Slip Op. 04–25

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

CARGILL, INCORPORATED, PLAINTIFF, v. UNITED STATES, DEFENDANT.

Court No. 00–04–00189

Plaintiff, Cargill, Incorporated ("Cargill") moves pursuant to USCIT R. 56 for summary judgment on the ground that there is no genuine issue as to any material facts. Defendant cross-moves for summary judgment seeking an order dismissing the case.

**Held:** Plaintiff's motion for summary judgment is denied. Defendant's cross-motion for summary judgment is granted.

Dated: March 18, 2004

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## OPINION

**TSOUCALAS, Senior Judge:** Plaintiff, Cargill, Incorporated ("Cargill") moves pursuant to USCIT R. 56 for summary judgment on the ground that there is no genuine issue as to any material facts. Defendant cross-moves for summary judgment seeking an order dismissing the case.

## JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (2000).

## STANDARD OF REVIEW

On a motion for summary judgment, the Court must determine whether there are any genuine issues of fact that are material to the resolution of the action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is genuine if it might affect the outcome of the suit under the governing law. *See id.* Accordingly, the Court may not decide or try factual issues upon a motion for summary judgment. *See Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988). When genuine issues of material fact are not in dispute, summary judgment is appropriate if a moving party is entitled to judgment as a matter of law. *See* USCIT R. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

## DISCUSSION

### I. Background

The merchandise subject to this action was entered in the port of Chicago, Illinois between March 19, 1996, and April 26, 1996. *See* Summons. The subject merchandise involves thirteen consumption entries covering merchandise identified as "deodorizer distillate" on the commercial invoices. *See* Mem. Supp. Def.'s Opp.'n Pl.'s Mot. Summ. J. & Supp. Def.'s Cross-Mot. Summ. J. ("Customs' Mem.") at 2. The subject merchandise is a residual by-product attained during the deodorization process of edible vegetable oils, which removes unwanted constituents during refining. *See* Compl. ¶7. The United States Customs Service[1] ("Customs") classified the imported merchandise under heading 3824 of the United States Harmonized Tariff Schedule ("HTSUS"), subject to a duty rate of 3 cents per kilogram, plus 12.2 percent *ad valorem*. *See id.* ¶12. Plaintiff filed a timely protest and application for further review with Customs challenging the classification of the subject merchandise under HTSUS 3824.90.28. *See id.* ¶13. Cargill requested reliquidation of the entries under subheading 3823.19.40, which carries a duty rate of 4.4 percent *ad valorem*. *See id.* On July 29, 1999, Customs issued Headquarters Ruling Letter ("HRL") 960311, holding that deodorizer distillate imported with a mixture of fatty acids that contains 5 percent or more of tocopherols is classifiable under subheading 3824.90.28, while a mixture of fatty acids containing less than 5 percent by weight of tocopherols is classified under 3824.90.9050. *See* Customs' Mem. Ex. D at 3. In reaching its decision, Customs states: "We agree [with Cargill's opinion that] the deodorizer distillate is not *prima facie* classified in heading 3823, and it is not classified in heading 3823

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[1] The United States Customs Service was renamed the Bureau of Customs and Border Protection of the Department of Homeland Security, effective March 1, 2003. *See* H.R. Doc. No. 108–32 (2003).

by virtue of [Rule 1 of the General Rules of Interpretation, HTSUS ('GRI 1')]. However, we disagree with the protestant's opinion concerning heading 3824." *Id.* at 2. Accordingly, Customs found that since the deodorizer distillate is not classifiable under heading 3823, by virtue of GRI 1, and is not elsewhere specified or included in the tariff, then pursuant to GRI 1, the merchandise is classifiable under heading 3824. *See id.* at 2–3.

The HTSUS sections relevant to the Court's discussion are set forth below:

| | |
|---|---|
| 3823 | Industrial monocarboxylic fatty acids; acid oils from refining; industrial fatty alcohols: |
| | Industrial monocarboxylic fatty acids; acid oils from refining: |
| 3823.11.00 | Stearic acid |
| 3823.12.00 | Oleic acid |
| 3823.13.00 | Tall oil fatty acids |
| 3823.19 | Other: |
| 3823.19.20 | Derived from coconut, palm-kernel or palm oil |
| 3823.19.40 | Other . . . 4.4% |
| . . . . | |
| 3824 | Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products) not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified of included: |
| . . . . | |
| 3824.90 | Other: |
| | Other: |
| | Mixtures containing 5 percent or more by weightof one or more aromatic or modified aromatic substances: |
| . . . . | |
| 3824.90.28 | Other . . . 3¢/kg + 12.2% |

## II. Contentions of the Parties

### A. Cargill's Contentions

Cargill complains that Customs wrongly liquidated or reliquidated the subject merchandise under subheading 3824.90.28 instead of the

more specific subheading 3823.19.40. *See* Pl.'s Mem. Supp. Mot. Summ. J. ("Cargill's Mem.") at 1–32. Cargill argues that, by applying GRI 1, the imported deodorizer distillate is *prima facie* classifiable under heading 3823. *See id.* at 14–18. Cargill asserts that the classification of merchandise begins with GRI 1. *See id.* at 13 (noting that "GRI 1 provides that classification is to be determined 'according to the terms of the headings and any relative section or chapter notes' " (quoting GRI 1)). Cargill maintains that heading 3823 "describes monocarboxylic fatty acids, regardless of whether they are presented separately or together in a combination or mixture." Cargill's Mem. at 14. Relying on the explanatory notes of the HTSUS ("*Explanatory Notes*") Cargill states that merchandise described by heading 3823 may contain substances not classifiable under Section VI but excludes separate chemically defined elements or compounds. *See id.* at 14–15. Consequently, Cargill argues that "there is no reason for the Court to find a narrower meaning of the terms of Heading 3823 here." *Id.* at 16.

Cargill further argues that heading 3823 is an *eo nomine* provision because it specifically describes a class or kind of merchandise by name. *See id.* Absent contrary legislative intent, such a provision "includes all forms of the described merchandise." *Id.* Consequently, Cargill argues, heading 3823 includes all monocarboxylic fatty acids, including those "that occur as natural combinations or mixtures of more than one of such fatty acid." *Id.* Furthermore, Cargill asserts that the subject merchandise is imported in bulk tanks for industrial consumers and, therefore, falls within the definition of industrial. "The term 'industrial' in Heading 3823 refers to the condition in which the merchandise is imported, *i.e.*, in bulk, for industrial consumers." *Id.* at 17. Consequently, since heading 3823 specifically provides for the classification of the subject merchandise, Cargill argues that Customs is precluded from classifying it under 3824, the "basket" chemical provision, "which is limited to preparations of the chemical or allied industries that are not elsewhere specified or included." *Id.*

Cargill further argues that the *Explanatory Notes* to heading 3823 indicate that industrial monocarboxylic fatty acids are generally obtained by the saponification[2] or hydrolysis of natural fats or oils. *See id.* at 18–19. According to Cargill, the subject merchandise is obtained "during the deodorization stage in which the [crude] vegetable oil is subjected to steam distillation under a vacuum to remove substances that are undesirable in edible vegetable oil." *Id.*

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[2] "Saponification" is defined as "the decomposition of a fat by the addition of an alkali which combines with its fatty acids to form a soap, the remaining constituent, glycerine, being consequently liberated." *Oxford English Dictionary* 474 (2nd ed. 1989).

Cargill also asserts that the exemplars of the merchandise covered by heading 3823 include an article referred to as "fatty acid distillate," which is defined by the method of its production and physical characteristics. *See id.* at 19. Cargill maintains that the manner in which the subject merchandise is produced and its physical characteristics is the same as the "fatty acid distillate" described in the *Explanatory Notes*. *See id.* Specifically, the fatty acid distillate "is characterized by a high free fatty acid content." *Id.* (quoting *Explanatory Notes*). Cargill states that free fatty acids predominate in the subject merchandise over any other substance and, therefore, has the characteristic of a high free fatty acid content and should have been classified under heading 3823. *See id.* at 19–20. Cargill asserts that the *Explanatory Notes* merely describe high free fatty acid content as a characteristic of fatty acid distillate. *See id.* at 24. The *Explanatory Notes* do not set out "any minimum percentage of free fatty acid content for 'fatty acid distillate.' " *Id.* Since no tariff definition of "high free fatty acid" exists, Cargill maintains that "if there is no legislative intent to the contrary, the tariff terms are to be construed in accordance with their common or popular meaning." *Id.* Cargill, citing various dictionary definitions of the word "high," argues that the term means greater than others or prominent in rank or standing. *See id.* at 25. Since the free fatty acids contained in the subject merchandise are greater than any other substance, Cargill deduces that it qualifies as a "fatty acid distillate" described in the *Explanatory Notes*. *See id.* at 24. Cargill maintains that its merchandise "is correctly characterized by a 'high' free fatty acid content and thus, appropriately classified under HTSUS Heading 3823," instead of the "basket" provision, heading 3824. *Id.* at 25. Classification under heading 3824 is precluded pursuant to GRI 1 because heading 3823 is the more specific heading. *See id.* at 26–27.

Finally, Cargill contends that Customs' HRL 960311 is not entitled to *Skidmore* respect because it is based on a number of assumptions that have no analytical or factual support. *See id.* at 27–28 (referencing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). Moreover, Cargill points out that "the ruling was not subject to formal notice and comment procedures, nor was it adopted as a part of a rulemaking process." *Id.* at 31. Cargill deduces that HRL 960311 lacks thoroughness, contains unsupported assertions and contains invalid reasoning. *See id.* at 28–29. While HRL 960311 is consistent with previous rulings, Cargill argues that "those rulings suffer from the same deficiencies that it does." *Id.* at 29. Furthermore, Cargill contends that HRL 960311 contravenes judicial precedent and implicitly applies the "more than" doctrine which was rejected by the United States Court of Appeals for the Federal Circuit in *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1353–54 (Fed. Cir. 2001). *See* Cargill's Mem. at 30–31.

**B. Customs' Contentions**

Customs replies that it properly classified the imported deodorizer distillate under subheading 3824.90.28. *See* Customs' Mem. at 6–31. Customs points out that "the first step in analyzing a classification issue is to examine the terms of the provision at issue in order to determine legislative intent." *Id.* at 9 (citation omitted). Turning to the GRI for guidance, Customs concludes that "when determining whether an imported good is classifiable within the scope of a provision encompassing a named material or substance, and the good is a mixture, the essential character of the good must be determined in order to ascertain whether or not it falls within the scope of the tariff provision." *Id.* at 10–11. Customs asserts that explanatory note VIII to GRI 3(b) elucidates the factors which determine essential character, "by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods." *Id.* at 11–12 (emphasis in original omitted). Accordingly, Customs concludes that an essential character analysis pursuant to GRI 2(b) and GRI 3(b) reveals that the deodorizer distillate's essential character is derived from its tocopherol rather than its fatty acid content. *See id.* at 27–31. The subject merchandise does not derive its value from its fatty acid content but from its non-fatty acid component. *See id.* at 30.

Customs also points out that Rule 1(a) of the Additional United States Rules of Interpretation ("ARI") sets forth specific requirements for classification under a "principal use" provision. *See id.* at 12–13. Customs maintains that "the classification of merchandise pursuant to ARI 1(a) is controlled by the use of the 'class or kind' of merchandise to which the goods belong and not the 'actual' use to which the specific imported merchandise is put." *Id.* at 12 (citing *Primal Lite, Inc. v. United States*, 182 F.3d 1362 (Fed. Cir. 1999)). Accordingly, Customs argues that in reading the GRIs and ARIs together, the imported deodorizer distillate "must be classified based upon that constituent substance from which it derives its essential character and a determination must be made as to whether or not the constituent substances from which it derives its essential character is of the same class or kind as 'industrial monocarboxylic fatty acids.' " *Id.* at 13.

Since industrial monocarboxylic fatty acids is not statutorily defined, Customs asserts that "the correct meaning of the phrase is its common meaning, in the absence of a proven commercial meaning different from the common meaning or contrary to legislative intent." *Id.* at 14. While there is no definition for industrial monocarboxylic fatty acids in any standard or technical lexicons, Customs opines that the phrase's meaning can be gleaned from the definitions of the individual terms. *See id.* at 15. Customs agrees with Cargill that "commercially, 'industrial monocarboxylic fatty acids' is a technical way of identifying a class of fatty acids which con-

sists of 'mixtures or blends of fatty acids.' " *Id.* at 16. Furthermore, Customs acknowledges that the kinds of fatty acids covered by heading 3823 are all mixtures or blends of fatty acids. *See id.* at 16–18. Customs argues, however, that such covered fatty acids are between 90 percent to 100 percent fatty acids with only *de minimus* amounts of non-fatty acid constituents. *See id.* at 17–18. A "class or kind" analysis in this case would show that the subject merchandise is not included in the class of goods commercially used as industrial monocarboxylic fatty acids. *See id.* at 18. Customs maintains that the deodorizer distillate does not have the same general characteristic as the kinds of fatty acids contemplated by the tariff term "industrial monocarboxylic fatty acids." *See id.* at 19.

Customs also asserts that the fatty acids encompassed by heading 3823 contain a higher percentage of fatty acids than the subject merchandise, 90 percent compared to less than 50 percent. *See id.* The imported deodorizer distillate is not used the same way as the fatty acids encompassed by heading 3823, which "are used as commercial fatty acids or their constituent chemical fatty acid components are isolated for specific applications." *Id.* Rather, the subject merchandise "is imported as a primary source material for tocopherols and sterols." *Id.* at 20. Commerce asserts that it would be impractical for the imported deodorizer distillate to be used for its fatty acid component. *See id.* Cargill's exhibits demonstrate that "the value of the deodorizer distillate depends upon the content of the unsaponifiables, pricing is based upon tocopherol content and stigmasterol content, or both, depending on market demand for each ingredient." Customs' Mem. at 20; *see* Cargill's Mem. at Exs. B and C.

While Customs concedes that the imported deodorizer distillate is "obtained from fats and oils which have been subjected to vacuum distillation in the presence of steam as part of a refining process," Customs argues that the deodorizer distillate is not a fatty acid distillate covered by explanatory note 5 to heading 3823. *Id.* at 23. The imported deodorizer distillate does not have a sufficiently "high" free fatty acid content to be classified as monocarboxylic fatty acids under heading 3823. The deodorizer distillate has at best a 50 percent fatty acid content whereas the fatty acid mixtures encompassed by the heading contain at least 90 percent fatty acids. *See id.* Commercially "high" free fatty acid is based on the amount of unsaponified matter contained in the deodorizer distillate and not upon the actual dry weight of the free fatty acids. *See id.* A deodorizer distillate with 10 percent or more of unsaponifiable matter is considered to be low in fatty acids whereas a deodorizer distillate with less than 5 percent unsaponifiable matter is considered "high" in acidity and, thus, characterized by a high free fatty acids content. *See id.* at 23–24. Here, the deodorizer distillate contained more than 10 percent unsaponifiable matter and was considered to be low in free fatty acids. *See id.* Accordingly, Customs contends that the deodorizer distillate was

properly classified under heading 3824 because it is a by-product of the oil refining industry as required by the terms in that heading. *See id.* at 31. "The deodorizer distillate is similar to the examples of the residual products of chemical or allied industries in the *Explanatory Notes* to Heading 3824. . . ." *Id.* In addition, the subject merchandise is a by-product used, after importation, for the extraction of various substances which are used to manufacture other products. *See id.*

Finally, Customs asserts that HRL 960311 is entitled to *Skidmore* respect because Customs has specialized experience in the classification of merchandise. Customs relied on this expertise in HRL 960311 to give "a reasoned analysis of the proper classification of the merchandise at issue here." *Id.* at 37. Customs' decision is supported "by the plain language of the competing provisions, basic tenets of classification, and the framework of the HTSUS as it applies to fatty acids, mixtures of fatty acids, and their derivatives." *Id.* at 38. Customs also maintains that HRL 960311 is consistent with prior classifications of similar merchandise. *See id.* at 39–40.

## III. Analysis

### A. Motion for Summary Judgment

Determining whether imported merchandise was classified under the appropriate tariff provision entails a two-step process. *See Sabritas, S.A. de C.V. v. United States*, 22 CIT 59, 61, 998 F. Supp 1123, 1126 (1998). First, the proper meaning of specific terms in the tariff provision must be ascertained. Second, whether the imported merchandise falls within the scope of such term, as properly construed, must be determined. *See Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994). The first step is a question of law and the second is a question of fact. *See id.*; *see also Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997). Pursuant to 28 U.S.C. § 2639(a)(1) (1994), Customs' classification is presumed correct and the party challenging the classification bears the burden of proving otherwise. *See Universal Elecs.*, 112 F.3d at 491. This presumption, however, applies only to Customs' factual findings, such as whether the subject merchandise falls within the scope of the tariff provision, and not to questions of law, such as Customs' interpretation of a particular tariff provision. *See Sabritas*, 22 CIT at 61, 998 F. Supp. at 1126; *see also Universal Elecs.*, 112 F.3d at 491; *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995). When there are no material issues of fact in dispute, as is admitted by both parties in the present case, the statutory presumption of correctness is irrelevant. *Goodman Mfg.*, 69 F.3d at 508.

The ultimate question in every tariff classification is one of law; "whether the merchandise is properly classified under one or another classification heading." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). Where, as in the instant case,

there is no disputed material issue of fact to be resolved by trial, disposition by summary judgment is appropriate. Pursuant to 28 U.S.C. § 2640(a) (1994), Customs' classification decision is subject to *de novo* review based upon the record before the Court. Accordingly, the Court must determine "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

### B. Skidmore Respect

As a preliminary matter, the Court finds that Customs is not entitled to *Skidmore* respect. In *Skidmore*, 323 U.S. at 140, the Supreme Court set forth the factors a reviewing court is to consider in determining how much weight an agency's decision is to be afforded. The amount of respect an agency's decision is afforded by a court "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control." *Id.* The power to persuade of each Customs' classification ruling may vary depending on the *Skidmore* factors articulated in *United States v. Mead*, 533 U.S. 218 (2001). *See Structural Indus., Inc. v. United States*, 356 F.3d 1366, 1370 (Fed. Cir. 2004). Applying these factors to the case at bar, the Court finds that Customs did not give thorough consideration and provide valid reasoning in HRL 960311.[3] The Court recognizes that Customs classification rulings are entitled to "a respect proportional to [their] 'power to persuade'," *Mead*, 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140), but the Court has an "independent responsibility to decide the legal issue regarding the proper meaning and scope of the HTSUS terms." *Mead Corp. v. United States*, 283 F.3d 1342, 1346 (Fed. Cir. 2002) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed Cir. 2001)).

### C. Classification Under Heading 3823

Cargill argues that the application of GRI 1 renders the imported deodorizer distillate as *prima facie* classifiable under heading 3823, HTSUS. *See* Cargill's Mem. at 14–18. Cargill contends that this heading encompasses a class or kind of merchandise, industrial monocarboxylic fatty acids, which includes the subject merchandise. *See id*. If Cargill is correct that the deodirizer distillate is classifiable under heading 3823, then Customs' classification under heading 3824, a "basket" provision, would be incorrect. The classification of imported merchandise under a "basket" provision is only appropriate

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[3] The Court notes, however, that Customs has specialized experience which can aide the Court in its review of the questions at issue in this case. *See Mead*, 533 U.S. at 234.

when there is no other tariff category that covers the merchandise more specifically. *See EM Indus., Inc. v. United States*, 22 CIT 156, 165, 999 F. Supp. 1473, 1480 (1998) (stating that " '[b]asket' or residual provisions of HTSUS Headings . . . are intended as a broad catch-all to encompass the classification of articles for which there is no more specifically applicable subheading"). Consequently, the Court must first determine whether the imported deodorizer distillate is more specifically classifiable under heading 3823. *See Lynteq, Inc. v. United States*, 976 F.2d 693, 698 (Fed. Cir. 1992).

Pursuant to GRI 1, the definition and scope of terms of a particular provision is to be determined by the wording of the statute and any relevant section or chapter notes. *See Sabritas*, 22 CIT at 62, 998 F. Supp. at 1126–27. GRI 1 states that "classification shall be determined according to the terms of the headings and any relative section or chapter notes. . . ." Although Cargill asserts that heading 3823 is an *eo nomine* provision, the Court finds that, for the reasons set forth below, heading 3823 is not an *eo nomine* provision but rather a designation for goods by class.

If a tariff term is not statutorily defined in the HTSUS and its intended meaning cannot be discerned from legislative history, then the definition is determined by ascertaining its common and commercial meaning. *See Lynteq*, 976 F.2d at 697–98; *see also Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). To ascertain a tariff term's common meaning, the Court may consult dictionaries and scientific authorities, as well as its own understanding of the term. *See Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1998), *cert. denied*, 488 U.S. 943 (1988). The common and commercial meaning of a term is presumed to be the same. *See Sarne Handbags Corp. v. United States*, 24 CIT 309, 316, 100 F. Supp. 2d 1126, 1133 (2000). The Court, in determining the definition of tariff terms, may also use the *Explanatory Notes*, which provide guidance in interpreting the language of the HTSUS. *See Bausch & Lomb, Inc. v. United States*, 21 CIT 166, 174, 957 F. Supp. 281, 288 (1997), *aff'd*, 148 F.3d at 1363.[4]

While heading 3823 encompasses "industrial monocarboxylic fatty acids; acid oils from refining; industrial fatty alcohols," *see* HTSUS 3823, the definition of "*industrial* monocarboxylic fatty acids" is not specifically defined in the HTSUS or in the relevant legislative history. Consequently, the Court must determine, as a matter of law, the common and commercial meaning of the phrase. *See E.M. Chems. v. United States*, 920 F.2d 910, 912 (Fed. Cir. 1990). While the definition of the phrase is not found in any standard or technical

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[4] The *Explanatory Notes* are not legally binding on the United States, yet they "generally indicate the 'proper interpretation' of provisions within the HTSUS . . . [and] are persuasive authority for the Court when they specifically include or exclude an item from a tariff heading." *Sabritas*, 22 CIT at 62, 998 F. Supp at 1127.

dictionaries, its meaning may be constructed based upon the definition of the individual terms. A carboxylic acid "may be classified in terms of the number of carboxyl (-COOH) groups it contains. If one carboxyl group [exists], it is designated as monocarboxylic. . . ." *Van Nostrand's Scientific Encyclopedia* 508 (7th ed. 1989). Fatty acid is "an organic monobasic acid . . . derived from the saturated series of aliphatic hydrocarbons. . . ." *McGraw-Hill Dictionary of Scientific and Technical Terms* 780 (6th ed. 2003).

Cargill asserts that the *Explanatory Notes* to heading 3823 indicate that monocarboxylic fatty acids "are generally manufactured by the saponification or hydrolysis of natural fats or oils." *See* Cargill's Mem. at 18. In addition, Cargill maintains that "[t]he method of production and physical characteristics [of the exemplar labeled fatty acid distillate] match exactly the method of production and physical characteristics of the subject deodorizer distillate." *Id.* at 19. Accordingly, Cargill contends that the imported deodorizer distillate is a monocarboxylic fatty acid under the description contained in the *Explanatory Notes*, and consequently *prima facie* classifiable under heading 3823. The Court agrees with Cargill and finds that the imported deodorizer distillate constitutes "monocarboxylic fatty acids." The deodorizer distillate is a by-product of the refining of crude vegetable oils and contains free fatty acids, including oleic, linoleic, stearic, palmitic and linolenic acids, and is obtained through the process described by the *Explanatory Notes* to heading 3823.

In drafting the HTSUS, Congress thought it appropriate to add the term "industrial" before the phrase "monocarboxylic fatty acids." Consequently, the Court must determine whether the imported deodorizer distillate constitutes monocarboxylic fatty acids within the scope of the definition of industrial. Cargill argues that "industrial" refers to the condition in which merchandise is imported, *i.e.* in bulk for industrial consumers. *See* Cargill's Mem. at 17. The Court does not agree. The common definition of the term "industrial" is "of a quality suitable for industrial use." *Oxford English Dictionary* 897 (7th ed. 1989). In heading 3823, the term "industrial" is an adjective describing the manner in which monocarboxylic fatty acids are to be used. While heading 3823 provides the more specific description of deodorizer distillate by referring to its dominant component, monocarboxylic fatty acids, the Court finds that heading 3823 is a use provision, describing a class or kind of merchandise by name. The classification decision turns on whether the imported deodorizer distillate can be characterized as containing *industrial* monocarboxylic fatty acids, that is whether the monocarboxylic fatty acids are "employed, required or used in industry." *Webster's II New Riverside University Dictionary* 625 (1988). Consequently, the Court holds that the deodorizer distillate is not *prima facie* classifiable under heading 3823.

Cargill alternatively argues that if the imported deodorizer distillate is *prima facie* classifiable under two headings, either heading 3823 or 3824, then, pursuant to GRI 2(b) and GRI 3(a) the subject merchandise should be classified under heading 3823. *See* Cargill's Mem. at 17 n.4. The Court finds that an analysis under either GRI 2(b) or GRI 3(a) excludes the deodorizer distillate from classification under heading 3823. This Court has noted that GRI 2(b) instructs that "any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance." *Pillowtex Corp. v. United States*, 21 CIT 1154, 1157, 983 F. Supp. 188, 191 (1997), *aff'd*, 171 F.3d 1370 (Fed. Cir. 1999). Plaintiff, in that case, claimed that its comforters filled with down should be classified as a "comforter of cotton" because GRI 2(b) extended the terms of a heading to include merchandise only partially comprised of the named material, and GRI 3(b) required classification based upon the essential character of the merchandise. *See id.* According to the plaintiff, its merchandise's essential character was the part of the good which predominated by weight, *i.e.* the cotton outer shell of the comforter.

In the case at bar, Cargill makes the a similar unconvincing argument. Cargill argues that the imported deodorizer distillate should be classified as an "industrial monocarboxylic fatty acid" because its free fatty acid content is in greater quantity than any other component. *See* Cargill's Mem. at 23–25. Tariff terms, however, should be interpreted to avoid absurd or anomalous results. *See Pillowtex*, 21 CIT at 1157, 983 F. Supp. at 191. An essential character analysis made according to GRI 2(b) and GRI 3(b) reveals that the essential character of the imported deodorizer distillate is not derived from its fatty acid content. Moreover, ARI 1 dictates how classification should be construed when a classification decision is controlled by use. Rule 1(a) of the ARI deals with "principal use" provisions while ARI 1(b) deals with "actual use" provisions. *See Primal Lite*, 182 F.3d at 1363. The rule states:

> a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the *principal use*.

ARI 1(a) (emphasis added). "Principal use" means the use which is greater than any other single use of the good. *See Minnetonka Brands, Inc. v. United States*, 24 CIT 645, 651, 110 F. Supp. 2d 1020, 1027 (2000). The "principal use" provision is used to classify particular merchandise according to the ordinary use of such merchandise. *See Primal Lite*, 182 F.3d at 1364–65 (construing ARI 1(a) as calling for a "determination as to the group of goods that are commercially fungible with the imported goods").

The Court finds that the deodorizer distillate's essential character is not of the same class or kind as industrial monocarboxylic fatty acids encompassed by heading 3823. While the imported deodorizer distillate's predominant component is free fatty acids, it contains less than 50 percent free fatty acids. Furthermore, the subject merchandise is not imported, obtained or used for its fatty acid content. Rather, the subject merchandise is used as a source material for its other components, specifically tocopherol and sterol. Heading 3823 specifically encompasses such fatty acids as stearic acid, oleic acid, tall oil acids and fatty acids derived from coconut, palm-kernel and palm oil. The composition of these fatty acids indicates that they are comprised of multiple types of fatty acids with *de minimus* amounts of non-fatty acid constituents. The Court agrees with Customs that the deodorizer distillate is not like the other goods encompassed by heading 3823 because the fatty acid component of the merchandise is not the part of the good with any commercial significance. In addition, the deodorizer distillate is not commercially fungible with the monocarboxylic fatty acids classified under heading 3823.

### D. Customs' Classification of the Imported Deodorizer Distillate Under HTSUS Subheading 3824.90.28

The Court finds that the imported deodorizer distillate was properly classified under subheading 3824.90.28. As demonstrated in the above analysis, the deodorizer distillate is not encompassed by heading 3823. Since the merchandise does not fit under a named provision, it must be classified elsewhere, under the basket provision 3824.90.28. *See EM Indus.*, 22 CIT at 165, 999 F. Supp. at 1480. Classification under this provision is proper because the deodorizer distillate is undisputedly a by-product of a chemical or allied industry. Furthermore, the deodorizer distillate is similar to the examples contained in the *Explanatory Notes* to heading 3824, of the by-products or residual products of chemical or allied industries used in the manufacture of other products. *See Explanatory Notes*. Deodorizer distillate fits into this category, as after importation, various substances are extracted from it and used in the manufacture of other products. Additionally, the subject imported deodorizer distillate contains more than 5 percent tocopherols and sterols, the components extracted and used in manufacturing. These are aromatic substances, properly classified under heading 3824: "Mixtures containing 5 percent of more by weight of one or more aromatic or modified aromatic substances: Other." Accordingly, the Court finds that Customs properly classified the imported deodorizer distillate under 3824.90.28.

## *CONCLUSION*

The deodorizer distillate does not fall within the common meaning of the tariff terms "industrial monocarboxylic fatty acids" because,

even though they contain fatty acids, the imported goods do not have the essential character of the same class or kind of goods encompassed by heading 3823. The deodorizer distillate is imported, obtained, and used for its other components, *i.e.* tocopherols and sterols, and not its fatty acid content. The types of fatty acids covered within the class designated "industrial monocarboxylic fatty acids" are used as commercial fatty acids. The deodorizer distillate, however, is imported and valued for its tocopherols and sterols content. Furthermore, the pricing of deodorizer distillate is determined based on the content of tocopherol and stigmasterol, depending on the market demand for each ingredient. Accordingly, Customs properly classified the subject merchandise under 3824.90.28. For the foregoing reasons, Cargill's motion for summary judgment is denied and Customs' motion for summary judgment is granted. Judgment will be entered accordingly.

Slip Op. 04–26

SHINYEI CORPORATION OF AMERICA, PLAINTIFF, v. UNITED STATES, ET. AL., DEFENDANT.

Court No. 00–00130

***ORDER***

This matter comes before the Court pursuant to the decision of the Court of Appeals for the Federal Circuit ("CAFC") in *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297 (Fed. Cir. 2004), and the CAFC mandate of March 12, 2004, reversing and remanding the judgment of the Court in *Shinyei Corp. of Am. v. United States*, 27 CIT ___ , ___ , 248 F. Supp. 2d 1350.

The CAFC held that this Court erred in granting defendant's motion to dismiss the action pursuant to USCIT R. 12(b)(1). Accordingly, it is hereby

**ORDERED** that plaintiff proceed with the merits of the case consistent with the CAFC's opinion.

Slip Op. 04–27

**BEFORE: GREGORY W. CARMAN, JUDGE**

BASF CORPORATION, PLAINTIFF, v. THE UNITED STATES, DEFENDANT.

Court No. 02–00260

[Defendant's Motion for Leave to Show Confidential Documents to a Third Party [ ] Consultant is denied.]

Dated: March 23, 2004

*Barnes, Richardson & Colburn* (*James S. O'Kelly, Frederic D. Van Arnam, Jr., Kevin J. Sullivan*), New York, NY, for Plaintiff.

*Peter D. Keisler*, Assistant Attorney General; *Barbara S. Williams*, Acting Attorney in Charge, International Trade Field Office; *Harry A. Valetk*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, for Defendant.

## OPINION

**CARMAN, Judge:** Defendant seeks leave of Court to show confidential documents to a third-party consultant in accordance with the terms of the Stipulated Protective Order granted by this Court on November 6, 2003, pursuant to Rule 26(c) of this Court. For the reasons discussed below, this Court denies Defendant's motion.

## BACKGROUND

This motion involves a discovery dispute in a case challenging the United States Bureau of Customs and Border Protection's ("Customs") denial of BASF's protest of the classification of seven entries, pursuant to 19 U.S.C. § 1514(a)(2). The imported merchandise is PIBA, also known as Puradd™ FD–100, "a clear, colorless, viscous liquid mixture consisting of polyisobutylene amine and several saturated hydrocarbons." *BASF Corp. v. United States*, No. 02–00260 (Ct. Int'l Trade Aug. 7, 2002) (Compl. ¶4); (Pl.'s Opp'n to Def.'s Mot. for Leave ("Pl.'s Opp'n") at 3.) . "The starting material for the manufacture of [PIBA] is a polyisobutylene (PIB) polymer containing an average of 25 repetitive, identical units of the monomer isobutylene. The PIB is modified in its alpha position by the addition of a single monomine group (Poly Isobutylene Amine)." (Compl. ¶4) Customs classified the merchandise as "a prepared additive for mineral oils, specifically as a gasoline detergent additive." (Mem. in Supp. of Def.'s Mot. ("Def.'s Mem.") at 2.) BASF alleges that Customs erred in classifying the imported merchandise as a fuel additive because PIBA must undergo a significant amount of blending and processing with other compounds before it can be used as a fuel additive. (Compl. ¶¶9–11.) Defendant argues that Customs properly classified

the merchandise; or in the event that the merchandise is not a prepared additive as imported, it is an "unfinished prepared additive," not classifiable under Plaintiff's suggested subheading, 3902.20.50 of the Harmonized Tariff Schedule of the United States ("HTSUS"). (Def.'s Mem. at 2–3; Compl. ¶12.)

The parties stipulated to a protective order, which the Court granted pursuant to Rule 26(c)(7) of this Court on November 6, 2003. *BASF Corp. v. United States*, No. 02–00260 (Ct. Int'l Trade Nov. 6, 2003) (granting protective order) ("Stipulated Protective Order"). This protective order contained the mutually agreed upon terms that would govern the use of confidential documents and commercial information disclosed in this case. (*Id.*) The parties are now engaged in discovery. On December 9, 2003, Defendant requested that BASF consent to its showing confidential documents obtained under the protective order to Dr. John M. Larkin, a third-party consultant selected by Defendant. (Def.'s Mem. at 3.) Defendant provided BASF with Dr. Larkin's resume and the confidentiality agreement executed by Dr. Larkin, indicating that he would abide by the terms of the protective order. (*Id.* at 6; Exs. B and C.) On December 17, 2003, BASF notified Defendant that it would "exercis[e] its rights under paragraph six of the protective order" to object to Defendant's sharing confidential information with Dr. Larkin. (*Id.* Ex. D; Letter from Pl.'s Counsel to Def.'s Counsel of 12/17/03, at 2.) BASF explained that, upon review of Dr. Larkin's resume, it is of the view that Dr. Larkin is not independent from BASF's competitors. (*Id.*) Dr. Larkin's resume states, in pertinent part, that he is "retained by Huntsman [a producer of a fuel additive that involves similar manufacturing processes as the imported merchandise] as a part-time consultant in [the] area of fuel additives . . . [and has] acted as a gasoline additive consultant for one other [unidentified] client company." (Def.'s Mem. Ex. B.)

Defendant has now filed a motion for leave to show Dr. Larkin confidential documents which it received from BASF under the protective order. Defendant asserts that disclosure to Dr. Larkin is consistent with the terms of the protective order. BASF opposes disclosure of the confidential information to Dr. Larkin, challenging his independence from BASF's competitors.

## PARTIES' CONTENTIONS

### I. *Defendant's Contentions*

Defendant seeks leave of Court to disclose confidential information to Dr. Larkin, the third-party consultant it has selected to assist it in preparing its defense, because BASF opposes disclosure to this particular expert based on its assertions that Dr. Larkin is not independent from BASF's competitors and that BASF would be harmed by

this disclosure. (Def.'s Mem. at 6.) Defendant argues that BASF has offered only "broad allegations of harm about what could happen if its information fell into the hands of its competitors." (*Id.* (emphasis in original).) Defendant asserts that "this Court has already examined a scenario in which an importer failed to articulate specific damages or harm that will be allegedly suffered as a result of the disclosure of confidential information to third party independent experts, and held against any restriction that would unnecessarily hamper the discovery process." (*Id.* (discussing *National Hand Tool, Corp. v. United States*, 14 Ct. Int'l Trade 490 (1990)).) Defendant contends that BASF's claims that it would suffer injury by disclosure of the confidential information to Dr. Larkin are unfounded. (*Id.* at 7.) As to BASF's concern based upon the similarities in production processes used to manufacture polyether amines ("PEA"), a product manufactured by Huntsman, and PIBA, the product manufactured by BASF, Defendant states that "Dr. Larkin has explained . . . that there is no overlap between the production of PEA . . . and PIBA . . . that would allow Huntsman to improve the production of PEA, or to alter its manufacturing processes to produce a form of PIBA that would compete with BASF in the marketplace." (*Id.*)

Defendant also highlights the fact that Dr. Larkin has signed a confidentiality agreement, in which he agreed to be bound by the terms of the protective order, and that BASF has presented no reason why Dr. Larkin would violate the protective order. (*Id.* at 7–8.) Defendant concludes by stating that it would be "unduly prejudiced if it is not allowed to use Dr. Larkin's impeccable expertise in defending Customs' decision in this case [because] Dr. Larkin is a fuel additive expert with 30 years of experience in the fuel additive industry." (*Id.* at 8.) Underscoring the fact that Dr. Larkin is only a part-time consultant to Huntsman, Defendant asserts that it has spent a considerable amount of time trying to find an expert with sufficient experience in the fuel additives sub-field of the fuel industry and that it is difficult to find experts who are not employed by or affiliated with a direct competitor of BASF. (*Id.*)

## II. *Plaintiff's Contentions*

BASF opposes disclosure of information obtained under protective order to Dr. Larkin because Dr. Larkin is not independent of BASF's competitors. (Pl.'s Opp'n at 1.) BASF stresses that "this is not a situation where it . . . is seeking to prevent or suppress disclosure of material documents and information to its adversary"; rather, BASF asserts that is had produced the confidential documents and information[1] requested by Defendant to be used consistent with the

[1] BASF states that the confidential documents and information that it has provided to Defendant include:

terms of the protective order. (*Id.*) BASF adds that it does not oppose disclosure of confidential documents and commercial information to an independent third-party consultant expert or consultant. (*Id.* at 6, 12.) BASF notes that, by its terms, the protective order provides that Defendant may show the confidential documents produced to "independent, third party consultants and experts." (*Id.* at 2 & n.3 (citing Stipulated Protective Order ¶6.) BASF argues that Dr. Larkin, "by his own acknowledgment is a paid consultant to a direct competitor of BASF and . . . has been a past consultant to [at least one] other compan[y] that may have been, could be, or [is] BASF's competitor[ ]." (*Id.*) BASF asserts that it has reasonably exercised its right, as provided by the protective order, to object to Dr. Larkin's access to confidential documents and information in this case. (*Id.*) BASF submits the affidavit of Susan Gardell, BASF's Marketing Manager, Fuel Additives for NAFTA Region, to support BASF's assertion that Dr. Larkin is not independent of BASF's competitors. (*Id.* at 3–4; Ex. B, Gardell Aff.) The affidavit states that "Huntsman is a direct competitor of BASF Corp. in the gasoline additive marketplace [because] Huntsman is the main toller for [PEA,] . . . a product that BASF also produces." (Ex. B, Gardell Aff. ¶¶3, 5.) The affidavit explains that, in addition to PEA being a product produced by both Huntsman and BASF, "[t]he reduction amination process used for producing PEA is the same as that used to produce [PIBA]. If Dr. Larkin were to acquire [and share with Huntsman] the BASF proprietary method for producing PIBA, . . . [then] Huntsman could use this information to refine the methods and processes by which it manufactures PEA [or] use [the information] in the manufacture of PIBA." (*Id.* ¶6.) The affidavit adds that Huntsman is a supplier of "products to the marketers of gasoline additive packages. These [marketers] directly compete with BASF." (*Id.* ¶7.) BASF notes that it does not object to Dr. Larkin's participation in this case as an advisor to Defendant. (Pl.'s Opp'n at 11.) BASF seeks only to limit Dr. Larkin's access to specific confidential documents that BASF has identified. (*Id.*; Ex. A, "BASF Confidential Info. and Docs. Disclosed to the Gov't During Discovery in Ct. No. 02–00260.")

BASF challenges Defendant's assertion that it has to show "good cause" in objecting to Dr. Larkin's access to the confidential informa-

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(1) the process by which the imported product—[PIBA]—is manufactured and the ingredients that go into the manufacture of PIBA; (2) the product specifications for PIBA; (3) the identity of BASF AG's customers for PIBA; (4) the chemical composition and formula of PIBA; (5) BASF's U.S. production process for the manufacture of deposit control additive packages (DCAP) in the United States; (6) the DCAP product specifications required of BASF by its customers; and (7) the results of various industry-wide tests run on the imported PIBA showing the unsuitability of it for use as a gasoline additive in its imported condition.

(*Id.* at 3 (footnote omitted); Ex. A.)

tion. (Pl.'s Opp'n at 4.) BASF asserts that a Rule 26(c)(7) of this Court requires a showing of "good cause" when a party seeks a protective order. (*Id.* at 5.) In this case, however, a protective order has already been granted. (*Id.*) BASF asserts that, contrary to the issues in the cases cited by Defendant to support its argument, it is not attempting to prevent disclosure of confidential information or prevent Defendant from showing confidential information to any independent third-party expert. (*Id.* at 4–6.) BASF argues that the issue before the Court is the "express language of the stipulated protective order"; specifically, the use of confidential information to a manner consistent with the mutually-agreed upon terms of the order. (*Id.*)

BASF contends that, given the fact that a protective order is already in place, Defendant bears the burden of establishing that "its need to disclose BASF's confidential information and documents to Dr. Larkin is relevant and necessary to the prosecution of this case, and that this necessity outweighs the harm disclosure will cause BASF." (*Id.* at 6–7 (citing 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2043 (2d. Ed 1994) (additional citations omitted).) BASF asserts that Defendant has failed to meet this burden. (*Id.* at 7.)

BASF argues that, even if Defendant has made a proper showing of necessity, "courts have historically found that the irreparable harm that can be suffered by the disclosing party will outweigh the need to disclose confidential information to a competitor." (*Id.* at 7 (citations omitted).) BASF notes that courts have declined to permit disclosure of confidential information to a party's competitor and to the in-house counsel of a party's competitor based on the possibility of "[i]nadvertant or accidental disclosure [which] may or may not be predictable." (*Id.* at 7–9 (quoting *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984).) BASF asserts that Defendant's motion should be denied based upon the following: (1) Dr. Larkin's ongoing affiliation with a BASF competitor; (2) the nature of the confidential documents and information already disclosed to Defendant; (3) Defendant's failure to establish that it will be prejudiced by Dr. Larkin being denied access to the confidential information, particularly, given that Dr. Larkin has not been identified as an expert witness; and (4) Defendant's failure to identify the specific documents that Dr. Larkin would need to review. (*Id.* at 9–15.)

## DISCUSSION

Rule 26(c) of this Court provides that the Court, "[u]pon motion by a party . . . from whom discovery is sought . . . and for good cause shown, the court may make any order which justice requires to protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense, including . . . the following: . . . that a trade

secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." USCIT R. 26(c)(7).

Because the language of Rule 26(c)(7) of this Court and Rule 26(c)(7) of the Federal Rules of Civil Procedure is fundamentally the same, the Court may look to cases which have interpreted and applied the Federal Rules of Civil Procedure for guidance. *See Nat'l Hand Tool*, 14 Ct. Int'l Trade at 492–493 (citing *A. Hirsh, Inc. v. United States*, 657 F. Supp. 1297, 1303 n.15 (Ct. Int'l Trade 1987)); FED. R. CIV. P. 26(c)(7). It is well established that "under Rule 26(c)(7), the trial court has broad discretion to determine whether a protective order is warranted, and the specific restrictions that should be imposed." *Nat'l Hand Tool*, 14 Ct. Int'l Trade at 492 (citation omitted); *see also, Dove v. Atl. Capital Corp.*, 963 F.2d 15, 19 (2d Cir. 1992). "In the exercise of its discretion, and in determining the scope of a protective order, the trial court 'must be guided by the liberal federal principles favoring disclosure, keeping in mind the need to safeguard confidential information transmitted within the discovery process from disclosures harmful to business interests.' " *Nat'l Hand Tool*, 14 Ct. Int'l Trade at 493 (citation omitted).

It is well established that the party seeking a protective order bears the burden of demonstrating the 'good cause' to support the issuance of such an order. *See id.* at 493 (quoting *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 202 (S.D.N.Y. 1977).). "Furthermore, when a party asserts that the discovery process will cause competitive injury because it will result in the revelation of trade secrets, the party cannot rely solely upon conclusory statements, 'but must present evidence of specific damage likely to result from disclosure.' " *Id.* (quoting *Culligan v. Yamaha Motor Corp., USA*, 110 F.R.D. 122, 125 (S.D.N.Y. 1986)).

After a protective order issues, the court will balance the interests of the parties, in the event that the party in receipt of confidential information under that order seeks to utilize the information in a manner that is opposed by the producing party. *See Telular Corp. v. VOX2, Inc.*, 2001 U.S. Dist. LEXIS 7472, at *3 (N.D. Ill. 2001); *Advanced Semiconductor Materials Am., Inc. v. Applied Materials, Inc.*, 1996 U.S. Dist. LEXIS 21459, at *8 (N.D. Cal 1996); *see also*, 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2043. When, as is the issue here, disclosure of confidential information to a third-party consultant is opposed by the disclosing party, this court will balance the movant's interest in selecting the consultant most beneficial to its case, considering the specific expertise of this consultant and whether other consultants possess similar expertise, against the dis-

closing party's interest in protecting confidential commercial information from disclosure to competitors. *See Telular*, 2001 U.S. Dist. LEXIS 7472, at *3; *Advanced Semiconductor*, 1996 U.S. Dist. LEXIS 21459, at *8.

This Court finds that Defendant has failed to establish that its need to use Dr. Larkin in preparing the defense of this case outweighs BASF's interests in keeping confidential commercial information from a competitor. This Court denies Defendant's motion for leave to show confidential documents and information to Dr. Larkin.

It is undisputed that there is a protective order in place in this case and that the language of the protective order was mutually agreed-upon by the parties. (*See* Stipulated Protective Order.) The relevant portion of the protective order states:

> Confidential Documents may be shown to third party consultants and experts, who sign a certification stating they are independent of all manufacturers or vendors of competitive merchandise, who are retained for the purpose of assisting in the preparation of this action on the condition that, before making disclosure, defendant must obtain an agreement in writing to be bound by the provisions of this Order (in the form of Exhibit A hereto) from such consultant, expert or other third party. Confidential Documents may be shown to third party consultants and experts who are affiliated with, employed by, or consultants to manufacturers or vendors of competitive merchandise, only with prior written consent of plaintiff, or upon order of the Court.

(Stipulated Protective Order ¶6 (first emphasis added).) It is also undisputed that the documents Defendant seeks to show Dr. Larkin are confidential and that Huntsman is a fuel additives manufacturer. (*See* Def.'s Mot. Exs. B and D; Pl.'s Opp'n Exs. A and B.) Additionally, there is no dispute that Dr. Larkin maintains a relationship with Huntsman as a retained, part-time consultant, acting as a liaison between Huntsman's fuel additive research team and Huntsman's fuel additive customers. (Def.'s Mot. Ex. B; Pl.'s Opp'n Ex. B.) BASF contends, and Defendant does not expressly deny, that Huntsman is a direct competitor of BASF in the fuel additive market. (*See generally*, Pl.'s Opp'n at 15, Ex. B, Gardell Aff ¶3; Def.'s Mem. at 8.) Seemingly, Dr. Larkin will remain on retainer to Huntsman during the course of this case and thereafter.

The agreed-upon language of the protective order includes precautions intended to protect BASF from possible competitive injury. (*See* Stipulated Protective Order ¶6.) BASF is seeking to exercise that precaution. Accordingly, the Court will balance Defendant's interest

in selecting the consultant it believes will be the most useful to its case, against BASF's interest in protecting its trade secrets and confidential information from disclosure to its competitors. *See Telular*, 2001 U.S. Dist. LEXIS 7472, at *3; *Advanced Semiconductor*, 1996 U.S. LEXIS 21459, at *8.

Defendant relies on Rule 26(c)(7) and cases addressing whether the issuance of a protective order is proper to assert that BASF is attempting to prevent disclosure of relevant confidential information and that BASF must show good cause as to why the confidential documents should not be provided to Dr. Larkin. (*See* Def.'s Mem. at 5–8.) The Court, however, finds that Defendant has not framed the issue accurately. The cases upon which Defendant relies, particularly, *National Hand Tool*, address issues involving broad prevention of disclosure of confidential information to any third-party consultant or expert. Specifically, the "major dispute" before the court in *National Hand Tool* "pertain[ed] to [a paragraph] of plaintiff's proposed protective order, which preclud[ed] confidential information from being shown to anyone other than counsel for the defendant, counsel's support staff, and government employees assisting counsel in the conduct of the action." *Nat'l Hand Tool*, 14 Ct. Int'l Trade at 493. In *National Hand Tool*, the defendant's proposed protective order contained essentially identical language as paragraph six of the Stipulated Protected Order in this case. *Compare id. with* Stipulated Protective Order ¶6. The court in *National Hand Tool* found that the plaintiff's attempt to prevent disclosure to any third-party consultant or expert was based upon "broad allegations of harm, rather than a particularized showing of injury." *Id.* at 494 (internal citation and quotation marks omitted). Contrary to Defendant's reading of *National Hand Tool*, the court did not "[hold] against any restriction that would unnecessarily hamper the discovery process." (Def.'s Mem. at 6.) In fact, the court noted with approval that "the defendant has taken precautions in its proposed protective order to protect plaintiff from possible competitive injury," by including language that permitted free disclosure of confidential information "only to experts who are independent of all manufacturers of competitive merchandise" and language that required the plaintiff's consent prior to disclosure of information to experts who may be affiliated with plaintiff's competitors. *Nat'l Hand Tool*, 14 Ct. Int'l Trade at 494 (emphasis added). The court adopted the defendant's proposed language for the protective order, finding that the provision "with precautions, permits the disclosure of plaintiff's confidential information to third party consultants and experts." *Id.*

As an initial matter, the Court finds that Dr. Larkin is not independent from BASF's competitors. In evaluating independence, the Court will consider "the individual's relationship to or status within the receiving party's business, the likelihood of that relationship continuing, and the feasibility of separating either the knowledge

gained or the individual from future competitive endeavors." *Digital Equip. Corp. v. Micro Tech., Inc.*, 142 F.R.D. 488, 491 (D. Colo. 1992). Here, Dr. Larkin maintains a relationship with Huntsman, a fuel additive manufacturer and "a direct competitor of BASF Corp. in the gasoline additive marketplace." (Pl.'s Opp'n, Ex. B Gardell Aff. ¶3.) Although Defendant notes in its memorandum that Dr. Larkin is of the view that there is insufficient overlap in the manufacturing processes of Huntsman's PEA product and BASF's PIBA product, and, therefore, his possible disclosure of information to Huntsman would not improve Huntsman's competitive position in the marketplace, the affidavit in support of BASF's opposition indicates otherwise. (*See* Def.'s Mem. at 7; Pl.'s Opp'n Ex. B ¶¶6–7.) Nothing in the papers submitted to the Court indicates that Dr. Larkin's relationship with Huntsman will end during this proceeding or anytime thereafter. *See Advanced Semiconductor*, 1996 U.S. Dist. LEXIS 21459, at *10–*11 (permitting disclosure to an expert who last consulted with the objecting party's competitor over four years preceding the litigation and had no existing relationship with the competitor). While in no way trying to impugn Dr. Larkin's character or his commitment to abiding by the terms of the protective order, this Court is concerned with Dr. Larkin acquiring knowledge based upon BASF's confidential information that could be used to assist a BASF competitor at BASF's expense. "It is very difficult for the human mind to compartmentalize and selectively suppress information once learned, no matter how well-intentioned the effort may be to do so." *A. Hirsh, Inc.*, 657 F. Supp. at 1302. In particular, if Dr. Larkin were granted access to BASF's confidential materials, he would most likely closely study BASF's sensitive commercial information and this information would become a part of his general knowledge. This knowledge may be inadvertently disclosed to Huntsman during the course of Dr. Larkin's on-going relationship with this BASF competitor. This Court finds that BASF could be commercially harmed by disclosure of its confidential documents and information to Dr. Larkin.

Defendant has not demonstrated that its interest in using Dr. Larkin as its third-party consultant outweighs the injury that BASF would likely suffer as a result of this disclosure. Defendant has not specified with particularity why Dr. Larkin's expertise is critical for conducting its defense. (Def.'s Mem. at 8.) Although Dr. Larkin has thirty years of extensive experience in the fuel additive industry, it is not apparent that he "possesses qualifications to be an expert witness in this case which . . . other . . . experts may not possess." *Advanced Semiconductor*, 1996 U.S. Dist. LEXIS 21459, at *8.

Given the likelihood of inadvertent disclosure of highly confidential commercial information to a direct competitor of BASF because of Dr. Larkin's on-going relationship with Huntsman and Defendant's failure to establish that its need to use Dr. Larkin outweighs BASF's interests in protecting against disclosure which will harm its

commercial interests, the Court denies Defendant's motion for leave to show BASF's confidential documents to Dr. Larkin.

## CONCLUSION

Upon consideration of Defendant's Motion for Leave to Show Confidential Documents to a Third Party [ ] Consultant as Provided by the Terms of the November 6, 2003[,] Stipulated Protective Order and Plaintiff's Opposition to Defendant's Motion for Leave, Defendant's motion is denied.

## ABSTRACTED CLASSIFICATION DECISIONS

| *DECISION NO./DATE JUDGE* | *PLAINTIFF* | *COURT NO.* | *ASSESSED* | *HELD* | *BASIS* | *PORT OF ENTRY & MERCHANDISE* |
|---|---|---|---|---|---|---|
| C04/18<br>3/1/04<br>Aquilino, J. | McNeil Consumer Prods. Co. | 02–00420 | 3824.90.40<br>Various rates | 3404.90.50<br>Free of duty | Agreed statement of facts | Minneapolis<br>Staest |
| C04/19<br>3/1/04<br>Aquilino, J. | McNeil Consumer Prods. Co. | 02–00449 | 3824.90.40<br>Various rates | 3404.90.50<br>Free of duty | Agreed statement of facts | Minneapolis<br>Staest |
| C04/20<br>3/3/04<br>Musgrave, J. | Pioneer Elecs. | 03–00199 | 8528.21.70<br>5% | 8471.60.45<br>Free of duty | Agreed statement of facts | Los Angeles<br>Pioneer brand Plasma Display Monitors, model PDP–503CMX |
| C04/21<br>3/15/04<br>Eaton, J. | Heraeus Tenevo, Inc. | 03–00444 | 7020.00.60<br>5% | 7002.31.00<br>0% | Agreed statement of facts | Charleston<br>High purity fused silica glass tubes |