U.S. Customs and Border Protection

Slip Op. 14–9

MEDLINE INDUSTRIES, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Nicholas Tsoucalas, Senior Judge
Court No.: 13–00070

[Plaintiff's motion for judgment on the agency record is denied.]

Dated: January 29, 2014

Michael G. Hodes and *Lawrence R. Pilon*, Hodes Keating & Pilon, of Chicago, IL, for plaintiff.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Scott D. McBride*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Tsoucalas, Senior Judge:

Plaintiff Medline Industries, Inc. ("Medline") moves for judgment on the agency record contesting defendant Department of Commerce's ("Commerce") *Scope Ruling on Medline's Hospital Bed End Panel Components* (Dec. 21, 2012) ("*Scope Ruling*"). Medline insists that Commerce erroneously determined that its wooden hospital bed end panel components were within the scope of the antidumping duty order on wooden bedroom furniture from the People's Republic of China ("PRC"). Mem. Supp. Pl.'s Mot. J. Agency R. at 7 ("Pl.'s Br."). Commerce opposes Medline's motion. For the following reasons, Medline's motion is denied.

BACKGROUND

In January 2005, Commerce issued an antidumping duty order covering wooden bedroom furniture from the PRC. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 70 Fed. Reg. 329 (Jan. 4, 2005) (the "*Or-*

der"). Commerce has since modified the scope of the *Order*, defining it during Medline's scope inquiry as follows:

> The product covered by the order is wooden bedroom furniture. Wooden bedroom furniture is generally, but not exclusively, designed, manufactured, and offered for sale in coordinated groups, or bedrooms, in which all of the individual pieces are of approximately the same style and approximately the same material and/or finish. The subject merchandise is made substantially of wood products, including both solid wood and also engineered wood products made from wood particles, fibers, or other wooden materials such as plywood, strand board, particle board, and fiberboard, with or without wood veneers, wood overlays, or laminates, with or without non-wood components or trim such as metal, marble, leather, glass, plastic, or other resins, and whether or not assembled, completed, or finished.
>
> The subject merchandise includes the following items: (1) Wooden beds such as loft beds, bunk beds, and other beds; (2) wooden headboards for beds (whether stand-alone or attached to side rails), wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds; (3) night tables, night stands, dressers, commodes, bureaus, mule chests, gentlemen's chests, bachelor's chests, lingerie chests, wardrobes, vanities, chessers, chifforobes, and wardrobe-type cabinets; (4) dressers with framed glass mirrors that are attached to, incorporated in, sit on, or hang over the dresser; (5) chests-on-chests, highboys, lowboys, chests of drawers, chests, door chests, chiffoniers, hutches, and armoires; (6) desks, computer stands, filing cabinets, book cases, or writing tables that are attached to or incorporated in the subject merchandise; and (7) other bedroom furniture consistent with the above list.
>
> The scope of the order excludes the following items: (1) seats, chairs, benches, couches, sofas, sofa beds, stools, and other seating furniture; (2) mattresses, mattress supports (including box springs), infant cribs, water beds, and futon frames; (3) office furniture, such as desks, stand-up desks, computer cabinets, filing cabinets, credenzas, and bookcases; (4) dining room or kitchen furniture such as dining tables, chairs, servers, sideboards, buffets, corner cabinets, china cabinets, and china hutches; (5) other non-bedroom furniture, such as television cabinets, cocktail tables, end tables, occasional tables, wall systems, book cases, and entertainment systems; (6) bedroom furniture made primarily of wicker, cane, osier, bamboo or rattan;

> (7) side rails for beds made of metal if sold separately from the headboard and footboard; (8) bedroom furniture in which bentwood parts predominate; (9) jewelry armories; (10) cheval mirrors; (11) certain metal parts; (12) mirrors that do not attach to, incorporate in, sit on, or hang over a dresser if they are not designed and marketed to be sold in conjunction with a dresser as part of a dresser-mirror set; (13) upholstered beds and (14) toy boxes.

Scope Ruling at 2–3 (internal footnotes omitted).

Medline imports hospital bed end panel components from the PRC. *See* Scope Ruling Request at 1 (Nov. 12, 2012). In November 2012, it filed a scope ruling request concerning wooden headboards and footboards made for its "Alterra™ Model FCE1232 steel-framed hospital beds." *Id.* at 1–2. In its request, Medline argued that the end panels were outside the scope of the *Order* because hospital beds are classified differently than bedroom furniture and were not discussed in the petition or the investigation underlying the *Order*. *Id.* at 5–7.

In the *Scope Ruling*, Commerce determined that Medline's wooden end panel components were within the scope of the *Order* because "the language of the scope explicitly includes wooden headboards and footboards." *Scope Ruling* at 8. Although it found the language of the *Order* to be dispositive, Commerce noted that its decision was consistent with previous scope rulings in which it determined that wooden end panels for metal-framed beds were within the scope of the *Order*. *Id.* at 6–8 (discussing *Final Scope Ruling: Sunrise Medical Inc.* (Sept. 29, 2005) ("*Sunrise Ruling*") and *Scope Ruling on University Loft Company's Request* (Dec. 13, 2011)). Commerce also rejected Medline's argument that its end panel components were not bedroom furniture, noting that it previously found that wooden end panels for beds made for use in long term care facilities were within the scope of the *Order* because "the scope covers all wooden bedroom furniture meeting the written description of the merchandise, and this written description is dispositive, regardless of tariff classifications." *Id.* at 7 (citing *Sunrise Ruling* at 11).

Medline contests the *Scope Ruling*, arguing that Commerce impermissibly expanded the scope of the *Order* to include non-bedroom furniture and failed to perform an adequate analysis in accordance with the regulations governing scope inquiries. *See* Pl.'s Br. at 8–23.

JURISDICTION and STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and section 516A(a)(2)(B)(vi) of the Tariff Act of 1930,[1] as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) (2006).

The Court must uphold Commerce's scope determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). When reviewing a scope ruling, the Court grants "significant deference to Commerce's interpretation of its own orders." *Allegheny Bradford Corp. v. United States*, 28 CIT 830, 842, 342 F. Supp. 2d 1172, 1183 (2004). "However, Commerce cannot 'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1095 (Fed. Cir. 2002) (citing *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001)).

DISCUSSION

"In a scope ruling proceeding 'a predicate for the interpretive process is language in the order that is subject to interpretation.'" *Arcelormittal Stainless Belg. N.V. v. United States*, 694 F.3d 82, 84 (Fed. Cir. 2012) (quoting *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1383 (Fed. Cir. 2005)). "If Commerce determines that the language at issue is not ambiguous, it states what it understands to be the plain meaning of the language, and the proceedings terminate." *Id.*; *see Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1302 (Fed. Cir. 2013).

However, "[i]f the language is ambiguous, Commerce must next consider the regulatory history, as contained in the so-called '(k)(1) materials.'" *Id.* The "(k)(1) materials" include the "descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [International Trade Commission]." 19 C.F.R. § 351.225(k)(1) (2013). While "[r]eview of the petition and the investigation may provide valuable guidance as to the interpretation of the final order[,]" these materials "cannot substitute for language in the order itself." *Duferco Steel*, 296 F.3d at 1097.

"If the (k)(1) materials are not dispositive, Commerce then considers the (k)(2) criteria." *Mid Continent Nail*, 725 F.3d at 1302. The (k)(2) criteria include: the "physical characteristics of the product,"

[1] All further references to the Tariff Act of 1930 will be to the relevant provisions of Title 19 of the United States Code, 2006 edition, and all applicable supplements thereto.

the "expectations of the ultimate purchasers," the "ultimate use of the product," the "channels of trade in which the product is sold," and the "manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2).

As noted above, Commerce found that the language of the *Order* was unambiguous — "the language of the scope explicitly includes wooden headboards and footboards." *Scope Ruling* at 8. As Medline's end panel components are wooden headboards and footboards, Commerce concluded that they were within the scope of the *Order*. *Id.*

Medline acknowledges that its end panel components are wooden furniture as described in the scope language, but disputes Commerce's interpretation of the scope language with regard to the term "bedroom." *See* Pl.'s Br. at 8. According to Medline, the scope language is unambiguous: the *Order* covers "wooden bedroom furniture," and therefore the merchandise must be used in a bedroom. *Id.* at 10–11. Insisting that its hospital bed end panel components are not made for use in a bedroom, Medline argues that Commerce unreasonably expanded the scope of the *Order*. *Id.* at 11. Medline contends that Commerce ignored the term "bedroom" in its analysis, and therefore failed to consider the use of the end panel components. *Id.* at 11–12. Furthermore, Medline argues that even if the term "bedroom" was ambiguous, Commerce's analysis of the (k)(1) materials focused too narrowly on prior scope determinations and ignored evidence contrary to its conclusion. *Id.* at 13–23.

Medline's alternative interpretation of the scope language is unpersuasive. Although Medline repeatedly refers to instances in which the *Order* mentions "bedroom" furniture, Medline does not identify any language in the *Order* limiting or defining the term "bedroom" in such a way as to unambiguously exclude the merchandise under review. *See* Pl.'s Br. at 10–13. In fact, the order does not further define the term "bedroom." *See Scope Ruling* at 2–4. Rather, it explicitly identifies the types of wooden furniture that are subject to the order, and those types that are excluded. *Id.* at 2–3. Accordingly, Medline cannot show that its end panel components are *per se* outside the scope of the *Order* simply in virtue of their use in hospital rooms.

Furthermore, contrary to Medline's insistence, the *Scope Ruling* is consistent with the plain terms of the *Order*. The scope language begins: "The product covered by the [*Order*] is wooden bedroom furniture." *Scope Ruling* at 2. As mentioned, the scope language does not further define "bedroom," but it does include a list of "subject merchandise" covered by the *Order* as well as a list of products excluded

from the scope. *Id.* at 2–3. It specifically states that "[t]he subject merchandise includes . . . (2) wooden headboards for beds[,] . . . wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds." *Id.* at 2. The list of subject and non-subject merchandise indicates that Medline's wooden end panels — headboards and footboards — are of a type of merchandise the *Order* covers. Moreover, the language contradicts Medline's argument that Commerce was required to consider the use of the merchandise in its scope inquiry. Because the *Order* specifically identifies wooden headboards and footboards as subject merchandise, Commerce's interpretation of the scope language was reasonable. *See Arcelormittal*, 694 F.3d at 84.

Given that Commerce reasonably concluded that the scope language was unambiguous, the court need not address Medline's claim that Commerce's (k)(1) analysis was unreasonable. *See id.; Mid Continent Nail*, 725 F.3d at 1302.

CONCLUSION

For the foregoing reasons, the *Scope Ruling* is supported by substantial evidence and otherwise in accordance with law. Judgment will be entered accordingly.

Dated: January 29, 2014
New York, New York

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS SENIOR JUDGE

Slip Op. 14–10

SHENYANG YUANDA ALUMINUM INDUSTRY ENGINEERING CO., LTD. et al., Plaintiffs, v. UNITED STATES, Defendant, and WALTERS & WOLF, BAGATELOS ARCHITECTURAL GLASS SYSTEMS, INC., and ARCHITECTURAL GLASS & ALUMINUM CO., Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 12–00420

[United States Department of Commerce's Final Scope Ruling is sustained.]

Dated: January 30, 2014

John D. Greenwald and *Thomas M. Beline*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., argued for plaintiffs. With them on the brief were *James R. Cannon, Jr.*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., and *Kristen S. Smith* and *Mark R. Ludwikowski*, Sandler, Travis & Rosenberg, P.A., of Washington, D.C.

Tara K. Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., argued for defendant. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Joanna V. Theiss*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Washington, D.C.

David M. Spooner, Squire Sanders (US) LLP, of Washington, D.C, argued for defendant-intervenors. With him on the brief was *Christine J. Sohar Henter*.

OPINION

Eaton, Judge:

This matter is before the court on plaintiffs Shenyang Yuanda Aluminum Industry Engineering Co., Ltd.'s and Yuanda USA Corp.'s (collectively, "Yuanda"), Jangho Curtain Wall Americas Co., Ltd.'s, Overgaard Ltd.'s, and Bucher Glass, Inc.'s (collectively, "plaintiffs") motion for judgment on the agency record pursuant to USCIT Rule 56.2. *See* Pls.' Rule 56.2 Mot. for J. on the Agency R. (ECF Dkt. No. 23) ("Pls.' Mot."). By their motion, plaintiffs challenge the Department of Commerce's ("Commerce" or the "Department") scope ruling made following the final determinations in Aluminum Extrusions from the People's Republic of China ("PRC"), 76 Fed. Reg. 30,650 (Dep't of Commerce May 26, 2011) (antidumping duty order) ("Antidumping Duty Order"), and Aluminum Extrusions From the PRC, 76 Fed. Reg. 30,653 (Dep't of Commerce May 26, 2011) (countervailing duty order) ("Countervailing Duty Order") (collectively, the "Orders").[1] *See* Final Scope Ruling on Curtain Wall Units and Other Parts of a Curtain Wall System from the PRC, PD 37 at bar code 3108210–01 (Nov. 30, 2012), ECF Dkt. No. 56–37 (Sept. 18, 2013) ("Final Scope Ruling"). Plaintiffs seek a remand of the Final Scope Ruling for Commerce to reconsider its findings. *See* Pls.' Mot. 2.

Defendant United States opposes plaintiffs' motion and asks that Commerce's Final Scope Ruling be sustained. *See* Def.'s Opp'n to Pls.' Mot. for J. upon the Agency R. 1–2 (ECF Dkt. No. 41) ("Def.'s Br."). Defendant-intervenors, Walters & Wolf, Bagatelos Architectural Glass Systems, Inc., and Architectural Glass & Aluminum Co., collectively referred to as the Curtain Wall Coalition (collectively, the "CWC" or the "CWC companies"), join in opposition to plaintiffs' motion. *See* Def.-Ints.' Resp. Br. in Opp'n to Pls.' Mot. for J. on the Agency R. 1 (ECF Dkt. No. 38) ("Def.-Ints.' Br."). The court has

[1] The operative language in the Orders is identical, and therefore all citations to the Orders will be to the Antidumping Duty Order. *See* Antidumping Duty Order, 76 Fed. Reg. 30,650.

jurisdiction pursuant to 28 U.S.C. §§ 1581(c), (i) (2006) and 19 U.S.C. §§ 1516a(a)(2)(A)(ii), (B)(vi) (2006).

Because curtain wall units are "parts for" a finished curtain wall, the court's primary holding is that curtain wall units and other parts of curtain wall systems fall within the scope of the Orders. *See* Antidumping Duty Order, 76 Fed. Reg. at 30,650. For this reason, and the others set out below, Commerce's Final Scope Ruling is sustained.

BACKGROUND

On March 31, 2010, the United States International Trade Commission ("ITC") initiated an investigation into whether a domestic industry was materially injured or threatened with material injury by reason of imports of certain aluminum extrusions from the PRC. *See* Certain Aluminum Extrusions From China, USITC Pub. 4153, Inv. Nos. 701-TA-475, 731-TA-1177, at 1 (June 2010) (Preliminary) ("ITC's Preliminary Determinations"). On May 26, 2011, as a result of the ITC's investigations, and following its own investigations and resulting determinations of sales at less than fair value and subsidized imports, the Department issued antidumping and countervailing duty orders on aluminum extrusions from the PRC. *See* Antidumping Duty Order, 76 Fed. Reg. 30,650; Countervailing Duty Order, 76 Fed. Reg. 30,653.

On October 11, 2012, defendant-intervenors, the CWC, submitted an amended scope request to Commerce, pursuant to 19 C.F.R. § 351.225(c) (2012). *See* Am. Scope Req. of the CWC, PD 24 at bar code 3100845–01 (Oct. 11, 2012), ECF Dkt. No. 56–24 (Sept. 18, 2013) ("Am. Scope Req."). The scope request was limited in nature, and asked Commerce to "issue a scope ruling confirming that curtain wall units and other parts of curtain wall systems are subject to the scope of the [Orders]." Am. Scope Req. at 1–2. Commerce commenced an initial scope investigation and determined that the language of the Orders and the description of the products in defendant-intervenors' petition were dispositive and that curtain wall units fell within the scope of the Orders. *See* Final Scope Ruling at 1. Accordingly, Commerce determined that it was "unnecessary to consider" the secondary criteria set forth in 19 C.F.R. § 351.225(k)(2). Final Scope Ruling at 8. Further, in its Final Scope Ruling, Commerce found that the CWC companies qualified as interested parties under section 771(9)(C) of the Tariff Act of 1930, as amended, "as manufacturers, producers, or wholesalers of a domestic like product, and thus ha[d] standing to bring the Amended Scope Request." Final Scope Ruling at 2; *see* 19 U.S.C. § 1677(9)(C) (2006) ("Tariff Act").

STANDARD OF REVIEW

"The 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." 19 U.S.C. § 1516a(b)(1)(B)(i) (2006).

DISCUSSION

I. LEGAL FRAMEWORK

Following receipt of an application from an interested party, Commerce's regulations direct it to undertake an investigation to determine whether a product falls within the scope of a final antidumping or countervailing duty order. 19 C.F.R. § 351.225(k). Initially, Commerce's investigation is limited to consideration of "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary [of Commerce] (including prior scope determinations) and the [ITC]." *Id.* § 351.225(k)(1). The use of these descriptions is circumscribed, however, for "[w]hile the petition, factual findings, legal conclusions, and preliminary orders can aid in the analysis, they cannot substitute for the language of the order itself, which remains the 'cornerstone' in any scope determination." *Walgreen Co. of Deerfield, IL v. United States*, 620 F.3d 1350, 1357 (Fed. Cir. 2010) (quoting *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002)). If Commerce's evaluation of these sources, and the scope language itself, are conclusive in determining whether the products at issue are subject to the scope of an order, Commerce is required to issue a final scope ruling. 19 C.F.R. § 351.225(d).

If these primary criteria are not dispositive and the scope of the order is ambiguous, Commerce is required to commence a formal scope inquiry in which it examines five secondary factors[2]: "(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." *Id.* § 351.225(k)(2). Where a scope determination is challenged, the court's objective is to

[2] These factors are commonly referred to as the *Diversified Products* criteria, referencing the case from which they were first derived. *Walgreen*, 620 F.3d at 1355; *Diversified Prods. Corp. v. United States*, 6 CIT 155, 162 (1983). These factors have since been reduced to regulation in 19 C.F.R. § 351.225(k)(2). *See Walgreen*, 620 F.3d at 1355 n.2 (citation omitted).

determine whether the scope of the order "contain[s] language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco Steel*, 296 F.3d at 1089.

II. PLAINTIFFS' MOTION FOR JUDGMENT ON THE AGENCY RECORD

A. The Scope of the Orders

The relevant scope language at issue in the Orders reads as follows:

> Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture. Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. The scope includes the aluminum extrusion components that are attached (e.g., by welding or fasteners) to form subassemblies, i.e., partially assembled merchandise unless imported as part of the finished goods 'kit' defined further below. The scope does not include the non-aluminum extrusion components of subassemblies or subject kits.

Antidumping Duty Order, 76 Fed. Reg. at 30,650–51. The Orders, however, contain two narrow exceptions that exclude from their scope

> finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels. The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a "finished goods kit."

Antidumping Duty Order, 76 Fed. Reg. at 30,651.

Plaintiffs' primary contention is that the scope language of the Orders explicitly excludes finished merchandise, and that curtain wall units that are filled in with glass and sealed at the time of importation, qualify as finished products. *See* Mem. of P. & A. in Supp. of Pls.' Mot. for J. on the Agency R. 17–18 (ECF Dkt. No. 23–1) ("Pls.' Br."). Plaintiffs argue that "[t]he scope of the Orders covers aluminum extrusions, not curtain wall units," and that "Commerce [mistakenly] determined that an aluminum frame fully and permanently in-filled with glass, sealed and attached to brackets and with holes drilled, ready for installation onto a building is an aluminum extrusion 'part'

for a final finished product, *i.e.*, a building façade assembled after importation." Pls.' Br. 17, 18. Plaintiffs insist, however, that "[f]airly read," the scope excludes "curtain wall units that (1) are 'fully and permanently' filled in with glass and sealed and, therefore ready for installation, before importation, (2) can be installed upon the side of the building with no additional fabrication, and (3) become the 'finished windows with glass' of the buildings on which they are installed." Pls.' Br. 19–20.

Curtain walls are a relatively new innovation. The American Society of Testing and Materials, describes a curtain wall as "'a nonbearing exterior wall, secured to and supported by the structural members of the building.'" Final Scope Ruling at 3 (quoting ASTM DICTIONARY OF ENGINEERING SCIENCE &TECHNOLOGY 674 (10th ed. 2005)); *see also* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 446 (5th ed. 2011) (defining a curtain wall as "[a] nonbearing wall, often of glass and steel, fixed to the outside of a building and serving especially as cladding"); DICTIONARY OF ARCHITECTURE & CONSTRUCTION 289 (4th ed. 2006) ("In a tall building of **steel-frame construction**, an exterior wall that is non-load-bearing, having no structural function."); DICTIONARY OF ENGINEERING 140 (2d ed. 2003) ("An external wall that is not load-bearing.").

Commerce, in its Final Scope Ruling, described a curtain wall as "a building façade[3] from the roof top to the ground floor that does not carry any building dead loads (i.e., the weight of all materials of construction incorporated into the building)." Final Scope Ruling at 3. Plaintiffs acknowledge that a curtain wall unit falls short of the finished curtain wall that constitutes the façade of a structure, and that a building's entire exterior wall (the curtain wall) is composed of numerous interlocked curtain wall units. *See* Pls.' Br. 6.

Nevertheless, plaintiffs reason that the scope of the Orders only encompasses aluminum extrusions, and excludes final finished products. *See* Pls.' Br. 17–18; Antidumping Duty Order, 76 Fed. Reg. at 30,651 ("The scope also excludes finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass . . . ."). Therefore, according to plaintiffs, once the curtain wall unit's aluminum frame is filled in with glass, it is no longer an aluminum extrusion, but rather, something akin to a finished window

[3] While a façade is often thought of as the wall constituting the front of a building, Commerce and the parties use the word to mean any entire exterior wall. *See, e.g.*, Final Scope Ruling at 3; Pls.' Br. 5–6; Def.-Ints.' Br. 8.

with glass, and is thus, excluded from the scope of the Orders. *See* Pls.' Br. 17–18. Plaintiffs argue that "[b]y definition, a window . . . and a curtain wall unit in which all or a portion of the in-fill is glass [are] precisely [the same thing:] a transparent opening in a wall to allow the passage of light, framed by the extruded aluminum parts." Pls.' Br. 20. They further contend that "a curtain wall unit that functions as a window is explicitly outside the scope of the Orders." Pls.' Br. 20.

Additionally, plaintiffs insist that Commerce should have considered whether plaintiffs' curtain wall units, as imported, were entitled to the benefits of the "finished goods kit" exception in the Final Scope Ruling. Pls.' Br. 21; Antidumping Duty Order, 76 Fed. Reg. at 30,651 ("The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a 'finished goods kit.'").

Having taken plaintiffs' arguments into consideration, the court finds that their interpretation of the Orders' scope language lacks merit. The relevant language provides that "[s]ubject aluminum extrusions may be described at the time of importation as *parts for* final finished products that are assembled after importation, including, but not limited to . . . *curtain walls*." Antidumping Duty Order, 76 Fed. Reg. at 30,650–51 (emphasis added). All parties agree that a curtain wall itself is a final finished product that is assembled and completed from the curtain wall units. *See* Pls.' Br. 6, 25; Def.-Ints.' Br. 7–9; Corrected Oral Arg. Tr. 7:21–8:12, 26:17–24, 27:11–17, 31:10–32:2, 32:19–33:3, Sept. 25, 2013 (ECF Dkt. No. 63) ("Oral Arg. Tr."). As the above-quoted language demonstrates, parts for curtain walls are expressly included within the scope of the Orders. In addition, the Orders state that "[t]he scope includes the aluminum extrusion components that are attached (e.g., by welding or fasteners) to form subassemblies, i.e., partially assembled merchandise . . . ." Antidumping Duty Order, 76 Fed. Reg. at 30,651. Curtain wall units are assembled into completed curtain walls by, among other things, fasteners. *See, e.g.*, Letter from Cassidy Levy Kent (US) LLP to Sec'y of Commerce at 9, PD 12 at bar code 3098432–01 (Sept. 25, 2012), ECF Dkt. No. 56–12 (Sept. 18, 2013) ("In short, in a stick system, the curtain wall is assembled on-site from extruded aluminum (or steel) frame components, in-fill (glass or panel), silicon sealant, and various brackets and *fasteners*." (emphasis added)); Am. Scope Req. at 19 ("Hardware consists generally of *fasteners*, elastomeric lineal gaskets, anchor assemblies and components, screws, nuts and bolts, steel embeds, insulation, splices to adjoin adjacent units, and sealants that are used between the frame, infill materials, and the building struc-

ture to construct the curtain wall system and secure it to the building structure and adjoining sections." (emphasis added)); Decl. of John J.P. D'Amario ¶ 8, PD 13 at bar code 3098432–02 (Sept. 24, 2012), ECF Dkt. No. 56–13 (Sept. 18, 2013). Plaintiffs necessarily concede that "absolutely no one purchases for consumption a single curtain wall piece or unit." Pls.' Br. 25 (internal quotation marks omitted). This is because a number of curtain wall units are attached to form the completed curtain wall, the final finished product. Curtain wall units are therefore undeniably components that are fastened together to form a completed curtain wall. Thus, they are "parts for," and "subassemblies" for, completed curtain walls. Accordingly, curtain wall units fall within the scope of the Orders. While implicit in plaintiffs' argument is the idea that the term "parts for" somehow means something smaller or less manufactured than a curtain wall unit, there is nothing in the "parts for" language that would suggest this kind of restriction, and the court will not add any.

Further, plaintiffs' attempts to liken curtain walls to finished windows are unconvincing. Although "finished windows with glass" are excluded from the scope of the Orders, the scope language distinguishes between finished windows and curtain walls by identifying them each individually. *See* Antidumping Duty Order, 76 Fed. Reg. at 30,650–51 ("Subject aluminum extrusions may be described at the time of importation as *parts for final finished products* that are assembled after importation, including, but not limited to, *window frames*, door frames, solar panels, *curtain walls*, or furniture." (emphasis added)). Thus, the "parts for" portion of the scope language expressly includes parts for window frames and parts for curtain walls. This is not the case, however, with respect to the "finished merchandise" exclusionary language. *See* Antidumping Duty Order, 76 Fed. Reg. at 30,650–51 ("The scope also *excludes* finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels." (emphasis added)). In accordance with this language, specifically excluded from the Orders, as completed products, are finished windows with glass. There is no similar exclusion for curtain wall parts (*e.g.*, curtain wall units). That is, in the finished products portion of the scope language, "finished windows with glass" are specifically listed, while any mention of curtain walls is notably absent. Thus, it is apparent that the

Orders separately and intentionally distinguish windows from curtain wall units, and that the "finished merchandise" exception does not encompass curtain wall units.

Moreover, the specific exclusion of in-filled windows and door frames from the scope of the Orders, while parts for window frames and door frames are expressly included, demonstrates that the determinative factor for exclusion under the "finished merchandise" provision is not whether a product is in-filled with glass or vinyl. Rather, what is significant is whether the product itself, once in-filled, is a stand-alone completed and finished product. Thus, each enumerated item of finished merchandise in the Orders is a complete product upon entry. For example, a finished window needs nothing more to be a completed product, purchased individually for consumption. The same is true of a finished door or picture frame, other goods explicitly excluded from the Orders' scope. A user can purchase one of these items and put it to use without buying additional identical merchandise.

On the other hand, multiple curtain wall units are designed to be attached together to form a completed curtain wall. An individual curtain wall unit, on its own, has no consumptive or practical use because multiple units are required to form the wall of a building. Therefore, a curtain wall unit's sole function is to serve as a part for a much larger, more comprehensive system: a curtain wall. All of this being the case, it is clear that curtain wall units are not finished merchandise but, rather, are parts for curtain walls.

In addition to claiming that the plain language of the Orders excludes curtain wall units from their scope, plaintiffs assert that their curtain wall units were not intended to fall within the scope of the Orders. As evidence for this conclusion, plaintiffs note that neither Commerce nor the ITC initiated a comprehensive investigation involving the curtain wall industry during their material injury dumping or subsidy investigations, nor did the ITC make an affirmative material injury finding specifically regarding curtain wall units. *See* Pls.' Br. 15. Plaintiffs, however, are unable to point to, and the court is unaware of, any statute or regulation that makes an individual product's inclusion within the scope of an order contingent upon the initiation by Commerce or the ITC of a specific investigation regarding that product. *See cf.* 19 C.F.R. § 351.225.

Furthermore, although curtain wall units were not the subject of an individualized investigation, it is clear that they were intended to be within the scope of the Orders from the investigation phase. The

curtain wall language has been included in the scope of these investigations since the initial petition, seeking the imposition of antidumping and countervailing duties, was filed in March 2010. *See* Petition for the Imposition of Antidumping and Countervailing Duties Against Certain Aluminum Extrusions from the PRC (Volume I) at 4 (Mar. 31, 2010) ("Petition") ("Aluminum extrusions may also be described as parts for products that are assembled or otherwise further processed after importation, including, but not limited to, . . . curtain walls . . . ."). Thereafter, the curtain wall language was included in Commerce's notices of initiation in April 2010 and the ITC's Preliminary Determinations in June 2010. *See* Aluminum Extrusions from the PRC, 75 Fed. Reg. 22,109, 22,114 (Dep't of Commerce Apr. 27, 2010) (initiation of antidumping duty investigation) ("Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, . . . curtain walls . . . ."); Aluminum Extrusions from the PRC, 75 Fed. Reg. 22,114, 22,118 (Dep't of Commerce Apr. 27, 2010) (initiation of countervailing duty investigation) ("Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, . . . curtain walls . . . .") (collectively, "Notices of Initiation").

Finally, early on in response to a product exclusion request made by plaintiff Yuanda in May of 2010, Commerce made a preliminary determination that the company's curtain wall units and component parts fell within the ambit of the Orders. *See* Preliminary Determinations Mem.: Comments on the Scope of the Investigations at 4, 11, PD 41 at bar code 3116929–01 (Oct. 27, 2010), ECF Dkt. No. 56–41 (Sept. 18, 2013) ("Investigations Mem.") ("The language of the scope of these investigations as articulated in the Petition and the Notices of Initiation explicitly states that curtain walls assembled after importation are within the scope."). All of the foregoing being the case, it is clear that "curtain wall units" are "parts for" curtain walls, and are reasonably included in the scope of the Orders by the scope's unambiguous language.

As to the "finished goods kit" exception,[4] plaintiffs further contend that their curtain wall units, as imported, qualify for the exemption found in the Orders, and that "Commerce's refusal to address the issue [in its Final Scope Ruling] renders [the Department's] determination unsupported by substantial evidence." Reply Br. of Consolidated Pls. 17 (ECF Dkt. No. 42) (internal quotation marks omitted). Plaintiffs posit that, even if their curtain wall units are found to be "subassemblies" that constitute parts for curtain walls, and are thus, covered by the scope language, that their product should have been excluded from the Orders' coverage under this exception. *See* Pls.' Br. 22–24. The "finished goods kit" exception excludes from the Orders' reach "partially assembled merchandise . . . packaged [as a] combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good." Antidumping Duty Order, 76 Fed. Reg. at 30,651.

The Department contends that it did not consider whether plaintiffs' curtain wall units qualified for the "finished goods kit" exception because "the CWC's Amended Scope Request d[id] not seek a scope ruling on complete curtain wall units, but rather 'parts of curtain walls.'" Final Scope Ruling at 9 (quoting Am. Scope Req. at 13). In its Amended Scope Request, the CWC sought a ruling confirming that "*curtain wall units and other parts* of curtain walls are explicitly covered by the scope of the [O]rders." Am. Scope Req. at 13 (emphasis added). Thus, Commerce found the CWC's request to be restricted to a confirmation, based on the explicit language of the Orders, that curtain wall units were "parts for" curtain walls. Therefore, Commerce determined that the request did not ask for an examination of whether particular entries would qualify for the "finished goods kit" exception at the time that they crossed the border.

For defendant and defendant-intervenors, plaintiffs' attempts to expand the request to include exceptions to the scope language simply extended too far beyond the confirmation that the CWC sought. Thus, the CWC asserts that the Department properly declined to consider the "finished goods kit" exception because it "properly indicated that

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[4] The Orders describe a "finished goods kit" as follows:

> A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled "as is" into a finished product. An imported product will not be considered a "finished goods kit" and therefore excluded from the scope of the investigation merely by including fasteners such as screws, bolts, etc. in the packaging with an aluminum extrusion product.

Antidumping Duty Order, 76 Fed. Reg. at 30,651.

the scope request d[id] not seek a scope ruling on a particular 'curtain wall kit,' but instead s[ought] a ruling on 'parts of curtain walls.'"[5] Def.-Ints.' Br. 33 (quoting Final Scope Ruling at 9).

The court finds that Commerce properly confined its inquiries to the request made by the CWC and was not required to make the entry by entry examination that plaintiffs propose. That is, an inquiry as to whether a particular entry, or even product, would qualify for an exception to the scope language simply goes far beyond the CWC's request. The CWC's request was limited to seeking a determination as to whether curtain wall units were "parts for" curtain walls, based on the language of the Orders. This is clear from the use of the words "and *other* parts for" in the CWC's Amended Scope Request. Am. Scope Req. 11, 13 (emphasis added) (titling its Amended Scope Request as "Amended Scope Request of [the CWC] Regarding the Inclusion of Curtain Wall Units and *Other* Parts of Curtain Wall Systems in the Scope of the Orders." (emphasis added)). The CWC sought a ruling on what products were covered by the Orders, not whether specific companies' merchandise could be excluded from them.

If plaintiffs wished treatment for their specific products under the "finished goods kit" exception, their route was to file a petition of their own seeking the benefit of the exclusion with respect to their curtain wall units. Indeed, as represented by plaintiffs at oral argument, they appear to have already done so. *See* Oral Arg. Tr. 39:21–40:14 ("THE COURT [(addressing plaintiffs' counsel):] Is it Commerce's position [that] if you want to find [out whether plaintiffs' products qualify for the finished goods kit exception,] you have to bring a [separate] scope ruling [of your own? PLAINTIFF'S COUNSEL]: It seems to be that way and in fact in all candor to this Court we have brought a separate ruling that followed on with this because there is some confusion in the trade as to what this actually applies to . . . ."). Thus, Commerce

[5] Defendant-intervenors further contend that "Commerce [had] already addressed Yuanda's unitized curtain wall 'kits', which include 'its unitized curtain wall product and the product[']s assorted parts' during the investigation and found [that] they did not qualify for the exclusion." Def.-Ints.' Br. 33 (citing Investigations Mem. at 4, 11–12). Commerce made a preliminary finding in 2010, in response to a request by plaintiff Yuanda, that curtain wall units and assorted curtain wall parts did not qualify for the "finished goods kit" exception, and were subject to the Orders. Investigations Mem. at 4, 11–12. Moreover, in its Investigations Memo, Commerce noted that Yuanda "ha[d] in fact stipulated that its components d[id] not enter as complete kits as defined by the scope of these investigations." Investigations Mem. at 11. It is apparent, however, that this finding was not made in the context of the consideration of the Amended Scope Request, and was made only with respect to plaintiff Yuanda's product. Further, while Yuanda may have stipulated that "its components d[id] not enter as complete kits as defined by the scope of these investigations," it does not appear that any of the other plaintiffs in this proceeding have done so. Investigations Mem. at 11.

did not err in restricting itself to the issue presented by the CWC's request and leaving the issue presented by plaintiffs for another day.

B. Standing

Plaintiffs next contend that Commerce should have refrained from initiating its inquiry resulting in the Final Scope Ruling because defendant-intervenors' product was not within the scope of the Orders, and therefore they lacked standing to submit a scope request. *See* Pls.' Br. 13–17. The Tariff Act confers standing upon "interested part[ies]," including "manufacturer[s], producer[s], or wholesaler[s] in the United States of a domestic like product." 19 U.S.C. § 1677(9)(C). In making their claim, plaintiffs assert that the CWC companies lack standing because they are domestic producers of curtain wall units and curtain wall systems, products that are not subject to the Orders. *See* Pls.' Br. 13–15. In other words, plaintiffs' standing argument is a variation of their argument that their curtain wall units are finished products and thus not subject to the Orders.

Commerce's regulations permit the submission of applications regarding "whether a particular product is within the scope of an order or a suspended investigation" by "[a]ny interested party." 19 C.F.R. § 351.225(c)(1). The Tariff Act defines an "interested party" in relevant part as

> (C) a manufacturer, producer, or wholesaler in the United States of a domestic like product, . . . (E) a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States, [and] (F) an association, a majority of whose members is composed of interested parties . . . with respect to a domestic like product.

19 U.S.C. §§ 1677(9)(C), (E)–(F). Although "manufacturer, producer, or wholesaler" are not among the terms further defined in the statute, Congress contemplated "a liberal construction" of the Tariff Act's standing requirements, intending that those requirements "be administered to provide an opportunity for relief for an adversely affected industry and to prohibit petitions filed by persons with no stake in the result of the investigation." *Brother Indus. (USA), Inc. v. United States*, 16 CIT 789, 793–94 (1992); S. REP.NO. 96–249, at 47 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 433.

The Tariff Act further defines a "domestic like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to . . . investigation." 19 U.S.C. § 1677(10). Therefore, "so long as [a party] manufactures or produces

any one of the . . . like products . . . it is an interested party." *Brother Indus., Ltd. v. United States*, 16 CIT 1106, 1108 (1992).

Since the court finds that defendant-intervenors' products are indeed covered by the Orders, there is no merit to plaintiffs' argument. That is, because defendant-intervenors produce and manufacture "aluminum extrusions for the production of curtain wall units and parts of curtain wall systems," products that the court finds fall within the ambit of the Orders, defendant-intervenors are interested parties, and thus have standing. Company Certifications at 6–8, PD 24 at bar code 3100845–01 (Oct. 11, 2012), ECF Dkt. No. 56–24 (Sept. 18, 2013).

C. Commerce's Instructions to Customs

Plaintiffs' final challenge is to Commerce's instructions to U.S. Customs and Border Protection ("Customs") which stated that the Department has "found that curtain wall units and other parts and components of curtain wall systems are within the scope of the order[s]" and ordered Customs to "[c]ontinue to suspend liquidation of entries of aluminum extrusions from the PRC, including curtain wall units and other parts and components of curtain walls . . . ." Antidumping Duty Liquidation Instructions Issued Jan. 3, 2013 at 184, 185 (Jan. 3, 2013), Tab 11, Public App. for Pls.' Mem. of P. & A., at 1, 2 at bar code 3116056–01 (ECF Dkt. No. 27–1); Countervailing Duty Liquidation Instructions Issued Jan. 3, 2013 at 1, 2, PD 40 at bar code 3116057–01 (Jan. 3, 2013), ECF Dkt. No. 56–40 (Sept. 18, 2013) ("Countervailing Duty Liquidation Instructions Issued Jan. 3, 2013") (collectively, "Final Scope Ruling Instructions to Customs").[6] Plaintiffs assert that (1) the instructions were inconsistent with Commerce's conclusions in its Final Scope Ruling, and "Commerce [consequently] instructed Customs to collect duties on a product which Commerce did not address in its [Final] Scope Ruling," and (2) "the retroactive application of suspension of liquidation [was] in contravention of Commerce's regulations and this Court's precedent when [p]laintiffs' entries were not subject to suspension of liquidation previously." Pls.' Br. 3, 30. Because the court finds that the curtain wall units are, in fact, subject merchandise that falls within the Orders' scope, and that liquidation of plaintiffs' curtain wall units has been

[6] The operative language in Commerce's Final Scope Ruling Instructions to Customs is identical, and therefore all citations to the Final Scope Ruling Instructions will be to the Countervailing Duty Liquidation Instructions Issued Jan. 3, 2013. *See* Countervailing Duty Liquidation Instructions Issued Jan. 3, 2013.

suspended since the publication of the preliminary determinations that preceded the issuance of the Orders, these arguments must both fail.

First, there are no inconsistencies between the language of Commerce's instructions and its Final Scope Ruling. To the contrary, the language included within the instructions and that derived from the Final Scope Ruling are virtually identical. In its Amended Scope Request, the CWC asked Commerce to "issue a scope ruling *confirming* that curtain wall units and other parts of curtain wall systems [were] subject to the scope of the [Orders]." Am. Scope Req. at 1–2 (emphasis added). Commerce's Final Scope Ruling confirmed that "the products described in [the] CWC's Amended Scope Request are within the scope of the Orders." Final Scope Ruling at 10. The Department's instructions to Customs state that "Commerce found that curtain wall units and other parts and components of curtain wall systems are within the scope of the order[s]." Countervailing Duty Liquidation Instructions Issued Jan. 3, 2013 at 1. As noted, this language has remained consistent since publication of the Notices of Initiation in April 2010. *See* Aluminum Extrusions from the PRC, 75 Fed. Reg. at 22,114 ("Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, . . . curtain walls . . . ."); Aluminum Extrusions from the PRC, 75 Fed. Reg. at 22,118 ("Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, . . . curtain walls . . . ."). The instructions following Commerce's Final Scope Ruling directed Customs to "[*c*]*ontinue to suspend* liquidation of entries of aluminum extrusions from the PRC, including curtain wall units and other parts and components of curtain walls . . . ." Countervailing Duty Liquidation Instructions Issued Jan. 3, 2013 at 2 (emphasis added). Thus, Commerce's instructions were consistent with its Final Scope Ruling and with the language used since the beginning of these proceedings.

As to plaintiffs' contention that Commerce's instructions to continue to suspend liquidation and collect cash deposits on entries of subject merchandise were *ultra vires*, the court is not convinced. *See* Pls.' Br. 31–32. Plaintiffs' argument that the Department's instructions were invalid is premised on *AMS Associates, Inc. v. United States*, where Commerce's instructions to Customs were found to be *ultra vires*. *AMS Assocs., Inc. v. United States*, 36 CIT __, __, 881 F.

Supp. 2d 1374, 1382 (2012), *aff'd*, 2013–1208, 2013 WL 6511398 (Fed. Cir. Dec. 13, 2013). In *AMS*, Commerce issued clarification instructions that interpreted the scope of an existing antidumping duty order to cover new products and then retroactively suspended liquidation of these products. *See AMS*, 36 CIT at __, 881 F. Supp. 2d at 1377. *AMS* is inapplicable to this case because, here, the instructions added no new products to the scope, and because liquidation of plaintiffs' curtain wall units has been suspended since publication of the preliminary determinations. In these proceedings, the Final Scope Ruling merely confirmed what had previously been the case.

Where, as here, a scope ruling confirms that a product is, and has been, the subject of an order, the Department has not acted beyond its authority by continuing the suspension of liquidation of the product. Thus, this case presents precisely the situation described by the Federal Circuit in *AMS*, as one where Commerce would act within its powers by issuing instructions suspending liquidation:

> Commerce does not have to initiate a formal scope proceeding under 19 C.F.R. § 351.225 when it wishes to issue a ruling that does not clarify the scope of an unambiguous original order. Commerce must only follow the procedures outlined in § 351.225[(k)(2) (the *Diversified Products* criteria)] when it wishes to clarify an order that is unclear. To hold otherwise would permit importers to potentially avoid paying antidumping duties on past imports by asserting unmeritorious claims that their products fall outside the scope of the original order. Importers cannot circumvent antidumping orders by contending that their products are outside the scope of existing orders when such orders are clear as to their scope. Our precedent evinces this understanding. We have not required Commerce to initiate a formal scope inquiry when the meaning and scope of an existing antidumping order is clear.

AMS Assocs., Inc. v. United States, __ F.3d __, __, 2013 WL 6511398, at *5 (Fed. Cir. Dec. 13, 2013) (citing *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1378–79 (Fed. Cir. 2003)). *AMS* involved a situation where "Commerce [was found to have] erred in failing to conduct a formal scope inquiry . . . because the scope of the original antidumping order was unclear." *AMS*, __ F.3d at __, 2013 WL 6511398, at *6. Here, the scope language of the antidumping and countervailing duty orders on aluminum extrusions from the PRC presents no similar problems of ambiguity with respect to its coverage

of plaintiffs' curtain wall units. Therefore, the holding in *AMS* does not affect the outcome of the present case.

In addition, liquidation of parts for curtain walls has been suspended since publication of the preliminary determinations for the countervailing duty order on September 7, 2010, and November 12, 2010 for the antidumping duty order.[7] *See* Aluminum Extrusions From the PRC, 75 Fed. Reg. 54,302, 54,321 (Dep't of Commerce Sept. 7, 2010) (preliminary affirmative countervailing duty determination); Aluminum Extrusions From the PRC, 75 Fed. Reg. 69,403, 69,415 (Dep't of Commerce Nov. 12, 2010) (notice of preliminary determination of sales at less than fair value, and preliminary determination of targeted dumping). Further, Commerce's Final Scope Ruling neither added nor subtracted products from the scope of these Orders. *Compare* Countervailing Duty Liquidation Instructions Issued June 2, 2011 at 2, 4 (June 2, 2011) ("Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, . . . curtain walls . . . . Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. . . . For imports of aluminum extrusions from the [PRC, Customs] shall re-

[7] Pursuant to regulation, Commerce's "instructions issued pursuant to an affirmative preliminary determination may not remain in effect for more than four months except [in an antidumping duty investigation,] where exporters representing a significant proportion of exports of the subject merchandise request the Department to extend that four-month period to no more than six months." Antidumping Duty Order, 76 Fed. Reg. at 30,652 (citing 19 U.S.C. § 1673b(d)(3) (2006)); *see* 19 U.S.C. § 1673b(d)(3); 19 U.S.C. § 1671b(d)(3) (2006).

In the antidumping duty investigation, the preliminary determination was published on November 12, 2010, and the four-month period was extended. Antidumping Duty Order, 76 Fed. Reg. at 30,652. Thus, the six-month period beginning on the date of publication of the preliminary determination concluded on May 11, 2011. Antidumping Duty Order, 76 Fed. Reg. at 30,652. In accordance with 19 U.S.C. § 1673b(d)(3), Commerce instructed Customs to terminate the suspension of liquidation and to liquidate all entries of aluminum extrusions from the PRC entered, or withdrawn from warehouse, for consumption after May 11, 2011 (the date that the six-month period expired), and through the day preceding the date of publication of the ITC's final injury determination in the Federal Register, at which time suspension of liquidation would resume. Antidumping Duty Order, 76 Fed. Reg. at 30,652 (citing 19 U.S.C. § 1673b(d)(3)).

In the countervailing duty investigation, the Department published its preliminary determination on September 7, 2010, and instructed Customs to suspend liquidation of all entries of subject merchandise entered or withdrawn from warehouse, for consumption, on or after that date. Countervailing Duty Order, 76 Fed. Reg. at 30,654. In accordance with 19 U.S.C. § 1671b(d)(3), the Department terminated suspension of liquidation effective January 6, 2011, after the four-month provisional remedy expired. Countervailing Duty Order, 76 Fed. Reg. at 30,655 (citing 19 U.S.C. § 1671b(d)(3)).

sume suspension of liquidation of entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after [May 19, 2011].”), *and* Antidumping Duty Liquidation Instructions Issued June 22, 2011 at 2, 4 (June 22, 2011) (“Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, . . . curtain walls . . . . Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. . . . For imports of aluminum extrusions from the [PRC, Customs] shall resume suspension of liquidation of entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after [May 19, 2011].”), *with* Countervailing Duty Liquidation Instructions Issued Jan. 3, 2013 at 1, 2 (“Because the language of the scope of the Order[s] specifically provides that subject aluminum extrusions may be described at the time of importation as parts for final products [including curtain walls] that are assembled after importation[,] . . . [c]ontinue to suspend liquidation of entries of aluminum extrusions from the PRC, including curtain wall units and other parts and components of curtain walls, subject to the . . . Order[s] on aluminum extrusions from the PRC . . . .” (alteration in original)). Therefore, Commerce did not err in the issuance of its instructions to Customs.

CONCLUSION

Accordingly, because parts for curtain walls are specifically and unambiguously provided for in the Orders, the court finds that Commerce reasonably determined that curtain wall units are included in the scope of the Orders. Additionally, because that conclusion was reasonable, the court also finds that the primary criteria set forth in 19 C.F.R. § 351.225(k)(1) were dispositive, and that there was no need for Commerce to consider the secondary (k)(2) factors. *See* 19 C.F.R. §§ 351.225(k)(1), (2).

Based on the foregoing, it is hereby

ORDERED that the Department of Commerce’s Final Scope Ruling is SUSTAINED.

Dated: January 30, 2014
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON

Slip Op 14–11

TRADE ASSOCIATES GROUP, LTD., Plaintiff, v. UNITED STATES, Defendant, and NATIONAL CANDLE ASSOCIATION, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 11–00397

[Remanding to the U.S. Department of Commerce a ruling interpreting the scope of an antidumping duty order on certain petroleum wax candles from the People's Republic of China]

Dated: January 31, 2014

Thomas J. O'Donnell, *Jessica R. Rifkin*, and *Lara A. Austrins*, Clark Hill PLC, of Chicago IL, for plaintiff Trade Associates Group, Ltd.

Antonia R. Soares, Trial Attorney, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Melissa Brewer*, International Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Karen A. McGee and *Teresa L. Jakubowski*, Barnes & Thornburg LLP, of Washington, DC, for defendant-intervenor National Candle Association.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff Trade Associates Group, Ltd. ("Trade Associates"), a U.S. importer of candles, contests a 2011 "Final Scope Ruling" in which the International Trade Administration, U.S. Department of Commerce ("Commerce" or "the Department") construed the scope of an antidumping duty order (the "Order") on certain petroleum wax candles from the People's Republic of China ("China" or the "PRC"). *Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China ("PRC")*, Admin.R.Doc. No. 3649 (Aug. 5, 2011), *available at* http://ia.ita.doc.gov/download/candles-prcscope/candles/20110805-requestors.pdf (last visited Jan. 24, 2014) ("*Final Scope Ruling*"). In the Final Scope Ruling, Commerce rejected the position, expressed by Trade Associates in a 2009 request ("Scope Ruling Request"), that Commerce should determine a number of specially-shaped or holiday-themed candles to be outside the scope of the Order. *Trade Assocs. Grp. Appl. for Scope Ruling on Antidumping Duty Order on Petroleum Wax Candles from China* 2 (June 11, 2009), Admin.R.Doc. No. 3564 ("*Scope Ruling Request*").

Before the court is plaintiff's USCIT Rule 56.2 motion for judgment on the agency record. Pl.'s Mot. for J. on the Agency R., ECF No. 26

(July 25, 2012) ("Pl.'s Mot."). Defendant and defendant-intervenor National Candle Association ("NCA"), a trade association of U.S. candle manufacturers and the petitioner in the original antidumping investigation, oppose plaintiff's motion. The court remands the Final Scope Ruling for reconsideration, concluding that Commerce unreasonably interpreted the Order when placing within the scope a large number of candles made in the shapes of identifiable objects.

I. BACKGROUND

On September 4, 1985, NCA petitioned Commerce and the U.S. International Trade Commission ("ITC" or the "Commission") to impose antidumping duties on petroleum wax candles from China. *Antidumping Pet. on Behalf of the National Candle Ass'n in the Matter of: Petroleum Wax Candles from China* (Sept. 3, 1985) (Admin.R.Doc. No. 3598) ("*Petition*"). On August 28, 1986, following the Department's final affirmative less-than-fair value ("LTFV") determination and the ITC's affirmative material injury determination, the Department issued a final antidumping duty order. *Antidumping Duty Order: Petroleum Wax Candles from China,* 51 Fed. Reg. 30,686 (Aug. 28, 1986) ("*Antidumping Duty Order*").

Trade Associates filed the Scope Ruling Request on June 11, 2009, in which it identified 261 Chinese-origin petroleum wax candles that Trade Associates described as having the shape of identifiable objects or as being associated with Christmas or other holidays. *Scope Ruling Request* 2. Commerce initiated an administrative proceeding to respond directly to the Scope Ruling Request and published a notice seeking "comments from the interested parties on the best method to consider whether novelty candles should or should not be included within the scope of the *Order* given the extremely large number of scope determinations requested by outside parties." *Petroleum Wax Candles from China: Request for Comments on the Scope of the Antidumping Duty Order & the Impact on Scope Determinations*, 74 Fed. Reg. 42,230, 42,230 (Aug. 21, 2009) ("*Request for Comments*"). This notice used the term "novelty candles" to refer to "candles in the shape of an identifiable object or with holiday-specific design both being discernable from multiple angles." *Id*.

In August 2010, Commerce issued the preliminary results of the request for comments ("Preliminary Results") in which it adopted a position favorable to Trade Associates and requested further comment. *Petroleum Wax Candles From the People's Republic of China: Prelim. Results of Request for Comments on the Scope of the Petroleum Wax Candles From the People's Republic of China Antidumping Duty*

Order, 75 Fed. Reg. 49,475 (Aug. 13, 2010) ("*Prelim. Results*"). On August 9, 2010 and October 13, 2010,[1] Commerce issued preliminary scope rulings. *Mem. to the File re: Certain Petroleum Wax Candles from China: Preliminary Scope Determinations Using Proposed Interpretation* (Aug. 9, 2010) (Admin.R.Doc. No. 3600); *Mem. to the File re: Petroleum Wax Candles from China: Prelim. Scope Rulings not Included in Prelim. Results* (Oct. 13, 2010) (Admin.R.Doc. No. 3618).

In the final results of its public comment proceeding ("Final Results"), issued on August 2, 2011, Commerce reversed its earlier position. *Petroleum Wax Candles From the People's Republic of China: Final Results of Request for Comments on the Scope of the Antidumping Duty Order*, 76 Fed. Reg. 46,277, 46,278 (Aug. 2, 2011) ("*Final Results*"). The Final Results incorporated by reference an "Issues and Decision Memorandum." *Issues & Decision Mem. for Final Results of Request for Comments on the Scope of the Petroleum Wax Candles from China Antidumping Duty Order* (July 26, 2011), A-570–504, ARP 5–10, *available at* http://ia.ita.doc.gov/frn/summary/prc/2011–19529–1.pdf (last visited Jan. 24, 2014) ("*Decision Mem.*"). Commerce incorporated the Final Results by reference in the Final Scope Ruling, which it issued on August 5, 2011.[2] *Final Scope Ruling* 3 & n.10 (citation omitted).

In late 2011, Trade Associates commenced this action to contest the Final Scope Ruling. Summons (Oct. 5, 2011), ECF No. 1; Compl. (Nov. 2, 2011), ECF No. 13. Plaintiff filed its motion for judgment on the agency record on July 25, 2012, Pl.'s Mot. 1, to which defendant and defendant-intervenor responded on February 19, 2013, Def.'s Resp. to Pl.'s Mot. for J. on the Agency R. (Feb. 19, 2013), ECF No. 41 ("Def.'s

[1] In the preliminary scope ruling issued contemporaneously with the preliminary results of its request for comments, the International Trade Administration, U.S. Department of Commerce ("Commerce" or "the Department") made scope determinations on only a portion of the candles in the pending scope requests. *Petroleum Wax Candles From the People's Republic of China: Prelim. Results of Request for Comments on the Scope of the Petroleum Wax Candles From the People's Republic of China Antidumping Duty Order*, 75 Fed. Reg. 49,475, 49,480 (Aug. 13, 2010) ("*Prelim. Results*"). On October 13, 2010, Commerce issued preliminary determinations for the candles that it had inadvertently omitted from the first preliminary scope ruling. *Mem. to the File re: Petroleum Wax Candles from China: Prelim. Scope Rulings not Included in Prelim. Results* (Oct. 13, 2010) (Admin.R.Doc. No. 3618).

[2] In addition to a determination on plaintiff's Scope Ruling Request, the Final Scope Ruling included determinations based on scope requests submitted by importers Candym Enterprises, Ltd., Sourcing International, LLC, and Accent Imports. *Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China ("PRC")*, Admin.R.Doc. No. 3649 (Aug. 5, 2011), *available at* http://ia.ita.doc.gov/download/candles-prc-scope/candles/20110805-requestors.pdf (last visited Jan. 24, 2014) ("*Final Scope Ruling*").

Resp."); Def.-Intervenor's Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R., ECF No. 40 ("Def.-Intervenor's Resp."). On April 3, 2013, plaintiff filed replies. Pl.'s Reply to Def.'s Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R., ECF No. 44; Pl.'s Reply to Def.-Intervenor's Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R., ECF No. 46.

With leave of the court, defendant and defendant-intervenor each submitted supplemental briefs on October 31, 2013 and October 7, 2013, respectively. Def.'s Supplemental Br., ECF No. 61 ("Def.'s Supplemental Br."); Def.-Intervenor's Supplemental Br., ECF No. 58 ("Def.-Intervenor's Supplemental Br.").[3] Also with leave of the court, plaintiff submitted a responsive supplemental brief on December 2, 2013. Pl.'s Supplemental Reply Br. to Def.'s & Def.-intervenor's Supplemental Brs., ECF No. 62.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants jurisdiction over civil actions brought under section 516A of the Tariff Act of 1930 ("Tariff Act").[4] 19 U.S.C. § 1516a(a)(2)(B)(iv). Section 516A provides for judicial review of a determination of "whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping . . . duty order." *Id*. In conducting review, the court must set aside "any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id*. § 1516a(b)(1)(B).

B. The Court Remands the Final Scope Ruling for Reconsideration

This case presents the question of whether the Final Scope Ruling, in placing within the scope various candles made in the shapes of identifiable objects, is based on a permissible interpretation of the scope language in the Order. Plaintiff claims on various grounds that the Final Scope Ruling is contrary to law. First, plaintiff argues that the Final Scope Ruling contravenes the Order, which plaintiff reads to exclude all candles in shapes not expressly mentioned in the per-

[3] At oral argument on July 18, 2013, the court offered the parties an opportunity to move for leave to submit additional briefing. Oral Tr. 97–98, (Sept. 5, 2013), ECF No. 56. Defendant and defendant-intervenor so moved on July 26, 2013, Joint Mot. of Def. & Def.-Intervenor for Leave to File Add'l Briefing, ECF No. 55, and the court granted the motion on September 5, 2013, Order, ECF No. 57.

[4] All statutory citations are to the 2006 edition of the United States Code. All citations to regulations are to the 2009 edition of the Code of Federal Regulations.

tinent Order language. Mem. of Law in Supp. of Pl.'s Mot. for J. on the Agency R. 14–22 (July 25, 2012), ECF No. 26 ("Pl.'s Mem.). Second, plaintiff argues that secondary sources examined in the Department's LTFV investigation, including the petition, confirm that the scope of the Order excludes candles other than those in the identified shapes. *Id*. at 22–34. Third, plaintiff submits that the Final Scope Ruling abandons the Department's twenty-five year practice of excluding candles in shapes of identifiable objects from the Order, undermining needed finality and certainty in the administration of antidumping duty orders. *Id*. at 38–40. In the alternative, plaintiff argues that even if the court determines that the Department's interpretation of the pertinent Order language is reasonable, the court still should determine that the Final Scope Ruling is unreasonable because the candles discussed in the petition "clearly fall" within an exception Commerce established for "figurine" candles. *Id.* at 34–38.

As provided in section 731 of the Tariff Act, Commerce conducts an antidumping investigation to determine whether "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. § 1673(1). The statute directs Commerce to include in an antidumping duty order "a description of the subject merchandise, in such detail as the administering authority deems necessary." *Id.* § 1673e(a)(2). In section 351.225 of its regulations, Commerce established a method for conducting scope inquiries and issuing scope rulings, explaining therein that issues "as to whether a particular product is included within the scope of an antidumping . . . duty order . . . can arise because the descriptions of subject merchandise contained in the Department's determinations must be written in general terms." 19 C.F.R. § 351.225(a). Antidumping duty orders "may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002) ("*Duferco*").

The scope language at issue in this case has remained essentially unchanged since the Order originally was published in 1986. The 1986 Order contained the following scope language:

> The products covered by this investigation are certain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks. They are sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled

> containers. The products are classified under the Tariff Schedules of the United States (TSUS) item 755.25, Candles and Tapers.

Antidumping Duty Order, 51 Fed. Reg. at 30,686. The Order contains no other language defining the scope. When specifying the scope of the Order in subsequent issuances, Commerce has left essentially unchanged the first two sentences quoted above. Although Commerce made some modifications and additions in subsequent issuances, these changes solely concern the conversion of the Tariff Schedules of the United States ("TSUS") to the nomenclature of the Harmonized Tariff Schedule of the United States ("HTS" or "HTSUS"), which took effect on January 1, 1989.[5] The TSUS or HTSUS tariff provisions cited in versions of the Order do not classify candles according to shape. Accordingly, the changes to the scope language made since Commerce issued the Order are not relevant to the issue this case presents.

1. The Final Scope Ruling Unreasonably Interprets the Scope Language of the Order

Plaintiff sought, and Commerce denied, exclusions for candles in the shapes of acorns, beach balls, caramel apples, cupcakes, flip flops, floating leaves, flowers, fruits, garden birdhouses, haunted houses, metallic balls, pears, snowmen, trees, vegetables, witches' hats, and woodies with surfboards, among many others. *Scope Ruling Request*,

[5] Commerce modified the third sentence, and added a fourth sentence, in conformance with the nomenclature of the Harmonized Tariff Schedule of the United States ("HTS" or "HTSUS"). *See, e.g. Notice of Prelim. Results of Antidumping Duty Admin. Review & Partial Rescission of Review: Petroleum Wax Candles from the People's Republic of China*, 65 Fed. Reg. 54,224, 54,225 (Sept. 7, 2000). Commerce also added a fifth sentence to explain that "[a]lthough the HTS subheading is provided for convenience and customs purposes, our written description of the scope of this proceeding remains dispositive." *Id.* The scope of the antidumping duty order as modified for the HTSUS is as follows:

> The products covered by this order are certain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks. They are sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers. The products were classified under the Tariff Schedules of the United States (TSUS) item 755.25, Candles and Tapers. The products are currently classified under the Harmonized Tariff Schedule (HTS) item 3406.00.00. Although the HTS subheading is provided for convenience and customs purposes, our written description of the scope of this proceeding remains dispositive.

Id. Commerce has maintained this scope language in subsequent reviews of the Order.

Ex. 1; *Final Scope Ruling* 6–35. The candles for which plaintiff sought exclusion are types of object-shaped candles not specifically identified in the second sentence of the scope language, *i.e.*, these are candles other than "tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers." *Antidumping Duty Order*, 51 Fed. Reg. at 30,686.

In the Final Scope Ruling, Commerce concluded generally "that the scope of the *Order* includes candles of any shape, with the exception of birthday candles, birthday numeral candles, utility candles, and figurine candles." *Final Scope Ruling* 3. In arriving at this conclusion, Commerce relied on "analysis of the record evidence" from the Final Results and the accompanying Issues and Decision Memorandum. *Id.* In the Final Scope Ruling, Commerce excluded only those candles it considered to qualify for its "figurine candle" exception and determined that the vast majority of the candles for which Trade Associates sought exclusion fell within the scope. *Id*. at 12–35. Applying a definition of the term "figurine" obtained from Webster's Online Dictionary, Commerce described its figurine candle scope exception as applying to "a candle that is in the shape of a human, animal, or deity."[6] *Id.* at 5.

Expressed according to the principle set forth in *Duferco*, 296 F.3d at 1089, the question presented in this case is whether the scope language of the Order "may be reasonably interpreted to include" candles in the shapes of identifiable objects that Commerce determined to fall outside the Department's "figurine" exception. The court concludes that the Order cannot reasonably be so interpreted.

Commerce presented its interpretation in the Decision Memorandum, addressing both the first and second sentences of the scope language. As to the word "certain" in the first sentence ("The products covered by this investigation are certain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks"), Commerce reasoned that "[t]hough the word 'certain' indicates that the *Order* does not include *all* petroleum wax candles, the phrase is ambiguous and cannot itself define what types of petroleum wax candles are excluded." *Decision Mem.* 7. Rejecting the argument of Trade Associates that the word "certain" in the first sentence must be read to refer to the specific candle shapes identified in the second sentence (" . . . tapers, spirals, and straight-sided dinner

[6] Applying its definition of the term "figurine," Commerce ruled, for example, that it must deny plaintiff's request for exclusion of a candle in the shape of a "ghost lantern" as "this candle is not a figurine because it represents a ghost, not a human, animal, or deity." *Final Scope Ruling* 25.

candles; rounds, columns, pillars, votives; and various wax-filled containers"), Commerce explained that "the Department has given effect to the word 'certain' by excluding those types of candles for which there is record evidence that the NCA intended their [*sic*] exclusion from the *Order*." *Id.* Regarding the second sentence, Commerce further reasoned that "the shapes listed in the scope of the *Order* " do not constitute "an exhaustive list of shapes, but simply an illustrative list of common candle shapes." *Final Results*, 76 Fed. Reg. at 46,278.

The Department's interpretation of the scope language is unreasonable in several respects and therefore is unsustainable under the *Duferco* standard. The Department's construction of the scope language begins with the proposition that the scope of the Order includes, as a general matter, candles of any shape. For this proposition to withstand scrutiny under *Duferco*, the scope language on its face must be capable of being reasonably interpreted so as to include candles generally without regard to shape. But nothing in the scope language reasonably supports this interpretation. The first sentence cannot be so interpreted, for it provides that not all, but only "certain," *i.e.*, unspecified, petroleum wax candles with fiber or paper-cored wicks are included in the scope. The most that can be said is that the first sentence does not specifically *exclude* candles of any particular shape. The second sentence, read in context or on its own, appears to describe the subject merchandise by candle shape, albeit without language expressly limiting the scope to the specific shapes identified. Together, the two sentences cannot reasonably be read to include generally candles of any shape.

A second flaw in the Department's interpretation is the suggestion that the word "certain" in the first sentence of the scope language should be read without reference to the second sentence. Because the relevant scope language consists of only the two sentences, any reasonable construction of the term "certain . . . petroleum wax candles" as used in the first sentence must find meaning in the second sentence. If, instead, the scope language is read, as Commerce does, to mean that as a general matter candles made in *any* shape fall within the scope of the Order, then the second sentence is rendered meaningless and superfluous as it would do nothing to define the scope. Such a construction is impermissible not only in failing to give effect to one of the two sentences that comprise the scope language but also in leaving only the first sentence to function as the entire operative scope language. The first sentence, however, which provides that

"certain," *i.e.*, unspecified, petroleum wax candles with fiber or paper-cored wicks are within the scope, cannot by itself function as a scope definition, as Commerce itself recognized. *See Decision Mem.* 7 ("Though the word 'certain' indicates that the *Order* does not include *all* petroleum wax candles, the phrase is ambiguous and cannot itself define what types of petroleum wax candles are excluded.") (emphasis in original). In this way, the Final Scope Ruling adopts an interpretation resulting in "scope" language that makes no meaningful attempt to define the scope. Commerce could not have intended to promulgate an antidumping duty order that leaves the scope of that order essentially undefined.

A third flaw is the Department's grounding its construction of the word "certain" on matters entirely outside of the scope language. According to the Decision Memorandum, this word must depend for its meaning on "record evidence" from which Commerce concludes that the petitioner intended that certain candle types would be outside the scope of the investigation. *Decision Mem.* 7. This analysis is contrary to the governing statutory provisions, under which the responsibility for defining the scope falls on Commerce, not the petitioner. *See* 19 U.S.C. §§ 1673(1), 1673e(a)(2). As the Court of Appeals recognized in *Duferco*, 296 F.3d at 1096, "[t]he critical question is not whether the petition covered the merchandise or whether it was at some point within the scope of the investigation." While "[t]he purpose of the petition is to propose an investigation, . . . [it is] Commerce's final determination [that] reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order." *Id*.

Because the scope language of the Order cannot reasonably be interpreted to include many of the candles identified in the Scope Ruling Request, the court decides that the Final Scope Ruling is contrary to law and must be remanded to Commerce for reconsideration. Defendant and defendant-intervenor put forth numerous arguments to the contrary, arguing that the court should affirm the Final Scope Ruling. As the court discusses below, none of these arguments has merit.

2. Trade Associates is Not Estopped from Basing an Argument on the Plain Meaning of the Scope Language

Defendant first raises several arguments that it grounds in the principle of judicial estoppel. The gist of these arguments is that Trade Associates, having conceded in proceedings before Commerce

that the scope language of the Order is ambiguous, should not be heard on any argument related to the plain meaning of the scope language. Def.'s Resp. 15–19.

The purpose of judicial estoppel is to prevent a party who assumed a certain position in a legal proceeding, and who succeeded in maintaining that position, from subsequently assuming a contrary position simply because its interests have changed. *See Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1353–54 (Fed. Cir. 2010) (citing *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)). The judicial estoppel principle is based in equity and is a matter for the court's discretion. *Id*. at 1351.

Defendant's judicial estoppel arguments fail because Trade Associates argued, both in the Scope Ruling Request and in its rebuttal comments following the Preliminary Results, that the Order should be interpreted, based on plain meaning, to pertain only to the candle shapes specifically identified in the scope language of the Order. *See Scope Ruling Request* 21 ("[T]he items are not within the scope of the Order because they are not in the shape or size of any of the exemplars in the language of the scope."); *Rebuttal Comments by Trade Assocs. Grp., Ltd. on Prelim. Results of Request for Comments on the Scope of the Petroleum Wax Candles from China Antidumping Duty Order* 3–4 (Sept. 29, 2010) (Admin.R.Doc. No. 3612) ("The plain language of the Order clearly limits the scope to [the identified shapes] . . . .") (footnote omitted). Commerce itself acknowledged in the Decision Memorandum that Trade Associates had made the plain meaning argument during the scope inquiry. *Decision Mem.* 7 ("[Trade Associates] contend[s] that the phrase in the scope text '*certain* petroleum wax candles' indicates that the scope covers only those enumerated shapes/types in the Order.") (emphasis in original).

It is true that Trade Associates made at least one argument during the scope inquiry premised on the presence or possible presence of ambiguity in the scope language of the Order. For instance, in its case brief to the Department, Trade Associates argued that the scope interpretation Commerce preliminarily adopted in the Preliminary Results "resolves any ambiguity concerning the scope of the Order with respect to candle shapes not specifically mentioned." *Comments by Trade Assocs. Grp., Ltd. on Prelim. Results of Request for Comments on the Scope of the Petroleum Wax Candles from China Antidumping Duty Order* 3 (Sept. 10, 2010) (Admin.R.Doc. No. 3608) (citing *Prelim. Results*, 74 Fed. Reg. at 42,231). But this statement was in addition to the plain meaning argument Trade Associates also

advanced during the scope inquiry.[7] Moreover, because the statement Trade Associates made regarding ambiguity contains the word "any," it is not clearly a concession of ambiguity.

In summary, it was permissible for Trade Associates to present arguments in the alternative during the scope inquiry and then advance before the court one of those arguments, which is grounded in the plain meaning of the scope language at issue in this case. And as the court discusses below, the mere presence of some form of ambiguity is insufficient, standing alone, to support a conclusion that Commerce reasonably interpreted the scope language of the Order.

3. The Final Scope Ruling Cannot Be Sustained on the Basis of Ambiguity in the Language of the Order

Defendant next argues that "Commerce reasonably determined that the scope language is ambiguous based on the broad language of the first sentence and the language of limitation reflected in the second sentence." Def.'s Resp. 11. According to defendant, this ambiguity permits Commerce to interpret the Order broadly to include candles made in shapes not mentioned in the second sentence and, in so doing, to take into consideration the sources identified in section 351.225(k)(1) of its regulations, including the petition, initial investigation, and prior scope determinations.[8] *Id.* at 20–25. Relying on *Novosteel SA v. United States*, 284 F.3d 1261 (Fed. Cir. 2002) ("*Novosteel*"), defendant submits that, in light of the deference owed to the Department's interpretation of its antidumping orders, there is a low bar for the identification of ambiguity in scope language. *Id.* at 21.

Defendant's argument is unavailing. The premise that the scope language is in some way ambiguous is insufficient to support a conclusion that the Final Scope Ruling is a reasonable interpretation of

[7] In the Preliminary Results, Commerce preliminarily concluded, *inter alia*, that candle shapes and types other than those specifically identified in the Order ("tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers") would fall outside the scope of the Order. *Prelim. Results*, 75 Fed. Reg. at 49,480,

[8] The regulation directs Commerce first to consider "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [International Trade] Commission." 19 C.F.R. § 351.225(k)(1). If these secondary sources are not dispositive, the regulations direct Commerce to evaluate the merchandise according to five factors set forth in section 351.225(k)(2): (i) "[t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2).

the scope language of the Order. Under *Duferco*, the inquiry that is controlling in this case is whether the scope language "may be reasonably interpreted to include," *Duferco*, 296 F.3d at 1089, candles that are made in the shape of specific objects but that do not fall within the Department's figurine candle exception. For the several reasons the court discussed above, the scope language cannot be so interpreted.

The second sentence could have avoided any ambiguity were it to have stated expressly that the scope includes *only* candles of the specified shapes and types. One could argue that the second sentence, read in context, is ambiguous in that it could be construed either as "an illustrative list of common candle shapes," as Commerce considered it to be, *Final Results*, 76 Fed. Reg. at 46,278, or as an exhaustive list of the candle shapes and types that fall within the scope of the Order.[9] But even were the court to accept as reasonable both of these constructions of the second sentence, the court still could not sustain the Final Scope Ruling. Even if the court were to assume, *arguendo*, that the second sentence was intended only as an illustrative list of common candle shapes, a reasonable interpretation still must give some meaning to the second sentence when ascertaining the intended scope of the Order. Either the sentence limits the scope to the mentioned shapes, or it excludes candles in shapes that are not common candle shapes as illustrated by the terms of the second sentence.[10] However, the term "common candle shapes" in no way describes the candles at issue here, each of which is in a unique shape depicting a specific object.[11] In other words, there may or may not exist "common candle shapes" other than those expressed in the second sentence, but that question is irrelevant to the interpretive issue this case presents.

In short, the scope language is not ambiguous in a way that makes it susceptible to a reasonable construction under which Commerce

[9] For example, it could be argued that the *eiusdem generis* ("things of the same kind") canon of construction supports a reading of the second sentence as exemplary of common candle shapes. Of course, it also could be argued that the canon of *expressio unius est exclusio alterius* ("the express mention of one thing excludes all others") supports a reading of the second sentence as defining the specific shapes and types to which the Order applies.

[10] If, aside from these two competing interpretations, the second sentence of the scope language were read to signify that the subject candles are sold in the mentioned shapes but may be sold in any shape, it would lose any meaning, as the court discussed earlier in this Opinion and Order.

[11] Of the candle shapes described in the second sentence of the scope language, only one conceivably could be read to describe candles of an individual shape: candles consisting of wax-filled containers, which theoretically could be made to resemble an object. Nonetheless, no candles consisting of wax-filled containers are at issue in this case.

may hold candles in the shapes of identifiable objects to be within the scope of the Order. The court, therefore, rejects the arguments defendant premises on the presence of ambiguity in the scope language. For the same reason, the court also rejects defendant-intervenor's similar arguments that the second sentence of the scope language "is language of inclusion, not exclusion" and that "[i]f all shapes were to be excluded other than those listed, then the language would say 'are *only* sold in the following shapes.'" Def.-Intervenor's Resp. 17 (emphasis in original).

Defendant argues that the mere presence of any form of ambiguity in the scope language is sufficient under *Duferco* to justify reliance on the sources identified in § 351.225(k)(1) and, if those sources are not dispositive, the criteria listed in § 351.225(k)(2). Def.'s Supplemental Br. 8. Defendant's argument is correct in one respect: the opinion in *Duferco* does not expressly state that Commerce is in some instances legally *precluded* from considering the § 351.225(k) factors. It does not follow, however, that the Department's interpretation of the scope language is sustainable in this case. Again, *Duferco* holds that Commerce may not place merchandise within the scope of an order where the scope language of that order may not reasonably be interpreted to include that merchandise. *Duferco*, 296 F.3d at 1089. That is precisely what Commerce did in the Final Scope Ruling. As the Court of Appeals reasoned in *Duferco*, the petition and the investigation "may provide valuable guidance" but "cannot substitute for language in the order itself." *Id.* at 1097. The court, therefore, need not reach the question of whether the Final Scope Ruling erred in considering the § 351.225(k)(1) factors. It is sufficient here to conclude, as the court does, that there is no reasonable construction of the scope language under which the Order could include those plaintiff's candles that were made in shapes that resemble identifiable objects.

Defendant also argues that "the nature of the parties' contentions during the administrative process (that is, debating the content of the section 351.225(k)(1) sources) indicates that the parties agreed that the scope language is ambiguous." *Id*. This argument fails because the question of ambiguity of scope language, even were it determinative in this case, is not an issue of contested fact on which a stipulation of the parties to the administrative proceeding could bind the court.

4. The Court Rejects Defendant's and Defendant-Intervenor's Various Arguments that Are Based on Section 351.225(k) of the Department's Regulations and Various Judicial Decisions

The court disagrees with defendant's argument that *Novosteel* is controlling on the issue this case presents. The scope-related issues in *Novosteel*, which affirmed a decision of this Court to uphold a challenged scope determination, concerned whether Commerce reached a valid finding that the product at issue in the case was "flat-rolled" within the meaning of that term in the scope language of an antidumping order and whether Commerce correctly included the product within the scope even though the tariff classification of the product was not among those expressly listed in the scope language. *See Novosteel*, 284 F.3d at 1268–69. Rather than *Novosteel*, the court considers *Duferco* to be the precedent establishing a rule of law controlling the outcome of this case. In *Novosteel*, the Court of Appeals reached its determination of a rule of law as a matter of first impression. *Id.* at 1095 ("This case presents an issue of first impression—whether the scope orders can be interpreted to cover subject merchandise even if there is no language in the orders that includes or can be reasonably interpreted to include the merchandise."). The holding of *Novosteel*, a decision that preceded *Duferco*, does not compel a conclusion that Commerce reasonably construed the scope language at issue here. To the contrary, the Court of Appeals drew a contrast in *Duferco* where it cited *Novosteel* as recognizing that "scope orders must necessarily be written in general terms, 19 C.F.R. § 351.225(a)(2001), and [that] the 'Commerce Department enjoys substantial freedom to interpret and clarify its antidumping orders,'" under 19 C.F.R. § 351.225(k)(1). *Duferco*, 296 F.3d at 1096–97 (quoting *Novosteel*, 284 F.3d at 1269). Again, the critical point is that review of the petition and the investigation "may provide valuable guidance" but "cannot substitute for language in the order itself." *Id.* at 1097.

Further alluding to the "general terms" language of 19 C.F.R. § 351.225(a), defendant argues that Commerce intentionally, and permissibly, could have written open-ended scope language in the Order in anticipation of candle shapes or types not in existence when the Order was promulgated. Oral Tr. 33–34. Defendant submits that Court of Appeals precedent does not "dictate how Commerce is to craft scope language." Def.'s Supplemental Br. 7. Concerning the question

of whether the interpretation adopted in the Final Scope Ruling would construe scope language in a matter too open-ended to define the scope, Defendant argues that *Duferco* does not "hold that this Court is authorized to determine whether scope language 'fails' as scope language." *Id.* These arguments miss the point of the inquiry the court must conduct in this case.

The question of whether Commerce had the discretion to leave the scope as open-ended as defendant suggests is not before the court. Nor is the question of whether the court permissibly may, in defendant's words, "determin[e] the sufficiency of the scope language as scope language." *Id.* at 8. As the court has emphasized, the relevant question is whether the scope language reasonably may be interpreted to include the object-shaped candles that the Final Scope Ruling held to be subject to the Order. In answering that question, the court concludes that the Department's interpretation of the scope language is flawed for the reasons the court has identified, one of which is that, as so interpreted, the scope language becomes indefinite in a way that Commerce could not have intended. Defendant's counterargument, that Commerce permissibly looked beyond the second sentence to define the word "certain," would have the court conclude that Commerce intended to confine the scope to certain types of candles while declining to specify what those types are. It is implausible that Commerce would have taken so cavalier an approach to the critical task of defining the scope of the Order. Moreover, every textual indication is to the contrary. In the Order, Commerce introduced its scope language with the following words: "The products covered by this investigation are . . . ." *Antidumping Duty Order*, 51 Fed. Reg. at 30, 686. Commerce later stated, on updating the scope language for the HTS, that the first two sentences, and not the subsequent sentences referring to tariff classification, are intended to be "dispositive" of the scope. *See*, *e.g.*, *Notice of Prelim. Results of Antidumping Duty Admin. Review & Partial Rescission of Review: Petroleum Wax Candles From the People's Republic of China*, 65 Fed. Reg. 54,224, 54,225 (Sept. 7, 2000) ("Although the HTS subheading is provided for convenience and customs purposes, *our written description of the scope of this proceeding remains dispositive*." (emphasis added)). In summary, there can be no doubt that Commerce, on promulgating the Order, intended for the two sentences in question to serve as dispositive scope language. Commerce could not also have intended that these same two sentences would leave the scope of the Order as vague and open-ended as defendant's

arguments would have the court presume. *See ArcelorMittal Stainless Belgium N.V. v. United States*, 694 F.3d 82, 90 (Fed. Cir. 2012) ("Commerce's discretion to define and clarify the scope of an investigation is limited by concerns for transparency of administrative actions.").

Both defendant and defendant-intervenor rely on *King Supply Co., LLC v. United States*, 674 F.3d 1343 (Fed. Cir. 2012) ("*King Supply*") in support of the Final Scope Ruling. Defendant posits that the second sentence of scope language at issue in *King Supply* is analogous to the second sentence of the scope language at issue in this case. Def.'s Supplemental Br. 9. Defendant notes that in *King Supply*, the Court of Appeals "rejected this Court's finding that the scope should have used direct qualifiers, such as 'for example' or 'principally used,' if the second sentence was to be only exemplary." *Id.* Defendant-intervenor makes a similar argument, maintaining that "[t]he absence of such qualifying language does not preclude an inclusive interpretation of the scope language." Def.-Intervenor's Resp. 18. These arguments do not convince the court that the Final Scope Ruling is sustainable upon judicial review. The court need not decide, and does not decide, whether the second sentence of the scope language at issue in this case expressly limits the scope of the Order to the specified candle shapes and types. As the court discussed herein, the second sentence might be construed as expressly limiting the scope, or alternatively, as listing examples of the common candle shapes that the Order includes. However, even under the latter construction, the Order is not reasonably susceptible to an interpretation under which the Order includes candles in the shapes of identifiable objects that are not in common candle shapes.

Moreover, the holding in *King Supply* sheds no light on the issue this case presents. *King Supply* concerned carbon steel butt-weld pipe fittings that Commerce ruled to be subject the following scope language: "These formed or forged pipe fittings are used to join sections in piping systems where conditions require permanent, welded connections, as distinguished from fittings based on other fastening methods (*e.g.*, threaded, grooved, or bolted fittings)." *King Supply*, 674 F.3d at 1346 (citation omitted). The plaintiff in *King Supply* conceded that its imported fittings "are identical to those subject" to the antidumping order but argued that these fittings were outside of the scope because they were not actually used to join sections of piping systems but instead were "'for structural use in applications

such as handrails, fencing, and guardrails.'" *Id.* at 1347 (citation omitted). Commerce concluded that the scope language sentence was not an "end-use" provision but rather that it uses piping systems only as an example "where a permanent, welded connection is desired'" and that "'the language 'are used' does not mean that the use identified is necessarily the exclusive use.'" *Id*. (citation omitted). The Court of Appeals noted that end-use restrictions are disfavored in antidumping duty orders because "the physical characteristics of an imported product are more readily identifiable than the product's end use, which may be unclear at the time of importation." *Id.* at 1348. The Court of Appeals held that antidumping orders are not subject to end-use restrictions "unless the AD [antidumping] order at issue includes clear exclusionary language," which "must leave no reasonable doubt that certain products were intended to be outside the scope of the *AD* [*Antidumping*] *Order* based solely on the end use of those products." *Id.* at 1349. The Court of Appeals determined that the "are used" language at issue in *King Supply* was not sufficiently clear to render unreasonable the Department's interpretation that the scope did not preclude other uses. *Id*. at 1349–50.

Defendant-intervenor points to the sources identified in 19 U.S.C. § 351.225(k)(1) to argue that substantial evidence supports the Department's interpretation of the scope language in the Order. Defendant-intervenor argues that the Petition sought an antidumping investigation that generally included all shapes of candles, with only a few exceptions, and that the Commission's injury determination construed the scope of the investigation in this way. Def.-Intervenor's Resp. 14–17. But under *Duferco*, the language of the Order must take precedence over the guidance provided in the sources identified in § 351.225(k), including the petition and the ITC's injury determinations. *Duferco*, 296 F.3d at 1097. Defendant-intervenor correctly points out that the ITC construed the scope of the investigation to include petroleum wax candles "'in *various shapes and sizes*, including tapers, spirals, straight-sided dinner candles, rounds, columns, pillars, votives, and various wax-filled containers . . .' and excluding "birthday, birthday numeral, and figurine candles." Def.-Intervenor's Resp. 9 (quoting Petroleum Wax Candles from the People's Republic of China, Inv. No. 731-TA-282 (Final), USITC Pub. 1888 (August 1986)) (emphasis added in original). But Congress gave Commerce, not the ITC, the responsibility to define the scope of an antidumping duty order. 19 U.S.C. § 1673e(a)(2).

Defendant-intervenor argues that its petition "did not exclude any candles made of petroleum wax from the scope of the investigation requested." *Id*. at 15 (citation omitted). This argument fails on two grounds. First, the language defendant-intervenor chose in its petition does not establish that defendant-intervenor intended to request an investigation of petroleum wax candles of any shape. Under the heading "*Description of the Imported Merchandise*," the petition stated as follows:

> The imported PRC candles are made from petroleum wax and contain fiber or paper-cored wicks. They are sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers. These candles may be scented or unscented. While manufactured in the PRC, these candles are marketed in the United States and are generally used by retail consumers in the home or yard for decorative or lighting purposes.

Petition, at 6–7. The first sentence of NCA's proposal, read in isolation, might be read to suggest a scope not limited to the enumerated candle shapes. But the second sentence, which Commerce adopted *verbatim* in the Order, can be read to indicate that the petition sought an investigation limited to the listed candle shapes. It is difficult to reconcile the inclusion of that sentence in the petition with defendant-intervenor's contention that the petition sought an investigation of candles of all shapes.[12] Second, Commerce did not adopt *verbatim* NCA's first sentence. As formulated by Commerce in the Order, the first sentence of the scope language, which refers instead to "*certain* scented or unscented petroleum wax candles," is more limited than the analogous language in the NCA's petition. *Antidumping Duty Order*, 51 Fed. Reg. at 30,686 (emphasis added). Because it is Commerce, not the petitioner, that defines the scope of an antidumping duty order, *Duferco*, 296 F.3d at 1089, defendant-intervenor's argument is unpersuasive.

In response to the court's inquiry as to whether the interpretation of the scope language adopted in the Final Scope Ruling would result in an undefined scope, defendant-intervenor argues that "[c]riteria

[12] In the Preliminary Results, Commerce found that "[a] thorough review of the record clearly illustrates that the NCA did not intend for the scope of the candles *Order* to include all candles" and "advocated a scope where only the enumerated shapes would be covered." *Prelim. Results*, 75 Fed. Reg. at 49,479. Commerce abandoned its finding when finalizing the decision.

defining which candles are in and outside the scope of the *Candles Order* are found in its first sentence." Def.-Intervenor's Supplemental Br. 2. Defendant-intervenor adds that "Commerce's interpretation of the second sentence of the scope language as providing an illustrative, rather than an exhaustive or exclusive, listing of the shapes in which such candles are typically sold in no way negates the defining criteria contained in the first sentence of the scope language, and does not leave importers and exporters without guidance as to which candles are in and outside the scope of the *Candles Order.*" *Id.* As "defining criteria" in the first sentence, defendant-intervenor points to the presence of petroleum wax and the type of wick. *Id.*

Defendant-intervenor's argument overlooks the effect of the word "certain" in the first sentence. That word must be read to indicate that some, but not all, PRC-origin petroleum wax candles with paperboard or fiber wicks are within the scope of the Order. Defendantintervenor's statement that "[c]riteria defining which candles are in and outside the scope of the *Candles Order* are found in the first sentence," *id.* 2, is correct only insofar as it refers to composition of the wax and type of wick—two criteria not at issue in this case. It is not correct as to the sole criterion that *is* at issue in this case, *i.e.*, the shape of the candle. Defendant-intervenor concedes that "the scope language must be read in its entirety," *id.*, maintaining that importers and exporters may consult the scope language for guidance as to what is inside and outside of the scope. However, as the court has discussed, the second sentence reasonably might be read to mean that only the specified shapes and types are included or, at least arguably, might be read to mean that the Order excludes candles other than those sold in common shapes, examples of which are provided in the second sentence. The Department's construction of the scope language, under which candles in all shapes generally are included, subject to exceptions not mentioned in the Order, does precisely what defendant-intervenor argues it does not: it leaves affected parties in the dark as to what the Order actually includes and excludes.

Regarding the word "certain" in the first sentence of the scope language, defendant-intervenor argues that this word need not necessarily be read to refer to the second sentence and that it is "equally plausible that 'certain' refers to the presence and/or nature of the wick." Def.-Intervenor's Supplemental. Br. 6. Such a construction is at variance with the one Commerce expressed in the Decision Memorandum, which grounded the meaning of the term in matters outside

the language of the Order. More important, though, is that defendant-intervenor's proposed construction would distort the first sentence well beyond common meaning and render the adjective "certain" superfluous.

The same must be said of defendant-intervenor's argument that "[u]se of 'scented or unscented' indicates that the Order broadly encompasses all candles, provided they have some petroleum wax and a fiber or paper-cored wick." *Id.* at 7. Somewhat inconsistently with that argument, defendant-intervenor also argues that while use of the word "certain" in the first sentence of the scope language "confirms that there are some limitations on the Order's scope, the language of the first sentence confirms that the Order is meant to be inclusive and encompass most petroleum wax candles." *Id.* To conclude that the first sentence connotes that the Order is meant to include most petroleum wax candles is to read something into the sentence that is not there. Moreover, the question is not whether the scope includes most petroleum wax candles but whether the scope language reasonably can be read to include the object-shaped candles that Commerce ruled not to qualify for its figurine exception.

Defendant-intervenor argues that "nothing in the Federal Circuit's holding in *Duferco* mandates that Commerce's interpretation of the *Candles Order* is unsupported at law." *Id.* at 8. Defendant-intervenor would distinguish *Duferco*, and certain other Court of Appeals decisions rejecting Commerce scope decisions, from this case because *Duferco* and the other decisions involved antidumping duty order scope language that unambiguously excluded the merchandise at issue, whereas, according to defendant-intervenor, in this case "Commerce's interpretation is not contrary to the express language of the order." *Id.* at 11. This argument overlooks the breadth of the rule of law established in *Duferco*, under which a court may uphold a determination that merchandise is included within the scope of an order only where the scope language specifically includes it or may be reasonably interpreted to include it. *Duferco*, 296 F.3d at 1089. The logic of the rule in *Duferco* is straightforward: were Commerce empowered in a scope ruling to place merchandise within the scope of an order that cannot reasonably be interpreted to include that merchandise, Commerce would be altering the scope, not interpreting it. *See id.* at 1097 ("Repeatedly, decisions of this court confirm that '[a]lthough the scope of a final order may be clarified, it can not be changed in a way contrary to its terms." (*quoting Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990).). Defendant-

intervenor argues that "[p]laintiff's merchandise is clearly encompassed within the first sentence of the scope language; Plaintiff does not dispute that its candles both contain petroleum wax and have either fiber or paper-cored wicks" and that unlike the scope language at issue in *Duferco*, "the second sentence of the scope language contains no qualifiers indicating whether the list is illustrative or exclusive." Def.-Intervenor's Supplemental Br. 11. However, as discussed *supra*, the first sentence of the scope language does not clearly encompass the candles in question because the word "certain" therein, and the two scope language sentences, when read together, cannot reasonably be interpreted to encompass those candles even if the second sentence is read as illustrative rather than exclusive.

Finally, defendant-intervenor argues that "[p]laintiff's hyper-strict interpretation of *Duferco* would require that antidumping duty contain a heightened degree of specificity far beyond that required under the law" and that under this interpretation "no resort to secondary sources under 19 C.F.R. § 351.225(k)(1) may be had," leading to "the result that candles Commerce has long-recognized as excluded from the scope of the *Candles Order*, such as birthday candles and utility candles, would no longer be excluded." *Id.* at 14.

Defendant-intervenor describes birthday candles as tapers and spirals and utility candles as pillars or columns and asserts that "Commerce could not rely on secondary sources to establish such exclusions because the plain language of the Order clearly encompasses those candle shapes. *Id.* (citing *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1301 (Fed. Cir. 2013), reh'g denied (Nov. 7, 2013) ("[J]ust as orders cannot be extended to *include* merchandise that is not within the scope of the order as reasonably interpreted, merchandise facially covered by an order may not be *excluded* from the scope of the order unless the order can reasonably be interpreted so as to exclude it.") (emphasis in original)). The court is unpersuaded by this argument. The court does not hold that the scope language in the Order fails for lack of specificity. Rather, the court holds, for the various reasons discussed herein, that Commerce unreasonably interpreted the scope language in the Order to include candles in the shapes of identifiable objects. This conclusion of law is not altered by the findings Commerce made in the Scope Ruling according to § 351.225(k)(1). As an ancillary matter, the validity of the exclusions for birthday and utility candles that Commerce has recognized are not at issue in this case.

III. CONCLUSION AND ORDER

In placing within the scope of the Order various candles made to resemble identifiable objects, the Final Scope Ruling applied an impermissible interpretation of the scope language in the Order.

Therefore, upon consideration of the *Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China ("PRC")*, A-570–504, , ARP 5–10 (Aug. 5, 2011), *available at* http://ia.ita.doc.gov/download/candles-prc-scope/candles/20110805requestors.pdf (last visited Jan. 21, 2014) ("Final Scope Ruling"), the *Petroleum Wax Candles From the People's Republic of China: Final Results of Request for Comments on the Scope of the Antidumping Duty Order*, 76 Fed. Reg. 46,277, 46,278 (Aug. 2, 2011) ("Final Results"), and all papers and proceedings had herein, it is hereby

ORDERED that the Final Scope Ruling of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), which incorporates by reference the Final Results, be, and hereby is, set aside as an impermissible interpretation of the scope of the *Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China,* 51 Fed. Reg. 30,686 (Aug. 28, 1986), to the extent it rules on the Scope Ruling Request submitted by plaintiff Trade Associates Group, Ltd. ("Trade Associates"), *Trade Assocs. Grp. Appl. for Scope Ruling on Antidumping Duty Order on Petroleum Wax Candles from China* 2 (June 11, 2009) (Admin.R.Doc. No. 3564) ("*Scope Ruling Request*"); it is further

ORDERED that Commerce shall have ninety (90) days from the date of this Opinion and Order to file a remand redetermination comprising a new scope ruling that complies with this Opinion and Order and addresses the products in the Scope Ruling Request submitted by Trade Associates; and it is further

ORDERED that plaintiff and defendant-intervenor shall have thirty (30) days from the date of the Department's filing of the remand redetermination in which to file comments on the remand redetermination; and defendant shall have fifteen (15) days after the filing of the last comment in which to file a reply to the comments of the other parties.

Dated: January 31, 2014
New York, New York

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