19/2031 | Supreme Scrubs & Design | Supreme Scrubs Inc. | No |
| TMK 21-00235 | 03/03/2021 | 05/23/2030 | HONEY BEE TREE | EPOCH EVERLASTING PLAY LLC | No |
| TMK 21-00236 | 03/03/2021 | 10/21/2030 | NOLTE HOME STUDIO | Nolte GmbH & Co. KGaA GMBH & CO. KG | No |
| TMK 21-00237 | 03/03/2021 | 10/17/2028 | BOLD HOLD EXTREME CREME | The Hair Diagram LLC | No |
| TMK 21-00238 | 03/03/2021 | 10/21/2025 | CI LOGO | Madison One Acme, Inc. DBA Solstice Medicine Company | No |
| TMK 21-00239 | 03/03/2021 | 10/28/2030 | WAG GLIDER | Allstar Marketing Group, LLC | No |
| TMK 21-00240 | 03/03/2021 | 03/30/2028 | ISAMU NOGUCHI | Isamu Noguchi Foundation and Garden Museum, The EDUCATION CORP. | No |

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|-----------------|----------------|-----------------|-------------------------|--|---------------|
| TMK 21-00241 | 03/03/2021 | 04/18/2024 | AKARI | The Isamu Noguchi Foundation and Garden Museum EDUCATION CORP. | No |
| TMK 21-00242 | 03/03/2021 | 04/04/2025 | Sun & Moon Logo | ISAMU NOGUCHI FOUNDATION AND GARDEN MUSEUM, THE EDUCATION | No |
| TMK 21-00243 | 03/03/2021 | 09/30/2030 | PÁPOOK | Posh Peanut, Inc. | No |
| TMK 21-00244 | 03/04/2021 | 11/06/2029 | CERVEZA PALMA & DESIGN | Soltura LLC | No |
| TMK 21-00245 | 03/04/2021 | 11/18/2030 | POKEMON SWORD | Nintendo Co., Ltd. | No |
| TMK 21-00246 | 03/04/2021 | 12/29/2030 | POKEMON MYSTERY DUNGEON | Nintendo Co., Ltd. | No |
| TMK 21-00247 | 03/04/2021 | 11/25/2030 | SNES | Nintendo Co., Ltd. | No |
| TMK 21-00248 | 03/04/2021 | 02/03/2031 | ANIMAL CROSSING | Nintendo Co., Ltd. | No |
| TMK 21-00249 | 03/04/2021 | 03/01/2031 | SUPER NES | Nintendo Co., Ltd. | No |
| TMK 21-00250 | 03/04/2021 | 03/22/2031 | RING FIT ADVENTURE | Nintendo Co., Ltd. | No |
| TMK 21-00251 | 03/04/2021 | 12/22/2030 | 5RD & Design | United States Department of Homeland Security | No |
| TMK 21-00252 | 03/04/2021 | 09/30/2030 | TSA | United States Department of Homeland Security | No |
| TMK 21-00253 | 03/04/2021 | 05/12/2025 | SLEEPWELL | AW INDUSTRIES, INC. | No |
| TMK 21-00254 | 03/04/2021 | 02/17/2031 | BOLD HOLD ACTIVE | The Hair Diagram LLC | No |
| TMK 21-00255 | 03/08/2021 | 01/27/2031 | ESSENTIALS REIMAGINED | Posh Peanut, Inc. | No |
| TMK 21-00256 | 03/08/2021 | 03/15/2026 | POSH PEANUT | POSH PEANUT, INC. | No |

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|-----------------|----------------|-----------------|------------------------------------|---|---------------|
| TMK 21-00257 | 03/08/2021 | 05/02/2031 | TRAVEL INN | Patel, Deval Kasan INDIVIDUAL | No |
| TMK 21-00258 | 03/08/2021 | 10/23/2029 | FORTNITE | Epic Games, Inc. | No |
| TMK 21-00259 | 03/08/2021 | 01/15/2030 | FORTNITE & DESIGN | Epic Games, Inc. | No |
| TMK 21-00260 | 03/08/2021 | 03/31/2030 | FORTNITE (Cityscape Logo) & DESIGN | Epic Games, Inc. | No |
| TMK 21-00261 | 03/08/2021 | 12/08/2030 | Llama Product Packaging Design | Epic Games, Inc. | No |
| TMK 21-00262 | 03/08/2021 | 02/28/2026 | THE PITS | Gortner, Frederick INDIVIDUAL | No |
| TMK 21-00263 | 03/08/2021 | 03/22/2031 | MASTER SADDLES | NACIONAL IND. E COM. DE SELAS DO BRASIL LTDA. | No |
| TMK 21-00264 | 03/08/2021 | 03/22/2031 | MASTER SADDLES M & DESIGN | NACIONAL IND. E COM. DE SELAS DO BRASIL LTDA. | No |
| TMK 21-00265 | 03/08/2021 | 02/28/2025 | LINCOLN STAR | FORD MOTOR COMPANY | No |
| TMK 21-00266 | 03/08/2021 | 09/25/2029 | COPPER FIT | IDVC, LLC | No |
| TMK 21-00267 | 03/08/2021 | 05/06/2028 | COPPER FIT & DESIGN | IDVC, LLC | No |
| TMK 21-00268 | 03/08/2021 | 11/30/2025 | AQUAPRO | PROFESSIONAL WATER PRODUCTS, INC. | No |
| TMK 21-00269 | 03/08/2021 | 04/16/2028 | HOVER COVER | Enhance Product Development, Inc. | No |
| TMK 21-00270 | 03/08/2021 | 12/24/2029 | PERFECT CUSHION | As Seen On TV Wholesale, Inc. | No |
| TMK 21-00271 | 03/08/2021 | 09/18/2023 | RUGGHES | Lenfest Media Group, LLC | No |
| TMK 21-00272 | 03/09/2021 | 05/23/2031 | CommonWealth GrantWorks (Stylized) | Higgins, Jennifer G. DBA | No |

CBP IPR RECORDATION — APRIL 2021

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|-----------------|----------------|-----------------|---|---|---------------|
| TMK 21-00273 | 03/09/2021 | 03/20/2027 | EVEREST QUALITY AND DESIGN EST. 1982 & DESIGN | EVEREST TRADING CORPORATION | No |
| TMK 21-00274 | 03/09/2021 | 02/13/2029 | COLOR BLUE FOR FISH TAPE Design | IDEAL Industries, Inc. | No |
| TMK 21-00275 | 03/09/2021 | 03/03/2030 | ZYIA-ACTIVE | ZYIA Active, LLC | No |
| TMK 21-00276 | 03/09/2021 | 03/03/2030 | LIGHT N' TIGHT | ZYIA Active, LLC | No |
| TMK 21-00277 | 03/09/2021 | 09/16/2029 | PHILLIPS II PLUS | PHILLIPS SCREW COMPANY | No |
| TMK 21-00278 | 03/09/2021 | 08/14/2029 | VÁRSTA | Menard, Inc. | No |
| TMK 21-00279 | 03/12/2021 | 06/02/2031 | EMATIC | Shaghal, Ltd. | No |
| TMK 21-00280 | 03/12/2021 | 05/02/2031 | H & DESIGN | Houston Astros, LLC | No |
| TMK 21-00281 | 03/17/2021 | 01/06/2031 | PACKAROO & DESIGN | Irate Zebra Corporation | No |
| TMK 21-00282 | 03/17/2021 | 12/29/2030 | PACKAROO | Irate Zebra Corporation | No |
| TMK 21-00283 | 03/17/2021 | 08/20/2028 | Configuration of BMW grille | Bayerische Motoren Werke Aktiengesellschaft | No |
| TMK 21-00284 | 03/17/2021 | 02/03/2031 | PIXEL | Google LLC | No |
| TMK 21-00285 | 03/18/2021 | 08/27/2028 | TRIGALIGHT | MB-Microtec AG | No |
| TMK 21-00286 | 03/18/2021 | 05/02/2031 | VARIBELT | D & D Global, Inc. | No |
| TMK 21-00287 | 03/18/2021 | 12/29/2030 | HELIX | Pensmore Reinforcement Technologies, LLC | No |
| TMK 21-00288 | 03/18/2021 | 01/13/2031 | MICRO REBAR | Pensmore Reinforcement Technologies, LLC | No |

CBP IPR RECORDATION — APRIL 2021

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|-----------------|----------------|-----------------|-------------------------------|---|---------------|
| TMK 21-00289 | 03/18/2021 | 01/13/2031 | TWISTED STEEL MICRO REBAR | Pensmore Reinforcement Technologies, LLC | No |
| TMK 21-00290 | 03/18/2021 | 02/24/2031 | TSMR | PENSMORE REINFORCEMENT TECH-NOLOGIES, LLC | No |
| TMK 21-00291 | 03/18/2021 | 02/24/2031 | COVE | COVE SMART, LLC | No |
| TMK 21-00292 | 03/18/2021 | 05/02/2031 | CORM!! & DESIGN | Cormier, Jason INDIVIDUAL | No |
| TMK 21-00293 | 03/18/2021 | 02/03/2031 | IDEASAURUS | Puppala, Venkata Ramana | No |
| TMK 21-00294 | 03/18/2021 | 02/28/2028 | FORCE FIN | Bob Evans Designs, Inc. | No |
| TMK 21-00295 | 03/18/2021 | 11/30/2030 | MERIDIAN & DESIGN | Meridian Audio Limited | No |
| TMK 21-00296 | 03/18/2021 | 04/19/2031 | FREEDA | Freeda Health LLC | No |
| TMK 21-00297 | 03/18/2021 | 04/30/2026 | BRONCO | FORD MOTOR COMPANY | No |
| TMK 21-00298 | 03/18/2021 | 03/15/2031 | BRONCO | Ford Motor Company | No |
| TMK 21-00299 | 03/24/2021 | 02/12/2024 | NEW MOOD | ONNIT LABS, INC. | No |
| TMK 21-00300 | 03/24/2021 | 02/26/2024 | SHROOM TECH | ONNIT LABS, INC. | No |
| TMK 21-00301 | 03/24/2021 | 08/13/2024 | HEMP FORCE | ONNIT LABS, INC. | No |
| TMK 21-00302 | 03/24/2021 | 09/14/2026 | TOTAL HUMAN OPTIMIZATION | ONNIT LABS, INC. | No |
| TMK 21-00303 | 03/24/2021 | 02/20/2029 | TOTAL HUMAN | ONNIT LABS, INC. | No |
| TMK 21-00304 | 03/24/2021 | 11/20/2029 | ONNIT | Onnit Labs, Inc. | No |
| TMK 21-00305 | 03/24/2021 | 08/15/2022 | ALPHA BRAIN & TRIANGLE DESIGN | ONNIT LABS, INC. | No |
| TMK 21-00306 | 03/24/2021 | 05/25/2030 | PELTON | Peloton Interactive, Inc. | No |

CBP IPR RECORDATION — APRIL 2021

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|-----------------|----------------|-----------------|--|--------------------------------|---------------|
| TMK 21-00307 | 03/24/2021 | 04/19/2031 | P-CUBED | Pathstone Family Office, LLC | No |
| TMK 21-00308 | 03/24/2021 | 06/20/2022 | POP'S & DESIGN OF A MAN'S POR-TRAIT (IN RED AND WHITE) | POP'S BIRDING CO, LLC. | No |
| TMK 21-00309 | 03/24/2021 | 01/04/2027 | HANDLEIT! | Myers, Keith | No |
| TMK 21-00310 | 03/24/2021 | 12/01/2030 | HANDLEITGRIPS | Myers, Keith | No |
| TMK 21-00311 | 03/24/2021 | 04/27/2025 | ELLUME | Ellume Limited | No |
| TMK 21-00312 | 03/24/2021 | 10/23/2029 | P (Stylized) | Peloton Interactive, Inc. | No |
| TMK 21-00313 | 03/24/2021 | 06/13/2024 | ORECCHIETTE BARESI | Joseph Rutigliano & Sons, Inc. | No |
| TMK 21-00314 | 03/24/2021 | 02/24/2031 | SEBAGO | TOS s.r.l. | No |
| TMK 21-00315 | 03/24/2021 | 09/30/2030 | CROSS AND SHIELD DESIGN | Victorinox AG | No |
| TMK 21-00316 | 03/24/2021 | 03/01/2031 | Configuration of Square Inlay with Notched Corners and Shaped Handle (applied to fish tape reel) | IDEAL Industries, Inc. | No |
| TMK 21-00317 | 03/24/2021 | 05/02/2031 | POOR MAN'S KITCHEN | Poor Man's Kitchen LLC | No |
| TMK 21-00318 | 03/25/2021 | 12/10/2029 | FOX TACTICAL | Fox Outdoor Products, LLC | No |
| TMK 21-00319 | 03/25/2021 | 01/15/2030 | Design of a Fox | Fox Outdoor Products, LLC | No |
| TMK 21-00320 | 03/25/2021 | 01/15/2030 | Design of a Fox | Fox Outdoor Products, LLC | No |
| TMK 21-00321 | 03/25/2021 | 11/05/2023 | SHEZAN & DESIGN | SHEZAN, LLC | No |
| TMK 21-00322 | 03/29/2021 | 03/16/2024 | SHEZAN | SHEZAN, LLC | No |
| TMK 21-00323 | 03/29/2021 | 04/02/2030 | CLARINS | CLARINS SOCIÉTÉ | No |

CBP IPR RECORDATION — APRIL 2021

| Recordation No. | Effective Date | Expiration Date | Name of Cop/Tmk/Tm | Owner Name | GM Restricted |
|-----------------|----------------|-----------------|--|--------------------------------|---------------|
| TMK 87-00458 | 03/22/2021 | 07/20/2025 | BRONCO | FORD MOTOR COMPANY | No |
| TMK 97-00164 | 03/18/2021 | 12/12/2025 | BRONCO | FORD MOTOR COMPANY | No |
| TMK 97-00167 | 03/08/2021 | 12/10/2025 | LINCOLN STAR DESIGN | FORD MOTOR COMPANY | No |
| TMK 97-00221 | 03/18/2021 | 12/12/2025 | BRONCO | FORD MOTOR COMPANY | No |
| TMK 97-00222 | 03/18/2021 | 08/21/2026 | BRONCO | FORD MOTOR COMPANY | No |
| TMK 97-00229 | 03/08/2021 | 08/30/2025 | LINCOLN | FORD MOTOR COMPANY CORPORATION | No |
| TMK 99-00626 | 03/09/2021 | 10/21/2028 | EVEREST & DESIGN | Everest Trading Corporation | No |
| TMK 99-00627 | 03/09/2021 | 10/21/2028 | EVEREST & Design | Everest Trading Corporation | No |
| COP 01-00052 | 03/04/2021 | 03/04/2041 | Pokemon Stadium 2. | Nintendo of America, Inc., | No |
| COP 21-00013 | 03/01/2021 | 02/26/2041 | Photograph of Lightning to USB Cable | Apple Inc. | No |
| COP 21-00015 | 03/02/2021 | 02/26/2041 | Apple icon - Apple Watch Interface Design. | Apple Inc. | No |
| COP 21-00016 | 03/08/2021 | 03/05/2041 | Strawmana | Mahadeva Enterprise, Inc., | No |
| COP 21-00017 | 03/08/2021 | 03/05/2041 | Tropical Blue | Mahadeva Enterprise, Inc. | No |
| COP 21-00018 | 03/08/2021 | 03/05/2041 | Fatty Patty | Mahadeva Enterprise, Inc. | No |
| COP 21-00019 | 03/08/2021 | 03/05/2041 | Pink Lemon | Mahadeva Enterprise, Inc. | No |
| COP 21-00020 | 03/09/2021 | 03/09/2041 | MARVEL GUARDIANS OF THE GALAXY VOL. 2 | MVL Film Finance LLC | No |
| COP 21-00021 | 03/16/2021 | 03/12/2041 | Frozen Lush | Mahadeva Enterprise, Inc. | No |

CBP IPR RECORDATION — APRIL 2021

| Recordation No. | Effective Date | Expiration Date | Name of Cop/Tmk/Tnm | Owner Name | GM Restricted |
|-----------------|----------------|-----------------|--|--------------|---------------|
| COP 21-00022 | 03/29/2021 | 12/24/2021 | Baishun Home Table Lamp Sculptures | MENG-LAN CHA | No |
| COP 21-00023 | 03/29/2021 | 12/24/2021 | Baishun Home Table Lamps Sculptures II | MENG-LAN CHA | No |

U.S. Court of International Trade

Slip Op. 20–44

QINGDAO SEA-LINE INTERNATIONAL TRADING CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, and its INDIVIDUAL MEMBERS CHRISTOPHER RANCH, L.L.C., THE GARLIC COMPANY, and VALLEY GARLIC, Defendant-Intervenors.

Before: Gary S. Katzmman, Judge
Court No. 19–00145
PUBLIC VERSION

[The court denies Plaintiff's motion for judgment on the agency record and sustains Commerce's *Final Results*.]

Dated: April 16, 2021

Irene H. Chen, Chen Law Group LLC, of Rockville, MD, argued for plaintiff.

Meen Geu Oh, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald Blades, Jr.*, Assistant Director. Of Counsel *Brendan Saslow*, Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce. With them on the post argument submission was *Jeffrey Bossert Clark*, Acting Assistant Attorney General.

Joshua R. Morey, Kelley Drye & Warren LLP, of Washington, DC, argued for defendant-intervenors. With him on the brief was *Michael J. Coursey* and *John M. Herrmann*.

OPINION

Katzmann, Judge:

This case concerns the reliance on facts otherwise available (“FA”) and application of an adverse inference (“AFA”) in an antidumping (“AD”) review by the U.S. Department of Commerce (“Commerce”), resulting in a higher tariff, where respondent submitted inconsistent and unreliable information regarding its U.S. sales price. At issue is Commerce’s twenty-third administrative review of AD duties on fresh garlic from China. *Fresh Garlic from the People’s Republic of China: Final Results of the 23rd Antidumping Duty Administrative Review; 2016–2017*, 84 Fed. Reg. 35,601 (Dep’t Commerce July 24, 2019) (“*Final Results*”); Issues and Decision Mem. for the Final Results of the AD Duty Administrative Review: Fresh Garlic from the People’s Republic of China; 2016–2017 (July 19, 2019), P.R. 282 (“IDM”); Final Analysis Mem. for Qingdao Sea-Line Int’l Trading Co., Ltd. (July 25, 2019), P.R. 284, C.R. 159 (“Final Analysis Memo”). Plaintiff Qingdao

Sea-Line International Trading Co., Ltd. (“Sea-Line”), an exporter of fresh garlic from China, brought this suit against Defendant the United States (“Government”) to challenge the *Final Results*, specifically Commerce’s application of AFA to its own dumping margin and, assuming that AFA was incorrectly applied, Commerce’s selection of a surrogate country in its calculation of a dumping margin for all other respondents to Commerce’s review. *See* Mem. in Supp. of Pl.’s Rule 56.2 Mot. for Summ. J. at 1, Feb. 18, 2020, ECF No. 26 (“Pl.’s Br.”). The Government and Defendant-Intervenor Fresh Garlic Producers Association, including its individual members Christopher Ranch L.L.C., The Garlic Company, and Valley Garlic, (collectively, “FGPA”), ask the court to sustain Commerce’s determination. Def.’s Resp. to Pl.’s Mot. for J. Upon the Agency R., May 8, 2020, ECF No. 29 (“Def.’s Br.”); Def.-Inters.’ Resp. in Opp’n to Pl.’s Mot. for J. on the Agency R., May 27, 2020, ECF No. 30 (“Def.-Inter.’s Br.”).¹ The court sustains Commerce’s *Final Results* as to Sea-Line and denies Sea-Line’s motion.

BACKGROUND

I. Legal Framework

Congress’s AD statute empowers Commerce to impose remedial duties on imported goods when those goods are sold in the United States for less than their fair market value, and when the International Trade Commission determines that the domestic industry is thereby “materially injured, or . . . is threatened with material injury.” *See* 19 U.S.C. § 1673(2)(A)(i)–(ii); *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017). Dumping constitutes unfair competition because it permits foreign producers to undercut domestic companies by selling products below their fair market value. *Sioux Honey Ass’n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). To address the harmful impact of such unfair competition, Congress enacted the Tariff Act of 1930, which empowers Commerce to investigate potential dumping and if necessary to issue orders instituting duties on subject merchandise. *Id.* at 1047. In these instances, “the amount of the [AD] duty is ‘the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.’” *Shandong Rongxin Imp. & Exp. Co. v. United States*, 42 CIT __, __, 331 F. Supp. 3d 1390, 1394 (2018) (quoting 19 U.S.C. § 1673), *aff’d*, 779 F. App’x 744 (Fed. Cir. 2019). If the exporting country is a non-market economy that pro-

¹ Many citations are to confidential filings for clarity in explaining the timeline of events. Public versions, often filed at later dates, are available on the public docket with corresponding pagination.

vides insufficient information to determine the normal value, Commerce may use surrogate values from market economy countries for “the factors of production utilized in producing the merchandise and . . . for general expenses and profit plus the cost of containers, coverings, and other expenses.” 19 U.S.C. § 1677b(c)(1). Upon request, Commerce may conduct an administrative review of its AD duty determination and recalculate the applicable rate. *Id.* § 1675(a)(1)–(2); see *Shandong Rongxin*, 331 F. Supp. 3d at 1394.

In determining or reviewing whether a good is being sold in the United States at less than fair value, Commerce may issue questionnaires to selected mandatory respondents² in order to gather information. See 19 U.S.C. § 1677f-1(c)(2)(A)–(B). Where Commerce’s request is unambiguous and pertinent to an investigation or review, 19 U.S.C. § 1677m requires that a respondent “prepare an accurate and complete record in response to questions plainly asked by Commerce” in a timely fashion. *Tung Mung Dev. Co. v. United States*, 25 CIT 752, 758, 23 ITDR 1775 (2001) (citing *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1571–72 (Fed. Cir. 1990)). If Commerce deems a response to its request deficient, then Commerce “shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle.” 19 U.S.C. § 1677m(d). Commerce may provide this notice and the opportunity to remedy deficiencies through issuance of a supplemental questionnaire. Commerce will verify information relied upon in the final results of an administrative review if: (1) a domestic interested party timely requests verification and no verification under the relevant paragraph occurred during either of the two immediately preceding administrative reviews, or (2) the Secretary of Commerce determines that “good cause” for verification exists. See 19 U.S.C. § 1677m(i)(1)–(3); 19 C.F.R. § 351.307(b)(1)(iv)–(v).

² In AD investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(c)(2), which provides:

If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—

- (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
- (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

A. *Reliance on FA and AFA*

Pursuant to 19 U.S.C. § 1677e, if a party fails to satisfactorily respond to Commerce's requests for "necessary information" to calculate a dumping margin by (1) withholding requested information, (2) failing to provide information by the submission deadlines or in the form or manner requested, (3) significantly impeding a proceeding, or (4) providing information that cannot be verified, Commerce shall use FA to calculate the margin. *Id.* § 1677e(a)(1)–(2). "The use of facts otherwise available . . . is only appropriate to fill gaps when Commerce must rely on other sources of information to complete the factual record." *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011) (citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003)).

Furthermore, Commerce may make a separate determination that the respondent failed to cooperate "to the best of its ability" and apply AFA. 19 U.S.C. § 1677e(b)(1)(A). A respondent does not cooperate to the "best of its ability" when it fails to "put forth its maximum effort to provide Commerce with full and complete answers to all inquiries." *Nippon Steel*, 337 F.3d at 1382. The Federal Circuit in *Nippon Steel* explained that Commerce must make an objective and subjective determination regarding respondent's efforts in assessing whether it acted to the best of its ability. *Id.* at 1382–83. The Federal Circuit clarified that this test applies "regardless of motivation or intent" on the part of the respondent, and that it "does not condone inattentiveness, carelessness, or inadequate record keeping." *Id.*

In applying AFA, Commerce may rely on information from the initial petition, a final determination in the investigation, a previous administrative review, or any other portion of the administrative record. 19 U.S.C. § 1677e(b)(2); 19 C.F.R. § 351.308(c). Although Commerce may choose to supplement the administrative record of its own accord, the burden of creating an adequate record, and therefore of avoiding AFA, lies with the respondent. *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1337 (Fed. Cir. 2016) (quoting *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011)). "[W]here there is useable information of record but the record is incomplete," Commerce applies partial AFA. *Wash. Int'l Ins. v. United States*, 33 CIT 1023, 1035 n.18, 31 ITRD 1803 (2009) (citing *Yantai Timken Co. v. United States*, 31 CIT 1741, 1746–48, 521 F. Supp. 2d 1356, 1364–65 (2007), *aff'd*, 300 Fed. Appx. 934 (Fed. Cir. 2008)). However, Commerce applies total AFA when "none of the reported data is reliable or usable," *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1305 (Fed. Cir. 2014), or where "the bulk of it is determined to be flawed and unverifiable" because of "pervasive and persistent

deficiencies that cut across all aspects of the data.” *Zhejiang DunAn Hetian Metal*, 652 F.3d at 1348 (discussing *Steel Authority of India, Ltd. v. United States*, 25 CIT 482, 149 F. Supp. 2d 921 (2001)). After making a finding that AFA is appropriate, Commerce may then select an AD rate using the adverse inferences against the respondent. See 19 U.S.C. § 1677e(d). The statute explicitly provides Commerce with the discretion to select among any dumping margins “under the applicable [AD] order,” including “the highest such rate or margin.” *Id.* § 1677e(d)(1)(B)–(2). In selecting an AFA rate, however, Commerce must “consider the totality of the circumstances in selecting an AFA rate, including, if relevant, the seriousness of the conduct of the uncooperative party.” *BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1302 (Fed. Cir. 2019).

II. Factual and Procedural History

A. Administrative Review of Sea-Line

Commerce issued an AD duty order on fresh garlic from China in 1994. *AD Duty Order: Fresh Garlic From the People’s Republic of China*, 59 Fed. Reg. 59,209 (Dep’t Commerce Nov. 16, 1994). In November of 2017, Commerce published a notice of opportunity to request an administrative review of this order for the period of review (“POR”) for November 2016 through October 2017. *Opportunity to Request Administrative Review*, 82 Fed. Reg. 50,620 (Dep’t Commerce Nov. 1, 2017). Sea-Line, Best Buy Produce International, Inc., and FGPA requested a review of Sea-Line.³ See *Requests for Administrative Review*, P.R. 6, 8, 10. Commerce initiated an administrative review on January 11, 2018, selected Sea-Line as a mandatory respondent after the largest importers withdrew from the review, and issued it a questionnaire. *Initiation of AD and Countervailing Duty Administrative Reviews*, 83 Fed. Reg. 1,329, 1331–32 (Dep’t Commerce Jan. 11, 2018); Mem. from USDOC to Office Dir/EC Pertaining to Interested Parties Respondent Selection Memo (June 22, 2018), P.R. 155, C.R. 66; Letter from USDOC to Davis & Leiman Pertaining to Sea-Line Questionnaire (June 22, 2018), P.R. 156 (“Initial Questionnaire”).

Sea-Line submitted answers in July and August of 2018. Resp. from Davis & Leiman P.C. to Sec’y of Commerce Pertaining to Sea-Line

³ Sea-Line originally underwent a new shipper review in June 2009. *Fresh Garlic From the People’s Republic of China: Initiation of New Shipper Review*, 74 Fed. Reg. 31,241, 31,241–42 (Dep’t Commerce June 30, 2009). Sea-Line had no shipments until the 22nd POR covering 2015 through 2016, but was not individually examined for that POR. *Fresh Garlic From the People’s Republic of China: Final Results and Partial Rescission of the 22nd AD Duty Administrative Review and Final Result and Rescission, in Part, of the New Shipper Reviews; 2015–2016*, 83 Fed. Reg. 27,949, 27,951 (Dep’t Commerce June 15, 2018).

Sec. A QR (July 18, 2018), P.R. 163–68, C.R. 68–83 (“Sea-Line’s Sec. A Resp.”); Fresh Garlic from PRC: Sec. C Resp. of Sea-Line (Aug. 10, 2018), P.R. 177, C.R. 85–87 (“Sea-Line’s Sec. C Resp.”); Resp. from Davis & Leiman P.C. to Sec’y of Commerce Pertaining to Sea-Line Sec. D. QR (Aug. 20, 2018), P.R. 183, C.R. 91–93 (“Sea-Line’s Sec. D Resp.”). Sea-Line reported [[]] kgs of imports of garlic during the POR, valued at \$[[]]. Sea-Line’s Sec. A Resp. at Ex. A-1. Despite being the importer of record, and thus being responsible for the cash deposits accompanying imports under an AD order, Sea-Line reported shipments on [[]], meaning that per the shipping terms with its customers Sea-Line [[]]. Sea-Line’s Sec. C Resp. at 6; Sea-Line’s Sec. A Resp. at Ex. A-1. Commerce initially requested Sea-Line report the date on which payment was received from the customer for each of its U.S. sales and the gross unit price less price adjustments equal to net amount of revenue for each sale. Initial Questionnaire at Sec. C. However, Sea-Line omitted the payment date field from its U.S. sales database because it claimed an inability to match customer payments to sale entries because payments were not made on a transaction-specific basis. Sea-Line’s Sec. C Resp. at 5–6. Sea-Line also reported the gross unit price for U.S. sales “in USD per kilogram,” corresponding to the price listed “on [its] commercial invoice[s],” rather than the requested net revenue price. *Id.* at 9.

In October 2018, Commerce issued a supplemental questionnaire requesting additional information on: (1) an aspect of its U.S. sales, specifically [[]

]; and (2) net revenue U.S. price data. Commerce’s First Suppl. Questionnaire for Sea-Line (Oct. 2, 2018), P.R. 194. In its response to Commerce’s first supplemental inquiry, Sea-Line explained that above the invoice price, its actual U.S. sales price was the “total negotiated price,” which included two additional components: Price Component A, [[]], and Price Component B, [[]]. Sea-Line’s First Suppl. Resp. at 3, (Oct. 22, 2018), P.R. 203, C.R. 112–18. Sea-Line also explained that its U.S. customers paid [[]

]. *See id.* at 3–4. As substantiation, Sea-Line provided one signed agreement that indicated that [[]

]. *Id.* at Ex. S-4. Second, for its U.S. sales price information, Sea-Line revised its sales database to include payment dates based on “records for sales and receipts” and calculations of accumulated sales values and accumulated payment values for each customer. *Id.* at 10, Ex. S-14. At the time the revised database was submitted,

Sea-Line reported that had it been paid for [[
]] of its total number of U.S. sales, accounting for roughly [[
]] its total sales value, and reported [[
]]. *Id.* at Ex. S-14 (listing to be collected payments). As to
 Commerce’s second request, Sea-Line did not revise its previously
 provided gross unit price to accommodate Commerce’s request for net
 revenue price. *Compare* Sea-Line’s Sec. C Resp. at Ex. C-1 *with*
 Sea-Line’s First Suppl. Resp. at Ex. S-14.

The following month, Commerce issued Sea-Line a second supple-
 mental questionnaire again addressing the previously identified dis-
 crepancies and requested further supporting documentation. Second
 Suppl. Questionnaire for Sea-Line (Nov. 14, 2018), P.R. 228, C.R. 126.
 Sea-Line submitted its narrative responses to this second supplemen-
 tal questionnaire on November 19, 2018, and additional supporting
 documentation on December 4, 2018. Sea-Line’s Resp. to Commerce’s
 Second Suppl. Questionnaire (Nov. 19, 2018), P.R. 233, C.R. 128
 (“Sea-Line’s Second Suppl. Resp. Pt. 1”); Sea-Line’s Resp. to Com-
 merce’s Second Suppl. Questionnaire, Question 3 (Dec. 4, 2018), P.R.
 243, C.R. 133–38 (“Sea-Line’s Second Suppl. Resp. Pt. 2”). Sea-Line
 again claimed to “negotiate[] a total final price with U.S. customers”
 that included Price Component A, which [[
]], and
 Price Component B. Sea-line’s Second Suppl. Resp. Pt. 1 at 2. Initially
 Sea-Line claimed Commerce’s requested supporting documentation
 “is entirely outside Sea-Line’s possession or knowledge.” *Id.* Yet, in its
 December supporting submission it provided [[
]] for [[
]]. Sea-Line’s Second Suppl. Resp.
 Pt. 2 at 1.

B. Results of Commerce’s Review

On November 30, 2018, Commerce issued preliminary results in
 which it calculated an estimated weighted-average dumping margin
 of \$4.60 per kilogram for Sea-Line based on Sea-Line’s reported U.S.
 sales data. *Fresh Garlic From the People’s Republic of China: Pre-
 liminary Results of Antidumping Duty Administrative Review;
 2016–2017*, 83 Fed. Reg. 63,479, 63,481 (Dep’t Commerce Dec. 10,
 2018) (“*Preliminary Results*”); Decision Mem. for the Prelim. Results
 and Final Rescission, in part, of the 2016–2017 AD Duty Administra-
 tive Review: Fresh Garlic from the People’s Republic of China (Nov.
 30, 2018), P.R. 242 (“PDM”). Because Sea-Line had just provided its
 narrative responses and had not yet provided supporting documen-
 tation for its response to the second supplemental questionnaire by
 the publication of the *Preliminary Results*, Commerce noted that
 “these responses will not be analyzed for the preliminary results.”

PDM at 4. Commerce calculated a dumping margin based on Sea-Line's reported U.S. prices and used [[]] as the payment date [[]]. Calculation Mem. For the People's Republic of China: Calculation Mem. for the Prelim. Results of Sea-Line at 7–8 (Dec. 10, 2018), P.R. 248, C.R. 146. In its *Preliminary Results*, Commerce announced its plans to conduct verification based on FGPA's request. *See* 83 Fed. Reg. at 63,480. FGPA did not request and Commerce did not announce verification of Sea-Line specifically. *See id.*; Petitioner's Request for Verification (Apr. 24, 2018), P.R. 112. On February 14, 2019, FGPA withdrew its request, and Commerce subsequently cancelled verification. *See* Petitioner's Withdrawal of Verification Request (Feb. 14, 2019), P.R. 258; 23rd Administrative Review of Fresh Garlic from the People's Republic of China — Briefing Schedule at 1 (Feb. 15, 2019), P.R. 259. The parties do not dispute that Sea-Line had not previously requested verification nor did it respond to the withdrawal and cancellation of verification with its own request. *See* Pl.'s Resps. to the Ct.'s Questions for Oral Arg. at 15, Nov. 9, 2020, ECF No. 39 ("Pl.'s Suppl. Br."); Def.'s Br. at 23; Def.-Inter.'s Br. at 22.

After analyzing the data provided by Sea-Line just before and right after publication of the *Preliminary Results* and receiving case and rebuttal briefs from interested parties, Commerce published the *Final Results* in July 2019. Based on its analysis of those supplemental responses, Commerce determined that it could not rely on Sea-Line's reported U.S. prices because of "inconsistent and irreconcilable information," and failure to "consistently report and substantiate the amount that Sea-Line charged to and received from its U.S. customers for U.S. sales." Final Analysis Memo at 7. Commerce also rejected Sea-Line's case brief request that Commerce use its reported total negotiated price as the U.S. price for the dumping calculation. *Id.* at 11–13. Commerce, thus, assigned a dumping margin based on total AFA of \$4.71 per kilogram for failure to cooperate to the best of its ability despite opportunities to remedy deficiencies in its responses. *See Final Results*, 84 Fed. Reg. at 35,603; IDM at 5–6, 10–12.

C. Procedural History

Sea-Line initiated this litigation on August 21, 2019. Summons, Aug. 21, 2019, ECF No. 1; Compl., Sept. 9, 2019, ECF No. 7. FGPA joined the litigation as Defendant-Intervenor on October 3, 2019. Order Granting Mot. to Intervene as Def.-Inter., ECF No. 18. On February 18, 2020, Sea-Line filed a revised Rule 56.2 motion for judgment on the agency record, arguing that Commerce erred in applying AFA and erred in its selection of a surrogate country. Pl.'s Br.

at 1. The Government and FGPA then responded to Sea-Line’s motion in May of 2020. Def.’s Br.; Def.-Inter.’s Br. Plaintiff replied on June 30, 2020. Reply Br. of Pl. Qingdao Sea-Line Int’l Trade Co., Ltd., ECF No. 32 (“Pl.’s Reply”). Oral argument was held on November 12, 2020. Oral Arg., ECF No. 46. Prior to oral argument, the court issued and the parties responded to questions regarding the case. Letter re: Questions for Oral Arg., Oct. 28, 2020, ECF No. 38; Pl.’s Suppl. Br.; Def.’s Resp. to the Ct.’s Questions, Nov. 9, 2020, ECF No. 41 (“Def.’s Suppl. Br.”); Def. Inter.’s Resp. to the Ct.’s Questions for Oral Arg., Nov. 10, 2020, ECF No. 44 (“Def.-Inter.’s Suppl. Br.”).

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): “[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.”

DISCUSSION

Sea-Line challenges Commerce’s application of AFA and its selection of a surrogate country in the *Final Results*. The court first concludes that Commerce correctly identified a gap in the record and used FA to calculate its dumping margin. Second, the court concludes that Commerce permissibly applied AFA because Sea-Line failed to cooperate to the best of its ability. Given that it affirms Commerce’s application of AFA, the court does not address Sea-Line’s challenge to Commerce’s selection of a surrogate country because Commerce relied on total AFA and not surrogate information to calculate Sea-Line’s dumping margin.⁴ See IDM at 10–12.

⁴ In its Complaint and opening brief, Sea-Line contends that Commerce’s selection of Romania rather than Mexico as the primary surrogate country was not supported by substantial evidence or in accordance with law. Compl. ¶¶ 16–17; Pl.’s Br. at 27–30. But, as the Government correctly observes, “although Commerce relied on surrogate value data to calculate a weighted average dumping margin for one mandatory respondent . . . , Commerce did not calculate a dumping margin based on surrogate value data for Sea-Line. . . . Commerce . . . determine[d], in the *Final Results*, that Sea-Line qualified for a separate rate, [but] Commerce applied total [AFA] in determining Sea-Line’s dumping margin.” Def.’s Suppl. Br. at 17 (citing IDM at 6). The court thus concludes that Sea-Line has not been impacted by Commerce’s surrogate country selection, and as such lacks standing to challenge that decision. See *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 572 (1992)) (holding that, in order to confer jurisdiction, a plaintiff must show “that it has suffered a concrete and particularized injury that is either actual or imminent,” (2) “that the injury is fairly traceable to the defendant,” and (3) “that a favorable decision will likely redress that injury”); see also Def.-Inter.’s Br. at 23–25 (arguing that Sea-Line’s challenge to surrogate value selection is not ripe for adjudication because none of the separate rate respondents appealed the *Final Results*).

I. Commerce Correctly Resorted to FA.

In its AD review of Sea-Line, Commerce resorted to FA rather than relying on Sea-Line's responses regarding its U.S. sales price. IDM at 5. Commerce identified gaps and inconsistencies in the record stemming from "Sea-Line's fail[ure] to consistently report and substantiate the amount that Sea-Line charged to and received from its U.S. customers for its U.S. sales during the POR." *Id.* Specifically, Commerce noted: (1) Sea-Line did not provide payment dates as requested, *id.* at 10; (2) Sea-Line's reported U.S. sales price "was not supported by its sales reconciliation or financial statements" despite having three opportunities to provide such information, *id.* at 11; and (3) Sea-Line inconsistently characterized its U.S. price as invoice price and total negotiated price, *id.* Thus, Commerce concluded "that reliable information concerning the amount that Sea-Line charged to and received from its U.S. customers, for its sales to the United States during the POR, is not present on the record." *Id.* at 11. Because Commerce concluded that the gaps and inconsistencies in the record were "core to Commerce's ability to calculate Sea-Line's dumping margin" and Sea-Line's submissions could not "serve as a reliable basis for [the] dumping margin analysis," Commerce resorted to FA to calculate Sea-Line's estimated weighted dumping margin. *Id.* at 5.

Sea-Line contends that there was no gap in the record, arguing that any deficiency in its responses was the result of Commerce not properly notifying and providing Sea-Line an opportunity to remedy. Pl.'s Br. at 18–21; Pl.'s Reply at 3. First, Sea-Line argues that the presence of [] in its data does not constitute a gap in the record and that Commerce could have used other information on the record to calculate its dumping margin as it did in the *Preliminary Results*. Pl.'s Br. at 18–19; Pl.'s Reply at 13. Second, Sea-Line argues that Commerce erred in not issuing deficiency questionnaires to allow Sea-Line to resubmit illegible documents in accordance with 19 U.S.C. § 1677m(d). Pl.'s Br. at 21–23. Third, Sea-Line argues that Commerce's cancellation of verification was unlawful because "it would have addressed minor issues Commerce cited in the Final Results." *Id.* at 24.

The Government and FGPA respond that Commerce acted based on substantial evidence and otherwise in accordance with law by (1) determining Sea-Line's initial questionnaire responses raised significant questions about the reliability of its reported U.S. prices (2)

Furthermore, Sea-Line acknowledges this by requesting that "if the [c]ourt remands the *Final Results* back to Commerce on the ground that Commerce erred in its decision regarding AFA and denying it a calculated rate, th[en] the [c]ourt also consider Sea-Line's arguments with regard to Romanian surrogate value data." Pl.'s Suppl. Br. at 19 (citing *Asahi Seiko Co. v. United States*, 33 CIT 1693, 1697 (2009)).

issuing supplemental questionnaires; and (3) determining Sea-Line's first and second supplemental questionnaire responses indicated its initially reported U.S. sales prices were deficient and that subsequently provided information did not correct these deficiencies. Def.'s Br. at 13–22; *see* Def.-Inter.'s Br. at 17–19. The Government also contends that Commerce was not required to allow Sea-Line to re-submit illegible documents because its issuance of two supplemental questionnaires regarding Sea-Line's U.S. price information fulfilled Commerce's obligation to notify and allow correction of deficiencies in questionnaire responses. Def.'s Br. at 16, 20–22. Similarly, FGPA notes that Commerce "assigned Sea-Line a rate based on total AFA because the exporter failed to submit accurate and reliable U.S. prices, and not because Sea-Line submitted illegible copies of certain tangentially-related documents." Def.-Inter.'s Final Comments at 2, Nov. 20, 2020, ECF No. 51. Finally, the Government and FGPA counter that Commerce is not obliged to verify a respondent's submission when necessary information is missing from the record and where no request for verification was on the record, as was the case here. Def.'s Br. at 23–25; Def.'s Suppl. Br. at 16; Def.-Inter.'s Br. at 20.

A. Gaps and Inconsistencies in Sea-Line's U.S. Sales Price Data

Based on Sea-Line's questionnaire response and subsequent supplemental questionnaire responses, Commerce concluded that Sea-Line "failed to consistently report and substantiate the amount that Sea-Line charged to and received from its U.S. customers for its U.S. sales during the POR." IDM at 10. This was because Commerce could not reconcile Sea-Line's U.S. sales database with source documentation despite issuing two supplemental questionnaires to Sea-Line for that purpose. *Id.* at 10–11. In its original questionnaire response, Sea-Line failed to provide dates of payments received from U.S. customers. *See* Sea-Line's Sec. C Resp. at 5–6. Customers' payments as to each sale, Sea-Line claimed, were not ascertainable because they were not paid on a transaction-specific basis. *See id.* Rather, Sea-Line suggested Commerce assign each sale a payment date based on the terms of payment, which Sea-Line reported as [[]]. Sea-Line's Sec. C Resp. at 6–7. Sea-Line also reported the gross unit price for U.S. sales corresponding to the price listed "on [its] commercial invoice[s]" despite Commerce's request for prices to be listed as net revenue price. *Id.* at 9.

Commerce noted that after first reporting its U.S. sales price as invoice price in its original questionnaire response, Sea-Line later explained that above the invoice price, its actual U.S. sales price was the total negotiated price, which included two additional components

above its invoice price: Price Component A and Price Component B. Final Analysis Memo at 9. To support this narrative explanation, Sea-line submitted a customer agreement, but Commerce found it to be ambiguous as to which party actually assumed the cost of the additional price components. *Id.* at 9–10. Furthermore, Sea-Line continued to report its U.S. price as invoice price in its U.S. sales database even after it explained that its actual U.S. sales price was different than the invoice price. *Id.* at 10. After Commerce sought further clarification on this point and asked Sea-Line for a reconciliation breaking out the additional components, Sea-Line provided documentation with its second supplemental questionnaire response that again did not break out these components or reconcile Sea-line’s reported U.S. sales prices. *Id.* Further, Commerce identified a large quantity of payment term violations by Sea-Line’s customers related to [[]], provided multiple instances of legible invoices not matching Sea-Line’s bank documentation, and noted other discrepancies regarding the supporting documentation for Price Component A. *Id.* at 8–10. Thus, Commerce noted that Sea-Line did not provide information related to Price Component A or a reconciliation of U.S. price with this component, and, because of the identified discrepancies in supporting documents, Commerce could not calculate the U.S. sales price based on the information in the record. *Id.* at 12. Finally, Commerce noted that, even assuming the data could be used to calculate U.S. sales price as Sea-Line proposed, it would have the undue burden of conducting “more than [[]] individual calculations,” requiring “a logical leap over the factual gaps in the record” because the composition of Price Component A did not “align with the actual payment data reported.” *Id.* at 11–12. Commerce determined that the inconsistencies and irreconcilable submissions detailed above constituted withheld information and impediments to the proceedings within 19 U.S.C. § 1677e(a)(2)(A), (C) and resorted to filling this gap in the record with FA. *Id.* at 12–13.

Given the many inconsistencies identified by Commerce in Sea-Line’s reported U.S. sales price data, the court rejects Sea-Line’s argument that Commerce erred in resorting to FA. Commerce provided Sea-Line three opportunities to provide consistent, reconcilable, and useable U.S. sales price data and Sea-Line did not do so.⁵ Commerce properly disregarded Sea-Line’s responses regarding its

⁵ Sea-Line also contends that Commerce deviated from its practice of using the factual cut-off date as the payment date for [[]] by not using that neutral information to fill in this gap in the record here. Pl.’s Br. at 19; Pl.’s Suppl. Br. at 8. However, because the payment date was one of several gaps and inconsistencies in the record that Commerce could not have rectified by using the factual cut-off date as the payment date alone, the court concludes that Commerce did not deviate from its practice here, but rather rejected unreliable information provided by Sea-Line.

U.S. sales price because the information was not verifiable, reliable, or usable without undue difficulty in accordance with 19 U.S.C. § 1677m(e). Thus, Commerce properly identified a gap in the record regarding Sea-Line's U.S. sales price information and resorted to FA in order to complete its review of Sea-Line's dumping margin. *See* 19 U.S.C. § 1677e(a)(2).

Sea-Line mischaracterizes Commerce's determination by finding fault with discrete aspects of Commerce's conclusions about its U.S. sales price while not addressing the main underlying problem that Commerce consistently identified: the lack of complete and supported U.S. sales price data. Commerce's conclusion was not just that certain aspects of Sea-Line's U.S. sales price information was deficient, but that Sea-Line's narrative responses contradicted themselves and that Sea-Line's supporting documentation further did not support Sea-Line's narrative responses. *See* Final Analysis Memo at 9–12. Once it provided Sea-Line two opportunities to clarify its U.S. sales price and Sea-Line failed to do so, Commerce met its requirement to “promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency.” 19 U.S.C. § 1677m(d). Commerce had no further obligation to notify Sea-Line of specific deficiencies regarding Sea-Line's documentation that would not have cured Commerce's determination that the U.S. sales price data as a whole was unreliable. None of the cases cited by Sea-Line detract from this conclusion. *See, e.g.*, Pl.'s Br. at 20–21 (citing *Hyundai Steel Co. v. United States*, 42 CIT __, __, 282 F. Supp. 3d 1332, 1343–44 (2018); *Ta Chen Stainless Steel Pipe v. United States*, 23 CIT 804, 21 ITRD 2057 (1999); *China Kingdom Imp. & Exp. Co. v. United States*, 31 CIT 1329, 1346–47, 507 F. Supp. 2d 1337, 1353–54 (2007)).

For the same reason, Sea-Line's contention that it proposed a feasible method of calculation of its U.S. sales price, Pl.'s Br. at 24–25, ignores the errors cited by Commerce that inform Commerce's conclusion that the information was untrustworthy as a whole that constituted a gap in the record pursuant to 19 U.S.C. § 1677e. Sea-Line's first and second supplemental questionnaire responses did not resolve significant questions raised by the initial questionnaire responses. IDM at 10. Rather, than identifying unrelated deficiencies within Sea-Line's questionnaire responses, data, and supporting documentation, Commerce cited issues throughout Sea-Line's responses that undermined the integrity and reliability of Sea-Line's reported U.S. sales price data as a whole — information core to its

Final Results. See IDM at 5. Commerce permissibly concluded that it would not have been able to use the data to calculate U.S. sales price and that Sea-Line’s proposed method of calculation was independently irreconcilable with the information on the record. See Final Analysis Memo at 11–12.

In sum, Commerce acted in accordance with 19 U.S.C. § 1677e(a) and § 1677m(e), in disregarding Sea-Line’s reported U.S. sales information.

B. Illegible Documents

In explaining why it could not rely upon Sea-Line’s reported U.S. sales price information, Commerce, among the many reasons discussed above, observed that

the poor quality of certain scanned documents resulted in bank documentation that was illegible for use in reconciling the payment dates, bank account numbers, charges or payments to the U.S. sales database. For certain invoices, the words and numbers on the bank documents submitted to support these data are too blurry to discern, and thus, both the payment amount and dates are unverifiable.

IDM at 10; Final Analysis Memo at 9.

The court rejects Sea-Line’s contention that Commerce’s *Final Results* are undermined by its failure to allow Sea-Line to resubmit the illegible documentation. See Pl.’s Br. at 21–23. As explained above, Sea-Line misapprehends the totality of the circumstances under which Commerce made its conclusion. Sea-Line is correct that 19 U.S.C. § 1677m(d) requires Commerce to notify a party of “the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews.” However, the illegible documents were only one of several reasons that Commerce concluded Sea-Line’s reported data was deficient. See Final Analysis Memo at 8–12. Beyond certain illegible supporting documents, Sea-Line’s own explanations and other legible documentation provided reason for Commerce to believe that the invoice price listed did not equal Sea-Line’s U.S. price. See, e.g., Final Analysis Memo at 10–11. Resubmitting the illegible documents would not rectify that deficiency. As the Government explains, “no part of the law states that Commerce must itemize, with detailed particularity, each specific deficiency within a broader set of data relating to a specific inquiry.” Def.’s Post-Arg. Submission at 2, Nov. 19, 2020, ECF No. 47. Rather, Commerce alerted Sea-Line to its

deficient U.S. price information and allowed Sea-Line two opportunities to remedy. No further opportunities to remedy were required, including opportunities to provide legible versions of the illegible supporting documents.

Sea-Line relies upon several other decisions of the court to argue that Commerce is required to allow parties to resubmit legible versions of illegible documents. Pl.'s Br. at 23 (citing *Ereğli Demir ve Çelik Fabrikalari T.A.Ş. v. United States*, 42 CIT __, __, 308 F. Supp. 3d 1297, 1318 (2018) (“*Ereğli Demir*”) (finding error in Commerce’s decision to reject certain illegible documents); *Shandong Jinxiang Zhengyang Imp. & Exp. Co. v. United States*, 44 CIT __, __, 429 F. Supp. 3d 1373, 1380 (2020) (concluding that Commerce did not err in rejecting a case brief where a party failed to correct illegible portions); *SeAH Steel Vina Corp. v. United States*, 42 CIT __, __, 332 F. Supp. 3d 1314, 1324–25 (2018) (concluding that a party waived its argument regarding illegible documents)). Of these cases, only *Ereğli Demir*, in which the court concluded that Commerce erred in rejecting certain illegible and partially untranslated documents provided through a supplemental questionnaire response, is arguably analogous. *See* 308 F. Supp. 3d at 1317–18. The court noted that “based on the particular facts of this case in which only one or two pages of a multi-page exhibit were difficult to read and a substantial portion of each document was translated,” *id.* at 1318 n.28, and Commerce did not seek any additional information related to this topic until the issuance of a third supplemental questionnaire, “Commerce erred in failing to inform [respondent] that its supplemental submission was deficient or make findings with regard to the practicability of providing [respondent] with an opportunity to remedy or explain the deficiencies.” *Id.* at 1318. Further, the court rejected Commerce’s reasoning because “[n]owhere [did] Commerce explain the materiality of these discrepancies” to Commerce’s stated purpose for the documentation. *Id.* at 1319. In sum, the court concluded that Commerce’s reasons, “individually and together, fail[ed] to support [its] determination.” *Id.* at 1319. The court cannot reach the same conclusion regarding Sea-Line’s illegible documentation. Here, Commerce explained that the information it sought was core to its analysis, Commerce sought information related to U.S. sales price through each supplemental questionnaire, and yet Sea-Line never provided reconcilable information to Commerce on its U.S. sales price. *See* IDM at 5; Final Analysis Memo at 10. Quite unlike the fact bound conclusion in *Ereğli Demir*, Commerce’s rejection of Sea-Line’s information was supported based on individual reasons and as a whole, and Commerce explained why

its overarching conclusion that the data was unusable was material to its entire investigation. The court is unpersuaded by this challenge to Commerce's *Final Results*.

C. Cancellation of Verification

After issuance of the *Preliminary Results*, FGPA withdrew its request for verification and Commerce cancelled verification. See Petitioner's Withdrawal of Verification Request (Feb. 14, 2019), P.R. 258; 23rd Administrative Review of Fresh Garlic from the People's Republic of China — Briefing Schedule at 1 (Feb. 15, 2019), P.R. 259. Sea-Line did not request verification or object to Commerce's cancellation in its subsequent briefs. See Pl.'s Suppl. Br. at 15; Def.'s Br. at 23; Def.-Inter.'s Br. at 22. Nevertheless, Sea-Line now argues that Commerce erred in cancelling verification because it would have allowed Sea-Line "to address[] minor issues Commerce cited in the *Final Results*." Pl.'s Br. at 24.

The court is not persuaded by this argument. Commerce has discretion to "decide whether and how to verify the information submitted during an [AD] proceeding." *Carpenter Tech. Corp. v. United States*, 33 CIT 1721, 1732–33, 662 F. Supp. 2d 1337, 1346 (2009). Commerce did not err in refusing to verify Sea-Line's submissions because, as discussed above, Commerce identified a pattern of missing and inconsistent information that did not reconcile with the reported pricing methodology in Sea-Line's submitted material. As a result, once FGPA withdrew its request for verification, none of the reasons for conducting verification per the applicable statute or regulation were present. See 19 U.S.C. § 1677m(i)(1)-(3); 19 C.F.R. § 351.307(b)(1)(iv)–(v). Sea-line never requested verification and never put forward arguments that good cause existed for Commerce to conduct verification. Sea-Line cites *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1354 (Fed. Cir. 2006), to argue that Commerce erred in rejecting verifiable information by cancelling verification. Pl.'s Br. at 27. However, the Federal Circuit in *Timken* mentioned Commerce's verification procedures only in dicta in relation to a fact-bound argument on appeal. See 434 F.3d at 1354 ("If Commerce had reason to doubt Timken's corrective information, then it could have, and perhaps should have, performed a second verification.").

Furthermore, the Federal Circuit rejected Sea-Line's exact argument regarding verification in *Shakeproof Assembly Components v. United States*, 268 F.3d 1376 (Fed. Cir. 2001). There, the Court noted that verification procedures are reviewed for an abuse of discretion, and "[i]n all cases . . . verification must be timely requested by an

interested party.” *Id.* at 1383. Plaintiff Shakeproof had not requested verification, but rather argued that “it did not have a reasonable opportunity to request verification because it was unaware that Commerce would use [certain record information in its calculation].” *Id.* at 1383. Thus, the Court concluded that Shakeproof could not argue on appeal that “information should have been verified when it failed to timely request verification as required by statute” and that “Commerce did not abuse its discretion by determining that there was not ‘good cause’ for further verification.” *Id.* at 1383–84 (citing *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997)). Therefore, the court similarly rejects Sea-Line’s contention that it “did not have an affirmative duty to request a verification, after [FGPA] withdrew its request for verification, because at that time, Sea-Line was unaware that Commerce was going to reject its entire questionnaire response and apply AFA.” Pl.’s Suppl. Br. at 15. Sea-Line made no argument to Commerce that good cause existed to conduct verification, and Commerce did not abuse its discretion in determining that good cause did not exist after FGPA withdrew its request.

In short, the court is also unpersuaded by this attempt to assign error in Commerce’s AD review.⁶ The court instead concludes that Commerce properly identified a gap in the record and resorted to FA to calculate Sea-Line’s dumping margin in this review.

II. Commerce Did Not Err When Assigning Sea-Line A Dumping Margin Based On AFA.

Beyond using FA, Commerce further determined that Sea-Line failed to cooperate to the best of its ability pursuant to 19 U.S.C. § 1677e(b) by not providing a reliable U.S. sales price despite being provided multiple supplemental questionnaires in which it could have remedied this deficiency. IDM at 6; Final Analysis Memo at 13. Thus, Commerce applied AFA to Sea-Line’s dumping margin.

Sea-Line argues that Commerce acted without substantial evidence and contrary to law by applying AFA because Commerce did not meet its obligation under 19 U.S.C. § 1677m(d) to notify it of deficiencies in its responses for the reasons discussed and rejected above. Pl.’s Br. at 17–23. The Government and FGPA contend that Commerce lawfully relied on AFA in calculating and assigning a dumping margin for

⁶ While the Government characterizes Sea-Line’s failure to request verification as a failure to exhaust administrative remedies, Def.’s Br. at 22–23, the court does not find this framing applicable. The court instead follows the Federal Circuit’s lead in *Shakeproof Assembly Components* in not using the exhaustion framework in describing Commerce’s discretion to refuse to conduct verification. See 268 F.3d 1376. The court notes that, in this case, the outcome is the same regardless of the framework applied.

Sea-Line because its inconsistent and unreliable responses indicate that it did not do the maximum it was able to in complying with Commerce's requests. Def.'s Br. at 8–14, 16; Def.-Inter.'s Br. at 17–19.

While “[c]ompliance with the ‘best of its ability’ standard . . . ‘does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.’” *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1355 (Fed. Cir. 2015) (quoting *Nippon Steel*, 337 F.3d at 1382). The Federal Circuit in *Nippon Steel* held that that by failing to exert “maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation,” a respondent fails to act to the best of its ability. 337 F.3d at 1382. Respondents are expected to “take reasonable steps to keep and maintain full and complete records” in anticipation of possible production requests, and to “conduct prompt, careful, and comprehensive investigations of all relevant records” upon receiving an inquiry from Commerce. *See id.* at 1382.

The Federal Circuit's decision in *Mukand, Ltd.*, 767 F.3d 1300, is instructive. There, the Federal Circuit upheld an application of AFA to a respondent that repeatedly failed to provide necessary information, did not explain its failure, and did not provide supporting documentation regarding its available information. *Id.* at 1304. Commerce described the requested product-specific cost information as “a fundamental element in the dumping analysis, and [] is standard procedure for Commerce to request” in AD investigations, and “Mukand evaded providing a direct response to Commerce's specific questions.” *Id.* at 1307. Further, in describing Mukand's submission to Commerce, the Federal Circuit noted that Commerce “found that Mukand's failure to provide size-specific cost information rendered its response ‘so incomplete that it could not serve as a reliable basis for reaching a final determination’ and could not be used without undue difficulty.” *Id.* at 1304. The Federal Circuit also noted that “it was not until Mukand responded to the third supplemental questionnaire that it informed Commerce that it did not maintain” the requisite information, but then “was suddenly able to provide the requested information after Commerce published the preliminary results and applied [AFA],” which the court noted “further demonstrated its failure to cooperate to the best of its ability.” *Id.* at 1307. The Federal Circuit concluded that “Commerce's decision to resorts to facts otherwise available and apply an adverse inference against Mukand [was] supported by substantial evidence.” *Id.* at 1306.

Like the respondent in *Mukand*, Sea-Line did not act to the best of its ability and Commerce did not err in applying AFA to its calculation

of Sea-Line's dumping margin. As the information at issue in *Mukand*, U.S. sales price is "a fundamental element in the dumping analysis," and it was reasonable for Sea-Line to maintain such information. *See* 767 F.3d at 1307. Commerce also found the information to be unreliable and, even assuming that it was usable, could not be used without undue difficulty. *See id.* at 1304. Further, Sea-Line's revelation in its first supplemental questionnaire response that its U.S. sales price was more than the initial invoice price provided and Sea-Line's subsequent failure to provide complete information regarding the additional price components shows that Sea-Line at least was inattentive or careless in responding to Commerce's questionnaires, thus justifying the application of AFA. *See id.* at 1307; *Dongtai Peak Honey Indus. Co.*, 777 F.3d at 1355. Therefore, Commerce correctly determined that Sea-Line did not act to the best of its ability in the administrative review and appropriately applied AFA.

CONCLUSION

The court concludes that Commerce's *Final Results* were in accordance with law and supported by substantial evidence. Commerce identified a gap in the record in accordance with 19 U.S.C. § 1677m and substantial evidence and permissibly applied AFA in calculating an AD margin for Sea-Line. Accordingly, Plaintiffs' motion for judgment on the agency record is denied; Commerce's *Final Results* are sustained, and judgment is entered in favor of the United States.

SO ORDERED.

Dated: April 16, 2021
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 21–45

UNITED STATES, Plaintiff, v. NYWL ENTERPRISES INC., Defendant.

Before: Mark A. Barnett, Chief judge
Court No. 16–00257

[Granting Plaintiff's motion for the entry of default judgment.]

Dated: April 16, 2021

Jason M. Kenner, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY for Plaintiff United States. With him on the brief were *Brian Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Steven J. Holtkamp*, Staff Attorney, Office of Chief Counsel, U.S. Customs and Border Protection, of Chicago, IL.

OPINION

Barnett, Chief Judge:

This matter is before the court following Plaintiff United States' ("Plaintiff" or "the Government") second motion for the entry of default judgment pursuant to U.S. Court of International Trade ("USCIT" or "CIT") Rule 55(b). *See* Pl.'s [Second] Mot. for Entry of Default J. ("Pl.'s Second Mot."), ECF No. 43. Plaintiff alleges that Defendant NYWL Enterprises Inc. ("NYWL") fraudulently misclassified 107 entries of imported Siamese coaxial cable ("coaxial cable") in violation of section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2012).¹ *See* Am. Compl. ¶¶ 1–7, 24, 36–40, Ex. A, ECF No. 39 (listing the 107 subject entries). The Government seeks \$379,665.83 in unpaid duties, a civil penalty in the amount of \$3,760,000.00, post-judgment interest, and costs. *See id.* ¶¶ 36–40, 51–52; *id.* p. 8 (Wherefore clause); Pl.'s Second Mot. at 17–18.

For the following reasons, the court grants Plaintiff's motion and will enter judgment for the requested amounts.

BACKGROUND

The following facts are taken from the Government's Amended Complaint. NYWL is a New York corporation. Am. Compl. ¶ 4. Mr. Dian He was NYWL's Chief Executive Officer during the events relevant to this action. *Id.* ¶ 4.² From March 4, 2011, to February 16, 2012, NYWL made 107 entries of merchandise consisting of coaxial cable through the Port of Chicago, Illinois. *Id.* ¶ 5, Ex. A. "The coaxial cable was imported on spools that were labeled 'Applications, General Use, Surveillance and CCTV'" and packed in boxes "labeled 'CCTV & CATV Cable.'" *Id.* ¶ 6.³ "[B]oth the spools and boxes showed that the cable had been produced for . . . a known user of CCTV and CATV cable." *Id.*

Entry documentation listed the cable as either: (1) cored wire of base metal for electric arc welding pursuant to subheading 8311.20.00 of the Harmonized Tariff System of the United States ("HTSUS"), dutiable at zero percent; (2) winding wire pursuant to

¹ Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2012 edition, which is the same in all relevant respects to the 2006 edition in effect when most of the subject entries were made.

² Plaintiff initially named Mr. He as a defendant in this case. *See generally* Summons, ECF No. 1; Compl., ECF No. 2. Plaintiff dismissed Mr. He as a defendant in the action after it was unable to serve process upon him in the United States. *See, e.g.*, [Tenth] Mot. to Extend Time for Domestic Service Pursuant to USCIT Rule 4(l), ECF No. 26; Notice of Dismissal as Against Dian He ("He Dismissal"), ECF No. 29.

³ "CCTV" refers to "closed-circuit television." *See* Am. Compl. ¶ 24. The Amended Complaint does not define "CATV."

8544.11.0050, HTSUS, dutiable at the rate of 3.5 percent *ad valorem*; or (3) insulated wire of a kind used for telecommunications pursuant to 8544.49.10, HTSUS, dutiable at zero percent. *Id.* ¶ 24. The coaxial cable in question was properly classifiable under subheading 8544.20.00, HTSUS, as coaxial cable and other coaxial electric conductors, dutiable at the rate of 5.3 percent *ad valorem*. *Id.* ¶¶ 7, 24.

Prior to importing the coaxial cable at issue in this case, “NYWL’s sole corporate executive, Dian He was aware” of the correct classification of the merchandise “based upon his experience with [two] other corporations for which he served as sole corporate officer.” *Id.* ¶ 7; see also *id.* ¶ 24 (alleging that NYWL “knew that the merchandise consisted of Siamese coaxial cable[] that [NYWL’s customer] was purchasing . . . for use in closed-circuit television systems”).

“Between 2003 and June 28, 2006, Dian He made 203 entries of coaxial cable into various ports through [Dony Industrial Corporation (“Dony”).]” *Id.* ¶ 9. “All 203 of the Dony entries . . . were made under subheading 8311.20.00, HTSUS, as cored wire of base metal for electric arc welding, duty-free.” *Id.* ¶ 10. On June 28, 2006, U.S. Customs and Border Protection (“CBP” or “Customs”) “examined one of the Dony entries at the Port of Pittsburg[h] and discovered that the entry included Siamese [coaxial] cable and not arc welding wire.” *Id.* ¶ 11. When CBP “informed Dony’s broker that the merchandise in the entry was improperly classified,” *id.* ¶ 12, “Dony ceased importing through the Port of Pittsburg[h],” *id.* ¶ 13. Thereafter, “Dony made eight additional entries through the Port of Chicago and the Port of Everglades/Fort Lauderdale” under either subheading 8544.49.00, HTSUS, or subheading 8311.20.00, HTSUS, both of which incur zero duties. *Id.* ¶¶ 14–15. Dony made the last of these entries on August 24, 2006. *Id.* ¶ 14.

On August 29, 2006, “Dian He began entering coaxial cable through Win Long Enterprises Inc. (^[1]Win Long^[1]) utilizing the same customs broker as used with Dony.” *Id.* ¶ 16. “Dian He was [Win Long’s] sole corporate officer.” *Id.* ¶ 17. From August 29, 2006, to February 25, 2011, “Win Long made 341 entries of coaxial cable.” *Id.* ¶ 18. Win Long classified each entry “as arc welding wire, duty free.” *Id.* ¶ 19. Several of the entries contained a commercial invoice stating that “the correct classification was under subheading 8544.40.00, HTSUS, as coaxial cable.” *Id.* ¶ 20. “In 18 of the Win Long entries, the correct classification for [coaxial] cable was crossed-out and the incorrect classification for arc welding wire was handwritten in.” *Id.* ¶ 21. Following CBP’s “examination of a Win Long entry on February 25,

2011, . . . Win Long ceased importing coaxial cable.” *Id.* ¶ 22. Thereafter, on March 4, 2011, Mr. He began entering coaxial cable “through NYWL utilizing the same customs broker as used to make the Dony and Win Long entries.” *Id.* ¶ 23.

On December 5, 2011, CBP identified an NYWL entry for “a routine inquiry.” *Id.* ¶ 25. On December 8, 2011, “in response to a request from CBP, NYWL’s customs broker provided an entry with attached commercial invoice describing the merchandise as CCTV cable and not as cored wire of base metal for electric arc welding.” *Id.* This information resulted in CBP’s discovery of NYWL’s classification violations. *See id.*

On February 22 and 23 of 2016, “CBP issued pre-penalty notices to NYWL and Mr. He.” *Id.* ¶ 30. These notices “identified a total loss of revenue of \$470,008.75 and an actual loss of revenue of \$379,665.83 relating to the misclassification of the [coaxial] cable.” *Id.* The notices further “proposed a culpability level of fraud and a corresponding penalty, jointly and severally against NYWL and Mr. He in the amount of \$3,760,070.00[,] equal to eight times the loss of revenue.” *Id.* “Neither NYWL nor Mr. He responded to the pre-penalty notice[s].” *Id.* ¶ 31. “On March 4, 2016, CBP issued a duty demand in the amount of \$379,665.83 and a penalty notice in the amount of \$3,760,070.00 to NYWL and Mr. He jointly and severally” for fraudulent misclassification. *Id.* ¶ 32. Again, “[n]either NYWL nor Mr. He responded.” *Id.* ¶ 33. The duties and penalty remain unpaid. *Id.* ¶ 35.⁴

On December 7, 2016, Plaintiff timely⁵ commenced this action through the concurrent filing of the Summons and Complaint. *See* Summons; Compl. The Government first effected service upon NYWL through the New York Secretary of State on March 7, 2017. Certificate of Service, ECF No. 4. On June 23, 2020, the Government obtained an entry of default against NYWL for its failure to respond to the original Complaint. Entry of Default, ECF No. 32. On October 30, 2020, the court denied the Government’s first motion for the entry of default judgment based on the insufficiency of the factual allegations concerning NYWL’s fraudulent misclassification. *See generally*

⁴ The total loss of revenue associated with NYWL’s entries is \$470,008.75, which consists of “an actual loss of revenue of \$379,665.83 and a potential loss of revenue of \$90,342.92.” Pl.’s Second Mot. at 8. “Potential lost revenue refers to unpaid duties discovered prior to liquidation while actual lost revenue refers to unpaid duties discovered after liquidation.” *Id.* at 8 n.3. NYWL’s surety paid the bond amount of \$100,000, which covered the potential lost revenue plus \$9,657.08 in interest. *Id.* at 8.

⁵ The statute of limitations for an action based on a fraudulent violation of 19 U.S.C. § 1592 is five years from “the date of discovery of fraud.” 19 U.S.C. § 1621(1). The Government alleges that discovery of the alleged fraud occurred on December 8, 2011, Am. Compl. ¶ 25, rendering this action timely, *see* Summons.

United States v. NYWL Enters. Inc. (“NYWL I”), 44 CIT ___, 476 F. Supp. 3d 1394 (2020).

On December 29, 2020, the Government filed its Amended Complaint. That day, the Government effected service upon NYWL through the New York Secretary of State. Aff. of Service, ECF No. 40. On January 20, 2021, the Government obtained an entry of default against NYWL for its failure to respond to the Amended Complaint. Entry of Default, ECF No. 42. On February 19, 2021, the Government filed the pending motion for the entry of default judgment. *See* Pl.’s Second Mot. Appended to the motion are several declarations and supporting exhibits. *See id.*, Ex. 2 (Decl. of Int’l Trade Analyst Jeffrey Kiekenbush) (“Kiekenbush Decl.”), ECF No. 43–2; *id.*, Ex. 3 (Decl. of Import Specialist Janice Vercillo) (“Vercillo Decl.”), ECF No. 43–3; *id.*, Ex. 4 (Decl. of CBP Officer John Brothers, Retired) (“Brothers Decl.”), ECF No. 43–4.⁶

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction pursuant to 28 U.S.C. § 1582. A case arising pursuant to 28 U.S.C. § 1582 is reviewed *de novo*. 28 U.S.C. § 2640(a)(6).

USCIT Rule 55 “provides a two-step process for obtaining judgment when a party fails to plead or otherwise defend—(1) entry of default followed by (2) entry of a default judgment.” *United States v. Six Star Wholesale, Inc.*, 43 CIT ___, ___, 359 F. Supp. 3d 1314, 1318 (2019); *see also* USCIT Rule 55(a)–(b). A defendant in default pursuant to USCIT Rule 55(a) “admits all well-[pleaded] factual allegations contained in the complaint.” *Six Star*, 359 F. Supp. 3d at 1318. Default does not, however, serve as an admission of legal claims or damages. *See, e.g., United States v. Puentes*, 41 CIT ___, ___, 219 F. Supp. 3d 1352, 1358 (2017). Thus, before entering judgment by default, the court must ensure that the factual allegations in the Government’s Amended Complaint “establish [NYWL’s] liability as a matter of law,” *Six Star*, 359 F. Supp. 3d at 1319, and “that there is an adequate evidentiary basis for any relief awarded,” *Puentes*, 219 F. Supp. 3d at 1358 (citation omitted).

The Government seeks judgment by default in connection with its fraudulent importation claim. Pl.’s Second Mot. at 17–18. The court’s review of Plaintiff’s Amended Complaint therefore implicates USCIT Rule 9(b), which requires a party alleging fraud to state the circumstances constituting the fraud with particularity, while intent or

⁶ The Government filed both public and confidential exhibits to the Declarations. *See* ECF Nos. 43–5 through 43–26 (public); ECF Nos. 44 through 44–13 (confidential).

knowledge “may be alleged generally.” USCIT Rule 9(b); *see also* NYWL I, 476 F. Supp. 3d at 1398 n.3 (finding that USCIT Rule 9(b) applies to the court’s review of a complaint alleging fraud for purposes of deciding whether to enter default judgment). These circumstances include “the who, what, when, where, and how of the alleged fraud.” *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1327 (Fed. Cir. 2009) (citation omitted) (examining the analogous Federal Rule of Civil Procedure (“FRCP”) 9(b)); *see also* *United States v. Univar USA, Inc.*, 40 CIT ___, ___, 195 F. Supp. 3d 1312, 1317 (2016) (noting that the court may refer to cases interpreting the analogous FRCP for guidance).

DISCUSSION

Section 1592 bars the fraudulent entry or introduction of merchandise into the commerce of the United States by means of a materially false statement or material omission. *See* 19 U.S.C. § 1592(a)(1)(A). A statement is considered material if it has the tendency to influence agency action including determination of the classification of merchandise. 19 C.F.R. pt. 171, app. B(B). The asserted classification of merchandise in entry paperwork “constitutes a material statement under the statute.” *United States v. Optrex Am., Inc.*, 32 CIT 620, 631, 560 F. Supp. 2d 1326, 1336 (2008). A violation is fraudulent when the “material false statement . . . was committed . . . knowingly, i.e., was done voluntarily and intentionally.” 19 C.F.R. pt. 171, app. B(C)(3). Section 1592 further requires CBP to issue a pre-penalty notice and penalty notice before commencing any enforcement action. 19 U.S.C. § 1592(b); *see also* *United States v. Int’l Trading Servs., LLC*, 40 CIT ___, ___, 190 F. Supp. 3d 1263, 1269–70 (2016) (discussing the procedures required for CBP to perfect its penalty claim at the administrative level). A fraudulent violation of section 1592(a)(1)(A) “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). The court will address liability before turning to damages.

I. Liability

Plaintiff’s factual allegations and the information contained in Exhibit A to the Amended Complaint adequately specify both the falsity and the materiality of each of NYWL’s alleged misclassifications. Plaintiff alleges that, from March 4, 2011, through February 16, 2012, NYWL made 107 entries of coaxial cable through the Port of Chicago, Illinois, that were accompanied by entry documentation reflecting incorrect HTSUS tariff provisions. Am. Compl. ¶¶ 5–6, 24, Ex. A. Exhibit A, attached to the Amended Complaint and incorporated by

reference, details, for each of the 107 entries at issue, the entry number and date, the classification declared by NYWL, the correct classification, and the code associated with the port of entry. *See id.* ¶ 5, Ex. A; *cf. Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (directing courts to consider “documents incorporated into the complaint by reference” when considering whether the complaint contains sufficient factual allegations to state a claim for relief). Plaintiff further specifies the difference between the duty rate reflected in each incorrect HTSUS provision and the higher duty rate provided for by the correct HTSUS provision, which resulted in the underassessment of duties by CBP. Am. Compl. ¶ 24. Plaintiff also adequately alleges the steps CBP took to perfect its claim at the administrative level. *Id.* ¶¶ 30–34.

With respect to culpability, to obtain a penalty based on fraud, Plaintiff must “include sufficient allegations of underlying facts from which a court may reasonably infer” NYWL’s knowledge of the falsity of the declared classification. *Exergen*, 575 F.3d at 1328. Plaintiff’s Amended Complaint satisfies that requirement.

Plaintiff alleges that NYWL knew that the merchandise consisted of coaxial cable that its customer purchased for use in closed-circuit television systems and knew the correct classification of the merchandise. Am. Compl. ¶ 24. Plaintiff demonstrates NYWL’s knowledge through allegations concerning the importing history of NYWL’s sole corporate executive, Mr. He, in connection with his previous companies. *Id.* ¶¶ 7–22.⁷ Specifically, the Government alleges that Dony made 203 entries of coaxial cable under subheading 8311.20.00, HTSUS, applicable to arc welding wire. *Id.* ¶¶ 9–10. When CBP informed Dony’s broker about the misclassification of entries entering through the Port of Pittsburgh, Dony ceased make entries through that port and instead made several entries through other ports using incorrect classifications. *Id.* ¶¶ 13–15. Soon after Dony ceased importing, Win Long made 341 entries of coaxial cable incorrectly classified as arc welding wire notwithstanding that several of the entries contained invoices stating the correct classification, which, in some instances, had been crossed out and replaced with the incorrect classification. *Id.* ¶¶ 18–21. Following an examination of a Win Long entry by CBP, NYWL began entering the subject coaxial cable with assistance from the same customs broker Dony and Win Long used. *Id.* ¶¶ 22–24. The Government’s allegations are sufficient for the court to infer that NYWL knew the correct classification for its entries of coaxial cable

⁷ Plaintiff also alleges that the spools of coaxial cable and boxes in which they were packed indicated the nature of the merchandise, Am. Compl. ¶ 6, and that the merchandise was to be used in closed-circuit television systems, *id.* ¶¶ 6, 24. These allegations further support an inference of knowing misclassification by NYWL.

prior to its first entry yet knowingly misclassified its entries under the same incorrect tariff provisions that Dony and Win Long had used.

Accordingly, the Government has alleged sufficient facts establishing that NYWL is liable for fraudulent violations of 19 U.S.C. § 1592(a) in connection with the 107 subject entries.

II. Damages

The Government seeks \$379,665.83 in unpaid duties. Pl.'s Second Mot. at 17; *see also* Kiekenbush Decl. ¶ 23 (calculating the loss of revenue).⁸ That figure was calculated “by multiplying the declared value by the required duty rate under the correct [HTSUS] classification and subtracting any duty that had been paid.” Kiekenbush Decl. ¶ 23; *see also id.*, Ex. F, ECF No. 44–6.⁹ Pursuant to USCIT Rule 55(b), “[w]hen the plaintiff’s claim is for a sum certain . . . , the court – on the plaintiff’s request with an affidavit showing the amount due – must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing.” Because the Government’s request for unpaid duties is for a sum certain that is supported by the Kiekenbush Declaration, the court will enter judgment for the Government in the amount of \$379,665.83 in unpaid duties.

The Government requests a monetary penalty in the amount of \$3,760,070.00. *See* Pl.’s Second Mot. at 17. The penalty determination is committed to the court’s discretion, subject to the statutory maximum amount equaling the domestic value of the merchandise. 19 U.S.C. § 1592(c)(1), (e)(1); *United States v. Nat’l Semiconductor Corp.*, 547 F.3d 1364, 1367–68 (Fed. Cir. 2008) (citation omitted). In this case, the requested penalty equals eight times the total loss of revenue, \$470,008.75, and is less than the domestic value of the merchandise, \$9,418,016.12. Vercillo Decl. ¶ 5; *see also* Kiekenbush Decl., Ex. F. The requested penalty is therefore consistent with 19 U.S.C. § 1592(c)(1), but the inquiry does not end there.

In determining an appropriate penalty, the court “determines the appropriate amount in light of the totality of the evidence supporting a higher or lower penalty.” *Six Star*, 359 F. Supp. 3d at 1320 (quoting *United States v. Sterling Footwear, Inc.*, 41 CIT ___, ___, 279 F. Supp. 3d 1113, 1144 (2017)). In so doing, “[t]he court ordinarily considers

⁸ NYWL’s surety paid the Government \$100,000, the limit of NYWL’s bond. Pl.’s Second Mot. at 8. That amount covered potential lost revenue in the amount of \$90,342.92 plus interest. *Id.*; *see also* Vercillo Decl. ¶ 2.

⁹ In its motion, the Government reports the amount of lost revenue variously as \$379,665.83, Pl.’s Second Mot. at 8; \$379,665.83, *id.* at 17; and \$379,656.83, *id.* at 18. The court understands the latter variations to be typographical errors. The court has verified that the calculations contained in Exhibit F to the Kiekenbush Declaration represent the correct summation of actual lost revenue.

fourteen non-exclusive factors.” *United States v. Deladiep, Inc.*, 41 CIT ___, ___, 255 F. Supp. 3d 1326, 1341 (2017) (citing *United States v. Complex Mach. Works Co.*, 23 CIT 942, 949, 83 F. Supp. 2d 1307, 1314 (1999)).¹⁰ In the default judgment context, however, a defendant’s failure to answer the complaint or otherwise participate in the action leaves the court with an incomplete record upon which to determine the appropriate penalty.

Under these circumstances, the court typically weighs any “mitigating or aggravating considerations” evident in the limited record. *United States v. Horizon Prods. Int’l, Inc.*, 41 CIT ___, ___, 229 F. Supp. 3d 1370, 1379 (2017) (collecting cases); *see also Deladiep*, 255 F. Supp. 3d at 1341–42. *But see United States v. NYCC 1959 Inc.*, 40 CIT ___, ___, 182 F. Supp. 3d 1346, 1348–49 (2016) (verifying that the requested penalty was within the statutory limit and noting the absence of arguments or factual allegations supporting a lesser penalty). Those considerations may, to the extent permitted by the record, draw upon the *Complex Machine Works* factors. *See, e.g., United States v. Cruzin Cooler, LLC*, 44 CIT ___, ___, 459 F. Supp. 3d 1366, 1380–82 (2020) (considering the defendant’s character; seriousness of the offense; practical effect of the penalty; and public policy concerns); *cf. Int’l Trading Servs.*, 222 F. Supp. 3d at 1334–36. The court addresses the existence of any mitigating or aggravating factors with this guidance in mind.

The record before the court merits the imposition of a substantial penalty.¹¹ Plaintiff’s factual allegations, accepted as true, and supporting exhibits indicate that NYWL was established in order to

¹⁰ Those factors are:

- (1) the defendant’s good faith effort to comply with the statute; (2) the defendant’s degree of culpability; (3) the defendant’s history of previous violations; (4) the nature of the public interest in ensuring compliance with the regulations involved; (5) the nature and circumstances of the violation at issue; (6) the gravity of the violation; (7) the defendant’s ability to pay; (8) the appropriateness of the size of the penalty to the defendant’s business and the effect of a penalty on the defendant’s ability to continue doing business; (9) that the penalty not otherwise be shocking to the conscience of the [c]ourt; (10) the economic benefit gained by the defendant through the violation; (11) the degree of harm to the public; (12) the value of vindicating the agency authority; (13) whether the party sought to be protected by the statute had been adequately compensated for the harm; and (14) such other matters as justice may require.

Complex Mach. Works Co., 23 CIT at 949–50, 83 F.Supp.2d at 1315. The factors reflect consideration of “the defendant’s character, the seriousness of the offense, the practical effect of the imposition of the penalty, the benefit gained by the defendant, and public policy concerns.” *Deladiep*, 255 F. Supp. 3d at 1341 n.29 (citing *Complex Mach. Works Co.*, 23 CIT at 949–50, 83 F. Supp. 2d at 1316); *see also United States v. Int’l Trading Servs., LLC*, 41 CIT ___, ___, 222 F. Supp. 3d 1325, 1334 (2017) (summarizing the factors).

¹¹ Rule 55(b) permits the court to look beyond the complaint in order to determine an appropriate penalty. *See, e.g., United States v. Freight Forwarder Int’l, Inc.*, 39 CIT ___, ___, 44 F. Supp. 3d 1359, 1362 (2015) (further noting that USCIT Rule 55(b) permits, but does not require, the court to hold a hearing on this issue).

avoid the statutory responsibilities attendant to an importer of record and the payment of lawful duties on the subject entries. Am. Compl. ¶¶ 7–23; Kiekenbush Decl. ¶¶ 10–22; *see also* 19 U.S.C. §§ 1484, 1485. This favors a heightened penalty. *Cf. Cruzin Cooler*, 459 F. Supp. 3d at 1381 (considering the creation of a company in order to avoid statutory obligations to constitute an aggravating factor). Additionally, NYWL’s misclassifications disregarded several publicly available Customs rulings, *see* Kiekenbush Decl. ¶ 3, and information previously provided by CBP to Dony’s broker concerning the correct classification of coaxial cable, *see id.* ¶¶ 12–13; Brothers Decl. ¶ 3. NYWL also disregarded descriptions of the subject merchandise as “CCTV & CATV Cable,” “Coax,” and “Coaxial Cable” listed in the specifications and on invoices, spools, and boxes accompanying the merchandise. Kiekenbush Decl. ¶¶ 4–5; *see also id.*, Ex. A, ECF No. 44–3 (NYWL’s response to CBP’s request for information and attached specifications and sample invoice); *id.*, Ex. B, ECF No. 44–4 (copy of NYWL’s Entry U79–0081147–3); *id.*, Ex. C, ECF No. 43–10 (photos of labeling on spools and boxes entered as Entry U79–0081147–3). The record lacks any mitigating evidence suggesting “a reason for [NYWL’s] actions other than an unlawful effort to obtain a [lower] rate for its entries.” *Horizon Prods.*, 229 F. Supp. 3d at 1380.

Further, NYWL’s violations—encompassing 107 entries over almost one year—represent “a pattern of disregard for the customs laws of the United States,” rather than “isolated occurrences.” *Id.* at 1380 (citing *United States v. New-Form Mfg. Co.*, 27 CIT 905, 921–22, 277 F. Supp. 2d 1313, 1328–29 (2003)). The misclassifications accrued to NYWL a substantial economic benefit totaling \$470,008.75 in unpaid duties on several millions of dollars’ worth of goods. Kiekenbush Decl. ¶ 23, Ex. F. The seriousness of NYWL’s offenses indicate the need for a heightened penalty. *See Complex Mach. Works Co.*, 23 CIT at 953, 83 F. Supp. 2d at 1317 (noting that the “[g]ravity of the violation may be evaluated in terms of the frequency of the violations, the amount of the duties at issue, and the domestic value of the imported goods”).

Given NYWL’s failure to defend, the court is unable to assess the practical effect of any penalty on NYWL. *Cf.* 19 C.F.R. pt. 171, app. B(G)(6) (a party asserting an inability to pay must present documentary evidence supporting the assertion). However, given the nature and seriousness of the violation, the requested penalty does not shock the court’s conscience. *See Complex Mach. Works Co.*, 23 CIT at 954, 83 F. Supp. 2d at 1318; *cf. Cruzin Cooler*, 459 F. Supp. 3d at 1381 (a penalty amount within “the statutory penalty range is not shocking to the conscience of the court given the blatant and intentional disregard for and violation of U.S. law”).

Lastly, public policy concerns favor a heightened penalty. The public interest is served by “the truthful and accurate submission of documentation to Customs and the full and timely payment of the duties required on imported merchandise.” *Horizon Prods. Int’l*, 229 F. Supp. 3d at 1381 (quoting *Complex Mach. Works Co.*, 23 CIT at 952, 83 F. Supp. 2d at 1317). “[T]he amount of harm suffered by the Government is not limited to the dollar value of duties lost.” *Complex Mach. Works Co.*, 23 CIT at 955, 83 F. Supp. 2d at 1319 (citing *United States v. Snuggles, Inc.*, 20 CIT 1057, 1068, 937 F. Supp. 923, 927 (1996)). In addition to the duties that remain unpaid, the Government has expended resources investigating the misclassified entries and pursuing an enforcement action against NYWL. See generally Kiekenbush Decl. (discussing CBP’s investigative efforts); Vercillo Decl. (discussing administrative enforcement actions). Absent mitigating circumstances, such as a voluntary disclosure of the violations, this factor also favors a heightened penalty. Cf. *United States v. Nat’l Semiconductor Corp.*, 30 CIT 769, 772 (2006) (finding that a voluntary disclosure would support penalty mitigation in order to encourage such behavior).

In view of the foregoing, the Government is entitled to a substantial penalty within the statutory range. The Government’s requested penalty in the amount of \$3,760,070.00 is significantly less than the \$9,418,016.72 amount allowed by section 1592(c)(1). The requested penalty is therefore reasonable and merited in this case. Thus, the court will enter judgment for the Government for a civil penalty in the amount of \$3,760,070.00.

The Government also seeks post-judgment interest and costs. Pl.’s Second Mot. at 18; Am. Compl. at p. 8 (Wherefore clause). The court will award post-judgment interest on the unpaid duties and penalty pursuant to 28 U.S.C. § 1961; see also *United States v. Great Am. Ins. Co. of NY*, 738 F.3d 1320, 1325 (Fed. Cir. 2013) (explaining that 28 U.S.C. § 1961 applies to the USCIT through the operation of 28 U.S.C. § 1585). The court will also award costs pursuant to USCIT Rule 55(b). See USCIT Rule 55(b) (requiring the court’s entry of judgment to include costs against a defendant in default).

CONCLUSION

For the foregoing reasons, the Government’s motion for the entry of default judgment will be granted. The court will enter judgment for the Government as against NYWL to include \$379,665.83 in unpaid duties, a civil penalty in the amount of \$3,760,000.00, post-judgment interest, and costs.

Dated: April 16, 2021
New York, New York

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

Slip Op. 21–46

ACQUISITION 362, LLC DBA STRATEGIC IMPORT SUPPLY, Plaintiff, v.
UNITED STATES, Defendant.

Before: Stephen Alexander Vaden, Judge
Court No. 1:20-cv-03762

[Granting Defendant's motion to dismiss for lack of subject matter jurisdiction.]

Dated: April 21, 2021

Heather L. Marx, Cozen O'Connor, of Minneapolis, MN, for Plaintiff Acquisition 362, LLC DBA Strategic Import Supply. With her on the brief were *Thomas G. Wallrich* and *Cassandra M. Jacobsen*.

Hardeep K. Josan, Trial Attorney, International Trade Field Office, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of New York, NY for Defendant United States. With him on the brief were *Jeffrey Bossert Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, Commercial Litigation Branch and Offices of Foreign Litigation and International Legal Assistance, *Aimee Lee*, Assistant Director, Commercial Litigation Branch and Offices of Foreign Litigation and International Legal Assistance, and *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office. Of Counsel was *Paula S. Smith*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Vaden, Judge:

Plaintiff Acquisition 362, LLC, doing business as Strategic Import Supply, filed this case under Section 515 of the Tariff Act of 1930, as amended, contesting the denial of its protests over countervailing duties. Specifically, Plaintiff challenges a decision by U.S. Customs and Border Protection (Customs) to assess countervailing duties on the importation from the People's Republic of China (China) of certain passenger vehicle and light truck tires over the course of multiple entries throughout 2016. Compl., ECF No. 5. Before the Court is the Government's motion to dismiss for lack of subject matter jurisdiction. Def.'s Mot. to Dismiss (Def.'s Mot.), ECF No. 25. For the reasons set forth below, this Court finds that it lacks subject matter jurisdiction and grants the Government's motion.

BACKGROUND

On August 10, 2015, the U.S. Department of Commerce (Commerce) issued a countervailing duty order regarding tires from China. *See Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China*, 80 Fed. Reg. 47902 (Aug. 10, 2015). Commerce's order included tire imports from Zhongyi Rubber Company Ltd. (Zhongyi). *See* Compl. ¶ 4, ECF No. 5; 80 Fed. Reg. at 47905. Plaintiff, an importer of tires, imported tires from Zhongyi on several occasions in 2016. Compl. ¶ 7, ECF No. 5; Pl.'s Mem. of Law in Opp'n to Def.'s Mot. to Dismiss (Pl.'s Mem.) at 2, ECF No. 27. Because Plaintiff's tire imports were subject to the duties established in Commerce's 2015 order, it "deposited payment of the assessed countervailing duties at a rate of 30.61%, the rate assigned...at the time entries were made." Pl.'s Mem. at 2, ECF No. 27.

Zhongyi and other interested parties requested that Commerce initiate an administrative review of its 2015 order. *Id.* at 7; Protests and Entries from the Port of Wilmington, NC., ECF No. 11–1 at 8 (Protest NC). Commerce agreed and published a notice in the Federal Register on October 16, 2017. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 82 Fed. Reg. 48051 (Oct. 16, 2017). Zhongyi would later withdraw its individual request for administrative review and therefore "Commerce rescinded this review of the [countervailing duty] Order on...tires from China with regard to Zhongyi."¹ Protest NC, ECF No. 11–1 at 8.

If an interested party, domestic or otherwise, does not request an administrative review of the applicability of a countervailing duty order to it, the regulations require the Secretary of Commerce to instruct Customs to assess countervailing duties on merchandise described by the order. 19 C.F.R. § 351.212(c). As such, Customs liquidated Plaintiff's entries between October 19, 2018 and November 9, 2018, at the 30.61% countervailing duty rate. Compl. ¶ 11, ECF No. 5; Summons ECF No. 1–1. Plaintiff did not file a protest of the liquidation within 180 days of its completion. *Cf.* 19 U.S.C. § 1514(c)(3).

On June 17, 2019, Commerce issued its Amended Final Results following its administrative review of the Countervailing Duty Order. *See Countervailing Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Amended Final Results of Countervailing Duty Administrative Review*; 2016, 84 Fed.

¹ Plaintiff submits Zhongyi withdrew its request for review because it was a non-selected company under review under an alternative company name, Dongying Zhongyi Rubber Co., Ltd. Plaintiff further submits "Zhongyi and Dongying Zhongyi are one in the same company." Protest NC, ECF No. 11–1 at 8.

Reg. 28011 (June 17, 2019) (Amended Final Results); Pl.'s Mem. at 2, ECF No. 27. The Amended Final Results concluded that the applicable countervailing duty amount should be nearly cut in half — from 30.61% to 15.56%. *Id.* at 28012. The International Trade Administration (ITA) issued Message No. 9184301 to Customs on July 3, 2019, instructing Customs to liquidate the relevant entries at the newly calculated rate.² Pl.'s Mem. at 3, ECF No. 27; *Liquidation instructions for passenger vehicle and light truck tires from the People's Republic of China for the period of 01/01/2016 through 12/31/2016*, ITA Message No. 9184301 (July 3, 2019) available at <https://aceservices.cbp.dhs.gov/adcvdweb/#9184301> (last visited Apr. 16, 2021).

Plaintiff filed protests on December 12 and December 13, 2019, for each already liquidated entry for its 2016 tire imports. Pl.'s Mem. at 4. Customs denied Plaintiff's protests as untimely and emailed the rejection notices to Plaintiff on April 24, 2020. Protests, ECF Nos. 11 to 21, 24. Plaintiff argues the protests were timely as they were filed within 180 days of Customs' decision not to apply an amended countervailing duty rate after receipt of instructions from the ITA to assess amended duty rates. Plaintiff subsequently commenced this action on October 15, 2020, to challenge the denial of the protests. Summons, ECF No. 1.

The Government moves to dismiss Plaintiff's Complaint. It argues that 19 U.S.C. § 1514(a) enumerates the Customs decisions that are protestable, a prerequisite to asserting jurisdiction under 28 U.S.C. § 1581(a). Unless a party files a protest of those enumerated actions within the required time limits, Customs' decision becomes final and conclusive. *See* 19 U.S.C. § 1514. The Government claims that Plaintiff's challenge to Customs' "decision" not to apply the amended countervailing duty rates to Plaintiff's already liquidated entries is not a valid claim under section 1514 because Customs made no decision that may now be challenged. *See* Def.'s Reply in Supp. of Mot. to Dismiss (Def.'s Reply) at 9, ECF No. 28. To the Government, it is simple: Because Plaintiff's protests arrived more than 180 days after the liquidations, Plaintiff is precluded from challenging the denial of its untimely protests now that Commerce has agreed the duty rate

² Commerce normally determines the rates for non-selected companies in reviews in a manner that is consistent with section 705(c)(5) of the Tariff Act of 1930, which provides instructions for calculating the all-others rate in an investigation. For non-selected companies subject to review by Commerce's administrative review, the ITA calculates the appropriate countervailing duty rate. This non-selected rate is the catch-all rate that would apply to companies not selected for individual examination by Commerce in an administrative review. 19 U.S.C. § 1671d(c)(1)(B)(i)(I). Plaintiff has not challenged Commerce's rate determination.

should be less. *See* Def.’s Mot. at 12, ECF No. 25. Accordingly, the Government argues that this Court lacks subject-matter jurisdiction to hear Plaintiff’s case.

STANDARD OF REVIEW

“[A] court’s subject-matter jurisdiction defines its power to hear cases.” *Lightfoot v. Cendant Mortgage Corp.*, 137 S. Ct. 553, 560 (2017). To adjudicate a case, a court must have subject-matter jurisdiction over the claim presented. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998). Even where the parties themselves fail to raise the issue, “federal courts have a duty to consider their subject matter jurisdiction in regard to every case and may raise the issue *sua sponte*.” *Answers in Genesis of Kentucky, Inc. v. Creation Ministries Int’l., Ltd.*, 556 F.3d 459, 465 (6th Cir. 2009); *see also Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804) (“[I]t [is] the duty of the Court to see that they had jurisdiction, for the consent of the parties could not give it.”). “[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the [claim] in its entirety.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

This Court’s jurisdiction under 28 U.S.C. § 1581(a) provides for “exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.” Section 1581(a) grants this Court jurisdiction over Customs’ denial of protests and “provides no jurisdiction for protests outside the [] exclusive categories’ listed in 19 U.S.C. § 1514(a).” *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1191 (Fed. Cir. 2018) (quoting *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 976 (Fed. Cir. 1994)) (brackets in original). A plaintiff bears the burden of establishing subject-matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). In resolving disputed predicate jurisdictional facts, this Court may review evidence extrinsic to the pleadings. *Shoshone Indian Tribe of Wind River Reservation, Wyo. v. United States*, 672 F.3d 1021, 1030 (Fed. Cir. 2012).

This Court’s jurisdiction is limited furthermore to cases in which the United States has waived sovereign immunity and consented to suit. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Consent cannot be implied “but must be unequivocally expressed.” *Id.* Without jurisdictional statutes enacted by Congress authorizing suit against the United States, there would be no jurisdiction to entertain claims against the United States. *Id.* Plaintiff must demonstrate that its claims come within the confines of the statutory conditions set by

Congress. *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983) (holding that waivers of immunity authorized by statute must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires).

DISCUSSION

Plaintiff claims jurisdiction under 28 U.S.C. § 1581(a), asserting it “is protesting the decision by U.S. Customs and Border Protection...to ignore the mandate of the Amended Final Results issued by the U.S. Department of Commerce...and instructions from the International Trade Administration.” Pl.’s Mem. at 1, ECF No. 27; Compl. ¶ 2, ECF No. 5. Although Plaintiff acknowledges it filed the protests with Customs later than 180 days after liquidation, it argues the 180-day clock should not have begun at the time of liquidation. *See* Pl.’s Mem. at 7, ECF No. 27. Instead, Plaintiff argues its protests were timely because they were filed within 180 days of Customs’ receipt of instructions from Commerce. *Id.* at 7. The Government responds that, because Plaintiff’s protests were filed more than 180 days after liquidation, the protests are untimely and fail to meet the requirements necessary to establish jurisdiction before this Court. *See* Def.’s Mot. at 6, ECF No. 25; Def.’s Reply at 4, ECF No. 28. As both sides acknowledge the jurisdiction-robbing 180 day deadline to file a valid protest, the dispute here is over when that 180-day time period begins.

I

Although 28 U.S.C. § 1581(a) provides for exclusive jurisdiction to contest the denial of a protest under 19 U.S.C. § 1515, there are procedural prerequisites to obtaining that jurisdiction. Section 1514 provides those prerequisites necessary to establish a valid challenge of a protest denial. 19 U.S.C. § 1514. It provides that all Customs decisions, including liquidation, become final unless a party files a protest. 19 U.S.C. § 1514(a). The section then identifies the decisions that are subject to protest:

[D]ecisions of the Customs Service, including the legality of all orders and findings entering into the same, as to

- (1) the appraised value of merchandise;
- (2) *the classification and rate and amount of duties chargeable*;
- (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
- (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;

(5) *the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;*

(6) the refusal to pay a claim for drawback; or

(7) the refusal to reliquidate an entry under section 1520(c) of this title;

shall be final and conclusive upon all persons...unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade....

19 U.S.C § 1514(a) (emphasis added to identify the Customs decisions relevant to the present matter). The same section establishes time limits for protesting a Customs decision. 19 U.S.C. § 1514(c). A valid protest must be filed within 180 days of the Customs decision. *Id.* Taken together, these two sections mean “a protest must have been timely filed under 19 U.S.C. § 1514(c)(3) for this Court to obtain jurisdiction over a suit that contests its denial.” *US JVC Corp. v. United States*, 15 F. Supp. 2d 906, 909 (CIT 1998); *accord Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973 (Fed. Cir. 1994).

Plaintiff urges the Court to consider the protests timely “because they were filed within 180 days following the issuance of the decision to implement the Amended Final Results” supplied by Commerce to Customs. Pl.’s Mem. at 7, ECF No. 27. Herein lies the problem with Plaintiff’s argument that Customs’ receipt of amended countervailing duty rates from Commerce is a Customs decision that triggers the 180-day time period. This Court has held, and the Federal Circuit has affirmed, that determinations of countervailing duty and antidumping duty rates are not Customs decisions but rather Commerce decisions. *See, e.g., Mitsubishi Elecs, Am.*, 44 F.3d at 977 (holding that decisions about the rate of an antidumping duty are made by Commerce and Customs’ role is to apply Commerce’s instructions). Customs holds but a ministerial role in implementation once these rate decisions are shared with it. *Id.* Therefore, the Plaintiff cannot carry its burden because it cannot (and has not) identified a Customs decision that it timely protested. *See Sunprime*, 892 F.3d at 1192–94; *Mitsubishi Elecs. Am.*, 44 F.3d at 975, 977–78. If the Plaintiff sought to challenge Commerce’s imposition of countervailing duties or its determination of a countervailing duty rate, an action should have been brought before this Court under its 28 U.S.C. § 1581(c) jurisdic-

tion and not its § 1581(a) jurisdiction, as Plaintiff has done here.³ See 19 U.S.C. § 1516a.

II

The application of the allegedly improper countervailing duty rates to Plaintiff's entries occurred from October 19 through November 9, 2018, when Customs liquidated Plaintiff's entries. Summons at 4, ECF No. 1; Def.'s Mot. at 2, ECF No. 25. A timely protest of Customs' liquidation had to be filed within 180 days of that liquidation. 19 U.S.C. § 1514. Plaintiff acknowledges filing outside the 180-day post-liquidation time period. See Pl.'s Mem. at 9, ECF No. 27. Therefore, even if the Court were to assume that the protests Plaintiff filed were valid, this Court lacks jurisdiction over the denial of Plaintiff's protests because of their untimeliness.

CONCLUSION

Plaintiff's challenge before this Court fails for two separate reasons. First, by using a protest against Customs to dispute a determination made by Commerce, Plaintiff has invoked the wrong jurisdictional statute. Compare 28 U.S.C. § 1581(a) (providing jurisdiction over denials of Customs protests) with 28 U.S.C. § 1581(c) (providing jurisdiction for challenges to determinations of countervailing duty rates by Commerce). Second, Plaintiff's admission that it filed its protests more than 180 days after Customs liquidated its entries also proves fatal. Were Plaintiff's protests permissible, they would be untimely and thus deprive the Court of jurisdiction. Either reason is sufficient to require dismissal; and for both the foregoing reasons, Defendant's motion to dismiss is **GRANTED**.

Dated: April 21, 2021

New York, New York

/s/ Stephen Alexander Vaden

STEPHEN ALEXANDER VADEN, JUDGE

³ Because Zhongyi withdrew its request to Commerce to review the countervailing duty order, Customs assessed the countervailing duties on these non-reviewed entries in accordance with the final determination in effect at the time of entry. See *Capella Sales & Servs. Ltd. v. United States, Aluminum Extrusions Fair Trade Comm.*, 878 F.3d 1329, 1335 (Fed. Cir. 2018) ("We do not question the authority of [Commerce], pursuant to its regulation, to liquidate entries...at the rate set in the original antidumping duty order when there has been no challenge to the validity of that order and no request for annual review.") (quoting *Asociacion Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1577 (Fed. Cir. 1990)) (omission and alteration in original).

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