U.S. Customs and Border Protection

Slip Op. 13–13

THE POMEROY COLLECTION, LTD., Plaintiff, v. UNITED STATES, Defendant.

Consol. Court No. 02–00150

[Plaintiff's Motion for Summary Judgment is denied; Defendant's Cross-Motion for Summary Judgment is granted]

Dated: January 28, 2013

Amended: February 15, 2013

Peter J. Fitch, Fitch, King, LLC, of Moonachie, New Jersey, argued for Plaintiff.

Beverly A. Farrell, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, New York, argued for Defendant. With her on the brief were *Tony West*, Assistant Attorney General, and *Barbara S. Williams*, Attorney in Charge, International Trade Field Office. Of counsel on the brief was *Beth C. Brotman*, Office of the Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, U.S. Department of Homeland Security, of New York, New York.

OPINION

RIDGWAY, Judge:

In this consolidated action,[1] plaintiff The Pomeroy Collection, Ltd. ("Pomeroy") challenges the decision of the United States Customs Service[2] denying Pomeroy's protests concerning the tariff classification of certain merchandise imported from Mexico in 1999.[3]

[1] Court No. 01–00784 and Court No. 01–01011 were consolidated into the present action based in part on the parties' representation that consolidation will help the parties "resolve all of the remaining issues existing in the Pomeroy cases." *See* Consent Motion to Consolidate (Feb. 27, 2009); *see also* Order (March 4, 2009). This action is also designated a test case, with more than 50 actions currently suspended under it. *See* Order (March 17, 2005) (designating action as test case).

[2] The U.S. Customs Service – formerly part of the U.S. Department of Treasury – was transferred to the U.S. Department of Homeland Security as part of the Homeland Security Act of 2002. *See Bull v. United States*, 479 F.3d 1365, 1368 n.1 (Fed. Cir. 2007). The agency is now commonly known as U.S. Customs and Border Protection, and is referred to as "Customs" herein.

[3] The contested items are listed in boldface type in schedules attached to Pomeroy's pleadings and briefs. The most up-to-date schedule – and the one that will be referenced

As discussed below, in the course of this litigation the parties have reached agreement on the classification of most of the merchandise identified in Pomeroy's Consolidated Amended Complaint, with virtually all issues resolved in Pomeroy's favor. *See* section I, *infra*. Now pending before the Court are the parties' cross-motions for summary judgment concerning the classification of the 16 articles that remain in dispute, which can be grouped into three basic categories of merchandise – "Pillar Plates," "Floor Articles," and "Wall Articles."

Pomeroy contends that all 16 remaining articles are properly classifiable as "Lamps and lighting fittings" under subheading 9405.50.40 of the Harmonized Tariff Schedule of the United States ("HTSUS") (1999),[4] and are thus duty-free. *See generally* Plaintiff's Brief in Support of Its Motion for Summary Judgment ("Pl.'s Brief") at 3, 6, 21–24; Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment ("Pl.'s Reply Brief") at 1–7, 25. In the alternative, Pomeroy argues that the Floor Articles and the Wall Articles are classifiable as "Other furniture and parts thereof" under subheading 9403.80.60, and are thus duty-free. *See generally* Pl.'s Reply Brief at 16–24, 25.

The Government maintains that Customs properly classified the contested merchandise as decorative glass articles under various subheadings of HTSUS heading 7013 (which covers "Glassware of a kind used for . . . indoor decoration or similar purposes") – specifically, subheadings 7013.39.50, 7013.99.50, 7013.99.80, and 7013.99.90 (depending on the value of the merchandise) – and assessed duties at rates ranging from 4.3% to 22.8% *ad valorem*. *See generally* Defendant's Cross-Motion for Summary Judgment ("Def.'s Brief") at 6–7, 16–20, 20–25; Defendant's Reply Memorandum of Law in Support of Its Cross-Motion for Summary Judgment and in Response to Plaintiff's Response to Our Cross-Motion ("Def.'s Reply Brief") at 1, 4–5, 8–9.

Jurisdiction lies under 28 U.S.C. § 1581(a) (1994).[5] As discussed below, all items of merchandise that remain in dispute are properly classified as decorative glass articles under the specified subheadings

hereinafter – is the schedule appended to Pomeroy's Reply Brief. *See* Pl.'s Reply Brief at attached Schedule ("Pl.'s Final Schedule").

[4] All citations to the HTSUS herein are to the 1999 edition.

All tariff provisions discussed in relation to both the classified and claimed provisions at issue here are properly preceded by the prefix "MX," to indicate that the goods qualify for the duty rate applicable to products of Mexico. However, the prefix is otherwise irrelevant to the analysis here, and is omitted throughout the opinion.

[5] All citations to statutes herein (other than citations to the HTSUS) are to the 1994 edition of the United States Code.

of HTSUS heading 7013. Pomeroy's Motion for Summary Judgment is therefore denied, and the Government's Cross-Motion for Summary Judgment is granted.[6]

I. *Background*

The parties here are no strangers to the Court. Numerous articles imported by Pomeroy with similarities to the merchandise at issue here have been the subject of classification litigation over the past decade. *See generally The Pomeroy Collection, Inc. v. United States*, 26 CIT 624, 246 F. Supp. 2d 1286 (2002) ("*Pomeroy I*") (finding glass vessels cradled by wrought iron pedestals and lacking candles to be classifiable as decorative glass under heading 7013), *aff'd*, 336 F.3d 1370 (Fed. Cir. 2003); *The Pomeroy Collection, Ltd. v. United States*, 32 CIT 526, 559 F. Supp. 2d 1374 (2008) ("*Pomeroy II*") (finding four pieces of merchandise, all of which included candles, to be classifiable as "Lamps and lighting fittings" under heading 9405); *The Pomeroy Collection, Ltd. v. United States*, 35 CIT ____, 783 F. Supp. 2d 1257 (2011) ("*Pomeroy III*") (classifying somewhat cylindrical, vase-shaped glass structure with opening at top as "part" of lamp under heading 9405).

Indeed, as discussed in greater detail below, one of the Floor Articles at issue here – the Medium Romano Floor Lamp – is identical to the merchandise which was the subject of *Pomeroy I*. *See Pomeroy I*, 26 CIT at 634, 246 F. Supp. 2d at 1287–88 (describing Medium Romano Floor Lamp Rustic in terms similar to Medium Romano Floor Lamp here, and finding it classifiable as glassware under heading 7013); Pl.'s Brief at 9 n.2 (acknowledging that "[o]ne size of the Romano Floor Candles was the subject of [*Pomeroy I*]"); Def.'s Brief at 20; *Pomeroy I*, 26 CIT at 634, 246 F. Supp. 2d at 1287–88 (describing Medium Romano Floor Lamp Rustic in terms similar to Medium Romano Floor Lamp here and finding it to be classifiable as decorative glass under heading 7013).

This latest chapter of the saga – the case at bar – has been the most extensive to date. The various protests subsumed in the three now-consolidated actions involved approximately 80 entries of merchandise and at least 90 distinct articles in dispute.

After Court No. 01–00784 and Court No. 01–01011 were consolidated into this action, Pomeroy filed a Consolidated Amended Complaint, which reflected the fact that the parties had reached agreement on Pomeroy's preferred classification of more than 60 items up

[6] Judgment also will be entered as to the classification of all those articles of merchandise on which the parties have reached agreement.

to that point in time. *See* Consolidated Amended Complaint ("Consol. Amended Complaint") at attached Schedule (using boldface type to identify items then in dispute, and regular type to identify items as to which classification had been agreed). The Consolidated Amended Complaint narrowed Pomeroy's challenge, focusing on 23 assorted articles of different types and sizes then still in dispute, which the Consolidated Amended Complaint divided into six different "groups" of merchandise. *See* Consol. Amended Complaint ¶ 6.

Specifically, "Group I," which the Consolidated Amended Complaint referred to as "Floor Lighting Articles," included Pomeroy's "Stix Floor Candle" (sizes small, medium, and large), "Basics Floor Candle" (sizes small, medium, and large), and "Romano Floor Lamp[]" (sizes medium and large). *See* Consol. Amended Complaint ¶ 6. "Group II," which the Consolidated Amended Complaint referred to as "Other Floor Goods," included Pomeroy's "Talon Floor Vase[]" (sizes small and large) and "Asiatica Floor Vase." *See* Consol. Amended Complaint ¶ 6. "Group III," which the Consolidated Amended Complaint referred to as "Wall Lighting Goods," included Pomeroy's "Lattice Wall Lighting" and "Romano Wall Lighting." *See* Consol. Amended Complaint ¶ 6. "Group IV," which the Consolidated Amended Complaint referred to as "Candle Goods," included Pomeroy's "Metropol Pillar Holder w/6" candle" and "Metropol Pillar Candle Glass w/candle." *See* Consol. Amended Complaint ¶ 6. "Group V," which the Consolidated Amended Complaint referred to as "Metropol Candle Holders," included two different model numbers of Pomeroy's "Metropol Pillar Holder," imported without candles. *See* Consol. Amended Complaint ¶¶ 6, 36–38. And "Group VI," which the Consolidated Amended Complaint referred to as "Other Candle Holders," included six assorted styles/sizes of Pomeroy's "Glass Pillar Plates." *See* Consol. Amended Complaint ¶ 6.

Since the filing of Pomeroy's Consolidated Amended Complaint, the parties have further narrowed their differences. Specifically, the parties have now agreed that – as Pomeroy has maintained – the "Metropol Pillar Holder w/6" candle" and the "Metropol Pillar Candle Glass w/candle" are properly classifiable as "Candles, tapers and the like," under subheading 3406.00.00, and are therefore duty-free. *See* Defendant's Response to Plaintiff's Statement of Material Facts As To Which No Genuine Issue Exists ("Def.'s Response to Pl.'s Statement of Facts") ¶¶ 3–4 (noting parties' agreement that two Metropol articles imported with candles (article # 687068 and article # 641053) should be classified under subheading 3406.00.00). Similarly, the parties have now agreed that – as Pomeroy has maintained – the two other

Metropol articles (*i.e.*, article # 687051 and article # 687037), which were imported without candles, should be classified as "Lamps and lighting fittings . . . and parts thereof" under subheading 9405.50.40, and thus are also duty-free. *See* Def.'s Response to Pl.'s Statement of Facts ¶¶ 3–4 (noting parties' agreement that two other Metropol articles, imported without candles, should be classified under subheading 9405.50.40). In addition, Pomeroy has voluntarily withdrawn its claims as to its "Talon Floor Vases" and its "Asiatica Floor Vase." *See* Pl.'s Brief at 2 n.1.

As a result, of the dozens of items originally at issue in this action, a total of 16 now remain in dispute. Those 16 items are described below, and are grouped for purposes of analysis into three categories of merchandise – the "Pillar Plates," the "Floor Articles," and the "Wall Articles."

Pomeroy contends that all 16 articles are properly classifiable under subheading 9405.50.40, HTSUS, "Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included: Non-electrical lamps and lighting fittings: Other: Other," and thus should be duty-free. *See* Pl.'s Brief at 3, 6, 2124; Subheading 9405.50.40, HTSUS. In the alternative, Pomeroy contends that the Floor Articles and the Wall Articles are properly classifiable under subheading 9403.80.60, as "Other furniture and parts thereof: Furniture of other materials, including cane, osier, bamboo or similar materials: Other." *See* Pl.'s Reply Brief at 16–24, 25; Subheading 9403.80.60, HTSUS.[7]

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[7] Significantly, although Pomeroy's Consolidated Amended Complaint claimed, in the alternative, that the Floor Articles are classifiable under subheading 9403.80.60, the Consolidated Amended Complaint included no such claim as to the Wall Articles. *Compare* Consol. Amended Complaint ¶¶ 12–18 (Count 2) (claiming, in the alternative, that Floor Articles are classifiable under subheading 9403.80.60). Having failed to raise a subheading 9403.80.60 claim as to the Wall Articles in its Consolidated Amended Complaint, Pomeroy is barred from raising such a claim its briefs – much less doing so for the first time in its *reply brief*. *See* section III.B, *infra*. And, in any event, the claim is without merit. *See id*.

In its Consolidated Amended Complaint, Pomeroy also claimed – in the alternative – that the Floor Articles were properly classifiable as other metal furniture under subheading 9403.20.10 (a duty-free provision), and that the Floor Articles and the Wall Articles were properly classifiable as statuettes and other ornaments of base metal under subheading 8306.29.00 (another duty-free provision). *See* Consol. Amended Complaint ¶¶ 12–18 (Count 2) (claiming, in the alternative, that Floor Articles are classifiable under subheading 9403.20.10); *id*. ¶¶ 22–26 (Count 4) (claiming, in the alternative, that Floor Articles and Wall Articles are classifiable under subheading 8306.29.00). Pomeroy has not briefed those claims, however, and has therefore waived them.

A. *Pillar Plates*

The Pillar Plates at issue are slightly concave glass plates, each with three small rounded feet on the bottom. *See* Def.'s Brief at 5; Pl.'s Brief at Exhs. 13A-D (samples of frosted and clear models of medium and large Pillar Plates). Three different sizes of plates were imported – small (5.5 inches in diameter), medium (7 inches in diameter), and large (9.5 inches in diameter); and each size was imported in two colors (*i.e.*, clear glass and white frosted glass). *See* Def.'s Brief at 5; Pl.'s Brief at Exhs. 13A-D (samples of Pillar Plates).[8]

Pomeroy alleges that the Pillar Plates were designed as candleholders. *See* Pl.'s Brief at 20 ("The 'pillar plates' were so named because they are platforms (or plates) for holding arrangements of pillar candles."). And Pomeroy emphasizes that the boxes in which the Pillar Plates were imported featured photographs depicting candles inserted into the merchandise. *See* Pl.'s Brief at Exhs. 13A-D (samples of Pillar Plates, with boxes); Pl.'s Brief at 20–21. However, the Pillar Plates were not imported with candles, and – as Pomeroy itself concedes – can readily be used to hold a wide range of items, including, for example, "colored glass, fruit, or perhaps a wine bottle." *See* Pl.'s Brief at 20 (noting that candles were not included with Pillar Plates); Plaintiff's Response to Defendant's Statement of Material Facts as to Which No Genuine Issue Exists ("Pl.'s Response to Def.'s Statement of Facts") ¶ 10; *see also* Defendant's Statement of Material Facts as to Which No Genuine Issue Exists ("Def.'s Statement of Facts") ¶ 10 (stating that Pillar Plates "could be used to hold . . . potpourri, flowers, sand, gravel, stones, pebbles, colored glass, fruit, wine bottles").

Customs classified virtually all of the Pillar Plates as decorative glass articles under HTSUS subheading 7013.99.50, and assessed duties at the rate of 18%. *See* Pl.'s Reply Brief at attached Schedule ("Pl.'s Final Schedule").[9] However, Large Frosted Glass Pillar Plates were variously classified under subheadings 7013.39.50, 7013.99.50,

[8] The Pillar Plates include the Small Clear Glass Pillar Plate (article # 687402), the Medium Clear Glass Pillar Plate (article # 687419), the Large Clear Glass Pillar Plate (article # 687426), the Small Frosted Glass Pillar Plate (article # 687457), the Medium Frosted Glass Pillar Plate (article # 687464), and the Large Frosted Glass Pillar Plate (article # 687471). *See* Pl.'s Final Schedule; First Pomeroy Affidavit ¶ 16.

[9] Specifically, subheading 7013.99.50 covers "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): Other glassware: Other: Other: Other: Valued over $0.30 but not over $3 each." *See* Subheading 7013.99.50, HTSUS.

and 7013.99.80, with duties assessed at the rates of 18%, 9%, and 9%, respectively. *See* Pl.'s Final Schedule.[10]

B. *Floor Articles*

The Floor Articles in dispute include three styles of merchandise – Pomeroy's "Stix Floor Candle" (sizes small, medium, and large), its "Basics Floor Candle" (sizes small, medium, and large), and its "Romano Floor Lamp" (sizes medium and large). *See*, *e.g.*, Pl.'s Brief at Exhs. 2 (Medium Basics Floor Candle), 4 (Small Romano Floor Candle), 5 (photograph of three Stix Floor Candles).[11] Each of the Floor Articles consists of two separate components – a glass vessel with a rounded bottom, and a wrought iron pedestal (*i.e.*, stand). *See* Pl.'s Brief at Exhs. 2–6 (physical samples and photographs of Floor Articles). Each glass vessel has a rounded bottom that prevents it from standing on its own (unless it is turned upside down) or from functioning in its intended manner without the pedestal, which is specifically designed to cradle (that is, to hold and support) the glass vessel. *See* Pl.'s Brief at Exhs. 2–6 (physical samples and photographs of Floor Articles).

The pedestals range in height from approximately 16 inches to approximately 42 inches, depending on the model and size of the Floor Article. *See* Pl.'s Brief at Exh. 7 (Pomeroy price list with descriptions of merchandise). The glass vessels used in the Basics and Romano models are identical, while the glass vessel used in the Stix model is more shallow with a somewhat wider brim at the top. *See* Pl.'s Brief at Exhs. 2–6 (samples and photographs showing differences among models of Floor Articles). Specifically, the glass vessel for the Basics and Romano models is approximately nine inches tall, with an opening that is approximately seven inches wide and a rim approximately two inches wide. *See* Pl.'s Brief at Exh. 2 (Medium Basics Floor Candle, including vessel); Def.'s Brief at 3. Similarly, the

[10] Subheading 7013.39.50 covers "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): Glassware of a kind used for table (other than drinking glasses) or kitchen purposes other than that of glass-ceramics: Other: Other: Valued over $3 each: Other: Valued over $3 but not over $5 each." *See* Subheading 7013.39.50, HTSUS.

Subheading 7013.99.80 covers "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): Other glassware: Other: Other: Other: Valued over $3 each: Other: Valued over $3 but not over $5 each." *See* Subheading 7013.99.80, HTSUS.

[11] The Floor Articles include the Small Stix Floor Candle (article # 574962), the Medium Stix Floor Candle (article # 574979 and article # 575914), the Large Stix Floor Candle (article # 574986), the Small Basics Floor Candle (article # 840999), the Medium Basics Floor Candle (article # 841996), the Large Floor Candle (article # 842016), the Medium Romano Floor Lamp (article # 856013 and article # 856037), and the Large Romano Floor Lamp (article # 857010). *See* Pl.'s Final Schedule; First Pomeroy Affidavit ¶¶ 4–6.

glass vessels included with the Stix models are approximately 8.5 inches tall, with an opening that is approximately 7.8 inches wide, and a brim that appears to be a few inches wider than that in the other models. *See* Pl.'s Brief at Exh. 6 (photograph of Stix Floor Candles); Def.'s Brief at 3–4.[12]

Pomeroy asserts that the Floor Articles were "all designed . . . as candle holders." *See* Pl.'s Brief at 9. However, candles were not included with any of the Floor Articles as imported. *See* Pl.'s Brief at 8; Def.'s Brief at 18. Moreover, there is nothing to limit the use of any of the Floor Articles to holding a candle. As even Pomeroy admits, any of the Floor Articles "CAN be used to hold a variety of articles other than candles." Pl.'s Response to Def.'s Statement of Facts ¶ 9; *see also* Def.'s Statement of Facts ¶ 9 (same).

Customs classified the eight Floor Articles as "Glassware of a kind used for . . . indoor decoration or similar purposes" under subheading 7013.99.90, assessing duties at the rate of 4.3%. *See* Pl.'s Final Schedule.[13]

C. *Wall Articles*

The Wall Articles at issue include two different models of merchandise – Pomeroy's Romano Wall Lighting and its Lattice Wall Lighting, each of which is comprised of a glass vessel and an iron wall mounting. *See* Pl.'s Brief at Exhs. 8–9 (boxes in which Wall Articles were imported, featuring photographs of articles).

No samples of the articles were made available, and their exact dimensions are unclear. Pl.'s Brief at 17. However, the depictions on the boxes indicate that the articles' iron wall mounting supports a glass vessel with a rounded bottom. *See* Pl.'s Brief at Exh. 8 (box in which Lattice Wall Lighting was imported); Pl.'s Brief at Exh. 9 (box in which Romano Wall Lighting was imported). The glass vessel appears somewhat smaller than – but roughly the same shape as – the vessels used in the Floor Articles. *Compare* Pl.'s Brief at Exh. 3 (photograph of three Basics Floor Candles) *and* Pl.'s Brief at Exhs. 8–9 (boxes in which Wall Articles were imported).

Pomeroy states that the Wall Articles "were always advertised and sold as candle holders." Pl.'s Brief at 18. And Pomeroy emphasizes

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[12] No samples of the Stix models were provided. However, as the Government notes, the dimensions of the glass vessel included with the Stix models can be extrapolated from a photograph that Pomeroy provided. *See* Pl.'s Brief at Exh. 6; Def.'s Brief at 3–4.

[13] Subheading 7013.99.90 covers "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): Other glassware: Other: Other: Other: Valued over $3 each: Other: Valued over $5 each." *See* Subheading 7013.99.90, HTSUS.

that the boxes in which the Wall Articles were imported featured photographs depicting the merchandise with candles inserted into the vessels. *See* Pl.'s Brief at 17–18. However, neither of the Wall Articles was imported with candles. Pl.'s Brief at 17; Def.'s Brief at 4–5, 19. Indeed, as Pomeroy concedes, the Wall Articles can be used to hold a wide variety of items other than candles, including "potpourri, flowers, sand, gravel, stones, pebbles, colored glass, fruit, wine bottles" and more. *See* Def.'s Statement of Facts ¶ 10 (stating that Wall Articles "could be used to hold . . . potpourri, flowers, sand, gravel, stones, pebbles, colored glass, fruit, wine bottles"); Pl.'s Response to Def.'s Statement of Facts ¶ 10 (admitting that the Wall Articles "COULD be so used").

Customs classified both models of Wall Articles as decorative glass articles under subheading 7013.99.50, and assessed duties at the rate of 18%. *See* Pl.'s Final Schedule.[14]

II. *Standard of Review*

Under USCIT Rule 56, summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). Customs' classification decisions are reviewed *de novo*, through a two-step analysis. *See* 28 U.S.C. § 2640; *Faus Group, Inc. v. United States*, 581 F.3d 1369, 1371–72 (Fed. Cir. 2009). The first step of the analysis "addresses the proper meaning of the relevant tariff provisions, which is a question of law. The second step involves determining whether the merchandise at issue falls within a particular tariff provision as construed." *See Faus Group*, 581 F.3d at 1371–72 (*citing Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)).

Interpretation of the relevant tariff headings is a question of law, while application of the terms to the merchandise is a question of fact. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1364–65 (Fed. Cir. 1998) (citation omitted). Summary judgment is thus appropriate where – as here – the nature of the merchandise is not in question, and the sole issue is its proper classification. *See Bausch & Lomb*, 148 F.3d at 1365 (citation omitted) (explaining that summary judgment is appropriate in customs classification cases "when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is").

In the case at bar, although the parties argue for classification under different headings of the HTSUS, there are no disputes of

[14] The complete text of subheading 7013.99.50 is set forth in footnote 9, above.

material fact. The question presented is limited to the legal issue of the proper classification of the merchandise.[15] This matter is therefore ripe for summary judgment.

III. *Analysis*

The proper tariff classification of all merchandise imported into the United States is governed by the General Rules of Interpretation ("GRIs"). The GRIs provide a framework for classification under the HTSUS, and are to be applied in sequential order. *See*, *e.g.*, *North Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001); *Orlando Food*, 140 F.3d at 1439–40.

GRI 1 provides for classification "according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to [GRIs 2 through 6]." GRI 1, HTSUS. Thus, the first step in any classification analysis is to determine whether the headings and notes require a particular classification.

Here, Note 1(e) to Chapter 70 of the HTSUS specifically provides that Chapter 70 does not cover lamps or lighting fittings or the other items included under heading 9405. *See* Chapter Note 1(e) to Chapter 70, HTSUS.[16] Similarly, Explanatory Note 94.03 expressly excludes

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[15] The parties argue over whether Customs' classifications of the merchandise here at issue are entitled to a statutory presumption of correctness. *See* Def.'s Brief at 9–10; Pl.'s Reply Brief at 1; 28 U.S.C. § 2639(a)(1). As Pomeroy correctly notes, however, the presumption of correctness is irrelevant at the summary judgment stage, where – by definition – there is assertedly no dispute as to any material fact. *See*, *e.g.*, *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995) (holding that, "[b]ecause there was no factual dispute between the parties, the presumption of correctness is not relevant"); *see generally Universal Elec. Inc. v. United States*, 112 F.3d 488, 491–93 (Fed. Cir. 1997); *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483–84 (Fed. Cir. 1997).

[16] As explained in *Pomeroy II*, if the subject merchandise here at issue is properly classifiable under heading 9405, its classification under heading 7013 is barred as a matter of law by Chapter Note 1(e), which provides, in relevant part:

1. This chapter does not cover:

   . . . .

   (e) *Lamps or lighting fittings*, illuminated signs, illuminated name-plates or the like, having a permanently fixed light source, or parts thereof of heading 9405;

Chapter Note 1(e) to Chapter 70 (emphasis added); *see* Pl.'s Brief at 8; Def.'s Brief at 7; *see also Pomeroy II*, 32 CIT at 540, 540 n.15, 559 F. Supp. 2d at 1388, 1388–89 n.15. Unlike Explanatory Notes (which are persuasive, but not binding), Chapter Notes are mandatory and conclusive statutory law for all purposes. *See*, *e.g.*, *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007) (noting that "chapter notes are integral parts of the HTSUS, and have the same legal force as the text of the headings," in contrast to "[e]xplanatory notes," which "are not legally binding but may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision") (citation omitted); *Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999) (describing chapter notes as "statutory language" of HTSUS).

"[s]tandard lamps and other lamps and lighting fittings" from classification under heading 9403. *See* World Customs Organization, Harmonized Commodity Description and Coding System: Explanatory Note 94.03 (2d ed. 1996). Thus, if the merchandise at issue is classifiable as "Lamps and lighting fittings" under heading 9405, it is not classifiable as either decorative glassware under heading 7013 or "Other furniture and parts thereof" under heading 9403. Accordingly, the analysis of the classification of all of the articles in question logically must begin with heading 9405.

Where classification is not resolved by GRI 1, the analysis proceeds to subsequent GRIs. GRI 2 instructs, in relevant part, that "[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete . . . , provided that, as entered, the incomplete . . . article has the essential character of the complete . . . article." GRI 2(a), HTSUS. Further, 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" and "[t]he classification of goods consisting of more than one material or substance shall be according to the principles of [GRI 3]." GRI 2(b), HTSUS. Pursuant to GRI 3, more "specific" heading descriptions "shall be preferred to headings providing a more general description." GRI 3(a), HTSUS. "However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods . . . , those headings are to be regarded as equally specific," and goods covered by such headings are to be "classified as if they consisted of the material or component which gives them their essential character." GRI 3(a)-(b), HTSUS.

In addition, pursuant to Explanatory Note 70.13, "Lamps and lighting fittings and parts thereof of heading 94.05" are expressly excluded from classification as "Glassware of a kind used for . . . indoor decoration" under heading 7013. *See* Explanatory Note 70.13.

The Explanatory Notes function as an interpretative supplement to the HTSUS, and are "generally indicative of . . . [its] proper interpretation." *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992) (*quoting* H.R. Conf. Rep. No. 100–576, 100th Cong., 2d Sess. 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582). They are the official interpretation of the scope of the Harmonized Commodity Description and Coding System (which served as the basis of the HTSUS) as viewed by the Customs Cooperation Council (now known as the World Customs Organization), the international institution that drafted the international nomenclature. Thus, while the Explanatory Notes "do not constitute controlling legislative history," they "nonetheless are intended to clarify the scope of HTSUS [provisions] and offer guidance in interpreting [those provisions]." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (*citing Lynteq*, 976 F.2d at 699). *See also Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003); *Rollerblade*, 112 F.3d at 486 n.3.

All citations herein are to the second edition of the Explanatory Notes, published in 1996.

As detailed below, the three groups of merchandise here in dispute are properly classified under heading 7013. The Pillar Plates are properly classified under HTSUS subheadings 7013.99.50 or 7013.99.80 through a straightforward application of GRI 1. The Floor Articles are properly classified under subheading 7013.99.90, through the application of GRI 3(b) and its "essential character" analysis. Finally, the Wall Articles are classifiable through a similar GRI 3(b) analysis under subheading 7013.99.50.

A. *Heading 9405*

Pomeroy maintains that all items in dispute are properly classifiable under heading 9405, which covers "Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included." Heading 9405, HTSUS.[17] As an *eo nomine* tariff provision,[18] heading 9405 generally encompasses all forms of the article. *See*, *e.g.*, *Pomeroy II*, 32 CIT at 549, 559 F. Supp. 2d at 1396 (concluding that heading 9405 "is clearly identifiable as an *eo nomine* provision," not a principal use provision); Pl.'s Brief at 6, 15, 16 (stating that heading 9405 is *eo nomine* provision); Def.'s Reply Brief at 5 (same); *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (explaining that *eo nomine* provisions ordinarily cover all forms of named article).[19]

[17] Pomeroy does not argue that the articles at issue fit within the definition of any terms other than "Lamps and lighting fittings . . . and parts thereof" under heading 9405. Heading 9405, HTSUS. That is, Pomeroy does not contend that any of the articles fit within the meaning of the terms "searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source." Heading 9405, HTSUS; *see generally* Pl.'s Brief; Pl.'s Reply Brief.

[18] An *eo nomine* provision is "one which describes [a] commodity by a specific name, usually one well known to commerce." *Casio, Inc. v. United States*, 73 F.3d 1095, 1097 (Fed. Cir. 1996) (*quoting* Black's Law Dictionary (6th ed. 1990)).

[19] Although Pomeroy repeatedly and unequivocally states that heading 9405 is an *eo nomine* provision, Pomeroy elsewhere argues for application of the *Carborundum* factors in the context of a "principal use" analysis, devoting much ink to assertions concerning matters such as the design, marketing, and sales of its merchandise. *See*, *e.g.*, Pl.'s Brief at 9 (representing that Floor Articles were "designed . . . as candleholders for use in homes, or offices, in doors or out of doors"), 18 (asserting that Wall Articles "were sold in the candle or lighting section of the stores, and were always advertised as candleholders"), 20 (describing in detail ways in which Pillar Plates were marketed); Pl.'s Reply Brief at 5–6 (discussing nature of packaging for Wall Articles and Pillar Plates), 13 (claiming merchandise to be classifiable "based upon the intent of their designer and the manner in which said articles are marketed and sold"); *see generally* Pl.'s Brief at 4–5, 21–23 (asserting that Pomeroy designed, marketed, and sold its merchandise as candle holders); Pl.'s Reply Brief at 5–7 (same); *United States v. Carborundum Co.*, 536 F.2d 373, 377 (CCPA 1976).

Explanatory Note 94.05 defines "Lamps and lighting fittings" to include items that "use any source of light," including "candles." *See* Explanatory Note 94.05. The Explanatory Note further specifies that heading 9405 "covers in particular . . . [c]andelabra" and "candlesticks," in addition to "candle brackets" (such as those used on pianos). *See* Explanatory Note 94.05. Heading 9405 thus covers not only "*Electrical* lamps and lighting fittings," but also lamps and lighting fittings of other types – including "*Non-electrical lamps* and lighting fittings," such as those specified in the Explanatory Note. *See* Explanatory Note 94.05 (emphases added); Def.'s Brief at 13 (noting that heading 9405 covers candle holders).

Dictionary definitions further emphasize the "illumination" focus of heading 9405 and clarify other relevant terms in Explanatory Note 94.05.[20] A "lamp" is defined as "any of various devices for producing light or sometimes heat." *See* Merriam-Webster's Collegiate Dictionary (10th ed. 1997). "Lighting" is synonymous with "illumination," and "fitting" is defined as "a small often standardized part," *e.g.*, an electrical fitting. *See* Merriam-Webster's Collegiate Dictionary (10th ed. 1997).

Dictionary definitions are similarly instructive in interpreting terms such as "candlestick" and "candelabra." One dictionary defines "candlestick" as "a holder with a socket for a candle" and defines "candelabra" as "a branched candlestick or lamp with several lamps." *See* MerriamWebster's Collegiate Dictionary (10th ed. 1997). Another dictionary defines a "candlestick" as "a holder with a cup or spike for a candle" and a "candelabrum" as "a large decorative candlestick

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But Pomeroy's reliance on the *Carborundum* factors is misplaced. As the Court of Appeals recently noted, the *Carborundum* factors are "typically used to establish whether merchandise falls within a particular class or kind for purposes of a principal use analysis." *BenQ America Corp. v. United States*, 646 F.3d 1371, 1377 (Fed. Cir. 2011). Because heading 9405 is an *eo nomine* provision, the "principal use" analysis and the *Carborundum* factors have no application here. *See Pomeroy II*, 32 CIT at 549, 559 F. Supp. 2d at 1396; Def.'s Reply Brief at 7 (explaining that "principal use factors do not govern whether a good is encompassed by an *eo nomine* term").

The Government also notes that, elsewhere in Pomeroy's briefs, Pomeroy occasionally seems to lapse into an "actual use" analysis. *See* Def.'s Brief at 13 n.11 (referring to Pl.'s Brief at Exh. 1). But an "actual use" analysis is no more appropriate here than a "principal use" analysis. Heading 9405 is not an "actual use" provision. There is nothing to suggest that heading 9405 is "a tariff classification controlled by the actual use to which the imported goods are put in the United States"; nor has Pomeroy proffered any evidence that it has satisfied the requirements to establish "actual use." *See* Def.'s Brief at 13 n.11 (*quoting* Additional U.S. Rule of Interpretation 1(b)).

[20] For guidance in determining the scope of the terms in a heading, "a court may consult dictionaries, scientific authorities, and other reliable information sources and lexicographic and other materials." *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1356 (Fed. Cir. 2001); *see also Mita Copystar*, 21 F.3d at 1082 (noting that "[a] court may rely upon its own understanding of terms used").

having several arms or branches." The American Heritage Dictionary of the English Language (4th ed. 2000). It is particularly telling that Pomeroy consistently and uniformly refers to the articles in dispute as "candle holders." *See*, *e.g.*, Pl.'s Brief at 4, 8, 9, 17, 21, 23; Pl.'s Reply Brief at 2, 5, 6, 7, 16, 23, 24, 15. Yet the dictionary definition of "candleholder" is "candlestick"; and, as noted above, the definition of "candlestick" is "a holder with a socket for a candle." *See* Merriam-Webster's Collegiate Dictionary (10th ed. 1997). These definitions, with their references to a "socket" and a "cup or spike," indicate that a basic function of a candle holder is to hold a candle securely.[21] As the Government puts it, "[i]t is the presence of a securely held candle that permits [an] article to satisfy the plain language purpose of articles under Heading 9405: to provide illumination." Def.'s Brief at 14.

In determining whether the articles in question fall within the scope of heading 9405, it is axiomatic that they must be classified in their condition as imported. *See*, *e.g.*, *BASF Corp. v. United States*,

[21] Pomeroy makes no argument that, if its merchandise cannot be classified under heading 9405 pursuant to GRI 1, it might be so classified pursuant to GRI 2(a). *See* Pl.'s Brief at 6 (arguing only that merchandise is classifiable under heading 9405 pursuant to straightforward application of GRI 1). As the Government explains, such an argument would get no traction in any event. *See* Def.'s Brief at 14–15; *see generally Pomeroy II*, 32 CIT at 537–40, 559 F. Supp. 2d at 1386–88.

GRI 2(a) provides, in relevant part, that "[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete . . . , provided that, as entered, the incomplete . . . article has the essential character of the complete . . . article." GRI 2(a). Accordingly, as the Government notes, the merchandise classifiable under heading 9405 includes not only "complete" merchandise, but also "incomplete" merchandise – provided that such "incomplete" merchandise has the "essential character" of the complete merchandise that is classifiable under heading 9405. *See* Def.'s Brief at 15.

Although both GRI 2(a) and GRI 3(b) employ the term "essential character," they do so in very different contexts; and there is little authority as to the term's meaning in the context of GRI 2(a). *See Pomeroy II*, 32 CIT at 539 n.14, 559 F. Supp. 2d at 1387 n.14. But that lack of guidance is of little moment here. By any measure, the merchandise at issue here lacks the "essential character" of "complete" merchandise that falls within the terms of heading 9405.

The Government considers whether – absent candles – the articles in question here can be classified under heading 9405 as incomplete articles possessing the essential character of a completed article (*i.e.*, a candle holder) under GRI 2(a). *See* Def.'s Brief at 15. The Government concludes that the imported articles do not possess – under GRI 2(a) – the essential character of a candle holder classifiable under heading 9405, which is to provide illumination by securely holding a candle. *See* Def.'s Brief at 15. The Government emphasizes that none of the articles incorporates any special design features to securely hold a candle, as do candelabras, candle sticks, and candle brackets. *See id*. Because the articles at issue do not incorporate any design characteristics that would permit them to function like the candelabras, candle sticks, and candle brackets specified in the Explanatory Notes to heading 9405, the Government concludes that the articles could not be classified under heading 9405 as incomplete lamps or lighting fixtures pursuant to GRI 2(a). *Id*.

497 F.3d 1309, 1314 (Fed. Cir. 2007) (*citing United States v. Citroen*, 223 U.S. 407, 414–15 (1912)). At the time of importation, none of the articles here contained candles. Therefore, at the time of importation, none of the articles were capable of providing illumination, as contemplated by heading 9405.

Nor do any of the articles have physical features that are specifically designed to hold a candle in place – no "sockets," "cups," or "spikes," or anything else remotely akin to the specific features of the items (candelabra, candlesticks, and candle brackets) listed in the Explanatory Notes to heading 9405. *See generally* Def.'s Brief at 7, 15; Def.'s Reply Brief at 6–7.[22] Pomeroy's assertion that candles "can be held by the articles at issue without the benefit of such features" is unavailing. *See* Pl.'s Reply Brief at 5; *see also* Pl.'s Reply Brief at 2 (arguing that "the pillar candles used in conjunction with the articles in this case may be supported by any flat surface, without the need for spikes, sockets, inserts or raised edges"). The Pillar Plates may be able to "hold" a candle – or "support [a candle] in a particular position or keep [a candle] from falling or moving." Merriam-Webster's Collegiate Dictionary (10th ed. 1997) (defining "hold"). However, the term "candle holder" is synonymous with "candlestick" – an article that not only holds a candle, but holds it securely. If it were otherwise, *any* relatively flat, non-slippery object could at least theoretically be referred to as a "candle holder" for flat-bottomed candles, and thus would be *prima facie* classifiable under heading 9405 – a patently absurd result.

The items properly classified in heading 9405 are those that are capable of providing illumination and those whose design incorporates features comparable to those of candelabra, candlesticks, and candle brackets. As such, the articles here at issue are not *prima facie* classifiable under heading 9405.

B. *Heading 9403*

In its reply brief, Pomeroy claims for the first time that – in the event that they are determined not to be classifiable as "Lamps and lighting fittings" under heading 9405 – the Floor Articles and the Wall Articles are alternatively classifiable as "Other furniture and parts thereof" under heading 9403. *See* Heading 9405, HTSUS; Heading 9403, HTSUS; Pl.'s Reply Brief at 1624, 25. The Government cries foul, arguing that Pomeroy waived any such claims by not raising

[22] The articles in dispute are thus distinguishable from the Metropol articles, which have such a socket and raised edge feature and which the parties stipulated as classifiable under heading 9405. *See* section I, *supra*.

them in its opening brief. *See* Def.'s Reply Brief at 9–10. It is "well established that arguments not raised in the opening brief are waived." *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319–20 (Fed. Cir. 2006); *see also Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002) (same). The doctrine of waiver has even greater force where, as here, it is a new claim (rather than a new argument) that is at issue. Pomeroy contends that *Jarvis Clark* nevertheless mandates consideration of the heading. *See* Pl.'s Reply Brief at 19; *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) (stating that "the court's duty is to find the *correct* result" in customs classification actions). There is no need to resolve either argument, however, because Pomeroy's claim for classification under heading 9403 cannot succeed on the merits. *See generally* Def.'s Reply Brief at 5, 9–14.

As a threshold matter, Note 2 to Chapter 94 limits classification under the headings of that chapter to articles that are "designed for placing on the floor or ground," subject only to certain select exceptions that are not relevant here. *See* Chapter Note 2 to Chapter 94, HTSUS; Def.'s Reply Brief at 13. Pomeroy's Wall Articles are therefore, by definition, expressly excluded from classification under heading 9403.

Even if the Wall Articles were not expressly excluded from classification under heading 9403, they cannot be so classified, just as the Floor Articles cannot be so classified, because they are not used "mainly with a utilitarian purpose." *See* Def.'s Reply Brief at 14. In relevant part, the General Explanatory Notes to Chapter 94 state:

> For purposes of this Chapter, the term "furniture" means: (A) Any "movable" articles (*not included* under other more specific headings of the Nomenclature), which have the essential characteristic that they are constructed for placing on the floor or ground and which are used, *mainly with a utilitarian purpose*, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafes, restaurants, laboratories, hospitals, dentists' surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport.

General Explanatory Notes, Chapter 94 (second emphasis added). The Explanatory Notes for heading 9403 further state that the heading "includes furniture for: (1) Private dwellings, hotels, etc., such as: cabinets, linen chests, bread chests, log chests; chests of drawers, tallboys; pedestals, plant stands; dressing-tables; pedestal tables; wardrobes, linen presses; hall stands, umbrella stands; sideboards,

dressers, cupboards; food-safes; pedestal ashtrays; music cabinets, music stands or desks; play-pens; [and] serving trolleys . . . .” Explanatory Note 94.03.

The Explanatory Note to Chapter 94 emphasizes that items classified as furniture are those “mainly with a utilitarian purpose.” “Utilitarian” is defined as “of, pertaining to, consisting in utility; aiming at utility, as distinguished from beauty, ornament.” *See* Webster’s New International Dictionary (2d ed. 1953). The nature of the items listed in the Explanatory Note for heading 9403 further underscores the seminal notion of utility.

The Government points to *Furniture Import* as an illustration of the longstanding trend of courts, even under prior tariff systems, to construe “furniture” as limited to articles that are “for the use, convenience, and comfort of the house dweller and not subsidiary articles designed for ornamentation alone.” Def.’s Reply Brief at 11 (*citing Furniture Import Corp. v. United States*, 56 Cust. Ct. 125, 133 (1966)); *see also Sprouse Reitz & Co. v. United States*, 332 F. Supp. 209 (Cust. Ct. 1971) (discussing the distinction between utilitarian and decorative articles for purposes of determining whether goods fall within common meaning or TSUS headnote definition of “furniture”). The *Furniture Import* court observed that “furniture” “embraces articles of utility which are designed for the use, convenience, and comfort of the dweller in a house,” as distinguished from articles that are “subsidiary adjuncts and appendages designed for the ornamentation of a dwelling or business place, or which are of comparatively minor importance so far as use, comfort and convenience are concerned.” *Furniture Import Corp.*, 56 Cust. Ct. at 132.

The court in *Furniture Import* considered the classification of a variety of items. Of particular relevance here is that court’s analysis of sconces that were designed to hold either plants or wax candles. The court concluded that the sconces were not classifiable as “furniture” under the applicable tariff system, because the sconces were ornamental rather than utilitarian. *See Furniture Import Corp.*, 56 Cust. Ct. at 133, 136. The mere fact that the sconces were designed to hold other decorative articles – *i.e.*, plants or candles – did not convert the sconces from ornamental articles into utilitarian ones.

By the same token, the Floor Articles and Wall Articles at issue here are not “mainly . . . utilitarian” in nature, because they are not “aiming at utility as distinguished from beauty, ornament.” *See* Webster’s New International Dictionary (2d ed. 1953) (definition of “utilitarian”). As with the sconces in *Furniture Import*, the mere fact that the Floor Articles and Wall Articles here can be used to hold other decorative items does not transform the Floor Articles and Wall Ar-

ticles into utilitarian articles classifiable as "furniture." *See Furniture Import Corp.*, 56 Cust. Ct. at 133, 136. Pomeroy seeks to make much of certain language from *Furniture Import* that was quoted in *Sprouse*: "None of the cases since that time [*i.e.*, the early twentieth century] have held that articles which are manifestly ornamental only, as distinguished from ones useful to hold ornaments, are furniture." *See* Pl.'s Reply Brief at 23 (*quoting Sprouse*, 332 F. Supp. at 215). Pomeroy apparently contends that holding ornaments suffices to render an object "furniture." But Pomeroy misconstrues the quote. *See generally* Def.'s Reply Brief at 11–12. Whatever that language may mean, it can only be read to be consistent with the holding in *Furniture Import* – that the sconces there at issue, although useful to hold ornamental objects such as plants and candles, could not be classified as "furniture."

In a further attempt to support its contention that the Floor Articles and Wall Articles are classifiable as "furniture," Pomeroy invokes a Customs ruling letter (specifically, NY N087135, dated December 18, 2009). *See* Pl.'s Reply Brief at 21–22. But that ruling letter is inapposite. *See generally* Def.'s Reply Brief at 12–13. In the ruling letter, Customs noted that the imported articles there in question contained spikes for impaling and securing pumpkins and jack-o-lanterns. It was the presence of the spike that rendered those articles primarily utilitarian. The ruling letter referred to the Explanatory Notes to Chapter 94, and observed that heading 9403 includes furniture for "Private dwellings, hotels, etc. such as: cabinets, linen chests, bread chests, log chests . . . pedestals, *plant stands* . . . . " *See* NY N087135 (emphasis in original). Customs determined that the articles in question were "pumpkin stands," and concluded that "[s]uch utilitarian articles are considered furniture." *Id.*

As the Government argues, the Floor Articles and Wall Articles at issue here are not like the pumpkin stands in the Customs ruling letter. Among other things, they are conspicuously missing spikes that would render them useful for impaling and securing an item. *See* Def.'s Reply Brief at 13. Because the Floor Articles and Wall Articles – much like the sconces in *Furniture Import* – are not used "mainly with a utilitarian purpose" (and are instead more decorative and ornamental in nature), they are not *prima facie* classifiable as furniture and Pomeroy's alternative claim to classification under heading 9403 must fail.

C. *Heading 7013*

The third of the three competing headings is the tariff provision under which Customs classified the merchandise in dispute – head-

ing 7013, which covers "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes," with certain exceptions not relevant here. *See* Heading 7013, HTSUS. As discussed below, each of the articles at issue is either wholly made of glass (*i.e.*, the Pillar Plates) or is a composite article (*i.e.*, the Floor Articles and the Wall Articles) where the glass vessel is the component that imparts its "essential character" to the merchandise. As such, all the articles were properly classified under heading 7013.[23]

1. *The Pillar Plates*

The Pillar Plates, which consist only of glass, with three glass feet to allow for display on a table or other similar surface, plainly fall within the scope of "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes," and thus were properly classified under heading 7013. *See generally* Heading 7013, HTSUS; Def.'s Brief at 7, 16.

Classification at the subheading level is determined by the value of the glassware items. Subheadings 7013.99.50 and 7013.99.80 are differentiated by the value of the glassware items covered by the provision. Subheading 7013.99.50 covers "Other glassware" valued over $0.30 but not over $3 each, while subheading 7013.99.80 covers "Other glassware" valued over $3 but not over $5 each. *See* Subheading 7013.99.50, HTSUS; Subheading 7013.99.80, HTSUS. The Pillar Plates are properly classified under these "basket" subheadings because they do not fall within any of the other subheadings under heading 7013.

The vast majority of the Pillar Plates were properly classified and liquidated. However, in certain entries, the Large Frosted Pillar Plate (article # 687471) was mistakenly classified under subheading 7013.39.50, which covers "Glassware *of a kind used for table . . . or kitchen purposes* other than that of glass-ceramics . . . Valued over $3 but not over $5 each." Subheading 7013.39.50, HTSUS (emphasis added). Although the rate of duty is the same (9%) for subheadings

[23] Highlighting the fact that one of the Floor Articles at issue here (specifically, the Medium Romano Floor Candle) was the subject of *Pomeroy I*, where it was classified under heading 7013, the Government seeks to invoke *stare decisis* to claim that the article must be so classified in this action. *See Pomeroy I*, 26 CIT at 634, 246 F. Supp. 2d at 1296; Def.'s Brief at 7–8, 20–21, 24–25; Def.'s Reply Brief at 4, 8–9. For its part, Pomeroy vigorously contests the applicability of the doctrine under the circumstances presented here. *See* Pl.'s Reply Brief at 7–16. As discussed below, the Government prevails on the merits as to the classification under heading 7013 of all Floor Articles, including the Medium Romano Floor Candle. There is therefore no need to parse the parties' respective positions on *stare decisis*.

7013.39.50 and 7013.99.80, Customs must reliquidate those articles under the proper subheading – subheading 7013.99.80.[24]

In sum, review of the relevant invoices indicates that – with the exception of the Large Frosted Glass Pillar Plates – all Pillar Plates at issue here are properly classified under subheading 7013.99.50, dutiable at the rate of 18%. The Large Frosted Glass Pillar Plates are properly classified under subheading 7013.99.80, dutiable at the rate of 9%.

2. *The Floor Articles and The Wall Articles*

Assuming, for purposes of analysis, that the metal components of the Floor Articles and the Wall Articles preclude their classification as "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes" under heading 7013 pursuant to GRI 1, the classification analysis proceeds to GRI 2. *See* Heading 7013, HTSUS. GRI 2(a), which addresses incomplete or unfinished goods, is not relevant here. *See* GRI 2(a), HTSUS. GRI 2(b) provides that, if the goods consist of two or more materials and are prima facie classifiable under two provisions, classification is governed by GRI 3. *See* GRI 2(b), HTSUS. Here, the Floor Articles and the Wall Articles each consist of a glass component and a metal component, rendering them *prima facie* classifiable under both heading 7013 and heading 8306 (which covers "statuettes and other ornaments, of base metal"). *See generally Pomeroy I*, 26 CIT at 628–29, 246 F. Supp. 2d at 1291; Heading 7013, HTSUS; Heading 8306, HTSUS. Analysis pursuant to GRI 2(b) and GRI 3 is therefore necessary.

Under GRI 3(a), because the competing headings "each refer to a part of the composite article at issue, the exception to GRI 3(a)'s rule of 'relative specificity' applies, and the two headings are deemed equally specific." *Pomeroy I*, 26 CIT at 630, 246 F. Supp. 2d at 1293. The analysis therefore proceeds to GRI 3(b) and the "essential character" test. *Id*. GRI 3(b) provides: "Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by

[24] In addition, in two entries (specifically, entry # W43–0036610–7 and entry # W43–00366776), the Large Frosted Glass Pillar Plates (article # 687471) were mistakenly classified under subheading 7013.99.50, which covers decorative glassware valued "over $0.30 but not over $3 each," dutiable at the rate of 18%. Subheading 7013.99.50, HTSUS. The invoices associated with those entries specify that the Large Frosted Glass Pillar Plates had a value of $3.72 per unit. As such, those items should have been classified under subheading 7013.99.80, which covers decorative glassware valued "over $3 but not over $5 each," dutiable at the rate of 9%. Subheading 7013.99.80, HTSUS. The Large Frosted Glass Pillar Plates in the two relevant entries must be reliquidated under the appropriate subheading – subheading 7013.99.80 – at the correct rate.

reference to [GRI] 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable." *See* GRI 3(b), HTSUS. Explanatory Note (IX) to GRI 3(b) elaborates that, under this rule, composite goods include goods whose components have been adapted to one another, are mutually complementary, and form a whole that would not normally be offered for sale separately. *See* Explanatory Notes, GRI 3(b), at (IX). Explanatory Note (VIII) to GRI 3(b) provides further guidance: "The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined 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." *See* Explanatory Notes, GRI 3(b), at (VIII).

Analyzing the Floor Articles at the GRI 3(b) level reveals that each of the articles is a composite of metal (iron) and a clear glass vessel which can be used to hold and display a variety of items. *See* Pl.'s Exhs. 2–6 (physical samples and photographs of Floor Articles). The metal pedestal cannot hold other items without first holding the glass vessel. *Id*. The function of each article as a whole is to hold and display an object or objects; and the glass vessel is the component that gives the article its ability to serve that function. Ruling on the classification of the Medium Romano Floor Lamp (one of the articles at issue here), *Pomeroy I* held exactly that:

> The pedestal, while complementary to the glass vessel, is subsidiary to it in the context of the merchandise as an integral whole. The pedestal serves to elevate the glass vessel, and to hold it upright. But it is the glass vessel which is the focal point of the article, and which performs the article's overall function – holding a candle, flowers, a plant, a wine bottle, or some similar object.

Pomeroy I, 26 CIT at 629, 246 F. Supp. 2d at 1292. Thus, the essential character of the Floor Articles is imparted by the glass vessels, which can hold – and, because they are clear, also display – any number of items. Because it is the glass vessel that imparts the essential character to each of the Floor Articles, those articles all were properly classified under heading 7013.

Classification at the subheading level, once again, is determined by value. Review of the invoices indicates that all of the entries fall within the value range (*i.e.*, over $5 each) specified for subheading 7013.99.90, "Glassware of a kind used for . . . indoor decoration,"

dutiable at the rate of 4.3%. Accordingly, the Floor Articles shall remain classified as assessed by Customs.

Like the Floor Articles, the Wall Articles too must be subjected to a GRI 3(b) analysis to determine their essential character. Each of the Wall Articles consists of two components – an iron wall mounting and a glass vessel. *See* Pl.'s Exhs. 8–9 (boxes depicting the Wall Articles). The metal wall mounting is specially designed to hold the accompanying glass vessel as an insert. *See id*. Like the Floor Articles, the function of each of the Wall Articles as a whole is to hold and display an object or objects; and it is the glass vessel that is the component that gives the article as a whole its ability to serve that function. *See id*. Thus, much as the glass components of the Floor Articles imparted their essential character to those articles as a whole, so too the essential character of the Wall Articles is imparted by the glass vessels. The Wall Articles therefore were also properly classified under heading 7013.

Classification at the subheading level, once again, is determined by value. Review of the invoices indicates that all of the relevant entries fall within the specified value range (over $0.30 but not over $3 each) for subheading 7013.99.50, "Glassware of a kind used for . . . indoor decoration," dutiable at the rate of 18%. Accordingly, Customs' classifications of the Wall Articles are sustained.

IV. *Conclusion*

For all the reasons detailed above, Pomeroy's Motion for Summary Judgment is denied, and the Government's Cross-Motion is granted. As detailed above, the Pillar Plates are properly classified under HTSUS subheading 7013.99.50 or subheading 7013.99.80, depending on the value of the articles; the Floor Articles are properly classified under subheading 7013.99.90; and the Wall Articles are properly classified under subheading 7013.99.50. Further, the articles as to which the parties have stipulated shall be reclassified under the agreed-upon tariff provisions.

Judgment will enter accordingly.

Dated: January 28, 2013
New York, New York

Amended: February 15, 2013

/s/ Delissa A. Ridgway
DELISSA A. RIDGWAY JUDGE

Slip Op. 13–22

CLEARON CORPORATION AND OCCIDENTAL CHEMICAL CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and ARCH CHEMICALS, INC., Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 08–00364

[The Department of Commerce's Final Results of Redetermination are sustained.]

Dated: February 20, 2013

Gibson, Dunn & Crutcher, LLP (*John C. Wood* and *Daniel J. Plaine*), for plaintiffs.

Stuart F. Delery, Acting Assistant Attorney General; *Jeanne E. Davidson,* Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David F. D'Alessandris*); Office of the Chief Counsel for Import Administration, United States Department of Commerce *(David Richardson),* of counsel, for defendant.

Law Offices of Peggy A. Clarke (*Peggy A. Clarke*), for defendant-intervenor.

OPINION

Eaton, Judge:

Before the court are the Final Results of Redetermination, pursuant to a remand order issued by the court on November 18, 2011, involving the Final Results and Amended Final Results of the Second Administrative Review of the antidumping duty order on chlorinated isocyanurates[1] ("isos") from the People's Republic of China ("PRC"). *See* Final Results of Redetermination (Dep't of Commerce Mar. 19, 2012) (ECF Dkt. No. 79) ("Remand Results"); *Clearon Corp. v. United States,* 35 CIT __, Slip Op. 11–142 (Nov. 18, 2011) *("Clearon II")*[2]*; see also* Chlorinated Isos from the PRC, 73 Fed. Reg. 52,645 (Dep't of Commerce Sept. 10, 2008) (final results of antidumping administrative review); Chlorinated Isos from the PRC, 73 Fed. Reg. 62,249 (Dep't of Commerce Oct. 20, 2008) (amended final results of antidumping administrative review) (collectively, "Final Results").

By the remand order, the Department of Commerce ("Commerce" or "the Department") was directed to reexamine its selection of surrogate data to value the factors of production of respondents Hebei Jiheng Chemical Corporation, Ltd. ("Jiheng") and Nanning Chemical

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[1] "Chlorinated isocyanurates are derivatives of cyanuric acid, described as chlorinated s-triazine triones .... [They are] available in powder, granular, and tableted forms." *Arch Chems., Inc. v. United States,* 33 CIT __, __, Slip Op. 09–00071, at 3 n.l (July 13, 2009) (not reported in the Federal Supplement) (internal quotation marks and citation omitted).

[2] In *Clearon I,* the court denied Commerce's December 14, 2009 motion to dismiss certain counts in plaintiffs' Complaint. *Clearon Corp. v. United States,* 34 CIT __, 717 F. Supp. 2d 1366 (2010) ("*Clearon I*").

Industry Co. Ltd. ("Nanning"), including the Indian surrogate data used to value urea and steam coal, and to reconsider and explain its selection of anhydrous ammonia to value an ammonia gas by-product offset credit for Jiheng. *Clearon II,* 35 CIT at __, Slip Op. 11–142, at 30–31.

In the Remand Results, Commerce continues to find that it used the best available information to value the factors of production and Jiheng's by-product offset, and that its conclusions are supported by substantial evidence. Remand Results at 2.

For the reasons set forth below, the Remand Results are sustained.

BACKGROUND

In late 2008, Commerce issued the Amended Final Results of the Second Administrative Review of the antidumping duty order on chlorinated isocyanurates from the PRC, in which Commerce assigned dumping margins to respondents Jiheng and Nanning of 0.90% and 54.86%, respectively. *See* Final Results, 73 Fed. Reg. at 62,250. The Final Results cover the period of review ("POR") June 1, 2006 through May 31, 2007, and incorporate by reference the Department's Issues and Decision Memorandum. *See* Issues & Decision Mem. for the 2006-2007 Admin. Review of lsos from the PRC (Dep't of Commerce Sept. 5, 2008) ("Issues & Dec. Mem.").

On April 17, 2009, plaintiffs Clearon Corporation and Occidental Chemical Corporation, domestic producers of isos, filed a motion for judgment on the agency record pursuant to USCIT Rule 56.2. *Clearon II,* 35 CIT at __, Slip Op. 11–142, at 2. Plaintiffs' motion challenged Commerce's (1) selection of surrogate values for urea; (2) selection of surrogate values for steam coal; and (3) valuation of Jiheng's waste ammonia gas by-product credit. On December 14, 2009, Commerce filed a motion to dismiss certain counts in plaintiffs' Complaint. The court denied defendant's motion in *Clearon I*. *Clearon Corp. v. United States,* 34 CIT __, 717 F. Supp. 2d 1366 (201 0) ("*Clearon I*"). Plaintiffs' 56.2 motion was granted, in part, in *Clearon II* and the case was remanded to Commerce on November 18,2011.

In its March 19,2012 Remand Results, Commerce has again determined that: "(1) the Indian import data are the best available information on the record for valuing urea; (2) the Tata Energy Research Institute ("TERI") data are the best available information on the record for valuing steam coal; and (3) the World Trade Atlas ("WTA") data for anhydrous ammonia are the best available information on the record for valuing Jiheng's ammonia gas by-product." Remand Results at 2.

Plaintiffs dispute each of these determinations. Comments of Clearon Corp. & Occidental Chern. Corp. Regarding Final Results of Redetermination 2, 8, 12 (May 3, 2012) (ECF Dkt. No. 90) ("Pis.' Cmts."). Defendant, the United States, contends that the Remand Results are consistent with the court's instructions, are supported by substantial evidence, and should be sustained. Def.'s Resp. to Pis.' Comments 1 (May 25, 2012) (ECF Dkt. No. 96) ("Def.'s Resp."). Defendant-Intervenor, Arch Chemicals, likewise contends that the Remand Results should be sustained. Resp. of Arch Chems. to Clearon Corp. & Occidental Chemical Corp.'s Comments 8 (May 25, 2012) (ECF Dkt. No. 94) ("Def.-Int.'s Resp.").

STANDARD OF REVIEW

"The court shall hold unlawful any determination, fmding, 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)(l)(B)(i) (2006).

DISCUSSION

I. Legal Framework

The United States imposes duties on foreign-produced goods that are sold in the United States at less-than-fair value.[3] When determining whether the subject merchandise is being, or is likely to be, sold at less-than-fair value, 19 U.S.C. § 1677b(a) requires Commerce to make "a fair comparison ... between the export price[[4]] or constructed export price[[5]] and normal value." 19 U.S.C. § 1677b(a). "Commerce ordinarily determines the normal value of subject merchandise of an exporter or producer from a non-market economy .. . country[[6]] 'on thebasis of the value of the factors of production

[3] "If the price of a good in the home market ('normal value') is higher than the price for the same good in the United States ('export price'), then the comparison produces a positive number that indicates that dumping has occurred, and the magnitude of the number determines the dumping margin." *Clearon II,* 35 CIT at __, Slip Op. 11–142, at 5.

[4] The "export price" is "the price at which the subject merchandise is first sold ... by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted." 19 U.S.C. § 1677a(a).

[5] The "constructed export price" is "the price at which the subject merchandise is first sold ... in the United States ... by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted." 19 U.S.C. § 1677a(b).

[6] A "nonmarket economy country" is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Because it deems China to be a nonmarket economy country, Commerce generally

utilized in producing the merchandise.'" *Shantou Red Garden Foodstuff Co. v. United States,* 36 CIT __, __, 815 F. Supp. 2d 1311, 1316 (2012) (quoting 19 U.S.C. § 1677b(c)(1)). In doing so, Commerce seeks "to assess the 'price or costs' of factors of production" of subject merchandise in a comparable market economy[7]" in an attempt to construct a hypothetical market value of that product" in the nonmarket economy. *Nation Ford Chern. Co. v. United States,* 166 F.3d 1373, 1375 (Fed. Cir. 1999). The statute directs Commerce to value the factors of production "based on the best available information regarding the values of such factors in a market economy country." 19 U.S.C. § 1677b(c)(l).

II. Commerce's Choice of a Surrogate Value for Urea

A. Urea Used in Agriculture Versus Chemical Production

The Department's Final Results valued the urea input using Indian World Trade Atlas ("WTA") import data, which included data for Omani-sourced imports of urea into India. In doing so, the Department rejected the use of prices for urea sold in the Philippines after finding the "domestic Philippine prices for urea not to be the best available information ... because these prices were for urea used as fertilizer and sold in 50-kg bags which were not product specific to the urea used by respondents in this review." Issues & Dec. Mem. at 8.

In *Clearon II,* the court directed Commerce to "reexamine its determination with respect to (1) whether urea used for agricultural purposes can be differentiated from urea used for chemical production, and (2) any reason urea sold in fifty kilogram bags cannot be the source of a surrogate price in this case." *Clearon II*, 35 CIT at __, Slip Op. 11–142, at 30.

Upon reexamination on remand, the Department has now "determined that the record evidence supports finding that urea used for agricultural purposes should *not* be differentiated from urea used for industrial purposes." Remand Results at 4 (emphasis added). In addition, while the Department found that information on the record

considers information on sales in China and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise." *Shanghai Foreign Trade Enters. Co. v. United States,* 28 CIT 480,481,318 F. Supp." 2d 1339, 1341 (2004).

[7] Section 1677b(c)(4)(A) requires that Commerce "in valuing factors of production ... shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are ... at a level of economic development comparable to that of the nonmarket economy country."

"supports the proposition that urea has multiple uses," it did not indicate "that there are two separate and distinct markets." Remand Results at 5.

As to the court's direction to Commerce to reexamine whether urea sold in fifty kilogram bags could be the source of a surrogate price in this case, on remand the Department found that "the record does not contain any evidence that there are any differences in the physical characteristics, packaging of, and channels of trade/selling functions for urea sold for different uses to support a finding that there are two distinct markets for urea used for agricultural versus industrial applications." Remand Results at 5. Hence, Commerce has now determined that its previous assertion that "the Philippine data were not specific to the type of urea used by the respondents ... [was] not supported by record evidence." Remand Results at 5. Indeed, on remand, the Department has found that "one of the two respondents in this administrative review purchased urea in similar quantities [to the fifty kilogram bags]." Remand Results at 5. Therefore, Commerce has now concluded that neither market segmentation nor that the Philippine urea was sold in fifty-kilogram bags presents an obstacle to the use of Philippine prices as surrogate values.

Nonetheless, as discussed below, "[a]fter reviewing the record, the Department continues to find that the Indian data constitute the best available information on the record for valuing urea." Remand Results at 6.

B. Evaluation of Philippine Data and Comparison to Indian Data

In addition to directing Commerce to reexamine the manner in which Philippine urea was sold, the court further directed Commerce to "[1] fully analyze the evidence presented by both sides in reviewing its decision to exclude the Philippine data, [2] further examine the Philippine data using the same criteria it employed in selecting the Indian data, [3] provide a complete comparison of the two data sets, and [4] adequately explain how it has come to its final determination." *Clearon II,* 35 CIT at __, Slip Op. 11–142, at 30–31.

According to Commerce, when valuing the factors of production pursuant to 19 U.S.C. § 1677b(c)(l), "the Department's stated practice [is] to choose surrogate values that represent broad market-average prices, prices specific to the input, prices that are net of taxes and import duties, prices that are contemporaneous with the POR, and publicly available non-aberrational data from a single surrogate market-economy." Remand Results at 6–7. Using these criteria, Commerce reexamined the Philippine dataset and compared it to the Indian WTA data. In doing so, Commerce found that the Philippine

dataset, like the Indian dataset, fulfilled its selection criteria, i.e., it represented a broad market-average; was specific to the urea input; was exclusive of taxes; was contemporaneous with the POR; and was publicly available. Remand Results at 7–8. The Department further found that, although the Philippine retail average unit value was the highest value on the record, it was not aberrational when compared to other potential surrogate countries, but "[r]ather it constitutes the high end of a range of values." Remand Results at 8. This being the case, Commerce found that "both sources of data could potentially be used in valuing the input for urea." Remand Results at 16.

The Department, however, continues to argue for its use of the Indian data based on its regulations. Pursuant to 19 C.F.R. 351.408(c)(2), the Department "normally will value all factors in a single surrogate country." 19 C.F.R. 351.408(c)(2) (2007). For Commerce, this regulation provides a sufficient basis for the use of data from India. Remand Results at 16–17; Def.' s Resp. 3 ("Commerce will only introduce data from a secondary surrogate country into the calculation if there were no primary surrogate value, or if the primary surrogate value was not reliable based on record evidence.").

Here, "India is the primary surrogate country, where the surrogate values, contingent upon availability, were obtained for the [other factors of production]. Accordingly, the Department's first preference in selecting surrogate value data ... is publicly available Indian data for the POR, where there is no evidence to show that the data are aberrational or otherwise unreliable." Remand Results at 17; *see also* Def.'s Resp. 2 ("[B]ecause Commerce had selected India as the primary surrogate country—a decision that has not been challenged in this litigation—Commerce appropriately selected the Indian data as a surrogate value for urea as the best available information in preference to the Philippine data."). Therefore, based on its regulation, Commerce concluded that "despite the fact that the Department reversed its decision that the Philippine retail pricing data were not specific to the input of urea being used in the production of the subject merchandise, the record evidence ... still supports a determination that the Indian import data meet the Department's criteria for best available information." Remand Results at 17.

In disputing this decision, plaintiffs insist that the Department's use of the "single surrogate country" criteria as the tiebreaker was overly simplistic. Pis.' Cmts. 3. Plaintiffs claim that "[t]he Department's task is not to select *any* data from its primary surrogate country that meets certain minimum indicia of reliability; it is rather to select the data that are the '*best available*' on the record." Pis.'

Cmts. 3. Plaintiffs rely on this Court's opinion in *Dorbest, Ltd. v. United States* for the proposition that the "'best' choice is ascertained by examining and comparing the advantages and disadvantages of using certain data as opposed to other data." *Dorbest, Ltd. v. United States*, 30 CIT 1671, 1675, 462 F. Supp. 2d 1262, 1268 (2006).

Plaintiffs further argue that Commerce "fail[ed] to make the 'complete comparison of the two data sets' required by the Court's remand instructions," and failed "adequately [to] explain how it has come to its final determination." Pis.' Cmts. 2. In other words, while conceding that the Department fully examined the Philippine data using the same criteria it employed in selecting the Indian data, plaintiffs argue that Commerce failed to actually compare the Philippine dataset to the Indian data. In plaintiffs view, "it is plain that the only 'comparison' that the Department performed of the Indian and Philippine urea price data was to a set of minimum reliability criteria." Pis.' Cmts. 3. To plaintiffs, this "exercise may *lay the groundwork* for a comparison, by confirming that both data sets are usable, but certainly does not constitute the 'complete comparison of the two data sets' that was required by this Court's remand decision." Pls.' Cmts. 3. Plaintiffs continue that "[h]ad the Department conducted the required comparative assessment, there are several relevant differences between the Indian and Philippine urea price data that would have been pertinent to a determination of the 'best available information.'" Pls.' Cmts. 4. The differences identified by plaintiffs are (1) "the Philippine data reflects domestic sales rather than import transactions," (2) "the greater specificity of the Philippine data [which] is specific to urea sold in 50-kilogram bags," and (3) "the very different structure of the Indian and Philippine urea markets." Pis.' Cmts. 5–6.

Commerce defends its "single surrogate country" preference by explaining that "[u]sing reliable data from the primary surrogate is preferred to using data from the secondary surrogate because mixing in values from a secondary surrogate country adds a distortion into the calculations." Def.'s Resp. 2–3; Def.'s Resp. 7 ("[U]nnecessary distortion [is] caused by mixing in values from other countries when reliable primary surrogate data is available."). According to Commerce, "there are sound and reasonable economic reasons for Commerce to select, to the extent there is reliable data in the primary surrogate, all of the surrogate values from the primary surrogate country. These economic reasons render information from secondary surrogate countries not the best available information, and thus not appropriate for valuing the factors of production." Def.' s Resp. 2.

Specifically, in selecting surrogate values,

> Commerce is attempting to determine what an Indian producer would pay for the factors of production. The Indian producer would pay prices available in India or for imports into India. An Indian producer generally has access only to prices in its own country (India) and would not have access to prices in secondary surrogate countries, such as the Philippines. Therefore, resorting to secondary surrogate country data to obtain a factor value actually undermines and makes less accurate Commerce's determination of what an Indian producer would pay for factors used to produce the subject merchandise.

Def.'s Resp. 3. Therefore, "Commerce only resorts to secondary surrogate country values if the record does not contain any value for a factor from the primary surrogate, or if the primary surrogate country values upon the record are determined, based on record evidence, to be aberrational or unreliable." Def.'s Resp. 3–4.

Commerce further asserts that it is not required to compare "the primary surrogate country value with a secondary surrogate country value to *see* which one is 'better.'" Def.'s Resp. 4. In other words, Commerce insists that it is not required to "search for the 'best available' information across surrogate countries." Def.'s Resp. 5; *see also* Remand Results at 29 ("In the instant review, where we have reliable surrogate value data from the primary surrogate country, we determined that the use of reliable surrogate value information from the primary surrogate country is the best available information when the alternative is information obtained from a secondary surrogate country."); Def.-Int.'s Resp. 2–3 ("The problem with Plaintiffs' argument is that all other things are not equal: one source is from the primary surrogate country and one is not.").

With respect to plaintiffs' claimed difference between the domestic sales prices from the Philippines and the import prices from India (and the related difference between the structures of the Indian and Philippine domestic urea markets), Commerce counters that plaintiffs' argument is misleading because the Department found "no evidence that the Indian import value of urea is distorted by virtue of any government involvement in the import, movement or resale of urea in India." Remand Results at 30. According to Commerce, plaintiffs "ha[ve] pointed to no new evidence that would lead us to reconsider the issue." Remand Results at 31; *see also* Def.-Int.'s Resp. 4 ("With respect to the Indian government's involvement in urea pricing within India that is not relevant to pricing at the border."). Put another way, Commerce argues that while the Indian government may play a role in domestic urea pricing, and therefore the structure

of the domestic urea market in India may differ from that of the Philippines, there is no evidence on the record that this role extends to import pricing.

In addressing plaintiffs' reference to the "greater specificity of the Philippine data," the Department counters that "any attempt to say that the Department established that the 50-kg bags are specific to purchases made in this review is misleading. The fact is that, while the record shows one respondent purchased urea in quantities similar to 50-kg bags, the record also shows that the other respondent's urea purchases were measured in [a] much larger unit of measure than [kilograms]." Remand Results at 30.

As to plaintiffs' argument that the Indian and Philippine urea markets are sufficiently different as to require the use of the Philippine data, this claim also relates to plaintiffs' assertion that the Indian government is involved in the domestic urea market. In addressing this argument, Commerce again points out that the value it used for urea was the import price, and that there is no record evidence of government involvement in the import market for urea. Remand Results at 30–31; *see also* Def.-Int.'s Resp. 4.

The court holds that Commerce's decision to use the Indian data was supported by substantial evidence. First, the preference for the use of a "single surrogate country" is directed by regulation. 19 C.F.R. § 351.408(c)(2) ("[Commerce] normally will value all factors in a single surrogate country."). Thus, the court must treat seriously the Department's preference for the use of a single surrogate country. *See, e.g., Royal Thai Gov't v. United States,* 436 F.3d 1330, 1340 (Fed. Cir. 2006) (deferring to Commerce's interpretation of its own regulation); *Cathedral Candle Co. v. United States ITC,* 400 F.3d 1352, 1363 (Fed. Cir. 2005) ("[I]t is well settled that an agency's interpretation of its own regulations is entitled to broad deference from the courts.").

Second, the preference is also reasonable because, as Commerce points out, deriving the surrogate data from one surrogate country limits the amount of distortion introduced into its calculations because a domestic producer would be more likely to purchase a product available in India. As the court pointed out in *Peer Bearing,* "the preference for use of data from a single surrogate country could support a choice of data as the best available information where the other available data 'upon a fair comparison, are otherwise seen to be fairly equal.'" *Peer Bearing Co.-Changshan v. United States*, 35 CIT __, __, 804 F. Supp. 2d 1337, 1353 (2011) (citation omitted); *see also Fuwei Films (Shandong) Co. v. United States*, 36 CIT __, __, 837 F. Supp. 2d 1347, 1356 (2012) ("Commerce's preference for using data from a single country [is] unreasonable when the data was demon-

strably aberrational as compared to certain benchmark prices, and alternative data sources could be better corroborated.") (citation omitted); *Bristol Metals L.P. v. United States*, 34 CIT __, __, 703 F. Supp. 2d 1370, 1374 (2010) ("Commerce's regulations provide that surrogate values should normally be 'publicly available' and ... from a single surrogate country." (citing 19 C.F.R. § 351.408(c)). Thus, the use of a "single surrogate country" is justified when, as here, all other factors are "fairly equal" because minimizing distortion supports a fmding that Commerce relied upon the best available information on the record.

Third, plaintiffs' reliance on *Dorbest* does not help their argument. In *Dorbest,* this Court stated that when "Commerce is faced with a choice between two imperfect options, it is within Commerce's discretion to determine which choice represents the best available information," so long as the Department provides a reasonable explanation. *Dorbest,* 30 CIT at 1687,462 F. Supp. 2d at 1277; *see also Trust Chern Co. v. United States*, 35 CIT __, __, 791 F. Supp. 2d 1257, 1263 (2011). As defendant indicates, "[n]owhere in *[Dorbest]* ... did the Court require Commerce to compare values between surrogate countries when there is a reliable value from the primary surrogate country. Indeed, [in *Dorbest]* the Court specifically upheld Commerce's decision not to use three Indonesian financial statements because there were adequate financial statements from the primary surrogate country, India, on the record." Def.'s Resp. 5 (citing *Dorbest,* 462 F. Supp. 2d at 1307–08).

With respect to plaintiffs' argument that a determination based on the "best available information" requires that Commerce make a more complete comparison of the datasets, it is clear that here, the Department, after establishing that the information from each country was reliable and not aberrational, went on to address the three specific areas for comparison urged by plaintiffs. As such, Commerce did not merely rely on its preference for using data from a single surrogate country in reaching its determination, but performed the comparison that plaintiffs insist is required by the "best available information" standard and by the court's remand instructions.

As to the first difference that plaintiffs claim would have emerged from a proper comparison, the court is not convinced. The plaintiffs have not adequately supported their argument that, because the Philippine dataset reflects domestic sales rather than import transactions, it should be preferred over the Indian data. As defendant points out, "[w]hile the Indian government may control the domestic market for urea, there is no evidence that the Indian government has any control over the price at which other market-economy countries

sell urea to India." Def.'s Resp. 7–8. In fact, the record is silent as to the question of whether or not the Indian government had any control over the prices at which third country market economy countries sold urea into the Indian market. Therefore, this claimed difference cannot be said to undermine the reliability of the Indian data because there is no record evidence that import prices of urea are not market-driven. In addition, plaintiffs have cited no evidence that a domestic Indian producer would prefer domestic rather than imported urea.

Plaintiffs also argue for the greater specificity of the Philippine data because it was for urea sold in fifty-kilogram bags. Pls.' Cmts. 4–5 ("Another potentially significant difference between the Philippine and Indian urea price data is the greater specificity of the Philippine data. The Philippine data is specific to urea sold in 50-kilogram bags."). This argument, however, results from a clear misreading of the Remand Results. While Commerce did identify one respondent that purchased urea in quantities similar to fifty-kilogram bags, "the other respondent's urea purchases were measured in [a] much larger unit of measure than [kilograms]." Remand Results at 30. Therefore, plaintiffs' "greater specificity" argument cannot be credited because the Philippine data is not necessarily more specific to the production of the isos at issue here.

Finally, plaintiffs point to the different market structures of lndia and the Philippines as an important difference between the two datasets. Pis.' Cmts. 5–6 ("[Another] potentially relevant consideration, had the Department conducted the required comparison of the data sets, involves the very different structure of the Indian and Philippine urea markets. The record establishes that only three State Trading Enterprises are authorized by the Indian government to import urea, and such imports are based on the Government of India's assessment of the 'requirements of urea imports' for the country[[8]]... Conversely, there is no record evidence of any governmental involvement whatsoever in the Philippine urea market."). This issue

[8] In support of this argument, plaintiffs point to a print-out of the Indian Department of Fertilizer's Website, which plaintiffs submitted to Commerce during the underlying review as part of their rebuttal comments on the surrogate values for the factors of production. According to the Department of Fertilizer's Website, "[t]he requirement of urea imports is assessed by [the Government of India] in relation to the estimated demand, indigenous production, availability of stocks and pipeline requirement." App. in Supp. of Pls.' Cmts. Tab 1, Ex. 12, at 1 (May 3, 2012) (ECF. Dkt. No. 91) (Pls.' App."). Then, based on the Indian Government's estimate of necessary imports, the Department of Fertilizer authorizes three agencies to arrange for imports of urea: (1) MMTC Ltd., (2) Indian Potash Limited, and (3) the State Trading Corporation. Pls.' App. Tab 1, Ex. 12, at 1. In doing so, "[l]ong term contracting with producers is permitted with a view to ensure security of supplies at the internationally competitive prices most advantageous to the country." Pls.' App. Tab 1, Ex. 12, at 2.

overlaps with plaintiffs' argument, discussed above, that the Indian dataset reflects import prices, while the Philippine dataset reflects domestic market prices. *See* Pis.' Cmts. 5–6. As noted above, however, this perceived difference between the market structures of India and the Philippines does not undermine the results of Commerce's comparison. While it is, in fact, the case that three domestic Indian companies are authorized to contract for all of the country's urea imports based on the government's assessment of need, there is no indication that the price of the urea is set by other than market forces. Indeed, Commerce examined the record and found "no evidence that the Indian import value of urea is distorted by virtue of any government involvement in the import, movement or resale of urea [with]in India." Remand Results at 30; *see also* Def.-Int.'s Resp. 4 ("With respect to the Indian government's involvement in urea pricing within India—that is not relevant to pricing at the border."). Plaintiffs have produced no evidence that would undermine this conclusion. That is, although plaintiffs find the government of India's involvement in the volume of urea imports significant, they placed no evidence on the record demonstrating that this involvement distorted the price of imports into India. The conclusion that the urea surrogate value was not distorted by government involvement is further bolstered by this court's consideration of the facts in *Arch Chemicals. Arch Chems., Inc. v. United States,* 33 CIT __, __, Slip Op. 09–00071, at 30 (July 13, 2009) (not reported in the Federal Supplement) (finding that there was no evidence that data was "tainted by reason of government involvement").

Thus, Commerce properly relied on the preference for single country data found in its regulation when finding a surrogate value for urea. In addition, the court finds that Commerce properly followed the court's remand instructions by evaluating the Philippine dataset and comparing it to the Indian dataset before concluding that the Indian data remained the best available information on the record. Because Commerce actually performed this analysis, the court reaches no conclusion as to whether the comparison is required by the statute. Therefore, based on the foregoing, the court sustains the Department's use of the Indian WTA data to value the urea input.

C. Omani Data Included in the Urea Price Data from India

The court also directed Commerce to "revisit its determination with respect to the Omani prices [that were included in the Indian WTA data used to value the urea input], fully analyze the evidence regarding the Omani data, and fully explain and support with substantial evidence its determination of whether or not to include the Omani

data in the WTA data." *Clearon II,* 35 CIT at __, Slip Op. 11–142, at 31. The purpose of this direction was to address plaintiffs' complaint that the Omani prices were aberrationally low, making the WTA data as a whole aberrationally low. Pls.' Cmts. 7 ("[T]he Omani imports were the lowest-valued imports of any country into India, and the next-lowest source of imports (from Liberia) was 46% higher than the Omani value.").

In response, Commerce "reexamined the information on the record ... and determined that the Omani data was properly included in the Indian WT A data in calculating a surrogate value for urea." Remand Results at 11. The Department asserts that, in accordance with its practice, it first "compared the aggregate Indian import [average unit value] of urea ($0.23 per kg) with [the prices for urea from] other potential surrogate countries (Indonesia ($0.14 per kg), Sri Lanka ($0.29 per kg), and the Philippines ($0.22 per kg)) and found that the Indian import value is within the range of values for those countries." Remand Results at 12. Thus, the Indian value, which included prices of urea imported into India from other countries including from Oman, was lower than the values for some potential surrogate countries, but higher than the values from others. For this reason, the Department did not find the Indian value to be aberrational.

Going beyond its usual practice, Commerce then "applied an additional test comparing the value of Indian imports from Oman with other record information, whereby it found that the [average unit value] for Indian imports of urea from Oman ($0.18 per kg) are higher than the Indonesian import [average unit value] ($0.14 per kg) and the [average unit value] for several countries in the Philippine import data ($0.13 per kg to $0.16 per kg)." Remand Results at 12; Remand Results at 14–15 ("[T]he Department took the additional steps to compare the Indian import value of urea from Oman to the [average unit value] for several countries in the Philippine and Indonesian import data and found that the Omani value is, in fact, higher than the import values of urea for other potential surrogate countries. Accordingly, as a result of this additional test, the Department found based on record evidence that the Omani urea price fell within the range of urea prices from other potential surrogate countries, and that this was additional support for finding that there was no record evidence that the Indian import value of urea from Oman is distorted or aberrational."); *see also* Def.'s Resp. 9 ("[T]he Omani data fell within the range of the import values from individual market economy countries into the other potential surrogate countries.").

Next, the Department looked at the range of values for urea imported into India and found that while

> the Omani price is the lowest unit value among Indian imports, we do not find the Omani value to be outside the range of unit values. As with any range of data, there is by necessity a low end and a high end of the range. While the Omani value is 30 percent lower than the average, the value of German imports of urea into India is approximately 50 percent higher than the average. Accordingly, we do not find the Omani import value, as a low end of the range, or the German import value, as the high end of the range, to be an outlier.... In other words, because the low value (Oman) and the high value (Germany) are both somewhat removed from the average, we don't find either to be an anomaly, but merely the low and high ends of a broad spectrum of values of Indian imports of urea.

Remand Results at 15. For these reasons, Commerce stated that it "continues to find that the Omani price is not distorted or aberrational because it is within a range of values of Indian imports, albeit at the low end of the range, and is within the range of import prices of urea of other potential surrogate countries." Remand Results at 15.

Plaintiffs renew their objection to the inclusion of the Omani values within the Indian WTA dataset because Commerce "has not explained the basis for its finding that the Omani and German imports represent the 'low and high ends of a broad spectrum of values.'"[9] Pls.' Cmts. 7. "To the contrary, the data appear more consistent with a

[9] Defendant also points to the court's finding in *Clearon II* that "there does not appear to be any evidence on the record that demonstrates how India's long-term contract with Oman tainted the sale prices of urea." *Clearon II,* 35 CIT at __, Slip Op. 11–142 at 19. Here, this continues to be true because there is no evidence on the record that suggests price distortions resulting from the long-term contract.

Similarly, in *Arch Chemicals,* a case involving the prior first administrative review of the antidumping duty order on isos from the PRC, the court rejected "the same argument with respect to the Government of India's control of the urea imports and market in India in an attempt to exclude Indian imports of urea from Oman." Remand Results at 10–11. In doing so, the court stated that it was

> unconvinced that Commerce erred by not excluding the [Omani] data as tainted by reason of government involvement. Oman and India are market economy countries and there is no evidence that, at the time the contract was entered into, the prices set were not market-driven. In addition, Commerce could reasonably find that, the mere fact that a product is sold to a single purchaser pursuant to a long-term contract, does not necessarily make the price anomalous. Further, there was no record evidence demonstrating that urea sales made subject to the contract were distorted.

Arch Chems., 35 CIT at __, Slip Op. 09–00071, at 29–30. Defendant claims that "[w]hile the facts in *Arch Chemicals* and the instant administrative review may be different with respect to the Indian import data of urea from Oman, we find in this redetermination that this record also does not contain any information to indicate that the Oman value is distorted or aberrational." Remand Results at 13.

range of imports within a relatively narrow band, with Oman and Germany as the clear outlier data points." Pls.' Cmts. 7–8.

The court finds that Commerce has supported with substantial evidence its decision to include the Omani data in the Indian WTA dataset when determining the surrogate value for urea. As an initial matter, it is worth noting that had Commerce relied solely on its argument that the low Omani value and the high German value demonstrated that the Omani value fell within an acceptable range, this issue would have been remanded. The Department's argument that these two values somehow validate each other is neither adequately explained nor convincingly self-evident. The Department, however, did not rely on this analysis alone.

First, Commerce compared the aggregate Indian import average unit value of urea to other potential surrogate datasets on the record (i.e., prices for urea imported into countries other than India), which demonstrated that it was not aberrational because it was higher than some potential surrogate datasets, but lower than others. Second, Commerce examined the Omani value on its own by comparing it to prices of other potential surrogate values on the record. In doing so, the Department showed that the Omani value was not aberrational, even though it was the lowest value within the Indian import dataset, because it was higher than other potential surrogate values, including the Indonesian import average unit value and the average unit value for several countries in the Philippine import data. Thus, it is apparent that the Indian import dataset as a whole fell within the range of urea prices from other potential surrogate countries. Furthermore, while the Omani data itself was at the low end of the range of all potential surrogate values on this record, it was not the lowest value, nor was it the lowest when compared to some countries within the Philippine import dataset.

Additionally, defendant is correct in noting that the Omani data was averaged with other Indian import data, serving to mitigate any distortion that the low figure may have introduced. Def.'s Resp. 6 ("[T]he Indian WTA data for urea represent broad-market average non-export prices, because the average value of the urea is based upon import prices compiled from a broad range of market-economy countries."). Thus, despite plaintiffs' argument, it appears that the Department's conclusion that the Omani data was not aberrational was supported by substantial evidence.

III. Commerce's Choice of a Surrogate Value for Steam Coal

In its Final Results, Commerce valued the steam coal input using prices from the TERI Data Directory and Yearbook, which reports steam coal prices from the Indian market. Remand Results at 18. In *Clearon II,* the court directed Commerce to "revisit its determination with respect to its surrogate valuation of steam coal, and fully analyze the use of the TERI data, including whether the chemical industry would be considered a core sector industry, and whether the use of this data is supported by substantial evidence." *Clearon II,* 35 CIT at __, Slip Op. 11 142 at 31. Whether India's chemical industry is a core sector industry might have a bearing on whether a manufacturer of isos could purchase steam coal at the price contained in the TERI data.

In response, Commerce "reopened the record .. . and requested that interested parties submit new information pertaining to the valuation of steam coal." Remand Results at 19. Specifically, Commerce sought "information on whether the chemical industry is a part of the core sector industry and, thus, received TERI prices which are lower than prices offered by [Coal India] to non-core industries." Remand Results at 19.

The Department received new information from plaintiffs and Jiheng, including Coal India's list of core sector customers. Following examination of this information, Commerce "continue[d) to find that TERI prices are the best available information for valuing Jiheng's steam coal." Remand Results at 20. In particular, Commerce found that "[w]hile the record does not list the chemical industry as a 'core industry' *per se,* evidence collected after reopening the record indicates that numerous chemical companies are listed by [Coal India] as part of the core sector." Remand Results at 20.

Plaintiffs contend that the Department "ignores directly relevant evidence showing that chemicals is *not* among the core industry customers of Coal India ... and that the [Department's] findings are manifestly not supported by substantial evidence." Pls.' Cmts. 8. Specifically, plaintiffs challenge the Department's reading of the Coal India List because "the vast majority of chemical companies listed in the [Coal India] customer list are identified as *non-core sector* customers, not core sector customers." Pls.' Cmts. 9. Under plaintiffs' reading of the list, "the chemical companies listed as 'core sector' customers ... are so identified because they have Captive Power Plants; those companies that simply produce chemicals and do not undertake other 'core sector' operations are all listed as 'non-core' customers." Pls.' Cmts. 9–10; *see also* Pls.' Cmts. 11 ("[T]he only chemical companies that are listed as Core Sector customers are so

listed *not* because of their chemical producing operations—which should be the focus of the Department's inquiry—but because they qualify based on other, unrelated operations such as running a Captive Power Plant.").

Responding to these assertions, Commerce states that while plaintiffs "claim that all five companies with the word 'chemical' in them are being listed as core sector customers only because they have captive power plants, ... [a] careful examination of the same information reveals that chemical companies which do not maintain captive power plants are also classified as core sector customers." Remand Results at 34; *see also* Remand Results at 21 (The list on the record "refers to additional chemical companies as core customers without referring to them as captive power producers."). In particular, Commerce identified "Tr Chemicals Pvt., Ltd." as a chemical company without a captive power plant that was listed as a core sector customer. Remand Results at 34. In addition, Coal India's list of core sector customers included Kanoria Chemical Industries, Ltd., which produces chemicals and fertilizers. Remand Results at 20. To . Commerce, "Kanoria's experience as a core consumer of steam coal supports the finding that producers of chlorinated isocyanurates and fertilizers [and other chemicals] are, *de facto,* treated as core industries in India." Remand Results at 20. For this reason, the Department insists that "while the definition of the core sector industries is unclear, chemical companies enjoy the access to TERI prices." Remand Results at 34.

Finally, plaintiffs argue that the Department "fail[ed] to discuss—or even acknowledge the record evidence directly contradicting the Department's findings with respect to steam coal valuation," including three specific items: (1) the 2006–2007 Ministry of Coal annual report, (2) the Indian Supreme Court decision, and (3) the annual reports. Pls.' Cmts. 11–12.

As to this last argument, the Department maintains that it addressed the evidence placed on the record by plaintiffs and discussed each item of evidence in the Remand Results. *See* Remand Results 34–37. In particular, Commerce notes that it reviewed the statement from the Indian Minister of Coal "regarding the price at which coal was supplied to small scale industries during the POR," and then concluded that "[w]hile the statement explains that 'Small Scale Industry units come in the non-core sector category,' no party has argued that the chemical industry is a small scale industry, nor is there any record evidence to that effect. Accordingly, we find this particular document to be of no consequence regarding the prices at which coal would have been supplied to chemical industry customers

during the POR.” Remand Results at 36. Thus, for Commerce, whether small-scale industries have access to inexpensive coal is irrelevant because there is no evidence that the Indian chemical industry is a small-scale industry.

As to the Supreme Court of India decision, the Department emphasized that the “Court stated that ‘core sector consumers include the vital sections of national economy related to infrastructure development as for example, power, steel, cement, defence, fertilizer, railway, paper, aluminum, export, central public sector undertaking, etc.’” Remand Results at 35. According to Commerce, “the use of ‘for example’ and ‘etc.’ suggests that the list is not all inclusive, *i.e.,* it is not necessarily a comprehensive list of all core sector industries.” Remand Results at 35. Moreover, the Department insists that even though the decision’s “list does not include the chemical industry, as explained elsewhere, other record evidence demonstrates that chemical companies are eligible for the TERI prices,” such as Tr Chemicals Pvt., Ltd. and Kanoria Chemical Industries, Ltd. Remand Results at 35.

The Department also addressed “the *Indian Minerals Year Book 2008,* an annual government publication issued by the Indian Bureau of Mines” that was submitted by Jiheng. Remand Results 21. In that publication, the chemical, cement, and fertilizer industries are characterized “as being dependent on coal for their process and energy requirements.” Remand Results at 21. As noted, the cement and fertilizer industries are indisputably core industries. Commerce points out that “[t]he publication lists the chemical industry together with other core industries as coal dependent without discriminating between core and non-core sector industries” and it “refers to dispatches of coal by industry priority” with the “chemical industry ... identified as a ‘priority’ industry on ... par with the cement or steel industries.” Remand Results at 21. Furthermore, the “publication discusses coal pricing over the relevant POR and never mentions any distinction in pricing between core and non-core sectors.” Remand Results at 21. For these reasons, the Department concluded that “[w]hile the publication does not define industries in terms of core and non-core industries, the designation of the chemical industries as a priority industry (along with the coincidence of the coal prices discussed in the yearbook being similar to the TERl steam coal prices for core industries) supports a finding that the chemical industry is a core industry.” Remand Results at 21.

Finally, Commerce reiterated its view that the TERl dataset was the best available information for valuing the steam coal input because the TERl dataset is specific to Jiheng’s reported coal inputs.

That is, the TERl dataset is for the type of coal actually used by Jiheng. Here, Jiheng provided the Department with information on the useful heat value ("UHV")[10] of the steam coal it used. "Therefore, Jiheng's steam coal inputs are easily categorized using domestic Indian price data, which assigns prices for coal based on UHV." Remand Results at 22; *see also* Remand Results at 37 ("[T]he Department has selected the TERI Data for categories Band C to value steam coal based on Jiheng's reported UHV of between 5300–5900 kcal/kg as provided by Jiheng."). In contrast, "the WTA steam coal price data, which [plaintiffs] suggest [Commerce] use, is listed under the heading 'steam coal,' without further specification of the UHV." Remand Results at 22. Consequently, "because domestic Indian coal data provide the most product-specific prices, we find that it offers the best available information for valuing Jiheng's steam coal inputs." Remand Results at 22; Def.'s Resp. 11–12 ("The only heat-indexed 'steam coal' surrogate value on the record is the TERI data steam coal value. All other record coal values do not identify the specific type of coal or the heat index of the coal.").

The court finds that Commerce has supported with substantial evidence its determination to value the steam coal input using the TERI data. First, it is clear that Commerce took into consideration the three pieces of evidence plaintiffs placed on the record, and reasonably concluded that they did not present substantial evidence sufficient to undermine Commerce's conclusion that chemical companies in India can qualify for core sector steam coal pricing. That is, the Ministry of Coal annual report, the Indian Supreme Court decision, and the annual report, whether considered separately or in combination, are simply not convincing evidence that the core sector pricing in the TERI data was not available to Jiheng.

The court also finds that it was reasonable for Commerce to conclude that some chemical companies are considered "core sector" industries and can thus benefit from the TERI prices for steam coal. While plaintiffs claim that the "vast majority of chemical companies listed in the [Coal India] customer list are identified as non-core sector customers, not core sector customers," the record evidence does not clearly show that the chemical industry is categorized as a core or a non-core sector, and the Department was able to point to at least one chemical company listed as a core sector industry that was not also listed for some other core activity, such as having a captive power plant. Pls.' Cmts. 9; *see* Def.-Int.'s Resp. 5 ("Commerce pointed to the substantial evidence that India's chemical industry, including those

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[10] Coal is classified according to its commercial usefulness as measured by its Useful Heat Value ("UHV").

manufacturing product comparable to the subject chlorinated isocyanurates, did, in fact, qualify to receive coal at core prices during the period of review.").

Furthermore, Commerce specifically found "that the TERI data are the best available information with which to value steam coal because they are specific to Jiheng's reported coal inputs, they comport with the core industry pricing, they are complete, and they are contemporaneous with the POR." Remand Results at 22–23. It appears, then, that Commerce has properly examined, explained, and supported its findings with substantial evidence as to the surrogate valuation of the steam coal. *Huaiyin Foreign Trade Corp. V. United States,* 322 F.3d 1369, 1374 (Fed. Cir. 2003) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (citation omitted)). Therefore, the court finds that here, as has been found in the past, the use of the TERI data is supported by substantial evidence. *See, e.g., Arch Chems.,* 33 CIT at __, Slip Op. 09–00071, at 41 (holding that "Commerce acted reasonably in using the TERI data to value steam coal" because the TERI dataset was the most "product specific" surrogate available); *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT 1204, Slip Op. No. 05–00126 (2005) (sustaining Commerce's use of TERI data as a surrogate value for coal). Thus, the Department's determination with respect to the surrogate value for steam coal is sustained.

IV. Commerce's Valuation of the Ammonia Gas By-Product Credit

In the Final Results, the Department granted Jiheng a by-product offset for ammonia gas, which the Department valued using Indian import data for anhydrous ammonia[11] from the WTA. Because the Department believed it had not adequately explained why the value for anhydrous ammonia was appropriate for valuing the by-product offset credit, it requested a voluntary remand to further explain its reasoning. Remand Results at 23. In *Clearon II,* the court granted Commerce's request and directed the Department to "explain its selection of anhydrous ammonia to value the ammonia gas by-product offset." *Clearon II,* 35 CIT at __, Slip Op. 11–142 at 31.

On remand, Commerce states that "the Department grants an offset to normal value for scrap generated during the production of

[11] According to defendant-intervenor, "there are only two forms of ammonia gas-anhydrous and hydrous (as opposed to ammonia compounds that are not at issue here). The terms 'anhydrous' and 'hydrous' refer to whether or not the ammonia gas molecules are combined with water. Specifically 'anhydrous' means 'Being without water, especially water of hydration.'" Def.-lnt.'s Resp. 6 (quoting MCGRAW-HILL DICTIONARY OF SCIENTIFIC & TECHNICAL TERMS 103 (6th ed. 2003)).

subject merchandise if the respondent can demonstrate that the scrap by-product is either resold, or has commercial value and reenters the respondent's production process." Remand Results at 23. Furthermore, "in valuing by-product offsets, ... the Department uses surrogate values based on the best available record information, as it does for other [factors of production]." Remand Results at 23. Here, the Department has again concluded that the WTA Indian import data for anhydrous ammonia is the best available information for valuing the ammonia gas by-product. Remand Results at 24.

Plaintiffs argue that Commerce's determination is flawed because Jiheng's ammonia gas by-product is not actually anhydrous ammonia. Thus, according to plaintiffs, the ammonia gas was improperly valued. In addition, plaintiffs believe that the Department should deny a by-product offset altogether based on (1) its previously-stated argument that Jiheng does not actually produce pure ammonia gas, but rather it produces a waste ammonia gas, and the anhydrous ammonia used to value this waste gas has a minimum purity level of 99%; and (2) because Jiheng does not possess the processing and packaging facilities that would be required to convert its waste ammonia gas by-product into the type of pure ammonia gas that would be more equivalent to the anhydrous ammonia used to value the waste ammonia gas by-product. Pls.' Cmts. 13. At center, plaintiffs argue that "the fundamental error ... is that the Department is crediting the respondent for the value of a highly-processed, high value-added product that it does not produce." Pls.' Cmts. 13.

For its part, the Department disagrees with plaintiffs' "speculative argument that Jiheng did not produce pure ammonia gas. Record evidence indicates that Jiheng indeed produced pure ammonia gas that was used in the production of the downstream product of ammonium sulfate." Remand Results at 38. Commerce further points out that "in valuing Jiheng's ammonia gas by product, the Department did not actually value the total quantity of ammonia gas that Jiheng produced during production of the subject merchandise because Jiheng was unable to place a measuring instrument to track the amount of pure ammonia gas produced or consumed." Remand Results at 24. "Upon the Department's request, however, Jiheng provided evidence that limited the quantity of ammonia claimed as a by-product offset to the amount of 100-percent pure ammonia gas—created from its production of subject merchandise—that was consumed in producing the amount of ammonium sulfate [the downstream product] that was actually sold [by Jiheng] during the POR." Remand Results at 24–25.

In other words, Jiheng informed the Department of the actual quantity of pure ammonia gas that was needed to produce the ammonium sulfate that it produced and sold during the POR. Thus, "while the total weight of the ammonia gas that was generated during Jiheng's production may include non-ammonia by-products ... , the quantity of ammonia gas that is being valued [for purposes of the offset] is a pure chemical weight, and we are only granting Jiheng a by-product offset for the pure ammonia content within the ammonium sulfate that it produces from its ammonia gas." Remand Results at 25; *see also* Remand Results at 38–39' ("Jiheng also provided information to demonstrate that the quantity of ammonia for which the Department applied an offset was limited to the amount created from Jiheng's reported [factors of production], and limited further by the amount that was used to produce ammonium sulfate that was actually sold during the POR.").

Second, "the record contains no evidence that Jiheng purchased ammonia gas in addition to the ammonia gas that Jiheng produced that could have entered into its production of ammonium sulfate." Remand Results at 38; *see also* Remand Results at 39 ("[T]here is no evidence on the record to demonstrate that the ammonia gas used by Jiheng to produce ammonium sulfate was not obtained from the ammonia gas produced as a result of the production of its subject merchandise."). Therefore, the Department concluded that the ammonia gas required for its production of its downstream product, the ammonium sulfate, was produced as a by-product of its production of isos, and then repurposed in the ammonium sulfate production process.

Thus, the Department insists that substantial evidence supports its granting of a by-product credit because: (1) it is undisputed that Jiheng produces ammonium sulfate; (2) pure ammonia gas is required to make ammonium sulfate; (3) there is no evidence Jiheng purchased pure ammonia gas, and, thus, the by-product is the only possible source; and (4) since Jiheng did not sell any pure ammonia gas, the by-product credit was limited to the amount required to make the ammonium sulfate Jiheng actually produced.

As to the valuation of the by-product credit, the Department observed that plaintiffs did not place on the record an alternative value for Jiheng's by-product. Remand Results at 26 ("[T]he WT A data for anhydrous ammonia is the only surrogate value information for ammonia available on the record of this administrative review."). Furthermore, "the surrogate product, *i.e.,* anhydrous ammonia is very similar to the 100-percent ammonia gas for which the Department is granting the by-product offset." Remand Results at 25

Having revisited its determination to use anhydrous ammonia to value the ammonia gas by-product offset, Commerce has reconsidered and fully explained its decision. It is undisputed that Jiheng produces ammonium sulfate. It is equally undisputed that Jiheng did not purchase the pure ammonia gas required to produce the ammonium sulfate that Jiheng actually produced and sold during the POR. Therefore, it was reasonable for Commerce to conclude that Jiheng reused the waste ammonia gas from the production of isos as an input in the production of ammonium sulfate, as there is no indication of any other potential source of the required ammonia gas. Hence, Commerce's conclusion that Jiheng was entitled to a by-product credit for its repurposing of the waste ammonia gas in the ammonium sulfate's manufacture was reasonable. It was also reasonable for Commerce to use the only value on the record to calculate the offset, and to apply the offset to the amount of ammonia gas actually used to produce ammonium sulfate.

CONCLUSION

Based on the foregoing, it is hereby ORDERED that the Department of Commerce's Final Results of Redetermination are SUSTAINED.

Dated: February 20, 2013
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 13–23

DEPENDABLE PACKAGING SOLUTIONS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 10–00330

[Defendant's motion for summary judgment is granted; plaintiffs cross-motion for summary judgment is denied; case dismissed.]

Dated: February 20, 2013

Peter S. Herrick, of Miami, FL, for plaintiff.

Stuart F. Delery, Acting Assistant Attorney General; *Barbara S. Williams,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Karen V. Goff*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Sheryl A. French*), of counsel, for defendant.

OPINION AND ORDER

Eaton, Judge:

At issue is the proper classification of two articles of glass imported by plaintiff Dependable Packaging Solutions, Inc. ("Dependable" or "plaintiff'). Before the court are the cross-motions for summary judgment of plaintiff and of the United States ("defendant" or "the Government") on behalf of U.S. Customs and Border Protection ("Customs"). Def.'s Mot. for Summ. J. (ECF Dkt. No. 25); Pl.'s Cross Mot. for Summ. J. (ECF Dkt. No. 30) ("Pl's Mot."). The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2006).

For the reasons set forth below, defendant's motion for summary judgment is GRANTED, plaintiffs cross-motion for summary judgment is DENIED, and the court finds that plaintiffs merchandise is properly classified under Heading 7013 of the Harmonized Tariff Schedule of the United States ("HTSUS").

BACKGROUND

The facts described below have been taken from the parties' 2012 USCIT Rule 56(h) statements and the record. Where no citation is provided, the statement has been admitted.[1] Citation to the record is provided where a fact, although not admitted in the parties' papers, is uncontroverted by record evidence.

On May 29, 2010, Dependable, an importer and distributor of packing, janitorial, floral, and office supplies, imported the glass items, identifying them on their respective commercial invoices as "Generic Bud Vases" for the smaller type ("bud vases") and "Generic Trumpet Vases" ("trumpet vases") for the larger type (collectively, "the vases"). The vases are articles of glass imported empty from the People's Republic of China. Both vases have an inexpensive look and visible seams. At the time of importation, the bud vases were valued at no more than $0.30 and the trumpet vases at more than $0.30 but no

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[1] At the time of filing, Plaintiffs Response to Defendant's Statement of Undisputed Facts ("Dependable's USCIT R. 56(h)(2) statement") failed to comply with the then-applicable requirements of USCIT R. 56(h)(4) (2012). That rule required that "[e]ach statement by the movant or opponent pursuant to Rule 56(h)(l) and (2), including each statement controverting any statement of material fact, will be followed by citation to evidence which would be admissible." Dependable's USCIT R. 56(h)(2) statement, however, summarily denied paragraphs 13, 17–26, 29, and 35–36, without providing any citation to admissible evidence supporting the denials. As a consequence, defendant has asked the court to disregard those denials and deem admitted the facts asserted in the controverted paragraphs. Because this case is one involving customs classification, the court declines to do so. *See Roche Vitamins, Inc. v. United States,* 35 CIT __, __, 791 F. Supp. 2d 1315, 1318 (2011) ("[D]eeming [denials without citations] admitted could preclude the 'correct result' that the Federal Circuit requires [the Court of International Trade] to reach in customs classification cases.").

greater than $3.00. Pictures of the vases, as advertised in Dependable's brochure, are appended to this opinion.

The bud vases are eight inches in height, with a quarter-inch lip that the parties agree is not designed for any sort of closure.[2] The lip surrounds an opening measuring one and one-half inches in diameter. The bud vases have a narrow neck extending downward five inches from the opening. The neck then widens into a bulbous shape, two and three-quarters inches in diameter at its widest point, and ends in a slightly concave bottom two inches in diameter. The bud vases also have deepening striations beginning one inch below the lip that continue to the bottom of the article.

The trumpet vases are nine and three-quarter inches in height with a quarter-inch lip that the parties agree is not designed for any sort of closure. The lip surrounds an opening measuring three and three-quarter inches in diameter. The diameter of the opening gradually narrows (as one moves two-thirds of the way down the vase) to a diameter of three inches, widening again thereafter to end in a bottom measuring four and one-quarter inches in diameter.

After importation, Dependable sells the vases to mass-market flower packing houses that fill them with flowers, water, and sometimes an additional nutrient solution from the grower. The packing houses then ship the flower-packed vases to retailers, typically supermarkets or similar stores, where the flowers and vases are displayed and sold as a unit. Dependable's vases are not sold empty at retail, but vases similar in design are sold empty at retail. Rozanski Decl. ¶¶ 14–15 (ECF Dkt. No. 25–9).[3] The vases can be reused. Grandio Dep. 41:7–41:10 (ECF Dkt. No. 25–2)[4]; Rozanski Decl. ¶ 14.

At the time of entry, Dependable classified the vases under HTSUS 7018.90.50.[5] At liquidation, Customs classified the bud vases under HTSUS 7013.99.40[6] and the trumpet vases under HTSUS

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[2] The measurements of the vases were determined by the court's examination of the samples.

[3] Ms. Rozanski is a Senior Import Specialist for glass commodities with Customs. She was responsible for Customs' classification of the goods. Rozanski Decl. ¶¶ 1–2.

[4] Mr. Grandio is in charge of Dependable Packaging's floral division. Grandio Dep. 7:7–7:11. He is identified in Dependable's interrogatory responses as the only person known to Dependable Packaging "to have personal knowledge of the factual matters" at issue in this litigation. Pl.'s Resp. to Interrog. & Req. 1(a) (ECF Dkt. No. 25–5, at 4).

[5] HTSUS 7018.90.50 covers: "Glass beads, imitation pearls, imitation precious or semiprecious stones and similar glass small wares and articles thereof other than imitation jewelry; glass eyes other than prosthetic articles; statuettes and other ornaments of lamp-worked glass, other than imitation jewelry; glass microspheres not exceeding 1 mm in diameter: Other: Other."

[6] HTSUS 7013.99.40 covers: "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): Other: Valued not over $0.30 each."

7013.99.50.[7] After its timely filed protest was deemed denied[8] and the assessed duties were paid, Dependable commenced this action, abandoning its entered classification under HTSUS 7018.90.50 by arguing that both vases are properly classified under HTSUS 7010.90.30.[9] In its motion for summary judgment, the Government maintains that Customs' classifications were correct and Dependable continues to argue for classification under HTSUS 7010.90.30 in its cross-motion.

STANDARD OF REVIEW

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." USCIT R. 56(a); *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242,247 (1986). In the context of a classification action, "summary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb, Inc. v. United States,* 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citations omitted).

The court reviews Customs' classification decisions de novo, applying the HTSUS General Rules of Interpretation ("ORis") and the HTSUS Additional U.S. Rules of Interpretation ("ARIs").[10] *CamelBak Prods., LLC v. United States,* 649 F.3d 1361, 1364 (Fed. Cir. 2011).

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[7] HTSUS 7013.99.50 covers: "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): Other: Valued over $0.30 but not over $3 each."

[8] Where, as here, a party requests accelerated disposition of a protest and Customs does not act within thirty days, the protect is deemed denied. 19 U.S.C. § 1515(b) (2006).

[9] The parties disagree as to the language of HTSUS 7010.90.30. Plaintiff reads that subheading to cover: "Carboys, bottles, flasks, jars, pots, vials, ampoules and other containers of glass, of a kind used for the conveyance or packing of goods; preserving jars of glass; stopper lids and other closures of glass: Other: Other." Pl.'s Compl. ¶ 15 (ECF Dkt. No.4). Customs has consistently read HTSUS 7010.90.30 as: "Carboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods; preserving jars of glass; stopper, lids and other closures, of glass: Other: Containers (with or without their closures) of a kind used for the conveyance or packing of perfume or other toilet preparations; other containers if fitted with or designed for use with ground glass stoppers: Other." *See* Customs Ruling Letter NY NO16987 (Oct. 4, 2007), *available at* 2007 WL 3124166; Customs Ruling Letter NY L82356 (Feb. 23, 2005), *available at* 2005 WL 713874; Customs Ruling Letter NY J86508 (July 18, 2003), *available at* 2003 WL 21916307. While the court agrees with Customs' reading of the disputed subheading, that disagreement is ultimately irrelevant here because Dependable's vases are not classifiable under Heading 7010 at the heading level, eliminating any need for the court to reach the proper reading of HTSUS 7010.90.30.

[10] Although referred to separately here, the GRIs and ARIs are part of the HTSUS statute which "consists of '(A) the General Notes; (B) the General Rules of Interpretation; the Additional U.S. Rules of Interpretation; (D) sections I to XXII, inclusive (encompassing chapters 1 to 99, and including all section and chapter notes, article provisions, and tariff and other treatment accorded thereto); and (E) the Chemical Appendix." *Baxter Healthcare Corp. of Puerto Rico v. United States,* 182 F.3d 1333, 1337 (Fed. Cir. 1999) (citing 19 U.S.C. § 3004(a) (1994)).

GRI 1 provides, in relevant part, that "classification shall be determined according to the terms of the [HTSUS] headings and any relative section or chapter notes." GRI 1 (2009–2010). "Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same." *Carl Zeiss, Inc. v. United States,* 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citing *Simod Am. Corp. v. United States,* 872 F.2d 1572, 1576 (Fed. Cir. 1989)). The court "is required to decide the correctness not only of the importer's proposed classification but of the Government's classification as well." *See Jarvis Clark Co. v. United States,* 733 F.2d 873, 874 (Fed. Cir. 1984).

Here, there is no genuine dispute as to "exactly what the merchandise is" or as to its actual use. *Bausch & Lomb*, 148 F.3d at 1365. The only factual disagreement between the parties is to the "principal use" of the vases, and, as discussed below, this quarrel is not a material dispute precluding summary judgment. *See Aromont USA, Inc. v. United States,* 671 F.3d 1310 (Fed. Cir. 2012) (making a principal use determination at summary judgment); *ENI Tech. Inc. v. United States,* 33 CIT__, 641 F. Supp. 2d 1337 (2009) (granting summary judgment on the issue of principal use); *Essex Mfg., Inc. v. United States,* 30 CIT 1 (2006) (resolving a principal use issue on the record facts and the court's examination of the article at summary judgment).

DISCUSSION

I. Legal Framework

Classification determinations are a two-step process by which "the court first ascertains the correct meaning of the relevant tariff provisions and then determines the proper classification for the merchandise at issue." *Pomeroy Collection, Ltd. v. United States*, 35 CIT __, __, 783 F. Supp. 2d. 1257, 1259 (2011) (citation omitted). The first step is a question of law; the second is a question of fact. *Id.* (citations omitted).

GRI 1 mandates that tariff classification initially "be determined according to the terms of the headings and any relative section or chapter notes." "[A] court first construes the language of the heading, and any section or chapter notes in question, to determine whether the product at issue is classifiable under the heading. Only after determining that a product is classifiable under the heading should the court look to the subheadings." *Orlando Food Corp. v. United States,* 140 F.3d 1437, 1440 (Fed. Cir. 1998). In other words, tariff

headings are construed without reference to their subheadings. *See id.* Accordingly, a court should not look to subheadings to either limit or broaden the scope of a heading.

II. The Construction of Headings 7010 and 7013

The court finds, and the parties agree, that the vases should be classified under HTSUS chapter 70 (“Glass and glassware”). The parties disagree, however, as to the appropriate heading. The parties agree-correctly-that the competing headings, 7010 and 7013, are principal use provisions. *See Automatic Plastic Molding, Inc. v. United States,* 26 CIT 1201, 1205 n.4 (2002) (noting that the applicable regulation from Customs “concluded headings 7010 and 7013 are ‘principal use’ tariff provisions”) (citation omitted); *Len-Ron Mfg. Co. v. United States,* 334 F.3d 1304, 1313 n.7 (Fed. Cir. 2003) (observing that principal use provisions “employ[] the language ‘of a kind’”) (citation omitted).

Principal use provisions, such as those at issue here, are governed by ARI 1(a), which the Federal Circuit has stated “calls for a determination as to the group of goods that are commercially fungible with the imported goods” so as to identify the “use which exceeds any other *single* use.” *Aromont,* 671 F.3d at 1312 (quoting *Primal Lite, Inc. v. United States,* 182 F.3d 1362, 1365 (Fed. Cir. 1999); *Lenox Collections v. United States,* 20 CIT 194, 196 (1996)). This Court customarily uses several factors, commonly referred to as the *“Carborundum* Factors”, to inform its determination as to which goods are “commercially fungible with the imported goods.” *Id.* (quoting *Primal Lite,* 182 F.3d at 1365) (internal quotation marks omitted). Those

> factors include: use in the same manner as merchandise which defines the class; the general physical characteristics of the merchandise; the economic practicality of so using the import; the expectation of the ultimate purchasers; the channels of trade in which the merchandise moves; the environment of the sale, such as accompanying accessories and the manner in which the merchandise is advertised and displayed; and the recognition in the trade of this use.

Id. (citing *United States v. Carborundum Co.,* 536 F.2d 373, 377 (Fed. Cir. 1976)). It is worth mentioning that the actual use of the goods is “evidence of the principal use” but is still only “one of a number of factors.” *Id.*

A. Heading 7010

HTSUS Heading 7010 covers “Carboys, bottles, flasks, jars, pots; vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods; preserving jars of glass; stoppers, lids and other closures, of glass.” Glass articles that are not capable of closure, while not expressly excluded by the language of the heading, are atypical of the type of article covered by HTSUS 7010. The Explanatory Notes to the Harmonized Commodity Description and Coding System, 4th ed., 70.10 (2007) (“Explanatory Notes”) observe that containers classified under HTSUS 7010 “are generally designed for some type of closure.” The Explanatory Notes, “while not legally binding, are ‘persuasive’ and are ‘generally indicative’ of the proper interpretation of [a] tariff provision.” *See Lemans Corp. v. United States,* 660 F .3d 1311 , 1316 (Fed. Cir. 2011) (quoting *Drygel, Inc. v. United States,* 541 F.3d 1129, 1134 (Fed. Cir. 2008)). Indeed, in *Automatic Plastic Molding,* this court considered the ability of an article to accept a secure, sanitary closure to be an important factor in determining whether an article of glass was properly classified in chapter 7010. *Automatic Plastic Molding,* 26 CIT at 1207 (citing *Kraft, Inc. v. United States,* 16 CIT 483,487 (1992)). There, even though the article was not shipped with a closure that could form a sanitary seal, the fact that it was designed with a finish capable of closure was “probative as to its principal use as a container for the conveyance or packing of goods.” *Id.* at 1204 n.3.

Although the vases are not designed to accept any kind of closure, plaintiff argues that they are properly categorized as “containers, of glass, of a kind used for the conveyance or packing of goods.” HTSUS 7010. In making its claim, plaintiff notes that the articles are made of glass and insists that their principal use is as a packing container for the wet transportation of flowers.[11] In other words, according to plaintiff, glass packing containers, rather than glass vases used for decoration, are “the group of goods that are commercially fungible with” the vases at issue. *Aromont,* 671 F.3d at 1312 (citation and internal quotation marks omitted).

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[11] Dependable is correct that if the vases are classifiable under this heading, they are unclassifiable under Heading 7013 by operation of the language in Heading 7013 excepting articles classifiable in Heading 7010. *See Midwest of Cannon Falls, Inc. v. United States,* 122 F.3d 1423, 1429 (Fed. Cir. 1997). That observation, however, means little here. Such “other than that of heading” provisions in the tariff schedule obviate the need to apply GRI 2 to determine under which of two competing headings an article is properly classified. These provisions, however, play no role in construing competing principal use provisions for the simple reason that an article can have only one principal use. Once that principal use is determined, only one of the competing headings can possibly cover the merchandise.

B. Heading 7013

HTSUS 701 3 covers “[g]lassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018).” Vases[12] are specifically identified in the Explanatory Notes to section 7013 as exemplary of items of glass used for indoor decoration that fall under this heading. Explanatory Notes 70.13 (“This heading covers ... [g]lassware for indoor decoration and other glassware ... such as vases.”). As a matter of law, then, this heading properly covers items of glass which meet the common meaning of “vase” and are primarily used for decorative purposes.

Although plaintiff has avoided use of the term “vase” in its moving and responsive papers, the company identified the merchandise as vases on its entry documents. Further, an examination of the merchandise confirms that there can be no genuine factual dispute that the articles are vases. *See Peerless Clothing Int’l., Inc. v. United States,* 33 CIT , , 602 F. Supp. 2d 1309, 1315 (2009) (“An issue of fact is to be considered ‘genuine’ when ‘the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’”) (quoting *Anderson,* 477 U.S. at 248); *Ricci v. DeStefano,* 557 U.S. 557, 586 (2009) (“Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.”) (citation and internal quotation marks omitted).

Importantly, in addition to identifying the merchandise as vases on its entry documents, the goods are advertised as vases on plaintiff’s website (Def.’s Mot., Ex. D (ECF Dkt. No. 25–8, at 24–25)), referred to as vases by plaintiff in its interrogatory responses *(e.g.,* Pl.’s Resp. to Interrog. & Req. 6–10 (ECF Dkt. No. 25–5, at 10–14)), referred to by plaintiff’s employee as vases in his deposition testimony *(e.g.,* Grandio Dep. 9:15–9:21,29:12–29:15, 35:3–35:9), and the court’s inspection of the samples attests that they are vases.

In its papers, the Government argues that the principal use of Dependable’s vases is as decoration because Dependable’s vases are commercially fungible with other, physically similar, glass vases that are sold empty at retail.

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[12] The word “vase” is defined by the American Heritage Dictionary of the English Language as “An open container, as of glass or porcelain, used for holding flowers or for ornamentation” and by Merriam-Webster’s Online Dictionary as “a usually round vessel of greater depth than width used chiefly as an ornament or for holding flowers.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1904 (4th ed. 2000); MERRIAM-WEBSTER’S ONLINE DICTIONARY, Vase, *available at* http://www.merriam-webster.com/dictionary/vase (last visited Feb. 5, 2013); *see also* OXFORD ENGLISH DICTIONARY (2d ed. 1989) (“A vessel, usually of an ornamental character, commonly of a circular section and made either of earthenware or metal, but varying greatly in actual form and use.”)

III. The Principal Use of the Vases

A. The Carborundum Factors

Application of the *Carborundum* Factors demonstrates that Dependable's vases are commercially fungible with other clear glass vases that are primarily used for decorative purposes.

The General Physical Characteristics of the Merchandise

The first *Carborundum* Factor, "the general physical characteristics of the merchandise," shows that the vases are commercially fungible with other clear glass vases that are sold empty at retail and are used for decorative purposes. First, the record contains photographic evidence of vases, identical to plaintiffs in all material respects, offered for sale empty at retail, both on the shelves of stores and via the internet in bulk. Rozanski Decl., Ex. 2 (ECF Dkt. No. 25–9, at 25, 27–30); Ex. 3 (ECF Dkt. No. 25–9, at 3); Ex. 5 (ECF Dkt. No. 25–9, at 39,41–42,49–52, 54). The design features of the vases that Dependable points to as indicating use as a packing material (narrow waists, long necks, small openings, inexpensive glass) are apparent in these other, virtually identical vases as well, indicating that the vases at issue here are commercially fungible with these other similarly priced vases that are sold empty at retail for decorative purposes. *See* Pl.'s Br. 12–13. Moreover, the record reflects that the designs of Dependable's vases are not new or unique to Dependable. Grandio Dep. 37:7–37:17 ("The trumpet, I designed that approximately [10 years before starting at Dependable]"; "The bud vase has been around forever.").

The Expectations of the Ultimate Purchasers

The second *Carborundum* Factor, "the expectations of the ultimate purchasers" also favors the conclusion that the vases are primarily used for decorative purposes. First, the record contains evidence that the retail purchaser pays extra for the pairing of flowers and vase when compared to the cost of flowers alone.[13] Grandio Dep. 47:17–47:22 ("Q.... You take the exact same bouquet of roses, you buy it out of the bucket without a vase, it's less expensive than the bouquet in the vase[?] A. Yes. It's less cost for transport and product

[13] At oral argument, Dependable took the position that the "ultimate purchaser" of the vases for *Carborundum* Factor purposes was not the retail purchaser, but packing houses who are Dependable's clients. Case law, however, makes clear that it is the retail consumer who is the "ultimate purchaser" when examining this factor. *See, e.g., Automatic Plastic Molding,* 26 CIT at 1208 (evaluating the expectations of the retail purchaser of a glass container as the "ultimate purchaser", not the wholesale packer); *Kraft,* 16 CIT at 489 (evaluating the expectations of the retail purchaser of packed food items).

obviously.") Thus, the consumer is willing to pay more for the combination of the products (flowers plus vase) than for the flowers alone. The added cost to the price of the flowers in combination with the vase is probative, indicating that the "acquisition of the [vases] was [not] incidental" to the purchase of the flowers, as packing containers are generally expected to be. *Automatic Plastic Molding,* 26 CIT at 1208 (citation and internal quotation marks omitted). It is apparent, then, that the purchaser is willing to pay something to obtain the vase and that the purchaser only does so in order to use the vase to display the flowers.

Next, although there is some disagreement on the record as to whether the vases are frequently reused, it is undisputed that the vases are capable of reuse and that the ultimate purchaser would have the option to do so "based on personal preference." Grandio Dep. 40:10–40:18. Indeed, despite arguing that the vases are used only for transport from the point of retail purchase to the home or office of the ultimate purchaser and then typically discarded, Dependable has offered no studies, testimony of consumers, or other objective evidence of the behavior of final purchasers to support this proposition. Grandio Dep. 41:11–41:13 ("Q. Are you aware of how any particular consumer uses the vase once they purchase it? A. No."). That the vases are not of the finest quality is not probative on this point, as other nearly identical empty vases are sold without flowers at retail.

Therefore, the undisputed record evidence indicates that the retail purchaser buys the vases for decorative purposes.

The Channels of Trade in Which the Merchandise Moves

The third factor, "the channels of trade in which the merchandise moves," is not particularly probative. As has been noted, the vases are imported empty, sold to a packer who fills them with flowers, and then resold to a retailer. The weight of these facts as evidence that the vases are principally used for the conveyance or packing of goods, however, is minimal. This is because the record is clear that similar vases are sold unpacked at retail to be filled with flowers by their purchasers. In other words, the movement of the vases in trade merely suggests that Dependable's vases travel in an atypical manner to the final purchasers who employ them in a typical manner.

The Environment of Sale

Fourth, "the environment of sale" of the vases is also probative of a decorative purpose. The vases are displayed for sale to consumers packed with flowers, encouraging the retail customer to purchase both flowers and the vase for their combined decorative value. Moreover, Dependable's own advertising brochure places vases in a sepa-

rate “floral” section, depicting both packed and unpacked vases. Def.’s Mot., Ex. B (ECF Dkt. 25–3, at 7, 8, 24.)

Use in the Same Manner Which Defines the Class

Fifth, the actual use or “use in the same manner which defines the class,” favors classification with other glass vases primarily used for decorative purposes. Although plaintiffs vases are never sold empty at retail, indicating that they have some value as packing materials, the vases ultimate use, consistent with the manner in which other similar inexpensive glass vases are used, is decorative. It is also undisputed that the vases are displayed filled with flowers at the point of sale, command a higher price than either the vase or the flowers individually, that retail purchasers can display the accompanying flowers in the vases and reuse the vases to display later purchased flowers, all of which evidence a decorative purpose. Grandio Dep. 42:4–42:6 (“Q. So then would you say the vases aid in the sale of the flowers? A. Yes.”); Compl. ¶ 31 (“The design of Dependable’s glass containers are decorative in nature and aid in the sale of the flowers.”). Moreover, where the “physical characteristics” factor so strongly favors one principal use, the actual use of an imported article will frequently not be controlling. *See Primal Lite,* 182 F .3d 1362, 1346 (1999) (“[A] classification covering vehicles principally used for automobile racing would cover a race car, even if the particular imported car was actually used solely in an advertising display.”).

Economic Practicality of the Specified Use

There is no admissible evidence on the record that the vases’ use as packing containers is economically practical. Plaintiff argues that wet packing the flowers using the vases—a process that entails packing the vase with flowers and liquid, placing the filled vase in a plastic sleeve, placing the plastic sleeve in a partitioned box, and then covering the box with an additional plastic liner—is economically feasible because the end retailers need not employ florists, and thus wet packing saves them labor costs. The only evidence on the record for this proposition, however, are the interrogatory responses signed by Mr. Grandio and the deposition testimony of Mr. Grandio in which he states that his knowledge of this information is from having spoken to “random people” employed by a Miami supermarket. Grandio Dep. 83:13–85:5. As such, the assertion that wet packing saves labor costs is really that of the supermarket employees to whom Mr. Grandio apparently spoke, not that of Mr. Grandio himself, and is offered for the truth of the out of court assertion that wet packing saves labor costs. As a consequence, Mr. Grandio’s testimony on this point is not

based on personal knowledge and is derivative of inadmissible hearsay. Thus, it is not evidence upon which summary judgment can be either granted or denied. *See* Fed. R. Evid. 801(c), 802 (defining hearsay and indicating its general exclusion); Fed. R. Evid. 602 (requiring that witnesses have personal knowledge of the facts to which they testify).

There is, however, record evidence indicating that the use of plaintiffs vases in the same manner as other inexpensive glass vases is economically feasible (i.e., that empty vases could be sold profitably at retail). First, the pricing of Dependable's vases is compatible with the advertised retail prices of similar vases. In a sales e-mail produced by Dependable, and which was sent by Dependable employee Ross Borer to a potential customer, the pre-shipping price of the bud vases was quoted at "$.12–.125 FOB China per unit in clear" with a "[l]anded cost [of] .225–.235" and the trumpet vases at "$.34 FOB China per unit in clear" with a "[l]anded cost [of] .615–.628." Def.'s Mot., Ex. B (ECF Dkt. No. 25–4 at 10). Dependable's invoices similarly reflect a unit price for the bud vases of between $0.30–.31 and $0.72 for the trumpet vases. Def.'s Mot.., Ex. B (ECF Dkt. No. 25–4 at 12, 14).

Next, evidence on the record shows that similar glass vases are sold empty at retail for between $1 and $3.20 per unit. Rozanski Decl., Ex. 2 (ECF Dkt. No. 25–9, at 23–30); Ex. 3 (ECF Dkt. No. 25–9, at 32–33). Dependable's vases, therefore, could be sold profitably at retail when empty, as other similar vases are. Indeed, Mr. Grandio testified that there is a retail market for similar vases. Grandio Dep. 95:4–95:8 ("Q.... This particular utility vase that [D]ependable sells is not sold at retail. Is that correct? A. What we sell is not for retail. We might have competition, Syndicate Sales. That is their specialty. They sell vases to [be resold at] retail.").

Thus, the record contains evidence of the commercial practicability of selling Dependable's vases in a manner consistent with that of other similar glass vases sold empty at retail, and there is no admissible evidence of the commercial practicability of using the vases as a packing container. Accordingly, this factor supports classification of the plaintiffs vases with other similar inexpensive glass vases sold empty at retail.

Recognition in the Trade of the Specified Use

Finally, the factor of "recognition in the trade of this use" is not very probative. The only record evidence as to trade recognition of the vases being used to convey goods as packaging is Mr. Grandio's testimony that wet packing with "utility vases" is an accepted trade practice within the "mass market floral [industry]." Grandio Dep.

96:3–96:6. Close examination of Mr. Grandio's testimony indicates, however, that "mass market floral [industry]" means "[s]upermarkets and the vases in question which are our vases." Grandio Dep. 96:3–96:10. In other words, the "industry" referred to is limited to the actual use of Dependable's vases by its customers, rather than connoting any broad commercial meaning or industry practice. Grandio Dep. 38:22–39:4 ("Q. Is that a term of art, utility vase? A. Of art, no. Q. Is it something used in the industry, that term "utility vase"? A. They usually use utility vase as cheap."). Indeed, there is significant record evidence that vases virtually indistinguishable from Dependable's product are sold empty at retail to customers for decorative purposes. Rozanski Decl., Ex. 2 (ECF Dkt. No. 25–9, at 23–30); Ex. 3 (ECF Dkt. No. 25–9, at 32–54).

B. The Court's Examination of the Articles

The court has undertaken an examination of the samples of the bud vase and trumpet vase provided by the parties. *Simod,* 872 F .2d at 1578 ("[T]he merchandise itself is often a potent witness in classification cases."). To the court's eyes, Dependable's vases are indistinguishable from the other inexpensive clear glass vases depicted in the record, which are indisputably sold empty at retail and used for decorative purposes. *See* appendix *infra.*

C. The Vases' Principal Use is Decorative

In sum, based on the foregoing analysis of the *Carborundum* Factors-in particular the very weighty factor of the relevant physical characteristics of the vases—a reasonable jury could only conclude that the vases here are commercially fungible with other inexpensive clear glass vases whose principal use is decorative, rather than with glass packing containers. As such, the vases are not classifiable under Heading 7010, i.e., no reasonable jury could conclude that they are principally "used for the conveyance or packing of goods." Accordingly, Customs' classification of the vases under Heading 7013 was correct, as the vases are articles of glass which a reasonable jury could conclude are principally "used for table, kitchen, toilet, office, indoor decoration or similar purposes." Given the vases' respective values and the lack of any other appropriate subheadings under Heading 7013, Customs' selection of subheadings 7013.99.40 and 7013.99.50 was also correct.

CONCLUSION

Based on the foregoing, it is hereby ORDERED that defendant's Motion for Summary Judgment is GRANTED, plaintiff's Cross-Motion for Summary Judgment is DENIED, and the case is dismissed.

Dated: February 20,2013
New York, New York

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

APPENDIX