U.S. Court of International Trade

Slip Op. 17–122

CHANGZHOU TRINA SOLAR ENERGY CO., LTD. et al., Plaintiffs and Consolidated Plaintiff, and YINGLI GREEN ENERGY AMERICAS, INC. et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SOLARWORLD AMERICAS, INC., Defendant-Intervenor and Consolidated Defendant-Intervenors.

Before Claire R. Kelly, Judge
Consol. Court No. 15–00068
PUBLIC VERSION

[Sustaining the U.S. Department of Commerce's remand determination in the countervailing duty investigation of certain crystalline silicon photovoltaic products from the People's Republic of China.]

Dated: September 8, 2017

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Justin Reinhart Miller, Senior Trial Counsel, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of Counsel on the brief was *Shelby Mitchell Anderson*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Kelly, Judge:

Before the court for review is the U.S. Department of Commerce's ("Department" or "Commerce") remand determination in the countervailing duty ("CVD") investigation of certain crystalline silicon photovoltaic products from the People's Republic of China ("PRC" or "China"), filed pursuant to the court's order in *Changzhou Trina Solar Energy Co., Ltd. et al. v. United States*, 40 CIT __, 195 F. Supp. 3d 1334 (2016) ("*Changzhou Trina*"). *See* Final Results of Redetermination Pursuant to Court Remand, May 1, 2017, ECF No. 98–1 ("Remand Results"). For the reasons that follow, Commerce has complied

with the court's order in *Changzhou Trina*, and the Remand Results are sustained.

BACKGROUND

The court assumes familiarity with the facts of this case as discussed in the previous opinion, *see Changzhou Trina*, 40 CIT at __, 195 F. Supp. 3d at 1338–58, and here recounts the facts relevant to the court's review of the Remand Results. In the course of this countervailing duty investigation, Commerce discovered additional subsidy programs that had not been identified in the petition. *See* Issues and Decision Mem. for the Final Determination in the [CVD] Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC], C-570–011, at 16–17, 84–88 (Dec. 15, 2014), ECF No. 36–4 ("Final Decision Memo"); [CVD] Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC]: Trina Solar Final Calculation Mem. at 7–10, CD 367–368, bar codes 3247979–01–02 (Dec. 15, 2014) ("Trina Solar Final Calc. Memo").[1] These programs fall into two categories: (i) forty governmental assistance programs that were examined in a related CVD investigation of solar cells from the PRC (the "*Solar I PRC* programs"), about which mandatory respondent Changzhou Trina Solar Energy Co., Ltd. and its affiliate Trina Solar (Changzhou) Science & Technology Co., Ltd. (collectively "Trina Solar") provided information in its questionnaire response, and (ii) twenty-seven additional governmental grants and a tax deduction received by Trina Solar during the period of investigation ("POI"), which Commerce discovered in the course of the agency's verification procedures (the "verification programs"). *See* Final Decision Memo at 16–17, 84–88; Trina Solar Final Calc. Memo at 7–10; Verification of the Questionnaire Resps. Submitted by [Trina Solar] and its Cross-Owned Companies, at 7, CD 354, bar code 3232621–01 (Oct. 2, 2014). Trina Solar provided information regarding the *Solar I PRC* programs, specifically the "names of the grant programs, the amounts received, and brief explanations of their understanding of the purpose of the program." Final Decision Memo at 84. However the Government of China ("GOC") refused to provide any information about the *Solar I PRC* and verification programs, in response to both the standard questionnaire requesting information related to any additional assistance provided by the GOC, directly or indirectly, to exporters or producers of solar products, and in a subsequent questionnaire spe-

[1] On July 7, 2015, Defendant submitted indices to the public and confidential administrative records for this CVD investigation, which identify the documents that comprise the records to Commerce's final determination. These indices are located on the docket at ECF No. 36. All further references to documents from the administrative records are identified by the numbers assigned by Commerce in these indices, unless otherwise specified.

cifically requesting information related to these programs. *Id.* at 16, 84–85. Upon discovery of the verification programs, Commerce sought an explanation as to why Trina Solar had not previously reported this additional assistance, to which "counsel for Trina Solar stated that the company reported all of the assistance for which it was asked." *Id.* at 16, 86.

Commerce determined to investigate both the *Solar I PRC* programs and the verification programs as discovered apparent subsidies pursuant to section 775 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677d (2012).[2] *See* Final Decision Memo at 16–19, 85–86. Commerce determined that the use of adverse facts available ("AFA")[3] was warranted with regard to the *Solar I PRC* programs and the verification programs because the GOC had failed to cooperate by withholding the information requested regarding the *Solar I PRC* programs, and because Trina Solar had failed to cooperate to the best of its ability by not reporting the verification programs. *Id.* at 16–17, 84–88. Invoking AFA, but without identifying specific facts in the record on which the determinations were based, Commerce determined that each of the *Solar I PRC* programs and verification programs provided a "financial contribution" within the meaning of 19 U.S.C. § 1677(5)(D), conferred a "benefit" within the meaning of 19 U.S.C. § 1677(5)(E), and was "specific" within the meaning of 19 U.S.C. § 1677(5A), and thus that the programs met the statutory requirements for countervailability. *Id.* at 16–17, 85–86; *see* Decision Mem. for the Prelim. Affirmative [CVD] Determination in the [CVD] Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC], C-570011, at 24, (Jun. 2, 2014), *available at* http://ia.ita.doc.gov/frn/summary/prc/2014–135101.pdf (last visited Sept. 5, 2017). Further, Commerce noted that it applied its standard methodology to calculate the AFA-based subsidy rates assigned to the additional discovered programs. *See* Final Decision Memo at 10–11, 88. Additionally, Commerce declined to initiate investigations into the creditworthiness of the mandatory respondents, Trina Solar and Wuxi Suntech Power Co., Ltd. ("Suntech"), concluding that petitioner SolarWorld Americas, Inc.'s ("SolarWorld") requests to initiate such

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

[3] Although 19 U.S.C. § 1677e(a)–(b) and 19 C.F.R. § 351.308(a)–(c) (2014) each separately provide for the use of facts otherwise available and the subsequent application of adverse inferences to those facts, Commerce sometimes uses the shorthand "adverse facts available" or "AFA" to refer to its use of such facts otherwise available with an adverse inference. *See, e.g.*, Final Decision Memo at 9–11.

investigations did not amount to "specific allegation[s]" as required by 19 C.F.R. § 351.505(a)(6)(i) (2014)[4] for initiating an investigation into a company's creditworthiness. *See id.* at 95–96; 19 C.F.R. § 351.505(a)(6)(i).

Plaintiff Trina Solar commenced this action on March 18, 2015 to challenge various aspects of the final determination. *See* Summons, Mar. 18, 2015, ECF No. 1; Am. Compl., Apr. 17, 2015, ECF No. 11. On July 1, 2015, the action was consolidated with an action brought by petitioner SolarWorld to challenge different aspects of the final determination. *See* Order, July 1, 2015, ECF No. 35. Trina Solar moved for judgment on the agency record, *see* Trina Solar's Rule 56.2 Mot. J. Agency R., Jan. 19, 2016, ECF No. 50, challenging: 1) Commerce's determination to countervail the *Solar I PRC* programs and verification programs; 2) Commerce's use of AFA to determine CVD rates for the verification programs; 3) Commerce's determinations that the provisions of aluminum extrusions, solar glass, and polysilicon were countervailable; and 4) Commerce's determination to include the PRC Export-Import Bank's Export Buyer's Credit Program in the calculation of Trina Solar's subsidy rate. *See* Pls.' Mem. L. Supp. Mot. J. Agency R. 9–33, Jan. 19, 2016, ECF No. 51 ("Trina Solar Br."). Consolidated Plaintiff SolarWorld also moved for judgment on the agency record, *see* SolarWorld's Mot. J. Agency R., Jan. 20, 2016, ECF No. 52, challenging: 1) Commerce's determination that SolarWorld's uncreditworthiness allegation was insufficient, and the agency's subsequent resultant failure to investigate the respondents' uncreditworthiness; 2) Commerce's determination to utilize a one-percent import duty in the benchmark calculation for polysilicon for less-than-adequate-remuneration subsidy program; and 3) Commerce's determination to utilize a twelve-percent import duty in the benchmark calculation for solar glass for less-than-adequate-remuneration subsidy program. *See* SolarWorld Americas, Inc.'s Mem. Supp. Rule 56.2 Mot. J. Agency R. 10–26, Jan. 20, 2016, ECF No. 52 ("SolarWorld Br.").

On December 30, 2016, the court sustained in part and remanded in part Commerce's final determination in this CVD investigation.[5] *See Changzhou Trina*, 40 CIT at __, 195 F. Supp. 3d at 1358. The court remanded Commerce's determination regarding the countervailabil-

[4] Further citations to Title 19 of the Code of Federal Regulations are to the 2014 edition.

[5] Of the challenged issues from the final determination, the court sustained: 1) Commerce's determination to examine the *Solar I PRC* programs and verification programs, *Changzhou Trina*, 40 CIT at __, 195 F. Supp. 3d at 1342–43; 2) Commerce's determination to use AFA to determine CVD rates for the verification programs, *id.*, 40 CIT at __, 195 F. Supp. 3d at 1346–47; 3) Commerce's determinations that the provisions of aluminum extrusions, solar glass, and polysilicon were specific, *id.*, 40 CIT at __, 195 F. Supp. 3d at 1351–54; 4) Commerce's determination to include the PRC Export-Import Bank's Export Buyer's Credit

ity of the *Solar I PRC* programs and the verification programs. *See id.*, 40 CIT at __, 195 F. Supp. 3d at 1347–50. While finding that Commerce had reasonably resorted to applying AFA to decide whether the elements necessary for the imposition of countervailing duties were met with regard to these programs, *id.*, 40 CIT at __, 195 F. Supp. 3d at 1343, 1346–47, the court remanded because it determined that Commerce had reached conclusions related to the programs' countervailability without the support of requisite factual findings.[6] *Id.*, 40 CIT at __, 195 F. Supp. 3d at 1350. The court determined that Commerce had not "indicated the 'facts' (adverse or otherwise) that it has 'select[ed]' in order to make the requisite factual findings with respect to the *Solar I PRC* programs and the verification grants and tax deduction." *Id.*, 40 CIT at __, 195 F. Supp. 3d at 1347. The court held that, when applying AFA, Commerce "must still make the necessary factual findings to satisfy the requirements for countervailability," *id.*, 40 CIT at __, 195 F. Supp. 3d at 1350, as the statute requires that "Commerce must still point to actual information on the record to make required factual determinations." *Id.* (citing 19 U.S.C. §§ 1677e(a)–(c)). The court specified that Commerce may re-open the record if necessary to make the requisite factual findings, and may use facts available on the record with an adverse inference to satisfy the requirements of countervailability. *See id.* Relatedly, the court ordered that, should Commerce continue to find the verification programs countervailable on remand, Commerce must explain how it selected the applicable AFA rates and how that selection "comports with its stated practice." *Id.*, 40 CIT at __, 195 F. Supp. 3d at 1351. Finally, the court granted Commerce's request for a remand of its determination that SolarWorld had not established a "reasonable basis to believe or suspect" that Suntech and Trina Solar were uncreditworthy during the POI as alleged by SolarWorld. *Id.*, 40 CIT at __, 195 F. Supp. 3d at 1357–58.

Commerce filed the Remand Results on May 1, 2017. "Under respectful protest," Commerce identified information on the record to demonstrate that certain of the *Solar I PRC* programs and the additional verification programs provided Trina Solar with a financial

Program in the calculation of Trina Solar's subsidy rate, *id.*, 40 CIT at __, 195 F. Supp. 3d at 1355; 5) Commerce's determination to utilize a one-percent import duty in the benchmark calculation for polysilicon for less-than-adequate-remuneration subsidy program, *id.*; and 6) Commerce's determination to utilize a twelve-percent import duty in the benchmark calculation for solar glass for less-than-adequate-remuneration subsidy program. *Id.*

[6] The court held that Commerce had reasonably investigated the *Solar I PRC* programs and the verification programs pursuant to its authority under the statute, 19 U.S.C. § 1677d, and Commerce's regulations, 19 C.F.R. § 351.311, to independently investigate discovered practices. *Changzhou Trina*, 40 CIT at __, 195 F. Supp. 3d at 1343.

contribution, conferred a benefit, and were specific within the meaning of 19 U.S.C. §§ 1677(5)(A), (B), (D), and (E), and thus satisfy the elements for a finding of countervailability.[7] *See* Remand Results at 13–24. Commerce provided additional explanation regarding its methodology for selecting AFA-based subsidy rates for the verification programs. *See id.* at 25–30. Commerce also reevaluated SolarWorld's uncreditworthiness allegations regarding Suntech and Trina Solar, and determined upon review that SolarWorld's allegation met the required threshold to initiate a creditworthiness investigation of Suntech for the years 2010 and 2012 and of Trina Solar for the years 2005 and 2007. *See id.* at 31–35; Redetermination Pursuant to Court Remand Regarding the [CVD] Investigation of Certain Silicon Photovoltaic Products from the [PRC]: Initiation of Creditworthiness Investigations, C-570–011, at 2, Remand Public Document 4, bar code 3543495–01 (Feb. 13, 2017) ("Creditworthiness Investigation Initiation Memo").[8] Following the creditworthiness investigations, Commerce determined that the companies were uncreditworthy in the years investigated. *See* Remand Results at 31–35; Creditworthiness Investigation Initiation Memo at 2–3.

On May 31, 2017, Trina Solar submitted comments on the Remand Results. Pl.'s Comments on Final Results of Redetermination, May

[7] Commerce noted its concerns with the court's remand order:

> [T]he Department is troubled by the implications of the Court's order. When a party categorically refuses to provide information requested by the Department, the record might not contain the necessary factual evidence the Court is now ordering the Department to cite to make its findings on whether a program is countervailable. Indeed, the subsidy programs that the Department examines often have generic names with no available public information, and necessary information regarding financial contribution, specificity, and benefit is often only available through responses to the Department's questionnaires.

Remand Results at 11. Commerce further noted its concerns that the court's order could "incentivize non-cooperation" on the part of governments providing examined subsidies, noting that the governments themselves

> are typically the only parties that can provide the Department with information on whether a particular subsidy is specific within the meaning of section 771(5A) of the Act. If, for example, a government does not provide the Department with requested information regarding the specificity of a subsidy program, based on the Court's analysis in its *Remand Order*, the Department might be required to find information that it frequently cannot obtain. Placing the burden on the Department to specify the factual basis for a specificity determination when the government of the foreign country under investigation fails to respond to a questionnaire or otherwise cooperate, especially when information is unavailable publicly, rewards the government under investigation not only for a lack of cooperation, but for an overall lack of transparency in the operation of its subsidy programs. Under these circumstances, the limited record should not inure to the benefit of non-cooperating parties.

Id. at 12.

[8] On May 15, 2017, Defendant submitted indices to the public and confidential administrative records for the remand determination in this investigation. These indices are located on the docket at ECF No. 102. The Creditworthiness Investigation Initiation Memo is one of these documents.

31, 2017, ECF No. 103 ("Trina Solar Remand Comments"); *see also* Pl.'s Rebuttal Comments on Final Results of Redetermination, July 21, 2017, ECF No. 112. Trina Solar argues that Commerce has not supported its findings of specificity with facts on the record for any of the subsidy programs at issue and has not supported its findings of a benefit conferred with facts on the record for the remaining 27 verification programs. *See* Trina Solar Remand Comments at 4–8. Trina Solar also argues that SolarWorld failed to provide a specific allegation of respondents' uncreditworthiness, and that Commerce therefore erred in investigating respondents' creditworthiness on remand. *See id.* at 8–10. Defendant responded to the comments on the Remand Results. *See* Def.'s Resp. Parties' Comments on the Remand Redetermination 12–21, July 21, 2017, ECF No. 110 ("Def.'s Remand Comments"). SolarWorld submitted comments in support of Commerce's remand determinations regarding the countervailability of and AFA rates selected for the *Solar I PRC* programs and verification programs, and regarding the uncreditworthiness of Suntech in 2010 and 2012 and Trina Solar in 2005 and 2007. *See* Def.-Intervenor SolarWorld Americas, Inc.'s Comments on the U.S. Dep't Commerce's Final Results of Redetermination Pursuant to Court Remand 7–13, May 31, 2017, ECF No. 104 ("SolarWorld Remand Comments"). However, SolarWorld contends that Commerce erred by not initiating a creditworthiness investigation of Trina Solar for 2012, pursuant to SolarWorld's allegation. *Id.* at 10–12.

STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of a countervailing duty order. "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

I. Factual Basis for Finding *Solar I PRC* Programs and Verification Programs Countervailable

The court remanded for Commerce to identify record facts to support its determinations regarding the countervailability of the *Solar I PRC* programs and verification programs. *Changzhou Trina*, 40 CIT at __, 195 F. Supp. 3d at 1350. The court now reviews Commerce's reconsideration on remand of the factual bases for finding, through the application of AFA, that the *Solar I PRC* programs and verification programs are countervailable subsidies. Under protest, on remand Commerce has made the requisite factual findings for two *Solar I PRC* programs. For the reasons that follow, Commerce has complied with the court's order in *Changzhou Trina*, and its determinations regarding the countervailabilty of these programs are sustained.

A. The *Solar I PRC* Programs

On remand Commerce reconsidered the factual basis for finding two *Solar I PRC* programs, the Funding on Infrastructure 2008 and Infrastructure 2009, countervailable.[9] *See* Remand Results at 13–15. Here, Commerce identified facts in Trina Solar's questionnaire responses on which the agency relied to find, using adverse inferences, that these programs are specific within the meaning of 19 U.S.C. §

[9] On remand Commerce clarified that only two of the 40 *Solar I PRC* programs (a 2008 and a 2009 infrastructure grant) identified by Commerce in the final determination were actually included in Trina Solar's final CVD rate in the investigation. Remand Results at 14. Commerce concluded, originally and on remand, that only these two programs should be allocated during the POI, as the other 38 programs should instead be expensed during the year in which they were received. *Id.*; *see* Trina Solar Final Calc. Memo at 7. To determine in which year each program should be expensed, Commerce conducted the "0.5 percent test" pursuant to 19 C.F.R. § 351.524(b)(2), which provides that Commerce

> divide the amount of the subsidy approved under a given subsidy program in a particular year by the relevant sales (*e.g.*, total sales or export sales) for the year in which the assistance was provided. If the amount of the subsidy is less than 0.5 percent of the relevant sales value, the benefit from that subsidy is expensed to the year in which it was received, rather than over the average useful life of the renewable physical assets used in the production of the subject merchandise. From these 40 grant programs, only two of these grants passed the 0.5 percent test and were allocated to the POI: (1) Funding on Infrastructure 2008; and (2) Infrastructure 2009.

Remand Results at 14. Although Commerce concluded in the preliminary and final determinations that the other 38 *Solar I PRC* programs were also specific and thus countervailable, Decision Mem. for the Prelim. Affirm. [CVD] Determination in the [CVD] Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC], C-570–011, at 24, PD 267, bar code 3206936–01 (Jun. 2, 2014); Final Decision Memo at 16–17, Commerce clarified on remand that it would no longer reach a specificity determination in relation to these 38 programs because they were not allocated to the POI and, again, were not included in the CVD rate in this investigation or on remand. Remand Results at 14; *see* Trina Solar Final Calc. Memo at 7.

1677(5A) (D)(i).[10] *See id.* at 14–15. Commerce determined that there was evidence in the questionnaire responses indicating that Trina Solar had received other grants that were provided only to "enterprises operating in the [[ ]] industry."[11] *Id.* at 15. Commerce stated that information in the responses indicated that certain grants were intended to encourage "[[ ]]." *Id.* Because those projects were expressly intended to benefit the solar industry, Commerce determined that they were limited to enterprises operating in that industry and that the assistance was accordingly specific within the meaning of 19 U.S.C. § 1677(5A)(D)(i).[12] *See id.* Commerce relied upon this record information, with an adverse inference, to determine that the two solar infrastructure grants at issue here, Funding on Infrastructure 2008 and Infrastructure 2009, are specific as well.[13] *Id.* This determination is reasonable, as it infers from the fact that other grants were limited to the solar industry that the grants at issue here are also limited to the solar industry. Lacking sufficient information about these two grants due to noncooperation by the GOC, *see id.* at 4; Final Decision Memo at 16, 85, and incomplete information provided by Trina, *see* Remand Results at 14–15, this adverse inference is in accordance with Commerce's authority pursuant to 19 U.S.C. §§ 1677e(a)–(b). Commerce has complied with the court's order in *Changzhou Trina* to point to facts on the record on which it relied when applying AFA to determine that the Solar I PRC programs were specific and, thus, countervailable.

Trina Solar argues that on remand Commerce again failed to identify the facts available on the record on which it relied to determine that these two infrastructure programs are specific to the [[ ]] industry, instead "assum[ing] specificity" from the fact that Trina Solar received other grants "for the purpose of [[ ]]." Trina Solar Remand Comments at 4–5. Commerce iden-

[10] Commerce noted that Trina Solar reported that it benefits under these two programs, but that Trina Solar had reportedly been unaware which government agencies were involved in providing the program and was unaware of the purpose of the program or of its eligibility criteria. *See* Remand Results at 14–15.

[11] In particular, Commerce noted that the objectives of another of these grant projects was [[ ]]. Remand Results at 15.

[12] Commerce stated that, "[i]n particular, Trina Solar reported that it received other grants from the [[ ]] regarding the [[ ]] for participating in a [[ ]] The main tasks of this [[ ]] included an [[ ]]." Remand Results at 15.

[13] Specifically, Commerce found they "were provided to Trina Solar for the [[ ]]," that they were limited to enterprises operating in the [[ ]] industry, and that the grants were accordingly specific within the meaning of section 19 U.S.C. § 1677(5A)(D)(i). Remand Results at 15.

tified the fact that Trina Solar had benefited from other programs specific to the solar industry and inferred from that fact, using an inference adverse to Trina Solar, that the infrastructure grants at issue are specific to the [[ ]] industry as well. Lacking information about these two grants due to noncooperation by the GOC and due to insufficient information provided by Trina, this adverse inference is in accordance with Commerce's authority pursuant to 19 U.S.C. § 1677e(a)–(b). Trina Solar's argument is essentially a challenge to the use of an inference. But Commerce possesses the express statutory authority to apply an inference to facts otherwise available where, as here, an interested party has not cooperated to the best of its ability to provide requested information. *See* 19 U.S.C. §§ 1677e(a)–(b).

B. The Verification Programs

In *Changzhou Trina*, the court held that Commerce's determinations, based on AFA, that the 27 unreported assistance programs and one unreported tax deduction program discovered at verification are countervailable subsidies amounted to "legal conclusions without the support of requisite factual findings." *Changzhou Trina*, 40 CIT at __, 195 F. Supp. 3d at 1350. The court ordered that, on remand, Commerce identify facts in the record to support the determination that each of these programs is specific, constitutes a financial contribution, and confers a benefit. *Id.* On remand Commerce notes that it continues to hold the position that "because Trina Solar did not cooperate to the best of its ability regarding our questions on nonreported subsidies," it was appropriate for Commerce to determine, through the application of facts available with an adverse inference, that the verification programs each provide a financial contribution and benefit, pursuant to the statute. Remand Results at 16. Commerce nonetheless examined the record for particular facts which support its determinations of countervailability. *See id.* The court now reviews this reevaluation.

1. The Tax Deduction Program Discovered at Verification

Regarding the tax deduction program for disabled employees, Commerce was not able to identify facts to support a determination that the program is de jure specific to certain enterprises or industries. Remand Results at 16–17. Commerce was also unable to confirm whether the program was de facto specific, emphasizing that the agency lacked the opportunity to obtain any factual information related to the tax deduction program because it had been unreported by

both the GOC and Trina Solar throughout the investigation. *Id.* at 17. As the agency could not confirm specificity, Commerce concluded "under respectful protest" that the tax deduction program is not countervailable and removed it from Trina Solar's subsidy calculation. *See id.* at 16–17.

Commerce emphasizes that its inability to identify facts to support a finding that the tax deduction program is de facto specific and its subsequent decision under protest to not countervail the tax deduction program illustrates the way in which respondents and governments may be incentivized towards noncooperation by the court's prior remand order. Remand Results at 17. Commerce notes that the prospect that a lack of factual information on the record related to a subsidy program could result in that program's removal from subsidy calculations may ultimately reward respondents' and governments' noncooperation with Commerce's requests for information. *Id.* The court acknowledges Commerce's concern, but notes that it is within Commerce's power to reopen the record to obtain additional information related to the tax programs. *See Changzhou Trina*, 40 CIT at __, 195 F. Supp. 3d at 1350.

Moreover, the court must uphold Congress' statutory perquisites to countervailability, *i.e.*, a factual finding of specificity, contribution and benefit. *See* 19 U.S.C. §§ 1677(5)(D)–(E), (5A). Where Commerce's efforts to find the requisite factual information are thwarted by a failure to cooperate, Congress has provided by statute that Commerce may resort to facts otherwise available, 19 U.S.C. § 1677e(a), and, as a result of that noncooperation, may apply an adverse inference to those facts. 19 U.S.C. § 1677e(b). Although many litigants in antidumping and countervailing duty proceedings refer to these two statutory provisions collectively as "adverse facts available" or "AFA," Congress clearly provided for two separate steps, not to be conflated by Commerce or the Court. Commerce must first identify facts available. 19 U.S.C. § 1677e(a). Once those facts are identified, it is within Commerce's discretion to apply adverse inferences to those facts. 19 U.S.C. § 1677e(b)(1)(A). Congress has specifically provided a nonexhaustive list of sources to which Commerce may look to find the facts to which it may apply an adverse inference: "(A) the petition, (B) a final determination in the investigation under this subtitle, (C) any previous review under section 1675 of this title or determination under section 1675b of this title, or (D) any other information placed on the record." 19 U.S.C. §§ 1677e(b)(2)(A)–(D). In short, Commerce may not make inferences untethered to facts in the record. Commerce therefore reasonably determined, albeit under protest, that the tax deduction program is not countervailable.

2. The Additional 27 Assistance Programs Discovered at Verification

On remand Commerce also identified the facts on which it relied to determine, through the application of an adverse inference, that the remaining 27 unreported assistance programs discovered at verification are countervailable. *See* Remand Results at 17–24. Regarding the requirements that a countervailable provision of assistance constitute a financial contribution and that the financial contribution confer a benefit, Commerce explained that it relied on the facts that each of the 27 verification programs appeared "in Trina Solar's accounting system under accounts for government assistance" and that there were positive balances in those accounts to conclude, applying an adverse inference, that government funds were dispersed through these assistance programs to Trina Solar. *Id.* at 17. Commerce therefore determined that these programs each constituted a financial contribution that conferred a benefit. *Id.* at 17–18. Pursuant to the statute, the finding of a "benefit conferred" requires a difference in the amount paid for assistance received. *See, e.g.*, 19 U.S.C. § 1677(5)(E)(ii). Further, the agency's regulations provide that, "[i]n the case of a grant, a benefit exists in the amount of the grant." 19 C.F.R. § 351.504(a). Commerce made the reasonable conclusion, based on Trina Solar's account records, and using an adverse inference, that the funds were actually dispersed, thus constituting a financial contribution. Commerce concluded that a grant with a positive balance provides the recipient with a benefit. This conclusion is reasonable and consistent with the regulatory definition that a benefit exists in the amount received. *See* 19 C.F.R. § 351.504(a). Trina Solar's argument that Commerce has not demonstrated that, for each of the 27 programs, the government made a financial contribution that conferred a benefit, *see* Trina Solar Remand Comments at 5–6, misunderstands "benefit conferred." Pursuant to the regulations, such a finding can be made if an amount is received. *See* 19 C.F.R. § 351.504(a). Commerce reasonably concluded here, from the positive account balances, that these grants had been received.

Regarding the specificity requirement, Commerce states that the record demonstrates the GOC's "great emphasis" on developing "the renewable energy industry" and the "science and technology industries," highlighting laws, economic measures, and economic incentives on the part of the GOC to promote the development of renewable

energy.[14] *See* Remand Results at 18–19. Commerce then provides particular facts on which it based its finding, through the application of facts available with an adverse inference, of specificity for each of the 27 verification grants.[15] *Id.* at 20–24; *see* Def.'s Remand Comments at 7–9. In light of the particular facts identified by Commerce on which it relied to determine specificity for each grant, the determination that each of these 27 programs is specific is supported by substantial evidence. Although Trina Solar argues that Commerce has not sufficiently demonstrated that each program is specific, *see* Trina Solar Remand Comments at 5–8, given the facts identified for each program, Commerce's determination that each of the 27 assistance programs discovered during verification is specific has met the "low bar" for asserting facts in the record which support a finding, based on adverse inferences, of specificity for each program. *See Changzhou Trina*, 40 CIT at __, 195 F. Supp. 3d at 1348.

II. The Selection of AFA Rates for the Verification Programs

The court deferred determination on Commerce's selection of the AFA-based subsidy rates applied to the verification programs, finding the issue intertwined with the remanded determination that the verification programs are countervailable. *See Changzhou Trina*, 40 CIT at __, 195 F. Supp. 3d at 1350–51. However, the court stated that

[14] Commerce indicated that the agency has previously relied upon these laws, measures, and incentives to find specificity in prior determinations. *See* Remand Results at 18–19.

[15] A summary of these facts includes that: 1) the GOC, including local and provincial governments, has provided subsidization to companies involved "in the PRC's renewable energy and science and technology sectors through its Renewable Energy Law, its various policy catalogues, and through programs such as the Golden Sun Demonstration Project"; 2) the GOC's "National Medium- and Long-Term Program for Science and Technology Development (2006–2020)" policy emphasizes the importance of "strengthening the capacity building of [science and technology] personnel" and states "that funds to implement the [science and technology] outline should be made available through financial means such as state appropriations"; 3) certain grants are limited by law to "enterprises operating in the PRC's renewable energy or science and technology sectors"; 4) the names of certain grants, and the evidence of GOC policy to support companies operating in the science and technology sector, "support a determination that they were provided to Trina Solar because it is an enterprise operating in the PRC's science and technology sector"; 5) certain funding was received from municipal agencies "for various projects related to [[

]]"; 6) certain patent grants were provided by agencies operating in the science and technology sector; 7) the names of certain grants indicate that the grants are contingent upon a company's export performance; 8) GOC policy materials indicate that "comprehensive water conservation and the development of technologies for industrial cyclic utilization of water and water efficient production activities" are priority areas for which "state treasury appropriations will be used"; 9) the GOC's laws promote "the development and utilization of renewable energies, such as solar energy" and "arrang[e] for funds to support scientific and technical research for the development of renewable energies"; and 10) the presence of "'key state support for new and high technology fields,'" of which solar energy is one. *See* Remand Results at 17–24; Def.'s Remand Comments at 7–9.

in the final determination Commerce did not "provide sufficient information to permit the court to judge whether or not the agency's choices here comport with its stated (and undisputed) practice." *Id.*, 40 CIT at __, 195 F. Supp. 3d at 1351. Accordingly the court stated that, should Commerce determine on remand that the verification programs are countervailable, the agency must explain the method by which it selects the AFA rates ultimately applied to these programs, to ensure that the rate selection is consistent with agency practice. *Id.*

On remand Commerce provided an explanation of the AFA rate selection methodology that it applied to the 27 unreported verification programs.[16] *See* Remand Results at 25–30. Commerce first explained the AFA rate selection hierarchy that the agency applies in an investigation. *Id.* at 26–29. Pursuant to this methodology:

> (a) [Commerce] first determine[s] whether there is an identical program in the instant investigation and use[s] the highest calculated rate for the identical program (excluding zero rates); (b) if there is no identical program above zero in the instant investigation, [Commerce] then determine[s] if an identical program was used in another CVD proceeding involving the same country, and appl[ies] the highest calculated rate for the identical program (excluding rates that are *de minimis*); (c) if no identical program exists, [Commerce] then determine[s] if there is a similar/comparable program (based on the treatment of the benefit) in another CVD proceeding involving the same country and appl[ies] the highest calculated rate for the similar/comparable program; (d) where there is no comparable program, [Commerce] appl[ies] the highest calculated rate from any non-company specific program in a CVD case involving the same country, but [does] not use a rate from a program if the industry in the proceeding cannot use that program.

Id. at 27.

Commerce then explained how it applied that hierarchy here. *See* Remand Results at 29–30. Commerce stated that, because it was unable to identify a non-zero rate calculated for a cooperative respondent for an identical program in the same investigation or an above-de minimis rate calculated for a cooperative respondent for an identical program in any proceeding covering subject merchandise

[16] Commerce did not provide such an explanation with respect to the tax deduction program for disabled employees, as the agency determined on remand that the tax deduction program is not countervailable so did not apply an AFA subsidy rate to that program. *See* Remand Results at 16, 25. Commerce is correct that the redetermination on the tax deduction program renders this issue moot with respect to the tax deduction program.

from China, the agency relied upon the highest non-de minimis rate calculated for a similar/comparable program in any proceeding covering subject merchandise from China. *Id.* Commerce selected the rate calculated for the "Special Fund for Energy Saving Technology" in the CVD investigation of chlorinated isocyanates from the PRC, and applied that rate here to each of the verification grants. *See id.* at 29–30; Final Decision Memo at 88. Commerce determined that this program was comparable because it was also a grant program and was provided to a Chinese producer of chlorinated isocyanurates, "based on its energy saving technology renovations." Remand Results at 30. Commerce further explained that, as facts on the record indicate "that Trina Solar is in the PRC's renewable energy industry generally, and in the science and technology sector specifically," and as no facts on the record conflict with that, there is no indication in the record "that the industry in which Trina Solar operates would be ineligible" to receive the grant program on which Commerce relied, awarded to a cooperating respondent in the proceeding covering chlorinated isocyanurates. *Id.* Although not determining affirmatively that the program is available to producers in the solar panel industry, Commerce provides a reasonable basis for its conclusion that the grant program would be available to producers in the solar industry. *See id.* Therefore, Commerce has complied with the court's request to provide analysis on remand regarding the AFA hierarchy, and has sufficiently explained "how this 'Special Fund for Energy Saving Technology' relates to each of the [verification] programs at issue" and "whether this program is even available to the solar panel industry." *Changzhou Trina*, 40 CIT at __, 195 F. Supp. 3d at 1351. Commerce's determinations in this regard on remand are supported by substantial evidence and are sustained.

III. The Creditworthiness of Suntech and Trina Solar

During the investigation, SolarWorld requested that Commerce find both respondents uncreditworthy during the POI, and argued that Commerce should have initiated creditworthiness investigations of Suntech for the years 2010 and 2012 and of Trina Solar for the years 2005, 2007, and 2012. *See Changzhou Trina*, 40 CIT at __, 195 F. Supp. 3d at 1357–58; SolarWorld Br. 10–17; Petitioner's Pre-Prelim. Determ. Comments at 30, PD 260–261, bar codes 3203261–01–02 (May 20, 2014). In the final determination, Commerce did not initiate creditworthiness investigations into either respondent, having determined that SolarWorld did not submit a "specific allegation" to satisfy the regulatory threshold required to

initiate such investigations. *See* Final Decision Memo at 95–96. Subsequently, Defendant acknowledged that SolarWorld's creditworthiness allegations did in fact "sufficiently specif[y] the years to which the allegation pertained," and requested that the court remand the determination not to investigate SolarWorld's allegations of uncreditworthiness. Def.'s Resp. Mots. J. Admin. R. 8–9, Apr. 21, 2016, ECF No. 66. The court granted Defendant's request to remand. *See Changzhou Trina*, 40 CIT at __, 195 F. Supp. 3d at 1357–58. Trina Solar now challenges Commerce's decision to initiate creditworthiness investigations on remand.[17] *See* Trina Solar Remand Comments at 8–10. SolarWorld now challenges Commerce's determination to not initiate a creditworthiness investigation of Trina Solar for 2012. *See* SolarWorld Remand Comments at 10–12.

Pursuant to the agency's regulations, Commerce will not initiate an investigation into a firm's creditworthiness "absent a specific allegation by the petitioner that is supported by information establishing a reasonable basis to believe or suspect that the firm is uncreditworthy." 19 C.F.R. § 351.505(a)(6)(i). According to Commerce's practice, the agency considers a prior finding of uncreditworthiness, absent an "intervening finding" that the firm is creditworthy, to satisfy the statutory requirement for "a reasonable basis to believe or suspect that the firm is uncreditworthy." *See Countervailing Duties*, 63 Fed. Reg. 65,348, 65,368 (Dep't Commerce Nov. 25, 1998) (final rule) (citing, and unchanged from, *Countervailing Duties*, 54 Fed. Reg. 23,366 23,370 (Dep't Commerce May 31, 1989) (notice of proposed rulemaking and request for public comments)).

In the final determination, Commerce did not investigate the creditworthiness of either respondent, having determined that SolarWorld did not submit a "specific allegation," thus not satisfying the regulatory threshold required to initiate an investigation into creditworthiness. *See* Final Decision Memo at 95–96. Commerce's conclusion that SolarWorld had not submitted a "specific allegation" was based on its finding that SolarWorld did not specify a time period for Commerce to investigate and did not provide information relating to

[17] Although the point heading in Trina Solar's comments on remand indicates that Trina Solar challenges both Commerce's determination to initiate the creditworthiness investigations and the ultimate creditworthiness determinations resulting from those investigations, *see* Trina Solar Remand Comments at 8, Trina Solar in fact only challenges the decision to initiate the creditworthiness investigations. *See id.* at 8–10. It seems that Trina Solar is only challenging the initiation decision because Commerce's findings of uncreditworthiness during 2005 and 2007 are rendered moot by the finding that Trina Solar "did not receive any long-term loans or nonrecurring subsidies in 2005 and 2007 that had benefits allocable to the POI." *See* Remand Results at 43; Trina Solar Remand Comments at 8.

the respondents' ability "to obtain long-term commercial loans," "present and past indicators of either company's financial health," or "future financial position," pursuant to 19 C.F.R. § 351.505(a)(4)(i). *Id.* at 95.

On remand Commerce reevaluated SolarWorld's allegations of the respondents' uncreditworthiness. *See* Remand Results at 31–35. Commerce determined that the allegations were specific, and met the regulatory threshold to initiate creditworthiness investigations of Suntech for 2010 and 2012 and Trina Solar for 2005 and 2007. *Id.* at 31, 44. Commerce emphasized that, after determining to initiate creditworthiness investigations, the agency provided both mandatory respondents with an "opportunity to provide information regarding their creditworthiness for the years in question," and that both respondents submitted relevant information accordingly. *Id.* at 31. Commerce conducted the investigations and determined that Suntech was uncreditworthy during 2010 and 2012 and that Trina Solar was uncreditworthy during 2005 and 2007. *Id.* at 9, 31–35. Commerce explained that, pursuant to 19 C.F.R. §§ 351.505(a)(4)(i)(A)–(D), it examined the following types of information to investigate the respondents' creditworthiness: receipt by the firm of comparable commercial long-term loans; present and past indicators of the firm's financial health; present and past indicators of the firm's ability to meet its costs and fixed financial obligations with its cash flow; and evidence of the firm's future financial position. *Id.* at 31–32, 46–47.

Commerce explained its findings on each factor. *See* Remand Results at 32–34. Regarding receipt of long-term loans, Commerce found that neither company received a comparable long-term loan during the investigated years. *Id*. at 32. Regarding present and past indicators of each company's financial health and each company's ability to meet its costs and fixed financial obligations with its cash flow, for Suntech Commerce found that Suntech's current and quick ratios, decreasing cash flows, and increasing debt-to-equity ratios between 2008 and 2012 indicate that the company "struggled to meet its costs and fixed financial obligations with its cash flow, and was required to borrow in order to cover its cash outlays after servicing its long-term debts." *Id.* at 33. For Trina Solar Commerce found that current ratios below the agency's established benchmark, quick ratios below or around the agency's established benchmark, fluctuating cash flows, and decreasing debt-to-equity ratios. *Id.* at 33–34. Regarding evidence of future financial position, Commerce reported not having "found any evidence indicating Suntech's or Trina Solar's future financial position as viewed during the years in question such as market studies, country and industry economic forecasts, or project

and loan appraisals that were prepared prior to loan agreements." *Id.* at 34. Based on these findings, Commerce determined that the respondents were uncreditworthy during the investigated years. *Id.* at 34–35. Based on the determinations of uncreditworthiness, Commerce "adjusted the long-term interest rate benchmarks" assigned for the investigated years and recalculated the CVD rates for both mandatory respondents and all other companies subject to the investigation. *Id.* at 35.

On remand, Commerce's determinations to investigate Suntech's creditworthiness for 2010 and 2012, and Trina Solar's creditworthiness for 2005 and 2007, are supported by substantial evidence. Commerce reasonably relied upon the previous findings of uncreditworthiness to determine that a reasonable basis existed to investigate the companies during those years. These determinations, which were based on specific information in the record, are supported by substantial evidence.

SolarWorld argues that Commerce erred in not initiating a creditworthiness investigation of Trina Solar for 2012, alleging that "there was significant evidence demonstrating that Trina Solar was uncreditworthy in 2012." SolarWorld Remand Comments at 10. Commerce concluded that its prior determinations in the related proceeding *Solar I PRC* that Trina Solar was uncreditworthy in 2005 and 2007 and Suntech was uncreditworthy during 2010 established the requisite "reasonable basis to believe or suspect" that the respondents were uncreditworthy in those same years for purposes of this investigation. Remand Results at 45; *see* Creditworthiness Investigation Initiation Memo at 2–3. Commerce also explained that it determined that the allegation that Suntech was uncreditworthy during 2012 met the initiation threshold for a "reasonable basis to believe or suspect" uncreditworthiness because there had been no "intervening finding" of uncreditworthiness subsequent to Commerce's determination, in the *Solar I PRC* proceeding, that Suntech was uncreditworthy in 2010.[18] *See* Remand Results at 45; Creditworthiness Investigation Initiation Memo at 2–3. Commerce explains that it did not initiate an investigation of Trina Solar for 2012 because of the "intervening finding" of creditworthiness for Trina Solar in 2008, and because petitioner did not provide sufficient additional information to satisfy the threshold for a creditworthiness investigation of Trina Solar for

[18] Commerce explained that this determination was based "on language from the regulatory history of 19 CFR [§] 351.505(a)(6)(i)," as the agency's 1989 Proposed Rulemaking provides that, "where a company has been previously found to be uncreditworthy and there has been 'no intervening finding' of the company's creditworthiness, the prior finding of uncreditworthiness provides a reasonable basis to believe or to suspect that the firm continues to be uncreditworthy." Remand Results at 45.

2012 following that finding. *See* Remand Results at 45–46; Creditworthiness Investigation Initiation Memo at 3; 19 C.F.R. § 351.505(a)(6)(i). Commerce further explained that SolarWorld had not supported its allegation with information satisfying any of the other criteria Commerce considers when determining whether to initiate a creditworthiness investigation, pursuant to 19 C.F.R. § 351.505(a)(6)(i). *Id.* at 47. This reasoning is sound.

CONCLUSION

For the foregoing reasons, the remand determination in the countervailing duty investigation of certain crystalline silicon photovoltaic products from the People's Republic of China are found to comply with the court's order in *Changzhou Trina*, 40 CIT at __, 195 F. Supp. 3d at 1358, and the conclusions are supported by substantial evidence and in accordance with law. Judgment will enter accordingly.

Dated: September 8, 2017
New York, New York

/*s*/ *Claire R. Kelly*
CLAIRE R. KELLY, JUDGE

Slip Op. 17–125

MILECREST CORPORATION, Plaintiff, v. UNITED STATES and U.S. CUSTOMS & BORDER PROTECTION, Defendants, and DURACELL U.S. OPERATIONS, INC., Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 17–00125

[Denying Defendant-Intervenor's motion to dismiss for lack of jurisdiction and for failure to state a claim upon which relief may be granted.]

Dated: September 15, 2017

John M. Peterson, Russell A. Semmel, and *Richard F. O'Neill*, Neville Peterson LLP, of New York, N.Y., for Plaintiff Milecrest Corporation.

Alexander J. Vanderweide, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendants the United States and U.S. Customs and Border Protection. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Beth C. Brotman*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, New York, N.Y.

Frances P. Hadfield, Crowell & Moring LLP, of New York, N.Y., and *Robert N. Phillips* and *John Patrick Donohue*, Reed Smith LLP, of San Francisco, CA and Philadelphia, PA, for Defendant-Intervenor Duracell U.S. Operations, Inc.

OPINION AND ORDER

Choe-Groves, Judge:

Milecrest Corporation ("Plaintiff") is a company engaged in the business of importing and distributing bulk-packaged gray market batteries bearing the "DURACELL" mark, a United States trademark currently owned by Duracell U.S. Operations, Inc. ("Duracell"). *See* First Amended Compl., July 25, 2017, ECF No. 78. Plaintiff brings this action pursuant to 28 U.S.C. § 1581(h) (2012)[1] seeking judicial review of the decision made by U.S. Customs and Border Protection ("Customs") to grant Lever-Rule protection to Duracell, thereby restricting imports of certain gray market batteries bearing its trademark.[2] *See* First Amended Compl. ¶ 1; *see also* U.S. Customs and Border Protection Grant of "Lever-Rule" Protection, 51 Cust. Bull. & Dec. No. 12 at 1 (Mar. 22, 2017).

Before the court is Duracell's motion to dismiss Plaintiff's amended complaint, which was filed to amend jurisdictional allegations in the original complaint. *See* Def.-Intervenor Duracell U.S. Operations, Inc.'s Mot. Dismiss, Aug. 8, 2017, ECF No. 92 ("Duracell Mot. Dismiss"). Pursuant to USCIT Rule 12(b)(1), Duracell argues that 28 U.S.C. § 1581(h) does not provide the court with jurisdiction in this action. *See* Duracell Mot. Dismiss 7–16, 28–31. Duracell also argues that Plaintiff's alternative basis for jurisdiction under 28 U.S.C. § 1581(i)(4) is not proper. *See id.* at 13–14. Pursuant to USCIT Rule 12(b)(6), Duracell argues that each count in Plaintiff's amended complaint fails to state a claim upon which relief may be granted. *See id.* at 16–28. The United States and Customs (collectively, "Government") join Duracell's request to dismiss Plaintiff's amended complaint. *See* Defs.' Resp. Def.-Intervenor's Mot. Dismiss 1–5, Aug. 9, 2017, ECF No. 94 ("Gov't's Resp."). Plaintiff filed a response in opposition to Duracell's motion arguing that the court has jurisdiction and that the claims for relief in this action were pleaded adequately in the

[1] All further citations to Titles 5, 19, and 28 of the U.S. Code are to the 2012 edition.

[2] Under the Lever-Rule, United States trademark owners have the ability to submit an application to Customs requesting restrictions on imports of gray market goods bearing a genuine trademark that are physically and materially different from the goods authorized by the United States trademark owner for importation or sale in the United States. *See* 19 C.F.R. §§ 133.2(e) (providing trademark owners with the ability to apply for Lever-Rule protection), 133.23(a)(3) (describing the goods subject to Lever-Rule protections). The applicant claiming that gray market goods possess physical and material differences "must state the basis for such a claim with particularity, and must support such assertions by competent evidence and provide summaries of physical and material differences for publication." 19 C.F.R. § 133.2(e). If Customs grants a trademark owner's application for Lever-Rule protection, the restricted gray market goods shall be denied entry into the United States, detained for a minimum period of thirty days, and potentially subject to seizure and forfeiture proceedings. *See* 19 C.F.R. § 133.23(c)–(f).

amended complaint. *See* Pl.'s Resp. Opp'n Def.-Intervenor's Mot. Dismiss 4–28, Aug. 9, 2017, ECF No. 96 ("Pl.'s Resp."). Briefing on the motion to dismiss concluded with the filing of Duracell's reply. *See* Def.-Intervenor Duracell U.S. Operations, Inc.'s Reply Pl.'s Resp. Opp'n Mot. Dismiss, Aug. 11, 2017, ECF No. 101 ("Duracell Reply").

For the reasons explained below, the court denies Duracell's motion to dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted.

BACKGROUND

The court presumes familiarity with the facts of this case as set forth in its previous opinion and order issued on July 17, 2017. *See XYZ Corporation v. United States*, 41 CIT __, Slip Op. 17–88, at *4–9 (July 17, 2017) ("Opinion and Order Denying Gov't's Mot. Dismiss").[3] The court now recounts and supplements the facts that are relevant to decide Duracell's motion to dismiss.

A. Administrative Proceedings

Duracell is the United States trademark owner of the 'DURACELL' mark, which has been registered with the U.S. Patent and Trademark Office, U.S. Trademark Reg. No. 3,144,722, and recorded with Customs, CBP Recordation No. TMK 16–01135. Duracell filed an application with Customs on October 13, 2016 requesting Lever-Rule protection against gray market OEM bulk packaged batteries and foreign retail packaged batteries bearing Duracell's trademark. *See* Duracell Request for Lever-Rule Protection, Doc. 1, CBP000006–CBP000008 (Oct. 13, 2016) ("Duracell Lever-Rule Request").[4] Duracell stated in its application that the OEM bulk pack-

[3] Plaintiff filed this action under the fictitious name "XYZ Corporation" because Plaintiff feared that it would be subject to commercial retaliation if its identity were revealed. *See* Compl. ¶ 1 n.1, May 19, 2017, ECF No. 2. Duracell notified counsel for Plaintiff on July 28, 2017 that it objected to Plaintiff's assumption of a fictitious name in this action and challenged Plaintiff's designation of its identity as confidential information under the amended judicial protective order. *See* Duracell Mot. Dismiss 1 n.1. Plaintiff refused to withdraw the designation of its identity as confidential information and the court was required to intervene to resolve the disagreement. On September 12, 2017, the court ordered that Plaintiff's identity shall not be treated as confidential information and that Plaintiff may not proceed anonymously in this action. *See XYZ Corporation v. United States*, 41 CIT __, Slip Op. 17–124 (September 12, 2017). Pursuant to the court's order, Plaintiff refiled a revised public summons and amended complaint without redactions of Plaintiff's identity on September 13, 2017. *See* Revised Summons, Sept. 13, 2017, ECF No. 118; Revised First Amended Compl., Sept. 13, 2017, ECF No. 119. Any reference to "XYZ Corporation" in this opinion refers to Plaintiff.

[4] On August 18, 2017, the Government submitted the confidential and public administrative record of all documents that were considered by Customs in its decision to grant Duracell's application for Lever-Rule protection. *See* Confidential Administrative Record, Aug. 18, 2017, ECF No. 106; Public Administrative Record, Aug. 18, 2017, ECF No. 107. The Government also submitted an index that provide document numbers and page numbers to

aged batteries and foreign retail packaged batteries differ physically and materially from the battery products authorized by Duracell for sale or importation in the United States. *See id.* Duracell's Lever-Rule application was not made publicly available.

On January 25, 2017, Customs issued a notice in the U.S. Customs Bulletin and Decisions publication that it had received an application from Duracell seeking Lever-Rule protection "against importations of OEM bulk packaged batteries and foreign retail packaged batteries, intended for sale in countries outside the United States that bear the 'DURACELL' mark, U.S. Trademark Registration No. 3,144,722/CBP Recordation No. TMK 16–01135." U.S. Customs and Border Protection Receipt of Application for "Lever-Rule" Protection, 51 Cust. Bull. & Dec. No. 4 at 1 (Jan. 25, 2017). Customs' notice did not seek input from the public. *See id.*

By letter dated March 1, 2017, Customs informed Duracell that its application for Lever-Rule protection had been granted. *See* E-mail From Customs to Duracell re Signed Decision Granting Lever-Rule Protection, Doc. 9, CBP000033–CBP000035 (Mar. 1, 2017). Customs issued a second notice in the U.S. Customs Bulletin and Decisions publication on March 22, 2017, notifying the public that it had granted Duracell's application for Lever-Rule protection. *See* U.S. Customs and Border Protection Grant of "Lever-Rule" Protection, 51 Cust. Bull. & Dec. No. 12 at 1 (Mar. 22, 2017). The notice explained that "gray market Duracell battery products differ physically and materially from the Duracell battery products authorized for sale in the United States with respect to the following product characteristics: label warnings, consumer assistance information, product guarantees, and warranty coverage." *Id.* Customs declared that the importation of such batteries was restricted and subject to seizure and forfeiture, unless certain labeling requirements had been satisfied. *See id.* The Lever-Rule restrictions became effective when Customs published the Customs Bulletin notice indicating that Duracell's application had been granted. *See* 19 C.F.R. § 133.2(f) (providing that Lever-Rule restrictions take effect once Customs has made and issued a determination on the application for Lever-Rule protection).

Counsel for Plaintiff sent a letter to Customs on April 10, 2017 requesting that it reconsider its grant of Lever-Rule protection to Duracell.[5] *See* First Amended Compl. Ex. C, July 25, 2017, ECF No.

identify the documents from the confidential and public administrative record. For ease of reference, the court will use the document numbers and page numbers assigned by Customs for all further citations to the documents from the administrative record.

[5] The letter sent to Customs was dated May 17, 2017, *see* First Amended Compl. Ex. C, July 25, 2017, ECF No. 78–1, but the Government has clarified to the court that the letter was dated incorrectly and that the letter was sent to Customs on April 10, 2017. *See* Gov't's Resp. 5.

78–1. The letter asserted that Customs' decision to grant Duracell Lever-Rule protection is the type of rule that is subject to the notice and comment rulemaking procedures required by the Administrative Procedure Act ("APA"). *See id.* The letter also claimed that Duracell was not entitled to Lever-Rule protection against bulk OEM batteries because these gray market products are not physically and materially different from batteries that are sold by Duracell. *See id.* Counsel for Plaintiff requested that Customs withdraw its determination and solicit public comments regarding whether any Lever-Rule protection should be granted with respect to these gray market battery products. *See id.* Plaintiff alleges that Customs has declined to reconsider its decision to grant Lever-Rule protection to Duracell, *see* First Amended Compl. ¶ 30, but Customs has not issued a written decision in response to Plaintiff's letter requesting for reconsideration.

B. Proceedings Before the Court

Plaintiff commenced this action on May 19, 2017 to obtain judicial review of Customs' decision to grant Duracell Lever-Rule protection. *See* Summons, May 19, 2017, ECF No. 1. The complaint alleged that Customs' decision to grant Duracell Lever-Rule protection was: (1) null and void because Customs failed to observe notice and comment rulemaking requirements of the APA; (2) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law because Customs restricted the importation of gray market merchandise that is not materially and physically different from the batteries authorized by Duracell for importation or sale in the United States; and (3) arbitrary and capricious because the grant of Lever-Rule protection was impermissibly vague in describing the gray market goods subject to import restrictions. *See* Compl. ¶¶ 31–54, May 19, 2017, ECF No. 2. Plaintiff's complaint invoked the court's residual jurisdiction under 28 U.S.C. § 1581(i)(4), alleging that this action relates to the administration and enforcement of the exclusion of merchandise. *See* Compl. ¶ 4.

The Government filed a motion to dismiss pursuant to USCIT Rule 12(b)(1) for lack of jurisdiction on June 7, 2017. *See* Defs.' Mem. Supp. Mot. Dismiss and Resp. Opp'n Pl.'s Appl. Prelim. Inj., June 7, 2017, ECF No. 33. The Government contended that this action does not fall within any of the specific grants of jurisdiction under 28 U.S.C. § 1581, Plaintiff does not have standing to bring this action, and the issues are not ripe for judicial review. *See id.* at 17–21. Plaintiff maintained that the court has jurisdiction pursuant to 28 U.S.C. § 1581(i) and refuted the Government's standing and ripeness argu-

ments. *See* Pl.'s Mem. Opp'n Defs.' Mot. Dismiss 4–13, June 12, 2017, ECF No. 36.

In a letter dated June 27, 2017, the court requested the Parties to submit supplemental briefs addressing whether 28 U.S.C. § 1581(h) provides the court with jurisdiction. *See* Request from the Court, June 27, 2017, ECF No. 53. Plaintiff filed its supplemental brief on June 30, 2017, explaining that § 1581(h) would serve as a basis for jurisdiction if the court determines that Customs' decision to grant Duracell's application for Lever-Rule protection is a ruling reviewable under § 1581(h). *See* Pl.'s Suppl. Mem. Opp'n Defs.' Mot. Dismiss 10, June 30, 2017, ECF No. 55. The Government responded to Plaintiff's submission on July 6, 2017, arguing that this action does not satisfy the requirements for jurisdiction under § 1581(h) and that Plaintiff does not have standing to bring an action pursuant to § 1581(h). *See* Def.'s Suppl. Resp. Br. Addressing 28 U.S.C. § 1581(h), July 6, 2017, ECF No. 58.

Duracell moved to intervene in this action. *See* Ex Parte Appl. Leave Intervene, July 11, 2017, ECF No. 61. The court granted Duracell permissive intervention and Duracell was entered as a defendant-intervenor in this action.[6] *See* Order, July 13, 2017, ECF No. 63. Duracell stated previously that it did not wish to participate in the briefing on the Government's motion to dismiss for lack of jurisdiction because Duracell believed "that the jurisdictional issues [were] appropriately briefed by the Parties." *See* Ex Parte Appl. Leave Intervene.

After reviewing the Parties' briefs and supplemental briefs concerning the court's jurisdiction in this matter, the court held that it possesses jurisdiction under 28 U.S.C. § 1581(h). *See* Opinion and Order Denying Gov't's Mot. Dismiss at *9–20. The court determined that Plaintiff's action satisfies the jurisdictional preconditions for § 1581(h) because: (1) Plaintiff seeks judicial review prior to the importation of goods, (2) Customs' decision to grant Duracell's application for Lever-Rule protection constitutes the type of ruling within the scope of review under § 1581(h), (3) the Lever-Rule grant relates to a restriction on imports of certain gray market battery products, and (4) Plaintiff would be irreparably harmed if it is unable to obtain judicial review prior to the importation of the merchandise. *See id.* at *13–20. Because the court found that it has jurisdiction under 28 U.S.C. § 1581(h), the court stated that it could not exercise jurisdic-

[6] The Rules of the Court provide that a party may intervene as of right or with permission from the court. *See* USCIT Rule 24(a)–(b). The court granted Duracell permissive intervention because Duracell, as the applicant for the Lever-Rule grant at issue, "has a claim or defense that shares with the main action a common question of law or fact." USCIT Rule 24(b). Duracell did not claim in its motion that it had any right to intervene in this action.

tion under § 1581(i)(4) as alleged in Plaintiffs complaint. *See id.* at *20. The court also found that the issues raised in this action are ripe for review and that Plaintiff satisfies Article III standing requirements as well as the standing requirements to bring an action under 28 U.S.C. § 1581(h). *See id.* at *20–24. The court denied, therefore, the Government's motion to dismiss for lack of jurisdiction. *See id.* at *25. The court instructed Plaintiff to amend the jurisdictional allegations in its complaint to satisfy the pleading requirements under USCIT Rule 8(a)(1) and directed the Parties to submit a joint proposed scheduling order for the remainder of this action. *See id.* at *11 n.13, 25. Plaintiff filed its amended complaint on July 25, 2017. *See* First Amended Compl.

The Parties were unable to come to an agreement regarding the schedule for the remainder of this action and submitted separate proposed schedules. *See* Proposed Scheduling Order, Aug. 1, 2017, ECF No. 81; Proposed Scheduling Order, Aug. 1, 2017, ECF No. 82. Plaintiff and the Government proposed that the case proceed to the merits, whereas Duracell proposed a schedule that allotted time for Duracell to file a motion to dismiss Plaintiff's amended complaint pursuant to USCIT Rule 12(b)(1) for lack of jurisdiction and USCIT Rule 12(b)(6) for failure to state a claim. The court held a teleconference with the Parties on August 3, 2017 to discuss the schedule for the remainder of the action. *See* Teleconference, Aug. 3, 2017, ECF No. 89. On the same date, the court entered a scheduling order providing Duracell with an opportunity to file a motion to dismiss and ordering expedited briefing on the motion. *See* Scheduling Order, Aug. 3, 2017, ECF No. 90. However, the court reminded Duracell during the teleconference that the court has already determined that it has jurisdiction under § 1581(h) and cautioned Duracell that the court will only consider new information and arguments regarding jurisdiction. *See* Teleconference at 00:35:32–00:36:32.

On August 8, 2017, Duracell moved to dismiss Plaintiff's amended complaint for lack of jurisdiction and for failure to state a claim.[7] *See* Duracell Mot. Dismiss. Duracell argues that 28 U.S.C. § 1581(h) does not provide the court with jurisdiction in this action because the Lever-Rule grant is not the type of ruling that is reviewable under § 1581(h), Plaintiff has failed to plead irreparable harm sufficiently, Plaintiff lacks prudential standing to bring this action, and Plaintiff has failed to exhaust its administrative remedies prior to obtaining

[7] The court had ordered Duracell to file its motion to dismiss on or before August 7, 2017. *See* Scheduling Order, Aug. 3, 2017, ECF No. 90. However, all filings due on August 7, 2017 became due on August 8, 2017 due to a technical failure in the Court's case management and electronic case filing system.

judicial review. *See id.* at 7–16, 28–31. Duracell also contends that Plaintiff's alternative basis for jurisdiction under 28 U.S.C. § 1581(i)(4) does not provide the court with jurisdiction in this action. *See id.* at 13–14. Duracell asserts further that each of the counts in Plaintiff's amended complaint fails to state a claim upon which relief may be granted. *See id.* at 16–31. The Government filed its response to Duracell's motion on August 9, 2017, joining Duracell's request to dismiss Plaintiff's amended complaint and explaining the Government's position on the issues raised in Duracell's motion. *See* Gov't's Resp. Plaintiff also filed its response to Duracell's motion on August, 9, 2017, arguing that the court has jurisdiction and that the claims for relief were pleaded adequately in the amended complaint. *See* Pl.'s Resp. Duracell filed its reply on August 11, 2017. *See* Duracell Reply.

DISCUSSION

When the court is presented with motions to dismiss under both USCIT Rule 12(b)(1) and Rule 12(b)(6), the court generally decides the 12(b)(1) motion first because "[w]hether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy." *Bell v. Hood*, 327 U.S. 678, 682 (1945).

A. Motion to Dismiss for Lack of Jurisdiction Pursuant to USCIT Rule 12(b)(1)

Duracell moves to dismiss this action for lack of jurisdiction pursuant to USCIT Rule 12(b)(1). *See* Duracell Mot. Dismiss 7–16. A court must have subject matter jurisdiction in order for an action to proceed. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). The U.S. Court of International Trade, like all federal courts, is one of limited jurisdiction and is "presumed to be 'without jurisdiction' unless 'the contrary appears affirmatively from the record.'" *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) (quoting *King Iron Bridge & Mfg. Co. v. Otoe Cty.*, 120 U.S. 225, 226 (1887)). The party invoking jurisdiction must "allege sufficient facts to establish the court's jurisdiction," *id.* (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936) and *KVOS, Inc. v. Assoc. Press*, 299 U.S. 269, 277–78 (1936)), and therefore "bears the burden of establishing it." *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (citing *Kokkenen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994)). The court must draw all reasonable inferences in favor of the non-movant when deciding a motion to dismiss for lack of jurisdiction. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

Plaintiff filed this action seeking declaratory and injunctive relief with respect to Customs' decision to grant Duracell's application for Lever-Rule protection. Plaintiff's amended complaint includes APA claims challenging the validity of the Lever-Rule restrictions. *See* First Amended Compl. ¶¶ 32–59. Plaintiff claims that Customs' decision to grant Duracell's application for Lever-Rule protection was (1) unlawful and must be set aside because Customs failed to follow notice and comment rulemaking requirements of the APA, *see* First Amended Compl. ¶¶ 32–47; *see also* 5 U.S.C. §§ 553, 706(2)(D); (2) arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law because Duracell has authorized the sale and importation of the gray market battery products covered by the Lever-Rule grant, *see* First Amended Compl. ¶¶ 48–52; *see also* 5 U.S.C. § 706(2)(A); and (3) arbitrary and capricious because Customs' description of the gray market battery products subject to import restrictions was impermissibly vague. *See* First Amended Compl. ¶¶ 53–59; *see also* 5 U.S.C. § 706(2)(A). "[T]he APA is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions." *Califano v. Sanders*, 430 U.S. 99, 105 (1977); *see also Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1552 (Fed. Cir. 1983) (providing that the APA is not a jurisdictional statute and "does not give an independent basis for finding jurisdiction in the Court of International Trade"). Rather, the court must have its own independent statutory basis for jurisdiction in order for Plaintiff's action to proceed. *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304 (Fed. Cir. 2004).

The Court is empowered to hear civil actions brought against the United States pursuant to the specific grants of jurisdiction enumerated under 28 U.S.C. § 1581(a)–(i). Plaintiff's amended complaint alleges that the court has jurisdiction pursuant to 28 U.S.C. § 1581(h) and § 1581(i)(4). *See* First Amended Compl. ¶ 4. The court notes that § 1581(i) provides for the Court's residual jurisdiction and may not be invoked "'when jurisdiction under another subsection of § 1581 is or could have been available.'" *Ford Motor Co. v. United States*, 688 F.3d 1319, 1323 (Fed. Cir. 2012) (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)). Thus, the court need only determine whether residual jurisdiction exists in this action if jurisdiction does not exist under § 1581(h).

Under § 1581(h), an importer may seek review of a ruling prior to the importation of goods. The statute reads as follows:

> The Court of International Trade shall have exclusive jurisdiction over any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secre-

> tary of the Treasury . . . relating to . . . restricted merchandise, . . . or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

28 U.S.C. § 1581(h). This provision has been interpreted to set out four requirements to establish jurisdiction: (1) judicial review must be sought prior to importation; (2) judicial review must be sought of a ruling, a refusal to issue a ruling, or a refusal to change such a ruling; (3) the ruling must relate to certain subject matter; and (4) the importer must demonstrate that irreparable harm will result unless judicial review prior to importation is obtained. *See Best Key Textiles Co. v. United States*, 777 F.3d 1356, 1360 (Fed. Cir. 2015) (citing *Am. Air Parcel Forwarding Co.*, 718 F.2d at 1551–52).

The court determined in its previous opinion that the aforementioned four requirements have been met, to wit: (1) Plaintiff's action seeks relief with respect to prospective imports; (2) the Lever-Rule grant is a determination as to the manner in which Customs will treat a completed transaction; (3) the ruling relates to the subject matter of the statute as it poses a restriction on imports of gray market battery products bearing the Duracell trademark; and (4) the evidence on the record indicated that, without judicial review at this juncture, Plaintiff would be irreparably harmed through the loss of revenue, loss of business opportunities, harm to goodwill and reputation with long-standing customers, and the inability to continue business operations. *See* Opinion and Order Denying Gov't's Mot. Dismiss at *13–20. Thus, the court held that 28 U.S.C. § 1581(h) confers the court with jurisdiction over this action.

Plaintiff's amended complaint has not raised any issues that would invalidate the court's previous opinion regarding jurisdiction. Duracell has moved, nonetheless, to dismiss Plaintiff's amended complaint for lack of jurisdiction. *See* Duracell Mot. Dismiss 7–16, 28–31. Duracell does not argue that there has been an intervening change in the facts since the court issued its opinion on July 17, 2017 that divests the court of § 1581(h) jurisdiction. Rather, Duracell interposes a flurry of new legal arguments challenging the court's jurisdiction under § 1581(h) that the Government did not raise in its USCIT Rule 12(b)(1) motion to dismiss. *See id.* First, Duracell argues that Lever-Rule decisions made pursuant to Part 133 of Customs' regulations are distinguishable from the rulings described under Part 177 of Customs' regulations and are not, therefore, the type of "rulings" suscep-

tible to judicial review under § 1581(h). *See id.* at 7–11. Second, Duracell asserts that Plaintiff has failed to plead irreparable harm adequately in the amended complaint and that the alleged irreparable harm was not caused by Customs' decision to grant Duracell's application for Lever-Rule protection. *See id.* at 11–13. Third, Duracell contends that Plaintiff does not have prudential standing and is not within the zone of interests protected by the Lever-Rule. *See id.* at 14–16. Fourth, Duracell invokes the exhaustion doctrine and claims that Plaintiff has failed to exhaust its administrative remedies before bringing this action. *See id.* at 28–31. The court continues to find that it possesses jurisdiction under § 1581(h) for the reasons stated in the court's previous opinion and, as explained below, Duracell's arguments fail to convince the court otherwise.[8]

1. Ruling

Duracell contends that the Lever-Rule decision that is the subject of this action is not a ruling that is subject to judicial review under 28 U.S.C. § 1581(h). *See* Duracell Mot. Dismiss 7–11. The court addressed this issue in its previous opinion in determining that jurisdiction under § 1581(h) is proper and provided the following explanation:

> A ruling within the meaning of 28 U.S.C. § 1581(h) is defined as "a determination by the Secretary of the Treasury as to the manner in which it will treat [a] completed transaction." H.R. Rep. 96–1235, at 52 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3758. "Internal advice" or a "general interpretive ruling" will not meet the requirements under the statute. *See id.* The decision that is the subject of this case is Customs' grant of Lever-Rule protection to Duracell U.S. on March 22, 2017, which restricted the importation of gray market Duracell battery products. The decision is not an internal advice ruling, which are rulings "available only for goods already imported and are not prospective." *See Am. Air Parcel Forwarding Co. v. United States*, 5 CIT 8, 11–12, 557 F. Supp. 605, 608, *aff'd*, 718 F.2d 1546 (Fed. Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). Nor is the decision a general interpretive ruling because it "speak[s] to

[8] As indicated above, Plaintiff also invokes the court's residual jurisdiction under § 1581(i)(4) as an alternative basis for jurisdiction in its amended complaint. *See* First Amended Compl. ¶ 6. Duracell argues that jurisdiction under § 1581(i)(4) is not proper in this case. *See* Duracell Mot. Dismiss 13–14. The court declines to opine on this issue because the court has jurisdiction under § 1581(h). *See Ford Motor Co.*, 688 F.3d at 1323 (providing that the court's residual jurisdiction may not be invoked "when jurisdiction under another subsection of § 1581 is or could have been available") (quoting *Miller & Co.*, 824 F.2d at 963).

> specific contemplated import transactions which contain identifiable merchandise and which will feel the impact of the ruling with virtual certainty." *Pagoda Trading Co. v. United States*, 6 CIT 296, 298, 577 F. Supp. 22, 24 (1983). In the decision at issue, Customs notified the public that it "granted 'Lever-Rule' protection for battery products bearing the 'DURACELL' mark, U.S. Trademark Registration No. 3,144,722/CBP Recordation No. TMK 16–01135." *See* U.S. Customs and Border Protection Grant of "Lever-Rule" Protection, 51 Cust. Bull. & Dec. No. 12 at 1 (Mar. 22, 2017). The decision identifies the merchandise with specificity and unequivocally directs Customs to restrict the importation of such merchandise, unless certain labeling requirements have been satisfied. *See id.*

Opinion and Order Denying Gov't's Mot. Dismiss at *14. This court concluded previously that Customs' decision to grant Duracell's application for Lever-Rule protection is a ruling reviewable under § 1581(h). This court explained that its conclusion was supported in part by Customs' regulatory definition of a ruling found in Part 177 of its regulations:

> Customs has defined a ruling as "a written statement issued by the Headquarters Office or the appropriate office of Customs as provided in this part that interprets and applies the provisions of the Customs and related laws to a specific set of facts." 19 C.F.R. § 177.1(d)(1). The definition provides that a ruling can either be "issued in response to a written request therefor . . . set forth in a letter addressed to the person making the request," or "published in the Customs Bulletin." 19 C.F.R. § 177.1(d)(1). The decision at issue in this case was (1) a written statement, (2) issued by the Headquarters Office, (3) published in the Customs Bulletin, and (4) interpreted 19 C.F.R. § 133.23(a)(3) as authorizing import restrictions on gray market OEM bulk packaged batteries bearing the "DURACELL" trademark. The court finds that Customs' decision falls squarely within the regulatory definition of a ruling and constitutes the type of ruling within the scope of review under 28 U.S.C. § 1581(h).

Id. at *14–15.

Duracell takes issue with the court's reliance on Customs' regulatory definition of a ruling in concluding that the Lever-Rule grant is a ruling reviewable under § 1581(h). *See* Duracell Mot. Dismiss 7–11. Duracell argues that the Lever-Rule grant is a decision under Part 133, which is distinguishable and excluded from the rulings described

in Part 177. *See id.* The court finds Duracell's argument to be without merit. The court did not conclude that the Lever-Rule grant is a ruling within the scope of review under § 1581(h) based on the regulatory definition of a ruling in Part 177 of Customs' regulations. Rather, this court's conclusion was based on the legislative history of the jurisdictional statute, which offered insight into the types of rulings that are reviewable under § 1581(h). The court found merely that Customs' regulatory definition of a ruling under Part 177 offered additional support for the court's conclusion.

Further, even assuming, *arguendo*, that there is a direct correlation between rulings reviewable under § 1581(h) and rulings described in Part 177 of Customs' regulations, Duracell's argument is predicated on an erroneous reading of the regulations. The scope provision under Part 177 reads as follows:

> **This part relates to the issuance of rulings to importers and other interested parties by the CBP**, other than advance rulings under Article 509 of the North American Free Trade Agreement (see subpart I of part 181 of this chapter). It describes the situations in which a ruling may be requested, the procedures to be followed in requesting a ruling, the conditions under which a ruling will be issued, the effect of a ruling when it is issued, and the publication of rulings in the Customs Bulletin. The rulings issued under the provisions of this part will usually be prospective in application and, consequently, will usually not relate to specific matters or situations presently or previously under consideration by any CBP field office. Accordingly, **the rulings requested under the provisions of this part should be distinguished from the administrative rulings, determinations, or decisions which may be requested under procedures set forth elsewhere in this chapter, including, but not limited to, those set forth in** Part 12 (relating to submissions of proof of admissibility of articles detained under section 307 of the Tariff Act of 1930 (19 U.S.C. 1307)), Part 103 (relating to disclosure of information in Customs files), **Part 133 (relating to disputed claims of piratical copying of copyrighted matter)**, Subpart C of Part 152 (relating to determinations concerning the dutiable value of merchandise by Customs field officers, Part 153 (relating to enforcement of the Antidumping Act, 1921, as amended), Part 159 (insofar as it relates to countervailing duties), Part 171 (relating to fines, penalties, and forfeitures), Part 172 (relating to liquidated damages), Part 174 (relating to protests), and Part 175 (relating to petitions filed by American manufacturers, producers, or wholesalers pursuant to section 516 of the Tariff Act of 1930, as amended). Nor do the provisions of Part 177 apply to requests for decisions of an operational, administrative, or in-

> vestigative nature which are properly within the cognizance of a CBP Headquarters Office other than Regulations and Rulings, Office of International Trade.

19 C.F.R. § 177.0 (emphasis added). Duracell contends that, according to the language of the scope provision under Part 177, Lever-Rule decisions under Part 133 are distinguishable and specifically excluded from the rulings described in Part 177. *See* Duracell Mot. Dismiss 8–9. Part 133 of Customs' regulations contains provisions relating to trademarks, trade names, and copyrights. The scope provision provides that the rulings under Part 177 should be distinguishable from those rulings, determinations, or decisions in Part 133 "relating to disputed claims of piratical copying of copyrighted matter." Notably absent is any reference to the regulatory provisions under Part 133 relating to trademarks and trade names. The logical inference is that Customs did not intend to exclude rulings, determinations, or decisions relating to trademarks, including Lever-Rule decisions, from the scope of the rulings described in Part 177.

Despite Duracell's arguments to the contrary, the court continues to find that Customs' decision to grant Duracell's application for Lever-Rule protection is a ruling within the scope of review under § 1581(h).

2. Irreparable Harm

Duracell argues that Plaintiff has failed to plead irreparable harm adequately in the amended complaint and that the alleged irreparable harm was not caused by Customs' decision to grant Duracell's application for Lever-Rule protection. *See* Duracell Mot. Dismiss 11–13. Duracell has presented arguments regarding irreparable harm that challenge both the sufficiency of the pleadings (a "facial" challenge) and the factual basis for the court's jurisdiction (a "factual" challenge).[9] The court addresses each of Duracell's challenges in turn.

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[9] When deciding a motion to dismiss pursuant to USCIT Rule 12(b)(1), the court's analysis depends on whether the motion "challenges the sufficiency of the pleadings or controverts the factual allegations made in the pleadings." *H&H Wholesale Servs., Inc. v. United States*, 30 CIT 689, 691, 437 F. Supp. 2d 1335, 1339 (2006). If the motion challenges jurisdiction based on the sufficiency of the pleadings, the pleadings are accepted as true and construed in a light most favorable to the non-moving party. *See Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1235 (1994). If the motion denies or controverts jurisdictional allegations, "the allegations in the complaint are not controlling" and "only uncontroverted factual allegations are accepted as true." *Id.* at 1583. The former is a "facial" attack on the pleading and the latter is a "factual" attack on the existence of jurisdiction. *See id.* The distinction is significant because the court may consider evidence outside the pleadings only on a motion that challenges the factual basis for the court's jurisdiction. *See id.* at 1584 ("In establishing the predicate jurisdictional facts, a court is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings, including affidavits and deposition testimony.").

i. Duracell's Facial Challenge

Duracell asserts that the unsupported allegations and legal conclusions regarding irreparable harm in Plaintiff's amended complaint do not satisfy a plaintiff's obligation to plead the court's jurisdiction affirmatively. *See id.* at 11–12. The Rules of the Court provide that a pleading must contain "a short and plain statement of the grounds for the court's jurisdiction . . . ."[10] USCIT R. 8(a)(1). The pleading must "allege sufficient facts to establish the court's jurisdiction." *See DaimlerChrysler Corp.*, 442 F.3d at 1318 (citing *McNutt*, 298 U.S. at 189 and *KVOS, Inc.*, 299 U.S. at 277–78). To state the basis for the court's jurisdiction, Plaintiff alleges the following:

> This action is commenced to review a CBP ruling, relating to restricted merchandise which, absent judicial review prior to importation of such merchandise, would irreparably harm Plaintiff. The Court therefore has subject-matter jurisdiction pursuant to 28 U.S.C. § 1581(h).

First Amended Compl. ¶ 4. All four predicates for § 1581(h) jurisdiction are alleged in this paragraph of the amended complaint. To provide factual support for its allegation of irreparable harm, Plaintiff alleges that: (1) it is a company that has been engaged in the business of importing and distributing gray market batteries bearing the "DURACELL" mark for more than twenty-seven years, *see* First Amended Compl. ¶¶ 5, 7, 9; (2) Customs received an application from Duracell requesting Lever-Rule protection with respect to imports of OEM bulk packaged batteries and foreign retail packaged batteries that bear the "DURACELL" mark, *see id.* ¶ 22; (3) Customs granted Lever-Rule protection for gray market battery products bearing the "DURACELL" mark in March 2017, *see id.* ¶ 24; and (4) Customs instructed its offices and inspectors to enforce the Lever-Rule protection against imports of the gray market batteries bearing the "DURACELL" mark. *See id.* ¶ 31; *see also Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 397 (6th Cir. 2016) (providing that a complaint should be read "holistically" and not limited to the portion dedicated to alleging jurisdiction), *cert. denied*, 137 S. Ct. 199 (2016). Accepting the factual allegations in the amended complaint as true and construing the allegations in a light most favorable to the non-movant, it

[10] In arguing that Plaintiff has failed to plead the court's jurisdiction, Duracell relies on the pleading requirement under USCIT Rule 8(a)(2) and cites to two Supreme Court cases interpreting that pleading requirement. Duracell Mot. Dismiss 11–12 (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). The court notes, however, that USCIT Rule 8(a)(2) concerns the pleading requirements for claims. The court addresses Duracell's argument based on the pleading requirement for jurisdiction, which is found in USCIT Rule 8(a)(1).

is reasonable to infer that, absent pre-importation judicial review, Customs' decision to grant Duracell's application for Lever-Rule protection will irreparably harm Plaintiff's business by restricting its imports of gray market battery products. The court finds that Plaintiff has satisfied the liberal pleading requirements of USCIT Rule 8(a)(1). *See* USCIT R. 8(f) (providing that "[p]leadings must be construed so as to do justice").

ii. Duracell's Factual Challenge

Duracell asserts that the alleged irreparable harm claimed by Plaintiff was not caused by Customs' decision to grant Duracell's application for Lever-Rule protection, which calls into question Plaintiff's claim that it would be irreparably harmed by Customs' Lever-Rule grant absent pre-importation judicial review. *See* Duracell Mot. Dismiss 12–13. The court addressed this issue in its previous opinion in determining that jurisdiction under § 1581(h) is proper. After considering the evidence pertaining to the issue of irreparable harm, including information gathered from briefs submitted by Plaintiff and the Government as well as two hearings, this court concluded that Plaintiff will suffer irreparable harm if it is unable to obtain pre-importation judicial review and provided the following explanation for its conclusion:

> Through an affidavit from the president of XYZ Corporation, witness testimony that was subject to cross-examination during the hearing held on June 14, 2017, and an exhibit indicating that Plaintiff's shipments of batteries have been held by Customs, Plaintiff has established that it would suffer irreparable harm without pre-importation judicial review of Customs' grant of Lever-Rule protection. Plaintiff has shown that as a result of the Lever-Rule ruling at issue, Plaintiff has lost approximately six customers (approximately 40% of its total customers), has lost revenue, has had several contracts cancelled, has suffered injury to his business reputation, has suffered injury to his goodwill with long-standing customers, and has lost the confidence of his customers. Plaintiff's customers canceled their orders and were reluctant to make any future purchases from Plaintiff because of concerns "that the batteries will be seized by [Customs], or that they will be exposed to suit and harassed by the [trademark owner]." Witness testimony indicated that, without judicial review at this juncture, Plaintiff would lose additional business opportunities, suffer harm to his goodwill and reputation, and be unable to continue business operations.

. . .

> The harms alleged by Plaintiff include significant non-monetary injuries to goodwill, reputation, and customer confidence that occurred prior to importation in anticipation of Customs' application of the Lever-Rule for Duracell batteries. Plaintiff's entries may also be subject to seizure and forfeiture, absent the ability to comply with any labeling requirements imposed by Customs. If Plaintiff is unable to obtain judicial review before importation of the goods, Plaintiff will experience harm that cannot be remedied by monetary relief. Therefore, Plaintiff will suffer irreparable harm if it is unable to obtain judicial review prior to the importation of the merchandise.

Opinion and Order Denying Gov't's Mot. Dismiss at *16–19 (internal citations and footnotes omitted); *see also Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) (explaining that harm such as "[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm."). Duracell argues that any alleged irreparable harm to Plaintiff was not caused by Customs' Lever-Rule grant, but rather by Duracell's efforts to protect its trademark rights against some of Plaintiff's customers through litigation. *See* Duracell Mot. Dismiss 12–13. The court finds that Duracell's argument as to the source of the irreparable harm is purely speculative and fails to rebut the evidence presented by Plaintiff in this action showing that Customs' Lever-Rule grant will cause Plaintiff irreparable harm if it is unable to obtain pre-importation judicial review. Further, Duracell's argument fails to account for Plaintiff's loss of business from its other customers. Thus, the court continues to find that Plaintiff has satisfied the irreparable harm requirement for § 1581(h) jurisdiction.

3. Prudential Standing

Duracell argues that Plaintiff does not have prudential standing[11] in this action because it is not within the zone of interests protected by the Lever-Rule regulations. *See* Duracell Mot. Dismiss 14–16.

[11] Standing poses both constitutional and prudential limitations on this court's jurisdiction. *See Bennett v. Spears*, 520 U.S. 154, 162 (1997) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). The constitutional limitations on the court's jurisdiction are derived from the case or controversy requirement of Article III. *See Liner v. Jafco, Inc.*, 375 U.S. 301, 306 (1964); *3V, Inc. v. United States*, 23 CIT 1047, 1049, 83 F. Supp. 2d 1351, 1352–53 (1999). "Article III standing requires plaintiffs to demonstrate: (1) that they have suffered some injury-in-fact; (2) a causal connection between the defendant's conduct and this injury-in-fact; and (3) that this injury is redressable by the court." *Canadian Lumber Trade Alliance v. United States*, 30 CIT __, __, 425 F. Supp. 2d 1321, 1335 (2006) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The court previously addressed the constitutional

The prudential limitations on the court's jurisdiction are "judicially self-imposed limits on the exercise of federal jurisdiction." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Plaintiff's cause of action arises out of the APA and challenges the validity of Customs' decision to grant Duracell's application for Lever-Rule protection, thereby restricting imports of gray market battery products bearing the "DURACELL" mark. *See* First Amended Compl. ¶¶ 32–59. The APA gives standing to any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. For a plaintiff to have prudential standing to bring a cause of action under the APA, the court must determine "'whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question.'" *Gilda Inds., Inc. v. United States*, 446 F.3d 1271, 1279–80 (Fed. Cir. 2006); *see also Bennett*, 520 U.S. at 162 (citing *Allen*, 468 U.S. at 751 and *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474–75 (1982)). This requirement is "'not meant to be especially demanding.'"[12] *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)).

The statute in question here is 19 U.S.C. § 1526, which is the statutory authority for 19 C.F.R. § 133.23 and the Lever-Rule protections against imports of restricted gray market goods. *See Animal Legal Def. Fund v. Quigg*, 932 F.2d 920, 937–38 (Fed. Cir. 1991) (discussing the meaning of "relevant statute" under § 702 of the APA for purposes of prudential standing). These laws protect United States trademark owners from the importation of gray market goods that are materially and physically different from those goods that are authorized by the trademark owner to be sold and imported in the United States. Conversely, any protection afforded to trademark owners under these laws regulate importers of gray market merchandise. As an importer of gray market batteries bearing Duracell's trademark, Plaintiff arguably falls within the zone of interests regulated by 19 U.S.C. § 1526. The court cannot say that Plaintiff's "'interests

limitations on the court's jurisdiction and determined that this action presents a case or controversy because Plaintiff satisfies the standing requirements of Article III of the U.S. Constitution. *See* Opinion and Order Denying Gov't's Mot. Dismiss at *20–21. Duracell's standing argument focuses on prudential limitations on the court's jurisdiction. *See* Duracell Mot. Dismiss 14–16.

[12] The court notes that the Supreme Court has called into question the strict application of the prudential standing doctrine, stating that a court "cannot limit a cause of action that Congress has created merely because 'prudence' dictates." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387–88 (2014).

are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 567 U.S. at 225 (quoting *Clarke*, 479 U.S. at 399). Therefore, Plaintiff has prudential standing to bring this action.

4. Exhaustion

Duracell argues that the court is without jurisdiction because Plaintiff has failed to exhaust administrative remedies before filing this action.[13] *See* Duracell Mot. Dismiss 28–31. Although the court ordinarily requires the exhaustion of administrative remedies,[14] litigants are statutorily permitted to bring an action pursuant to 28 U.S.C. § 1581(h) in this court "prior to the exhaustion of administrative remedies if the person commencing the action makes the demonstration required by such section." 28 U.S.C. § 2637(c). Congress has afforded litigants the ability to obtain judicial review prior to the importation of merchandise in exceptional circumstances "if the party commencing the action can demonstrate that he would be irreparably harmed if forced to exhaust his administrative remedies in following the traditional route prior to judicially challenging the Secretary's ruling or lack thereof." H.R. Rep. 96–1235, at 52 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 3769. As discussed in this opinion and in the court's previous opinion, Plaintiff has satisfied the four preconditions for jurisdiction under § 1581(h), including irreparable harm. Requiring the exhaustion of administrative remedies prior to bringing such an action "would frustrate the purpose of [§ 1581(h)], which was

[13] Duracell asserts that, prior to bringing this action, Plaintiff was required to exhaust the remedy available under 19 U.S.C. § 1625(b). *See* Duracell Mot. Dismiss 28–31. That statute provides that "[a] person may appeal an adverse interpretive ruling and any interpretation of any regulation prescribed to implement such ruling to a higher level of authority within Customs for de novo review," and "any such appeal shall be considered and decided no later than 60 days following the date on which the appeal is filed." 19 U.S.C. § 1625(b). Duracell claims that Plaintiff's April 10, 2017 letter requesting reconsideration of the Lever-Rule grant was an appeal of an adverse interpretive ruling, but Plaintiff commenced this action before the expiration of the 60-day time period given to the agency to make a decision on such an appeal. The court notes that the Government does not believe that the remedy provided under 19 U.S.C. § 1625(b) applies in this case. *See* Gov't's Resp. 4–5.

[14] The court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). The exhaustion requirement is based on the principle "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003). The overall purpose of the exhaustion doctrine is to "allow the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review– advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F. Supp. 2d 1344, 1346 (2006) (citing *Woodford v. Ngo*, 548 U.S. 81, 88–90 (2006)). Put simply, the exhaustion doctrine requires a litigant to avail itself of all available remedies at the administrative level as a precondition to judicial review.

enacted to provide importers with a means for obtaining pre-importation relief without having to" endure post-importation consequences. *Heartland By-Prods., Inc. v. United States*, 424 F.3d 1244, 1252 (Fed. Cir. 2005). The court declines, therefore, to require Plaintiff to exhaust its administrative remedies, if any, before bringing this action. To impose such a requirement would render § 1581(h) meaningless and would be inconsistent with the intent of Congress.

B. Motion to Dismiss for Failure to State a Claim Pursuant to USCIT Rule 12(b)(6)

Duracell moves to dismiss Plaintiff's amended complaint for failure to state a claim upon which relief may be granted pursuant to USCIT Rule 12(b)(6). *See* Duracell Mot. Dismiss 16–28. Pleadings before the court are governed by Rule 8(a) of the Rules of the Court, which provides that "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." USCIT Rule 8(a)(2). When deciding a motion to dismiss for failure to state a claim, the court accepts the well-pleaded factual allegations in the complaint as true and draws all reasonable inferences from those factual allegations in favor of the plaintiff. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1376 (Fed. Cir. 2000). The pleading requirement under USCIT Rule 8(a)(2) is satisfied if the complaint "state[s] a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). Dismissal under USCIT Rule 12(b)(6) is appropriate "only when it is 'beyond doubt that the plaintiff can prove no set of facts in support of his claim [that] would entitle him to relief.'" *Ponder v. United States*, 117 F.3d 549, 552 (Fed. Cir. 1997) (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) and citing *Trauma Serv. Grp. v.* United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997)).

Plaintiff's cause of action rests solely on APA challenges to Customs' decision to grant Duracell's application for Lever-Rule protection. *See* First Amended Compl. ¶¶ 32–59. Thus, to survive a motion to dismiss pursuant to USCIT Rule 12(b)(6), Plaintiff's amended complaint must contain a short and plain statement (1) identifying the final agency action, (2) showing that there is no other adequate remedy in a court, and (3) showing that it is plausible that Plaintiff is entitled to the

relief sought for each of its claims.[15] *See Twombly*, 550 U.S. at 570; *Perry Capital LLC v. Mnuchin*, __ F.3d __, __–__, Appeal Nos. 14–5243–54, 14–5260, 14–5262, at *48–50 (D.C. Cir. July 17, 2017); *Cohen v. United States*, 650 F.3d 717, 731 (D.C. Cir. 2011); *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 805–06 (D.C. Cir. 2006); *Shinyei Corp. of Am.*, 355 F.3d at 1305–12.

The agency action[16] challenged here is Customs' decision to grant Duracell's application for Lever-Rule protection against imports of certain gray market battery products bearing the Duracell trademark. *See* First Amended Compl. ¶ 8. Agency action is final if the act "mark[s] the 'consummation' of the agency's decisionmaking process" and "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *United States Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett*, 520 U.S. at 177–78). This court previously addressed this issue and concluded that the Lever-Rule grant was final agency action:

> Customs issued a notice on January 25, 2017 that it received an application from Duracell U.S. for Lever-Rule protection for gray market batteries bearing the "DURACELL" trademark. Customs published a second notice on March 22, 2017 announcing that it granted Duracell U.S.'s application for Lever-Rule protection. Customs' decision was final because it "mark[ed] the 'consummation' of the agency's decision making process" and notified the public of the type of conduct "from which 'legal consequences will flow.'" *See Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Customs' second notice declared definitively that the importation of the subject gray market batteries is restricted and that its decision was not subject to change or any conditions. Further, Customs' regulations provide that Lever-Rule restrictions take effect upon granting an application for protection. *See* 19 C.F.R. § 133.2(f).

Opinion and Order Denying Gov't's Mot. Dismiss at *22–23. Congress has not provided Plaintiff with another adequate remedy in a court to obtain judicial review of Customs' Lever-Rule grant. Thus,

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[15] Under the APA, "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704.

[16] Agency action is defined in the APA as including "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . . ." 5 U.S.C. § 551(13).

Plaintiff's amended complaint has identified final agency action for which there is no other adequate remedy in a court.[17]

The final hurdle for Plaintiff's action to survive Duracell's motion requires the court to determine whether Plaintiff is plausibly entitled to the relief sought for each of the counts in the amended complaint. The first count in Plaintiff's amended complaint claims that Customs' decision to grant Duracell's application for Lever-Rule protection was unlawful and must be set aside because Customs failed to follow notice and comment rulemaking requirements of the APA. *See* First Amended Compl. ¶¶ 32–47. Plaintiff alleges that Customs' decision to grant Lever-Rule protection against imports of gray market battery products bearing the Duracell trademark constituted the type of rulemaking that required Customs to follow notice and comment procedures.[18] *See* First Amended Compl. ¶¶ 32–47. Plaintiff requests the court to declare unlawful and set aside the Lever-Rule grant for failure to follow notice and comment procedures. It is not apparent that Customs followed notice and comment procedures before issuing the Lever-Rule grant. If the court determines that the Lever-Rule grant was subject to notice and comment rulemaking requirements, then Plaintiff would be entitled to the relief sought. *See* 5 U.S.C. § 553 (requiring agencies to notify the public and provide an opportunity for comment prior to issuing a rule); 5 U.S.C. § 706(2)(D) (providing that a reviewing court shall hold unlawful and set aside agency action performed "without observance of procedure required by law"). Thus, it is plausible that Plaintiff is entitled to the relief sought for the first count in the amended complaint.[19]

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[17] Duracell argues that Customs' Lever-Rule grant was not final agency action because Customs has not issued a written response to Plaintiff's letter requesting for reconsideration. *See* Duracell Mot. Dismiss 28–31. As explained above, *supra* Discussion Section A.4., Plaintiff was not required to exhaust its administrative remedies, if any, before bringing this action pursuant to 28 U.S.C. § 1581(h).

[18] Generally, agencies are free to develop policy through either rulemaking or adjudication. *See SEC v. Chenery*, 332 U.S. 194, 202 (1947); *see also Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524–25 (1978) (providing that a court will not impose more procedures than those imposed by Congress or the agency). According to the APA, an agency is required to notify the public of proposed rulemaking and provide the public with an opportunity to comment as part of the process for formulating a rule. *See* 5 U.S.C. § 553. A rule is defined as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy." 5 U.S.C. § 551(4). The APA's notice and comment requirement applies to legislative rules, but not to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A).

[19] Duracell argues that Plaintiff has failed to state a claim because the Lever-Rule grant was not subject to notice and comment requirements, but this argument would require addressing the merits of the case. *See* Duracell Mot. Dismiss 16–19. Duracell's arguments regarding the merits of the case have no bearing on whether Plaintiff has adequately stated its claims in this action as required by USCIT Rule 8(a). Therefore, the court declines to address Duracell's argument on the merits at this stage of the proceeding.

The second count in the amended complaint alleges that Customs' decision to grant Duracell's application for Lever-Rule protection was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law because Duracell has authorized the sale and importation of the battery products covered by the Lever-Rule grant. *See* First Amended Compl. ¶¶ 48–52. The Lever-Rule regulations authorize the imposition of import restrictions only on imports of gray market goods bearing a genuine trademark that are physically and materially different from the goods authorized by the United States trademark owner for importation or sale in the United States. *See* 19 C.F.R. § 133.23(a)(3) (describing the goods subject to Lever-Rule protections). Plaintiff claims that the Lever-Rule grant imposes restrictions on goods that are not physically and materially different from the goods authorized by Duracell for importation or sale in the United States. Customs is not authorized to restrict imports of gray market goods if they do not possess such physical and material differences. Assuming that Duracell has authorized the importation and sale of the merchandise covered by the Lever-Rule grant, Plaintiff has stated a plausible claim for relief. *See* 5 U.S.C. § 706(2)(A) (providing that a reviewing court shall hold unlawful and set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *see also Iqbal*, 556 U.S. at 678; *Amoco Oil Co.*, 234 F.3d at 1376.

The third count in the amended complaint alleges that Customs' decision to grant Duracell's application for Lever-Rule protection was arbitrary and capricious because Customs' description of the gray market battery products subject to import restrictions was impermissibly vague. *See* First Amended Compl. ¶¶ 53–59. A law that purports to define the lawfulness or unlawfulness of conduct "'is void for vagueness if its *prohibitions* are not clearly defined.'" *Nyeholt v. Sec'y of Veterans Affairs*, 298 F.3d 1350, 1356 (Fed. Cir. 2002) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). The void-for-vagueness doctrine explains that a law that regulates conduct is arbitrary if it does not provide the public with "a reasonable opportunity to know what is prohibited" and "provide explicit standards for those who apply them." *Grayned*, 408 U.S. at 108–09. Duracell's application sought Lever-Rule protection "against importations of OEM bulk packaged batteries and foreign retail packaged batteries, intended for sale in countries outside the United States that bear the 'DURACELL' mark." U.S. Customs and Border Protection Receipt of Application for "Lever-Rule" Protection, 51 Cust. Bull. & Dec. No. 4 (Jan. 25, 2017). Customs granted the application and explained that the subject "gray market Duracell battery products differ physically

and materially from the Duracell battery products authorized for sale in the United States with respect to the following product characteristics: label warnings, consumer assistance information, product guarantees, and warranty coverage." U.S. Customs and Border Protection Grant of "Lever-Rule" Protection, 51 Cust. Bull. & Dec. No. 12 (Mar. 22, 2017). Plaintiff claims that the Lever-Rule grant is impermissibly vague because "it does not describe the goods covered, nor the physical or material differences in sufficient detail to permit compliance by affected persons." First Amended Compl. ¶ 58. The court can hold unlawful and set aside the Lever-Rule grant if it determines that the grant fails to provide the public adequate notice of what conduct is restricted. *See* 5 U.S.C. § 706(2)(A) (providing that a reviewing court shall hold unlawful and set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). Plaintiff has shown that it is plausibly entitled to relief and has satisfied the liberal pleading requirements for each count in the amended complaint.

Duracell argues that Plaintiff's claim that Customs failed to observe notice and comment rulemaking requirements is barred by the statute of limitations for APA challenges because Plaintiff's action is actually a challenge to the Lever-Rule regulations promulgated in 1999. *See* Duracell Mot. Dismiss 20–22. A civil action against the United States seeking judicial review of agency action under the APA must be brought "within six years after the right of action first accrues." 28 U.S.C. § 2401. Actions brought pursuant to 28 U.S.C. § 1581(h) in this court are subject to a two-year statute of limitations. *See* 28 U.S.C. § 2636(i). Duracell's argument that Plaintiff's action is time barred by the statute of limitations fails even assuming, *arguendo*, that the shorter two-year statute of limitations applies here. Generally, "a statute of limitations begins to run . . . when the cause of action 'accrues'—that is, when 'the plaintiff can file suit and obtain relief.'" *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013) (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (internal quotations omitted). In the context of judicial review of agency action, "the cause of action accrues when all statutorily required or permitted agency review has been exhausted." *Impro Prods., Inc. v. Block*, 722 F.2d 845, 850–51 (D.C. Cir. 1983). As explained above, Plaintiff was not required to exhaust administrative remedies prior to obtaining judicial review of Customs' decision to grant Duracell's application for Lever-Rule protection. *See* 28 U.S.C. § 1581(h); H.R. Rep. 96–1235, at 52 (1980), *reprinted in* 1980

U.S.C.C.A.N. at 3769; *see also Heartland By-Prods., Inc.*, 424 F.3d at 1252. Where there is no prescribed administrative remedy, the cause of action for an APA challenge accrues when the challenged final agency action occurred, *see Impro Prods., Inc. v. Block*, 722 F.2d 845, 850–51 (D.C. Cir. 1983) (concluding that a cause of action accrues when the agency action occurred where no administrative review procedures exist), and the party has suffered a legal wrong, adversely affected, or aggrieved by the final agency action. *See Herr v. U.S. Forest Serv.*, 803 F.3d 809, 819–20 (6th Cir. 2015) (clarifying that a cause of action under the APA accrues when there is final agency action and injury-in-fact). Duracell's argument that Plaintiff's action is barred by the statute of limitations is predicated on the notion that Plaintiff's action is a facial challenge to the Lever-Rule application and decision process promulgated by Customs in 1999. *See* Duracell Mot. Dismiss 20–22; *see also Gray Market Imports and Other Trademarked Goods*, 64 Fed. Reg. 9,058 (Dep't Treasury Feb. 24, 1999) (final rule). Duracell mischaracterizes the nature of Plaintiff's action. Plaintiff does not seek to invalidate the 1999 Lever-Rule regulation, but rather the specific Lever-Rule grant issued by Customs in 2017 that restricted the importation of gray market battery products bearing the "DURACELL" mark. The Lever-Rule grant is the final agency action challenged in this case. Plaintiff's action is neither barred by the six-year nor the two-year statute of limitations because the Lever-Rule grant was issued in March 2017.

CONCLUSION

Therefore, upon consideration of Defendant-Intervenor Duracell U.S. Operations, Inc.'s Motion to Dismiss, and all other papers and proceedings in this action, it is hereby

ORDERED that Duracell's motion is denied; and it is further

ORDERED that this action shall proceed according to the Scheduling Order issued on August 3, 2017, ECF No. 90.

Dated: September 15, 2017
New York, New York

/*s*/ *Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 17–126

UNITED STATES, Plaintiff, v. GREENLIGHT ORGANIC, INC., Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 17–00031

[Plaintiff's action to recover unpaid duties and a civil penalty is exempt from the automatic stay of 11 U.S.C. § 362(a) pursuant to 11 U.S.C. § 362(b)(4).]

Dated: September 15, 2017

William Kanellis, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Plaintiff. With him on brief were *Chad A Readler*, Acting Assistant Attorney General, *Jeanne E Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director.

Peter S. Herrick, Peter S. Herrick, P.A., of St. Petersburg, FL, for Defendant. With him on brief were *Josh Levy*, Marlow, Adler, Abrams, Newman and Lewis, P.A., of Coral Gables, FL, and *Gregory E. Garman* and *Mark M. Weisenmiller*, Garman Turner Gordon LLP, of Las Vegas, NV.

OPINION

Choe-Groves, Judge:

Before the court is the issue of whether the automatic bankruptcy stay of 11 U.S.C. § 362(a) (2012)[1] applies to an action brought pursuant to 19 U.S.C. § 1592 for fraudulent misrepresentations made in the course of importing merchandise into the commerce of the United States. For the reasons set forth below, the court finds that the stay in 11 U.S.C. § 362(a) does not apply and this action may proceed accordingly.

BACKGROUND

This action concerns the alleged fraudulent importation of athletic wearing apparel from Vietnam, entered into the United States by Greenlight Organic, Inc. ("Greenlight" or "Defendant") from January 1, 2007 through December 31, 2011. *See* Summons, Feb 8, 2017, ECF No. 1; Compl. ¶ 3, Feb 8, 2017, ECF No. 2. The United States ("Plaintiff" or "Government") commenced this action on February 8, 2017 seeking to recover unpaid duties, fees, and a penalty for fraudulent violation of 19 U.S.C. § 1592(a). *See* Compl. ¶ 1. Defendant filed its answer on April 21, 2017, and the court entered a scheduling order on May 16, 2017 setting forth the deadlines for discovery. *See* Scheduling Order, May 16, 2017, ECF No. 12. The court subsequently amended the scheduling order and set the deadline for initial disclosures for July 27, 2017. *See* Scheduling Order, July 14, 2017, ECF No. 14 (granting Defendant's motion to amend the scheduling order). The

[1] All further citations to Titles 11, 19, and 28 of the U.S. Code are to the 2012 edition.

court held a teleconference with the Parties on July 26, 2017. *See* Teleconference, July 26, 2017, ECF No. 16. During the teleconference, the court was informed that Defendant had filed for bankruptcy in the United States Bankruptcy Court for the District of Nevada on July 25, 2017, and Defendant believed that the proceedings in this action were automatically stayed pursuant to 11 U.S.C. § 362(a). *See* Teleconference. Plaintiff argued, however, that the automatic stay was inapplicable because 11 U.S.C. § 362(b)(4) excluded actions against a debtor by the government when the matters involved the government's police power. *See* Teleconference. The court requested that the Parties submit briefs addressing whether 11 U.S.C. § 362(a) stayed this action. Briefing was completed on August 8, 2017. *See* The United States Mem. Relating to 11 U.S.C. § 362, July 28, 2017, ECF No. 17 ("Pl. Memo."); Debtor's Mem. 11 U.S.C. § 362, Aug. 4, 2017, ECF No. 18 ("Def. Memo"); The United States' Reply in Supp. Mem. Relating to 11 U.S.C. § 362, Aug. 8, 2017, ECF No. 19 ("Pl. Reply").

JURISDICTION

The court has jurisdiction over the underlying action pursuant to 28 U.S.C. § 1582. A non-bankruptcy court has jurisdiction to decide whether the automatic stay provision of 11 U.S.C. § 362 stays proceedings that have been properly commenced in that court. *See Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 384 (6th Cir. 2001) (finding that "when a party seeks to commence or continue proceedings in one court against a debtor or property that is protected by the stay automatically imposed upon the filing of a bankruptcy petition, the non-bankruptcy court properly responds to the filing by determining whether the automatic stay applies to (*i.e.*, stays) the proceedings.").[2] This court has jurisdiction, therefore, to determine whether the automatic stay applies to this action.

[2] The court notes that several circuit courts, as well as this Court, have similarly held that a non-bankruptcy court possesses jurisdiction to determine the applicability of the automatic stay. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1107 (9th Cir. 2005) (holding "that a district court has jurisdiction to decide whether the automatic stay applies to a proceeding pending before it, over which it would otherwise have jurisdiction."); *Brock v. Morysville Body Works, Inc.*, 829 F.2d 383, 387 (3d Cir. 1987) (finding that the non-bankruptcy court may "determine the applicability of the automatic stay."); *Hunt v. Bankers Tr. Co.*, 799 F.2d 1060, 1069 (5th Cir. 1986) ("While section 362 of the Bankruptcy Code stays the continuation of a judicial proceeding that was commenced before a commencement of the bankruptcy case, the Texas district court had jurisdiction to determine its applicability to the case pending in the Texas district court, and particularly to enforcement of the order that forbade filing the Chapter 11 proceeding in Louisiana."); *In re Baldwin-United Corp. Litig.*, 765 F.2d 343, 347 (2d Cir. 1985) ("The court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction but also the more precise question whether the proceeding pending before it is subject to the automatic stay."); *United States v. Rupari Food Servs., Inc.,* 41 CIT __, __, Slip Op 17–104 *5 n.6 (Aug. 10, 2017)

DISCUSSION

Plaintiff argues that when the action instituted by the government involves claims of fraud against a debtor, such as an action pursuant to 19 U.S.C. § 1592, the automatic stay is inapplicable by operation of the exemption in 11 U.S.C. § 362(b)(4). *See* Pl. Memo. 6–14. Defendant asserts that 19 U.S.C. § 1592 is not the type of action that is exempted from the stay and this action should be stayed pending resolution of the proceedings in the bankruptcy court. *See* Def. Memo. 4–10.

Generally, when a debtor files a bankruptcy petition, 11 U.S.C § 362(a) operates to stay any pending, or subsequently filed, judicial proceedings against the debtor. *See* 11 U.S.C. § 362(a).[3] "The purpose of the automatic stay is to 'give[] the debtor a breathing spell from his creditors . . . [and] permit[] the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.'" *In re Robinson*, 764 F.3d 554, 559 (6th Cir. 2014) (quoting H.R. REP. No. 95–595, at 340 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–97). The automatic stay, however, "does not apply in all cases; there are statutory exemptions, and there are non-statutory exemptions." *Dominic's Rest. Of Dayton, Inc. v. Mantia*, 683 F.3d 757, 760 (6th Cir. 2012). One statutory exemption relates to actions by a governmental unit seeking "to enforce such governmental unit's . . . police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power[.]" 11 U.S.C. § 362(b)(4).

To determine if the judicial proceeding is within the exemption of 11 U.S.C. § 362(b)(4), courts have applied two tests: the pecuniary purpose test and the public policy test. *See In re Nortel Networks, Inc.*, 669 F.3d 128, 139 (3d. Cir. 2011); *Chao*, 270 F.3d at 384; *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1108 (9th Cir. 2005). The tests can be summarized as follows:

("Where a party has filed for bankruptcy pursuant to Chapter 11, the non-bankruptcy court in which other litigation is pending possesses concurrent jurisdiction to determine the applicability of a stay.").

[3] Section 362(a) of Title 11 of the U.S. Code provides as follows:

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

> The pecuniary purpose test asks whether the government primarily seeks to protect a pecuniary governmental interest in the debtor's property, as opposed to protecting the public safety and health. The public policy test asks whether the government is effectuating public policy rather than adjudicating private rights. If the purpose of the law is to promote public safety and welfare or to effectuate public policy, then the exception to the automatic stay applies. If, on the other hand, the purpose of the law is to protect the government's pecuniary interest in the debtor's property or primarily to adjudicate private rights, then the exception is inapplicable.

In re Nortel Networks, Inc., 669 F.3d at 139–40. Therefore, the court "must determine the primary purpose of the law that [the government] is attempting to enforce." *Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 865 (4th Cir. 2001) (citing *Yellow Cab Coop. Ass'n v. Metro Taxi, Inc. (In re Yellow Cab Coop.)*, 132 F.3d 591, 597 (10th Cir. 1997); *Javens v. City of Hazel Park (In re Javens)*, 107 F.3d 359, 367–68 (6th Cir. 1997); *E.E.O.C. v. Rath Packing Co.*, 787 F.2d 318, 324 (8th Cir. 1986)).

The Government's action is brought pursuant to 19 U.S.C. § 1592(a), which makes it unlawful for any person, by fraud, gross negligence, or negligence, to "enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of . . . any document or electronically transmitted data or information, written or oral statement, or act which is material and false." 19 U.S.C. § 1592(a)(1)(A).[4] 19 U.S.C. § 1592, the Government can seek two types of money damages: 1) civil penalties pursuant to 19 U.S.C. § 1592(c);[5] and 2) a restoration of any lawful duties pursuant to 19 U.S.C. § 1592(d).[6] *United States v. Ford Motor Co.*, 497 F.3d 1331, 1338 (Fed. Cir. 2007). Plaintiff alleges that Greenlight made certain fraudulent misrepresentations on importation documents.[7]

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[4] The general prohibition of 19 U.S.C. § 1592(a) operates "[w]ithout regard to whether the United States is or may be deprived for all or a portion of any lawful duty, tax, or fee thereby." 19 U.S.C. § 1592(a)(1).

[5] Under 19 U.S.C. § 1592(c)(1), "a fraudulent violation of [19 U.S.C. § 1592(a)] is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise." 19 U.S.C § 1592(c)(1).

[6] Under 19 U.S.C. § 1592(d), "if the United States has been deprived of lawful duties, taxes, or fees as a result of violation of [19 U.S.C. § 1596(a), Customs] shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed." 19 U.S.C. § 1592(d).

[7] The Government alleges that Greenlight instructed its Vietnamese manufacturer to state falsely that the imported apparel was made with recycled polyester rather than first-run polyester, which resulted in lower amounts of duties than would have been paid had the

See Compl. Defendant asserts that because the Government seeks monetary damages, the purpose of the action is to gain an interest in the Defendant's property and to adjudicate private rights. *See* Def. Memo 7–10. The legislative history notes, however, that the purpose of 19 U.S.C § 1592 is "to encourage accurate completion of the entry documents upon which Customs must rely to assess duties and administer other customs laws." S. Rep. No. 95–778, at 17, *as reprinted in* 1978 U.S.C.C.A.N. 2211, 2229. Congress' decision "to tie the maximum penalty to the culpability of the violator further suggests that '[19 U.S.C. § 1592] is driven primarily by considerations of deterrence rather than compensation.'" *United States v. Nat'l Semiconductor Corp.*, 547 F.3d 1364, 1370 (Fed. Cir. 2008) (quoting *United States v. Complex Mach. Works Co.*, 23 CIT 942, 950, 83 F. Supp. 2d 1307, 1315 (1999)).[8] Despite Defendant's arguments, simply because the action involves a pecuniary component, it "does not abrogate [the government's] police power function." *In re Universal Life Church, Inc.*, 128 F.3d 1294, 1299 (9th Cir. 1997). Therefore, an action brought pursuant to 19 U.S.C § 1592 is "effectuating public policy rather than adjudicating private rights," *Nortel Networks*, 669 F.3d at 140, and is an exercise of the Government's police and regulatory power.

Defendant asserts that the action should be stayed because the Government seeks to "recover" unpaid duties and a penalty for fraud, rather than merely to fix the damages for the alleged violation. *See* Def. Memo 9. Defendant argues that the damages the Government seeks were fixed when Customs issued a duty demand and a penalty notice. *See id.* at 10. Defendant reasons that Plaintiff is seeking to enforce these damages through this action to gain a pecuniary interest in the Defendant's property. *See id.* at 9–10. Plaintiff represents, however, that the "purpose of this lawsuit is to assess liability and fix damages" for Greenlight's allegedly fraudulent conduct. Pl. Reply 9. *See also* Pl. Memo 14. The automatic stay does not apply "where a governmental unit is suing a debtor to prevent or stop violation for fraud, . . . or similar police or regulatory laws, or attempting to fix damages for violation of such a law[.]" S. Rep. No. 95–989 at 52

apparel been classified correctly. *See* Compl. ¶¶ 4–7. The Government asserts further that Greenlight submitted invoices for its apparel that fraudulently understated the transaction costs. *See id.* ¶¶ 9–14. The Government's action seeks to recover unpaid duties and penalize Defendant for fraudulent violations of 19 U.S.C § 1592(a). *See id.* ¶¶ 21–26. The Government asserts that Greenlight owes $238,516.56 in unpaid duties and fees related to its importations and $3,232,032 as a penalty for fraudulent misrepresentations. *See id.* ¶¶ 20–26.

[8] "[T]he plain language of the statute supports [the] position that the damages authorized by [19 U.S.C. § 1592(c)] are punitive." *Nat'l Semiconductor Corp.*, 547 F.3d at 1369–70. "The history of [19 U.S.C. § 1592(d)] is consistent with the view that Congress intended to continue to impose liability for unpaid duty on any party guilty of fraud or aiding and abetting fraud." *United States v. Inn Foods, Inc.*, 560 F.3d 1338, 1348 (Fed. Cir. 2009).

(1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5838. *See also* H.R. Rep. No. 95–595 at 343 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6299. Despite Defendant's arguments to the contrary, the amount of unpaid duties and penalty for fraud in this case are not yet fixed because the court must review "all issues, including the amount of the penalty," *de novo. See* 19 U.S.C. § 1592(e). Only if the Government successfully establishes a violation of 19 U.S.C § 1592(a) may a judgment for unpaid duties and a penalty be entered. *See* 19 U.S.C. § 1592(c)–(e). "It is well established that the governmental unit exception of § 362(b)(4) permits the *entry* of a money judgment against a debtor so long as the proceeding in which such a judgment is entered is one to enforce the governmental unit's police or regulatory power." *S.E.C.* v. Brennan, 230 F.3d 65, 71 (2d Cir. 2000) (emphasis in original).[9] Here, an "entry of judgment would simply fix the amount of the government's unsecured claim against [Greenlight]." *In re Commonwealth Companies, Inc.*, 913 F.2d 518, 524 (8th Cir. 1990). A money judgment "would not convert [the Government] into a secured creditor, force the payment of a prepetition debt, or otherwise give the government a pecuniary advantage over other creditors of [Greenlight's] estate." *Id.*

The Government seeks in this case to enforce United States customs laws related to the fraudulent importation of merchandise, which is the type of enforcement action that is contemplated under 11 U.S.C. § 362(b)(4). Therefore, to the extent that the Government seeks entry of a money judgment, this action against Greenlight is within the exception of 11 U.S.C. § 362(b)(4) and exempt from the automatic stay provision of 11 U.S.C. § 362(a). The action shall proceed accordingly.

Dated: September 15, 2017
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

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[9] As the Court of Appeals for the Second Circuit explained:

> When the government seeks to impose financial liability on a party, it is plainly acting in its police or regulatory capacity – it is attempting to curb certain behavior (such as defrauding investors, or polluting groundwater) by making the behavior that much more expensive. It is this added expense that deters a party from defrauding or polluting – not the identity of the entity which it must eventually pay. Accordingly, up to the moment when liability is definitively fixed by entry of judgment, the government is acting in its police or regulatory capacity – in the public interest, it is burdening certain conduct so as to deter it. However, once liability is fixed and a money judgment has been entered, the government necessarily acts only to vindicate its own interest in collecting its judgment. Except in an indirect and attenuated manner, it is no longer attempting to deter wrongful conduct. It is therefore no longer acting in its "police or regulatory" capacity, and the exception to the exception does not apply.

Brennan, 230 F.3d at 72–73.

Slip Op. 17–127

FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH, L.L.C., THE GARLIC COMPANY, VALLEY GARLIC, and VESSEY AND COMPANY, INC., Plaintiffs, HEBEI GOLDEN BIRD TRADING CO., LTD., CHENGWU COUNTY YUANXIANG INDUSTRY & COMMERCE CO., LTD., QINGDAO XINTIANFENG FOODS CO., LTD., SHENZHEN BAINONG CO., LTD., YANTAI JINYAN TRADING, INC., JINING YIFA GARLIC PRODUCE CO., LTD., JINAN FARMLADY TRADING CO., LTD., and WEIFANG HONGQIAO INTERNATIONAL LOGISTICS CO., LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant, SHENZHEN XINBODA INDUSTRIAL CO., LTD., JINXIANG MERRY VEGETABLE CO., LTD., and CANGSHAN QINGSHUI VEGETABLE FOODS CO., LTD., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 14–00180

[Commerce's final results of redeterminations in antidumping reviews sustained.]

Dated: September 19, 2017

Michael J. Coursey, John M. Herrmann, II, and *Joshua R. Morey*, Kelley Drye & Warren, LLP, of Washington, DC, for plaintiffs.

Robert T. Hume, Hume & Associates, LLC, of Taos, NM, for consolidated plaintiffs Hebei Golden Bird Trading Co., Ltd., Qingdao Xintianfeng Foods Co., Ltd., Shenzhen Bainong Co., Ltd., Yantai Jinyan Trading, Inc., Jining Yifa Garlic Produce Co., Ltd., Jinan Farmlady Trading Co., Ltd., and Weifang Hongqiao International Logistics Co., Ltd.

Yingchao Xiao and *Jianquan Wu*, Lee & Xiao, of San Marino, CA, for consolidated plaintiff Chengwu County Yuanxiang Industry & Commerce Co., Ltd.

Richard P. Schroeder, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Chad A.* Readler, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Khalil N. Gharbieh*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Gregory S. Menegaz, J. Kevin Horgan, and *Alexandra H. Salzman*, deKieffer & Horgan PLLC, of Washington, DC, for defendant-intervenor Shenzhen Xinboda Industrial Co., Ltd.

John J. Kenkel, deKieffer & Horgan PLLC, of Washington, DC, for defendant-intervenors Jinxiang Merry Vegetable Co., Ltd. and Cangshan Qingshui Vegetable Foods Co., Ltd.

OPINION

Restani, Judge:

Before the court is the U.S. Department of Commerce ("Commerce")'s Final Results of Second Redetermination Pursuant to Remand, Consol. Ct. No. 14–00180, ECF No. 115–1 ("*18th AR Second Remand Results*") concerning the eighteenth periodic administrative review ("18th AR") of the antidumping ("AD") duty order on fresh

garlic from the People's Republic of China ("PRC"). *See Antidumping Duty Order: Fresh Garlic from the People's Republic of China*, 59 Fed. Reg. 59,209 (Dep't Commerce Nov. 16, 1994). Also before the court is Commerce's Final Results of Redetermination Pursuant to Remand, Ct. No. 15–00179, ECF No. 74–1 ("*19th AR Remand Results*") concerning the nineteenth periodic administrative review ("19th AR") of the same AD order.[1] For the reasons stated below, Commerce's 18th AR Second Remand Results and 19th AR Remand Results are both sustained.

BACKGROUND

I. Eighteenth Administrative Review

In its final results for the 18th AR,[2] Commerce selected the Philippines as the primary surrogate country for a valuation of the factors of production ("FOPs") to calculate normal value. *See Fresh Garlic From the People's Republic of China: Final Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011–2012*, 79 Fed. Reg. 36,721 (Dep't Commerce June 30, 2014) ("*18th AR Final Results*"); Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review: Fresh Garlic from the People's Republic of China; 2011–2012 Administrative Review at 5, 18th AR PD[3] 361 (June 23, 2014) ("*18th AR I&D Memo*"). The Philippines' 2011 fresh garlic production, however, comprised just 0.04% of the world market, ranking it forty-forth in the world. *See* Golden Bird SV Info. at Ex. 1 at 3, 18th AR PD 111 (June 26, 2013). As detailed in *Fresh Garlic Producers Ass'n v. United States*, 121 F. Supp. 3d 1313, 1338–40 (CIT 2015) ("*FGPA I*") and *Fresh Garlic Producers Ass'n v. United States*, 180 F. Supp. 3d 1233,

[1] Commerce issued its *19th AR Remand Results* in consolidated court number 15–00179. That consolidated action was deconsolidated and the issues in the original complaint of that case were consolidated under the instant consolidated court number 14–00180. *See* Order, July 12, 2017, Consol. Ct. No. 14–00180, ECF No. 85.

[2] The 18th AR covers the period of review ("POR") from November 1, 2011 through October 31, 2012. *Fresh Garlic From the People's Republic of China: Preliminary Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011–2012*, 78 Fed. Reg. 77,653, 77,653 (Dep't Commerce Dec. 24, 2013) ("*Preliminary Results*"). Commerce selected Hebei Golden Bird Trading Co., Ltd. ("Golden Bird") and Shenzhen Xinboda Industrial Co., Ltd. ("Xinboda") as the mandatory respondents in the 18th AR. *Id.*

[3] "18th AR PD" refers to the original public record index for consolidated court number 14–00180. *See* Public Record Index, Consol. Ct. No. 14–00180, ECF No. 24–3. "18th AR Remand II PD" will refer to the second remand public record index for consolidated court number 14–00180." *See* Exhibit Remand Administrative Record Index, Consol. Ct. No. 14–00180, ECF No. 116–1. And "19th AR PD" refers to the public record index for court number 15–00179, *see* Public Record Index, Ct. No. 15–00179, ECF No. 19–1, while "19th AR Remand PD" refers to the remand public record index for court number 15–00179, *see* Exhibit Public Record Index, Ct. No. 15–00179, ECF No. 75–1.

1242–45 (CIT 2016) ("*FGPA II*"), the court twice rejected Commerce's determination that the Philippines is a "significant producer."[4]

Following the court's second remand in *FGPA II*, Commerce reopened the administrative record for parties to propose new surrogate countries and to comment on the existing surrogate countries, India and Thailand. Reopening the Record at 1, 18th AR Remand II PD 2 (July 25, 2016). This decision came after two ex parte calls between Commerce and counsel for the Fresh Garlic Producers Association ("FGPA"), which calls Commerce noted on the record in short, written memoranda. Commerce Ex-Parte Mem., 18th AR Remand II PD 1 (July 22, 2016). In response to Commerce reopening the record, FGPA submitted data for a new surrogate country, Ukraine, and Xinboda updated the surrogate value data for India and Thailand. FGPA New Factual Data, 18th AR Remand II PD 3–19 (July 29, 2016); Xinboda Updated Factual Data, 18th AR Remand II PD 28–30 (Aug. 15, 2016). Xinboda filed a mandamus petition with the court attempting to keep the record closed, which petition the court denied. *Fresh Garlic Producers Ass'n v. United States*, 190 F. Supp. 3d 1302, 1306–08 (CIT 2016). Subsequently, in its *18th AR Second Remand Results*, Commerce selected Ukraine as the primary surrogate country, rejecting Thailand and India. *18th AR Second Remand Results* at 31.[5] Xinboda now challenges Commerce's decision to reopen the record, as well as Commerce's selection of Ukraine as the primary surrogate country.

II. Nineteenth Administrative Review

In the final results for the 19th AR, covering the POR from November 1, 2012 through October 31, 2013, the two mandatory respondents, Golden Bird and Jinxiang Hejia Co., Ltd., received total AFA rates of $4.71/kg. *Fresh Garlic From the People's Republic of China: Final Results and Partial Rescission of the 19th Antidumping Duty Administrative Review; 2012–2013*, 80 Fed. Reg. 34,141, 34,141–42 (Dep't Commerce June 15, 2015) ("*19th AR Final Results*"); Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review: Fresh Garlic from the People's Republic of China; 2012–2013 Administrative Review at 12, 19th AR PD 233

[4] Commerce's surrogate country selection is constrained by 19 U.S.C. § 1677b(c)'s requirement to use the "best available information" and to choose a country "at a level of economic development comparable to that of the [nonmarket economy, that is a] . . . *significant producer[] of comparable merchandise*." 19 U.S.C. § 1677b(c) (emphasis added).

[5] Commerce's decision to use Ukraine as the primary surrogate country rather than the Philippines changed Xinboda's dumping margin from $1.82/kilogram ("kg") to $2.19/kg. *See 18th AR Final Results*, 79 Fed. Reg. at 36,723; *18th AR Second Remand Results* at 19. Because the other mandatory respondent in the 18th AR, Golden Bird, received an Adverse Facts Available ("AFA") rate, Commerce based the separate rate for the 18th AR entirely on Xinboda's dumping margin. *See 18th AR Final Results*, 79 Fed. Reg. at 36,723.

(June 5, 2015) ("*19th AR I&D Memo*"). As discussed in *Shenzhen Xinboda Industrial Co., Ltd. v. United States*, 180 F. Supp. 3d 1305, 1321 (CIT 2016) ("*Shenzhen Xinboda*"), because the mandatory respondents received AFA rates and volume data for the mandatory respondents was not available, Commerce did not employ its usual method of averaging the mandatory respondents' rates to determine the dumping margin for non-investigated separate rate companies, which included Xinboda. *See* 19 U.S.C. § 1673d(c)(5); *19th AR I&D Memo* at 7. Instead, Commerce calculated the separate rate for the 19th AR by using the separate rate of $1.82/kg from the prior AR, that is, the *18th AR Final Results. 19th AR I&D; Memo* at 7; *18th AR Final Results*, 79 Fed. Reg. at 36,723. In *Shenzhen Xinboda*, the court remanded Commerce's use of the 18th AR's separate rate to calculate the 19th AR's separate rate because Commerce had calculated the 18th AR's rate using the rejected Philippines as the primary surrogate country. *See Shenzhen Xinboda*, 180 F. Supp. 3d at 1323. The court instructed that "Commerce shall reconsider the separate rate applied to Xinboda and the other non-examined companies [in the 19th AR], by either employing a different reasonable method to calculate the separate rate, such as reopening the record to examine new mandatory respondents, reopening the record to collect information from which to calculate a reliable separate rate, or if it results in a non-punitive rate for separate respondents, adjusting the separate rate assigned based on the results of the remand pursuant to *FGPA II*." *Id.* at 1324. On remand in the 19th AR, Commerce chose to continue basing the separate rate on the 18th AR's separate rate, calculated by Commerce to be $2.19/kg. *See 19th AR Remand Results* at 2; *18th AR Second Remand Results* at 19. Xinboda now challenges Commerce's reliance on the 18th AR's separate rate to calculate the 19th AR's separate rate.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court upholds Commerce's final results in an AD review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Eighteenth Administrative Review

A. Reopening the Record

In its *18th AR Second Remand Results*, Commerce reopened the record for the submission of new surrogate country data. *18th AR Second Remand Results* at 4–5, 20. Commerce justified this decision by stating that the court had not prohibited Commerce from doing so, and had considered the possibility of an expanded surrogate country record in *FGPA I* and *FGPA II*. *Id.* at 20. Commerce also stated that it had given parties sufficient time to submit surrogate country data and comment on other parties' submissions. *Id.* at 20–21.

Xinboda continues to argue that Commerce's decision to reopen the 18th AR's record and accept the submission of new surrogate countries to value the FOPs was an abuse of discretion. Consol. Pl. Shenzhen Xinboda Indus. Co., Ltd. Cmts. in Opp'n to U.S. Dep't of Commerce's Remand Redetermination 5–27, Consol. Ct. No. 14–00180, ECF No. 127 ("Xinboda Cmts."); Consol. Pl. Shenzhen Xinboda Indus. Co., Ltd. Reply Cmts. in Opp'n to U.S. Dep't of Commerce's Remand Redetermination 3–10, Consol. Ct. No. 14–00180, ECF No. 133 ("Xinboda Reply"). Xinboda argues that Commerce's ex parte phone calls with FGPA influenced its decision, and contends that Commerce did not "need" to reopen the record because data for India and Thailand existed on the record. Xinboda Cmts. at 11, 21–27. In addition, Xinboda states that reopening the record frustrates the finality of judicial decisions. *Id.* at 19–20. Xinboda also contends that FGPA's filing of data from Ukraine was untimely, and that FGPA did not exhaust its administrative remedies before submitting the information. *Id.* at 14. Lastly, Xinboda argues that allowing Commerce to reopen the record and ultimately calculate a higher dumping margin will have a chilling effect on respondents' willingness to challenge Commerce's dumping determinations because even though a respondent may be successful before the court, it may ultimately receive a higher rate than calculated in the final results. *Id.* at 19–20; Xinboda Reply at 8–9.

The government and FGPA respond that Commerce's decision to reopen the record was not arbitrary and capricious. Both parties contend that the court explicitly mentioned the possibility of reopening the record in *FGPA I* and implicitly did so in *FGPA II*. Def.'s Resp. to Cmts. Regarding Second Redetermination 9, Consol. Ct. No. 14–00180, ECF No. 132 ("Gov't Resp."); Pls.' Resp. to Def.-Intvr.'s Cmts. on Remand Results 3–4, Consol. Ct. No. 14–00180, ECF No. 131 ("FGPA Resp."). Next, the government and FGPA argue that

Commerce's ex parte phone conversations are not problematic because Commerce, in line with the applicable statutes and regulations, made a public record of the conversations. Gov't Resp. at 9; FGPA Resp. at 4–5. The government further states that it is irrelevant whether Commerce "needed" to reopen the record, given the existence of Thai and Indian data, because Commerce has the discretion to reopen the record. Gov't Resp. at 15. In addition, the government argues that permitting Commerce to reopen the record does not call into question the finality of Commerce's dumping determinations because the court has the authority to forbid Commerce from reopening the record. *Id.* at 14–15. Lastly, the government contends that neither timeliness nor exhaustion issues precluded FGPA from submitting data on Ukraine because Commerce requested the additional information from parties, thus creating a new deadline. *Id.* at 12–14.

Commerce properly exercised its discretion in deciding to reopen the record. Reopening the record on remand is a matter largely left up to Commerce's discretion. *See NTN Bearing Corp. of Am. v. United States*, 25 CIT 118, 124, 132 F. Supp. 2d 1102, 1107 (2001) ("As long as the Court does not forbid Commerce from considering new information, it remains within Commerce's discretion to request and evaluate new data."); *Laclede Steel Co. v. United States*, 19 CIT 1076, 1078 (1995) ("Any decision to expand the administrative record upon remand is well within [Commerce's] discretion, absent express language from the court barring such action."); *see also Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379, 1382 (Fed. Cir. 2003) ("Whether on remand the Commission reopens the evidentiary record, while clearly within its authority, is of course solely for the Commission itself to determine."). There is no reason to set aside Commerce's decision on the facts here. As discussed below, the Thai and Indian data that existed on record prior to Commerce reopening the record suffered from significant flaws. Indeed, the court stated in *FGPA I* that "[u]pon remand, Commerce can decide to compile a second list of potential surrogate countries," and that "Commerce may have to expand its surrogate country list to include other [market economy] countries." 121 F. Supp. 3d at 1340 n.17, 1342. The court said nothing to the contrary in *FGPA II*. There, the court noted that, in this case, "the significant producers are not closely economically comparable and the chosen economically comparable countries may not be significant producers." *FGPA II*, 180 F. Supp. 3d at 1244. Accordingly, the court is not now convinced that reopening the record was beyond Commerce's discretion.

None of Xinboda's arguments to the contrary are persuasive. First, the fact that Commerce reopened the record shortly after an ex parte

phone call, although concerning, is not enough to invalidate Commerce's decision. Commerce complied with its statutory duties regarding ex parte conversations and made a record of the phone calls, detailing that Commerce discussed with FGPA's counsel "the potentiality of opening the record in this review." Ex Parte Phone Call Mem. at 1, 18th AR Remand II PD 1 (July 22, 2016); *see* 19 U.S.C. § 1677f(a)(3) (directing Commerce to maintain a record of ex parte meetings). In addition, Xinboda's finality concerns fall short because the court has the authority to instruct Commerce not to reopen the record, thus preventing endless reopening of the record. *See NTN Bearing*, 25 CIT at 124, 132 F. Supp. 2d at 1107 (stating that Commerce has the discretion to request new data "[a]s long as the Court does not forbid Commerce" from doing so). Furthermore, Xinboda's contention that FGPA's submission of Ukrainian data was untimely and that FGPA did not exhaust its administrative remedies fails because Commerce invited the parties to submit surrogate country data. Thus, the relevant deadlines were not those governing the submission of data during the course of an administrative review, but the deadlines set by Commerce when it made the invitation to submit new surrogate data. *See Elkay Mfg. Co. v. United States*, Slip Op. 15–33, 2015 WL 1786940, at *3 (CIT Apr. 20, 2015) (rejecting a similar argument because "[t]he remand proceeding is being conducted under the authority of this Court pursuant to statutory provisions governing judicial review, not the provisions governing the time limits for the agency's conducting of the investigation prior to the publication of the contested determination.") (internal citations omitted). FGPA's submission of the Ukrainian data occurred within these deadlines. *See* 19 C.F.R. § 351.301(c)(3)(i) (stating that "[a]ll submissions of factual information to value factors of production . . . are due no later than 30 days before the scheduled date of the preliminary determination."); Extending SV Deadline at 1, 18th AR Remand II PD 20 (Aug. 3, 2016) (Commerce extending the deadline for new surrogate value information to August 8, 2016); FGPA Remand II SV Submission at 1, 18th AR Remand II PD 3–19 (July 29, 2016) (FGPA submitting new surrogate value data on July 29, 2016); Reopening the Record at 1, 18th AR Remand II PD 2 (July 25, 2016) (Commerce reopening the record for parties "to propose new and comment on existing surrogate country candidates and surrogate values," and setting a deadline of July 29, 2016 by which to do so).

Although the court recognizes the potentially chilling effect on challenges to Commerce determinations that Commerce's ability to reopen the record and ultimately calculate a higher dumping margin may have, this risk should not have been unknown to Xinboda given

the court's statements in *FGPA I* on the possibility of reopening the record and Commerce's discretion to do so. Xinboda cites no authority for the proposition that when Commerce opens the record on remand it must ultimately choose data favorable to the party who first won before the court. Thus, the court will not overturn Commerce's decision to reopen the record for surrogate country selection purposes.

B. Selection of Ukraine

In its *18th AR Second Remand Results*, Commerce selected Ukraine as the primary surrogate country, rather than India or Thailand. *18th AR Second Remand Results* at 1. Commerce concluded that Ukraine is economically comparable to the PRC, a significant producer of fresh garlic, and that Ukraine offers the highest quality data. *Id.* at 7–9, 13–15. As for India, Commerce rejected it as a potential surrogate country primarily because it is not economically comparable to the PRC. *Id.* at 7, 23, 30.[6] Regarding Thailand, Commerce chose not to use it, first, on the grounds that Thailand was not a significant producer of fresh garlic during the POR. *Id.* at 8–9, 21–24. Commerce reasoned that the court in *FGPA II* had stated that there were only ten significant producers of garlic during the POR, and that because Thailand was not in the top ten, it was not a significant producer. *Id.* at 8, 23. In addition, Commerce noted that Ukraine had produced twice as much garlic during the POR. *Id.* at 8–9. Second, Commerce concluded that Thailand's data was of an inferior quality to that of Ukraine. *Id.* at 9–15, 24–30. Commerce found several faults with Thailand's data—Thailand's garlic bulbs are smaller than those grown in the PRC, Thailand's data was not clearly exclusive of taxes and duties, Thailand's prices are for the entire garlic plant (including stems and roots), and one of the four Thai data sets is for harvest months only, a time of the year with high supply and, accordingly, low prices. *Id.* at 11–12, 25–26. Regarding the Ukrainian data, Commerce rejected Xinboda's central concern with the Ukrainian data—that Ukrainian prices were aberrantly high during the POR. *Id.* at 13–15. Commerce reasoned that world market prices in general were historically high during that period, that Xinboda's comparisons of Ukrainian prices to world market prices were flawed, that Thai prices were also outside the norm, and that higher Ukrainian prices likely could be explained by Ukrainian garlic's larger bulb size. *Id.* at 13–15, 27–28.

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[6] In addition, Commerce criticized the Indian data for being from "a single wholesale market" rather than representing country-wide, farmgate prices. *18th AR Second Remand Results* at 29–30.

Xinboda argues that Commerce's selection of Ukraine as the primary surrogate country over Thailand and India is not supported by substantial evidence. Xinboda Cmts. at 2, 21–32. First, Xinboda contends that Thailand should have been selected as the primary surrogate country because, contrary to Commerce's conclusions, Thailand is a significant producer of fresh garlic and offers data superior to Ukraine's data. *Id.* at 26–28. Xinboda posits that Thailand is a significant producer because Thailand's production of fresh garlic is above the world mean when the PRC is excluded, the court's reference to top ten producers in *FGPA II* was meant merely to show that there are a variety of significant producers available in this case, and Commerce has selected a country with less garlic production than Thailand as a surrogate country in subsequent ARs. *Id.* at 21–27. Xinboda argues that Thailand's data is superior to Ukraine's principally because Ukraine's prices during the POR were aberrantly high vis-à-vis world market prices. *Id.* at 29.[7] Second, Xinboda argues that Commerce should alternatively have selected India as the primary surrogate country over Ukraine because, although India was "less" economically comparable to the PRC than other countries, India is clearly a significant producer. Id. at 23–24.[8]

The government and FGPA respond that Commerce's choice of Ukraine as the primary surrogate country was supported by substantial evidence. Gov't Resp. at 15–24; FGPA Resp. at 6–9. The government argues that Commerce correctly concluded that Thailand is not a significant producer because Thailand was not a top ten world producer nor close to being one, and because there is a relatively steep drop-off in production after Ukraine, the tenth largest producer. Gov't Resp. at 16–20. In addition, the government and FGPA attack the quality of the Thai data, primarily by stating that it is not specific to the size of garlic bulb under review. Gov't Resp. at 23; FGPA Resp. at 8. As for Ukraine, both parties state that Ukraine's relatively high prices can be explained by its large garlic bulb size, and that the lack of a Ukrainian financial statement is irrelevant. Gov't Resp. at 22–24; FGPA Resp. at 8–9. Lastly, both parties argue that India is not a suitable surrogate country because India is not economically comparable and its data is not reflective of a country-wide average. Gov't Resp. at 24; FGPA Resp. at 9.

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[7] Xinboda also contends that no financial statement from Ukraine exists on the record, that Thailand has a more specific and contemporaneous labor rate than Ukraine, and notes that only one of the four Thai data sources was restricted to harvest months, and, regardless, harvest-period data accurately mirrors the PRC's high supply market. Xinboda Cmts. at 27–28, 31–32.

[8] Xinboda also argues that India's data is more specific than Ukraine's data to the garlic bulb size consumed by the mandatory respondent, Xinboda. Xinboda Cmts. at 31–32.

"[T]he valuation of the [FOPs] shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce]." 19 U.S.C. § 1677b(c)(1)(B). In determining the best available information, Commerce "shall utilize, to the extent possible, the prices or costs of [FOPs] in one or more market economy countries that are (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." *Id.* § 1677b(c)(4). To decide between countries that fit these requirements, Commerce typically looks to the following data considerations: "(1) public availability, (2) product specificity, (3) broad market average, (4) tax and duty exclusivity, and (5) contemporaneity of the data." *Fresh Garlic Producers Ass'n v. United States*, 83 F. Supp. 3d 1330, 1337 (CIT 2015) ("FGPA 2015"). Furthermore, Commerce is obligated to "establish[ ] antidumping margins as accurately as possible." *Shakeproof Assembly Components, Div. of Il. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001). Accordingly, "Commerce's practice is to reject 'aberrational' data that does not reliably indicate the price a producer would have paid for the input." *Peer Bearing Co.–Changshan v. United States*, 752 F. Supp. 2d 1353, 1370 (CIT 2011).

Substantial evidence supports Commerce's determination that Ukraine offers the best available information. No party challenges Commerce's conclusion that Ukraine is both economically comparable and a significant producer, nor could they.[9] India, meanwhile, is not economically comparable, thus using it as a surrogate country "would lead to a severe understatement of the surrogate values." *18th AR Second Remand Results* at 23; FGPA New SV Data at Ex. 1 at 2–3, 18th AR Remand II PD 3 (July 29, 2016) (showing that India's gross national income ("GNI") per capita in 2011 was $1,420, while the PRC's was $4,940); Office of Policy ("OP") GNI Band List at Attach. at 2, 18th AR PD 78 (Apr. 9, 2013) (listing countries economically comparable to the PRC with a GNI per capita for 2011 of $2,210 to $7,660). Given the existence of data from a country that is both a

[9] Ukraine produced 171,900 metric tons of fresh garlic in 2011, which placed Ukraine in the top ten countries for production. *See* Golden Bird SV Info at Ex. 1 at 1, 18th AR PD 111 (June 26, 2013). Excluding the PRC and India, Ukraine's market share of world production is 4.99%, far more than the Philippines' 0.26%, which was Commerce's previous surrogate country option. *Id.* at 2–4; *see* Xinboda Cmts. at 25. Regarding economic comparability, Ukraine's gross national income ("GNI") per capita for 2011 was $3,130, which is within the Office of Policy ("OP")'s GNI band and comparable to the PRC's GNI per capita of $4,940. Office of Policy GNI Band List at Attach. at 1–2, 18th AR PD 78 (Apr. 9, 2013) (listing economically comparable countries with a 2011 GNI per capita range of $2,210 to $7,660); FGPA New SV Data at Ex. 1 at 2.

significant producer of the subject merchandise and economically comparable, Commerce properly rejected India.

The only remaining surrogate country option is Thailand. Commerce reasonably concluded, however, that Ukraine offers higher quality data than Thailand.[10] Xinboda's central complaint with the Ukrainian data is that it is aberrantly high vis-à-vis world market prices. To this end, Xinboda provides a table of 2011 and 2012 fresh garlic prices from "top world producers of garlic," which Xinboda argues is "thus most indicative of global average pricing." Xinboda Cmts. at 29–30; Xinboda Updated Factual Data at Ex. SV-5 at 7, 18th AR Remand II PD 28 (Aug. 15, 2016). In this table, Ukraine does have the highest price in both years and Thailand a mid-range price. Xinboda Cmts. at 30; Xinboda Updated Factual Data at Ex. SV-5 at 7. But, Ukraine's price is not so high in relation to the others as to be unreliable. The mere fact a surrogate value is the highest on record does not make that value aberrational. *See Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States*, 929 F. Supp. 2d 1352, 1356 n.9 (CIT 2013). As noted by Commerce, the 2012 Ukrainian price in Xinboda's comparison is only 14% higher than the second highest price, and 17% higher than the third highest price. *18th AR Second Remand Results* at 28; *see* Xinboda Updated Factual Data at Ex. SV-5 at 7, 18th AR Remand II PD 28 (Aug. 15, 2016).[11] Xinboda cites no case law in which the court has found such price differentials to be indicative of aberrational prices, and indeed, the court has generally been concerned only with much larger price differences. *See Xinjiamei Furniture (Zhangzhou) Co. v. United States*, Slip Op. 13–30, 2013 WL 920276, at *1, *7 (CIT Mar. 11, 2013) (remanding Commerce's selection of a surrogate value that was three times higher than the others on record); *Peer Bearing Co.–Changshan v. United States*, 752 F. Supp. 2d 1353, 1369–74 (CIT 2011) (remanding Commerce's choice of a surrogate value four times higher than the others on record, and remanding a different surrogate value when it

[10] Thailand is also a less significant producer than Ukraine, having produced 75,589 metric tons of fresh garlic in 2011, constituting 2.19% of the world market when the PRC and India are excluded. Golden Bird SV Info at Ex. 1 at 1–4, 18th AR PD 111 (June 26, 2013). Because the court concludes that substantial evidence supports Commerce's determination that Ukraine offers higher quality data than Thailand, the court does not decide whether Thailand qualifies as a "significant producer."

[11] Commerce focused solely on the 2012 price, although the POR is November 1, 2011 through October 31, 2012. *See Preliminary Results*, 78 Fed. Reg. at 77,653; *18th AR Second Remand Results* at 28. If the countries' average prices are weighted between the two months in 2011 and ten months in 2012, Ukraine's garlic price is 18% higher than the next highest country (Russia) and 22% higher than the third highest country (Spain). *See* Xinboda Updated Factual Data at Ex. SV-5 at 7, 18th AR Remand II PD 28 (Aug. 15, 2016). These percentages also fail to present cause for concern.

was 60% higher than the rest); *Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 1133–35, 502 F. Supp. 2d 1295, 1306–08 (2007) (remanding a surrogate value selection choice that was ten times higher than those of other countries).[12] Neither are Xinboda's other concerns with using Ukraine as the primary surrogate country convincing.[13]

The Thai data, meanwhile, suffers from unique flaws that further support Commerce's conclusion that Ukraine's data is superior to that of Thailand. First, the Ukrainian garlic bulb[14] data provides prices for garlic bulbs that are more analogous in terms of bulb size to those consumed by the PRC respondents than those produced in Thailand. Record evidence indicates that Thai garlic bulbs are relatively small, whereas Ukrainian and PRC garlic bulbs are both relatively large.[15] Second, as Commerce determined in the underlying

[12] Furthermore, FGPA offered a price comparison of its own, relied on by Commerce, that indicates Ukraine's price is not extraordinarily high when compared to the world average. FGPA made two comparisons for this purpose. First, it analyzed Ukraine's price vis-à-vis the average price of countries on the OP list, weighted two months for 2011, and ten months for 2012. FGPA Remand Rebuttal Cmts. at 14, 18th AR Remand II PD 32 (Aug. 25, 2016); *18th AR Second Remand Results* at 14. In this comparison, Ukraine's price was 22.2% above the average, while Thailand's price was 49.4% below the average. FGPA Remand Rebuttal Cmts. at 14; *18th AR Second Remand Results* at 14. Second, FGPA compared Ukraine's price to the average price of market economy countries within the GNI band. FGPA Rebuttal Cmts. at 15; *18th AR Second Remand Results* at 14. In this analysis, Ukraine's price was 26.4% above the average, and Thailand's price was 47.6% below the average. FGPA Rebuttal Cmts. at 16; *18th AR Second Remand Results* at 14. Although these comparisons are likely less indicative of world market trends than Xinboda's table indicating prices for significant producers, they further support Commerce's conclusion.

[13] Xinboda challenges the use of Ukraine as the primary surrogate country because Ukraine has no financial statement on record and Thai labor statistics are more specific and contemporaneous than Ukraine's. Xinboda Cmts. at 31–32. Commerce's selection of Ukraine despite these deficiencies was reasonable in this case, however, given that "raw garlic bulb is the most significant input because it accounts for the largest percentage of [Normal Value]." *See* Decision Memorandum for the Preliminary Results of the 2011–2012 Antidumping Duty Administrative Review: Fresh Garlic from the People's Republic of China at 11, 18th AR PD 208 (Dec. 16, 2013) ("Prelim. I&D Memo"). Additionally, as Commerce noted in the *18th AR Second Remand Results*, it is unlikely that the financial ratios derived from the financial statements vary greatly between countries of similar economic development. *18th AR Second Remand Results* at 29.

[14] As noted, "raw garlic bulb is the most significant input [of fresh garlic] because it accounts for the largest percentage of [normal value]." *See* Prelim. I&D Memo at 11. In addition, the parties do not dispute that the size of garlic bulbs apparently can influence prices. *See, e.g., Fresh Garlic from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the 13th Antidumping Duty Administrative and New Shipper Reviews and Recission, In Part, the Antidumping Duty Administrative and New Shipper Reviews* at 15, A-570–831 (June 8, 2009), *available at* http://enforcement.trade.gov/frn/summary/prc/E9–14358–1.pdf (stating that the "size of the garlic bulbs is given significant value in the marketplace.").

[15] For this proposition, the government relies on FGPA's citation to the seventeenth AR, where evidence indicated that "the majority of garlic grown in Ukraine is large (*i.e.*, 50–55 mm) and white, similar to the garlic produced in the PRC." *See Decision Memorandum for the Preliminary Results of the 2010–2011 Antidumping Duty Administrative Review: Fresh*

final results of this administrative review and reiterates in the *18th AR Second Remand Results*, the Thai data is not clearly exclusive of taxes and duties. *See 18th AR I&D Memo* at 10; *18th AR Second Remand Results* at 26. Xinboda does not here challenge that finding. Third, one of the four Thai data sources only reports values for the harvest months. *See* Xinboda Updated Factual Data at SV-1 at 1, 18th AR Remand II PD 28 (Aug. 15, 2016); Golden Bird SV Info at Ex. 3 at Attach. 1, 18th AR PD 239 (Jan. 27, 2014). Commerce reasonably concluded that data from these high supply, low-price months would be less accurate than a data set reflective of the entire POR, even if the PRC is also a high supply market. *See 18th AR Second Remand Results* at 12; *FGPA 2015*, 83 F. Supp. 3d at 1340 (noting Commerce's preference for contemporaneous data). Given these concerns, and Commerce's reasonable conclusion that the Ukrainian data is not aberrantly high, Commerce's selection of Ukraine as the primary surrogate country for calculating normal value in the 18th AR is supported by substantial evidence.

II. Nineteenth Administrative Review

In its *19th AR Remand Results*, Commerce chose to continue using the separate rate from the 18th AR[16] to calculate the dumping margin for the non-examined separate rate companies in the 19th AR, including Xinboda. *See 19th AR Remand Results* at 26, 40–42. Commerce cited the court's instruction in Shenzhen Xinboda that Commerce could use the 18th AR rate "if it results in a non-punitive rate for separate respondents." Id. at 15, 41–42. In response to Xinboda's request that Commerce use Ukrainian garlic bulb surrogate data from the 19th POR rather than the 18th POR, Commerce stated that mixing a surrogate value data set from the 19th POR with "Xinboda's factors of production and U.S. prices from the 18th POR . . . would not result in a reliable antidumping duty margin." *Id.* at 41.

Xinboda argues that Commerce should not have used the 18th AR's rate to set the rate of the non-examined separate rate companies in

Garlic from the People's Republic of China at 11, A-570–831 (Dec. 3, 2012), *available at* http://enforcement.trade.gov/frn/summary/prc/2012–29986–1.pdf. Thai garlic, however, appears to generally be significantly smaller. *See* FGPA Cmts. on SV Selection at 6–7, Ex. T-2 at 3, 18th AR PD 116–49 (June 28, 2013) (showing that Thailand's government reports statistics for garlic bulbs generally ranging from 15–35mm). Xinboda does not challenge that these countries generally grow these sizes of garlic, but instead argues that the Ukrainian and Thai data report prices "for all fresh garlic, regardless of size." Xinboda Cmts. at 32. Although this appears true, Commerce reasonably assumed that prices from those countries will reflect prices for the bulb sizes generally grown in those countries, even if some other size bulbs are also grown in each country.

[16] As discussed above, based on its investigation of Xinboda, who was a mandatory respondent in the 18th AR, Commerce initially calculated the 19th AR separate rate to be $1.82/kg, *see 18th AR Final Results*, 79 Fed. Reg. at 36,723, and after remand in the 18th AR, determined the rate to be $2.19/kg, *see 18th AR Second Remand Results* at 19.

the 19th AR. Pl. Shenzhen Xinboda Indus. Co., Ltd.'s Cmts. in Opp'n to Remand Results 1–3, Ct. No. 15–00179, ECF No. 78 ("Xinboda 19th AR Cmts."). Xinboda first supports this position by noting that, at the time of Commerce's decision, the 18th AR's rate was not a final rate. *Id.* at 1–2. Second, Xinboda posits that the 18th AR's rate is punitive because, as argued above by Xinboda, Ukraine's garlic prices in the 18th POR were aberrantly high. *Id.* at 2.[17] Lastly, Xinboda argues that Commerce should have used 19th POR-contemporaneous Ukranian data to value the garlic bulb input because the bulb is the most critical surrogate value, Commerce can easily update the bulb price, and doing so "would make the margin contemporaneous and more representative of garlic prices" for the 19th POR. *Id.* at 2.[18]

The government and FGPA respond that Commerce reasonably chose to base the 19th AR's separate rate on that of the 18th AR. The government argues that Commerce need not have waited for the court to sustain the 18th AR's rate before using it in the 19th AR because the court explicitly permitted Commerce to use the 18th AR's rate if it was not punitive. Def.'s Resp. to Cmts. Regarding Remand Redetermination and Mot. to Strike Extra-Record Exs. at 31, Ct. No. 15–00179, ECF No. 82 ("Gov't 19th AR Resp."). In addition, the government and FGPA submit that using a surrogate value that is contemporaneous with neither the FOPs used by Xinboda in the 18th AR, when it was a mandatory respondent, nor with Xinboda's sales prices from the 18th AR, would lead to a distorted and unreliable dumping margin. Def.-Intvr.'s Resp. to Cmts. on Remand Results at 7–8, Ct. No. 15–00179, ECF No. 84 ("FGPA 19th AR Resp."); Gov't 19th AR Resp. at 31.

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[17] Because the court today sustains Commerce's calculation of the 18th AR's separate rate, this argument fails.

[18] Xinboda also argues that Commerce unreasonably failed to select Xinboda as a mandatory or voluntary respondent. Xinboda 19th AR Cmts. at 3–5. As Xinboda acknowledges, and FGPA and the government point out, the court has already concluded that Commerce properly declined to investigate Xinboda because of Xinboda's failure to exhaust its administrative remedies. *See Shenzhen Xinboda*, 180 F. Supp. 3d at 1317–20; Xinboda 19th AR Cmts. at 3; Def. Intvrs.' Resp. to Cmts. on Remand Results 7, Ct. No. 15–00179, ECF No. 84 ("FGPA 19th AR Resp."); Def.'s Resp. to Cmts. Regarding Remand Redetermination and Mot. to Strike Extra-Record Exs. 32, Ct. No. 15–00179, ECF No. 82 ("Gov't 19th AR Resp."). Accordingly, the court will not reconsider this matter. *See Intergraph Corp. v. Intel Corp.*, 253 F.3d 695, 697 (Fed. Cir. 2001) ("The doctrine of law of the case generally bars retrial of issues that were previously resolved."). Xinboda also contends that Commerce should have selected an additional mandatory respondent in the 19th POR, even if it were not Xinboda. Xinboda Cmts. at 4–5. Xinboda did not directly advance this argument in its initial challenge to the *19th AR Final Results*, however, thus Xinboda waived the argument and the court will not now consider the matter. *See generally* Pl. Shenzhen Xinboda Indus. Co., Ltd. Mem. in Supp. of Mot. for J. on the Agency R., Ct. No. 15–00179, ECF No. 31.

"To determine the dumping margin for non-mandatory respondents in [non-market economy] cases (that is, to determine the 'separate rates' margin), Commerce normally relies on the 'all others rate' provision of 19 U.S.C. § 1673d(c)(5)." *Amanda Foods (Vietnam) Ltd. v. United States*, 33 CIT 1407, 1417, 647 F. Supp. 2d 1368, 1379 (2009). The separate rate under § 1673d(c)(5) is "typically . . . calculated by averaging the rates of the individually examined exporters." *Albermarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1348 (Fed. Cir. 2016). But, if the individually examined exporters' dumping margins were established based on facts available, as here, Commerce "may use any reasonable method" to set the separate rate. 19 U.S.C. § 1673d(c)(5); *see Amanda Foods*, 33 CIT at 1418, 647 F. Supp. 2d at 1379. As explained by the authoritative Statement of Administrative Action ("SAA"), "[t]he expected method in such cases will be to weight-average . . . margins determined pursuant to the facts available." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103–316, vol. 1, at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201; *see Albermarle*, 821 F.3d at 1352 n.5. If, however, volume data is unavailable or the method "would not be reasonably reflective of potential dumping margins for non-investigated exporters," then Commerce may use "other reasonable methods" to determine the separate rate. SAA at 4201; *see Albermarle*, 821 F.3d at 1352. Commerce must strive to make the dumping margin as accurate and as current with the POR as possible. *See Albermarle*, 821 F.3d at 1356; *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1379 (Fed. Cir. 2013).

Commerce's use of the 18th AR's separate rate to calculate the 19th AR's separate rate was reasonable in this case. First, Commerce's selection of a rate that was not yet final is not an unscalable barrier. As the government and FGPA note, the court explicitly said that Commerce could use the 18th AR's rate as long as it resulted in a non-punitive rate. *See Shenzhen Xinboda*, 180 F. Supp. 3d at 1324. Although this is a unique case, Xinboda cites to no authority to support its position here. The problem is not using a non-final rate,[19] but using a rate that is improperly calculated, which is why the court remanded Commerce's selection of the 19th AR's rate in *Shenzhen Xinboda*. *See id.* Second, Commerce reasonably declined Xinboda's request to insert the 19th AR's Ukrainian garlic bulb price into its calculation of the 18th AR's separate rate, for purposes of determining the 19th AR's separate rate. Granted, the 2013 Ukrainian garlic price

[19] Obviously, using a rate from a different proceeding has the potential for creating problems. This is not optimal, but can be dealt with, as this case demonstrates. This is just one of the myriad of complications stemming from Commerce's refusal to expand the number of examined respondents.

put forth by Xinboda is more current with the POR for the 19th AR (November 31, 2012–October 31, 2013) than the 2011 and 2012 prices used in the 18th AR, and the 2013 price is 38% lower than the 2012 price. *See* Xinboda Draft Remand Comments at Attach. 1, 19th AR Remand PD 25 (Apr. 25, 2017). But, using the updated garlic bulb price would not necessarily result in a more accurate dumping margin. It is possible that Xinboda's use of the FOPs during the 19th POR or Xinboda's U.S. sales, neither of which exist on the record in the 19th AR, *see 19th AR I&D Memo* at 10–11, changed during the 19th POR such that using Xinboda's preferred method would be less accurate than simply leaving the 18th AR's rate intact. Furthermore, there is no other record evidence indicating that Xinboda's dumping margin in the 19th AR was lower than in the 18th AR, when Xinboda's rate was individually determined, such as de minimis rates for the mandatory respondents in the 19th AR. Accordingly, Commerce reasonably decided to apply the 18th AR's separate rate of $2.19/kg to the separate rate companies of the 19th AR.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's *18th AR Second Remand Results* and *19th AR Remand Results*. Judgment will enter accordingly.

Dated: September 19, 2017
New York, New York

/S/ Jane A. Restani
JANE A. RESTANI
JUDGE

Slip Op. 17–128

IRWIN INDUSTRIAL TOOL COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 14–00285

[Granting Plaintiff's motion for summary judgment and denying Defendant's motion for reconsideration.]

Dated: September 21, 2017

Frances Pierson Hadfield, Crowell & Moring LLP, of New York, NY, and *Daniel J. Cannistra*, Crowell & Moring LLP, of Washington, DC, for plaintiff.

Guy R. Eddon, Trial Attorney, U.S. Department of Justice, International Trade Field Office, of New York, NY, for defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Michael W. Heydrich*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection.

OPINION

Kelly, Judge:

Before the court are Plaintiff's motion for summary judgment and Defendant's motion for reconsideration of the court's prior opinion, *Irwin Indus. Tool Co. v.* United States, 41 CIT __, 222 F. Supp. 3d 1210 (2017) ("*Irwin Indus. Tool Co.*"). *See* Pl.'s Mot. Summary J., May 8, 2017, ECF No. 53; Def.'s Resp. Opp'n Pl.'s Mot. Summary J. and Def.'s Mot. Reconsideration, Jun. 7, 2017, ECF No. 57. For the reasons that follow, Plaintiff's motion for summary judgment is granted and Defendant's motion for reconsideration is denied.

BACKGROUND

The court assumes familiarity with the facts of this case as discussed in the previous opinion, *see Irwin Indus. Tool Co.*, 41 CIT at __, 222 F. Supp. 3d at 1213–15, and here recounts the facts relevant to the court's review of the pending motions for summary judgment and reconsideration.

This case involves the classification of five styles of Plaintiff's hand tools.[1] Plaintiff, Irwin Industrial Tools, is the importer of record of the subject hand tools in the 46 subject entries. Am. Compl. ¶¶ 3, 7, May 4, 2015, ECF No. 13. United States Customs and Border Protection ("CBP" or "Customs") liquidated the subject entries under subheading 8204.12.00, Harmonized Tariff Schedule of the United States (2013) ("HTSUS"),[2] a category covering "hand-operated spanners and wrenches . . .: Adjustable, and parts thereof." *Id.* Plaintiff timely filed 14 administrative protests challenging CBP's classification of the subject merchandise. *Id.* at ¶ 9. CBP denied Plaintiff's protests. *Id.*

[1] The five styles of hand tools are "large jaw locking pliers," "curved jaw locking pliers," "long nose locking pliers with wire cutter," "curved jaw locking pliers with wire cutter," and "straight jaw locking pliers." Pl.'s 56.3 Statement of Undisputed Material Facts ¶¶ 33, 42, 52, 57, 65, 79, May 8, 2017, ECF No. 53 ("Pl.'s 56.3 Statement"); Def.'s Resp. Pl.'s Rule 56.3 Statements of Undisputed Material Facts ¶¶ 33, 42, 52, 57, 65, 79, Jun. 7, 2017, ECF No. 57 ("Def.'s 56.3 Statement"). Although the Amended Complaint indicated that only four styles of locking hand tools were at issue in this case, not including "straight jaw locking pliers," Am. Compl. ¶ 17, May 4, 2015, ECF No. 13, the chart of the models of subject merchandise that Plaintiff provided in its motion for summary judgment includes five styles of locking pliers, including straight jaw locking pliers. *See* Pl.'s 56.3 Statement ¶¶ 33, 65. Defendant admitted the contents of this chart as undisputed fact. Def.'s Resp. Pl.'s 56.3 Statement ¶¶ 33, 65. Accordingly, it is evident to the court that five styles of locking hand tools are at issue in this case, and that the subject merchandise includes certain models of Plaintiff's "straight jaw locking pliers."

[2] All references to the HTSUS refer to the 2013 edition, the most recent version of the HTSUS in effect at the time of Plaintiff's entries of subject merchandise, which entered between November 11, 2012 and June 11, 2013. *See* Am. Compl. ¶ 7. The 2012 edition of the HTSUS, in effect at the beginning of the period during which Plaintiff entered the subject merchandise, is the same in relevant part to the 2013 edition.

Plaintiff commenced this action to challenge the classification of various hand tools, referred to by Plaintiff collectively as "locking pliers." *See* Am. Compl. Defendant moved for summary judgment, requesting the court to hold that the subject hand tools are properly classified as adjustable wrenches within subheading 8204.12.00, HTSUS. Def.'s Mot. Summ. J., Jan. 6, 2017, ECF No. 43; Mem. Supp. Def.'s Mot. Summ. J. 10–27, Jan. 6, 2017, ECF No. 43. Plaintiff opposed the motion, arguing that the subject hand tools are not classifiable as adjustable wrenches within subheading 8204.12, HTSUS, but rather as pliers within subheading 8203.20, HTSUS, or as vises or clamps within subheading 8205.70, HTSUS. *See* Pl.'s Resp. Opp'n Def.'s Mot. Summ. J., Feb. 6, 2017, ECF No. 44.

The court denied Defendant's motion for summary judgment. *Irwin Indus. Tool Co.*, 41 CIT at __, 222 F. Supp. 3d at 1229. The court construed the relevant tariff terms and determined as a matter of law that the term "wrench," as it appears in subheading 8204.12.00, HTSUS, refers to "a hand tool that has a head with jaws or sockets having surfaces adapted to snugly or exactly fit and engage the head of a fastener (such as a bolt-head or nut) and a frame with a singular handle with which to leverage hand pressure to turn the fastener without damaging the fastener's head." *Id.*, 41 CIT at __, 222 F. Supp. 3d at 1221. The court further determined as a matter of law that the term "pliers," as it appears in subheading 8203.20.6030, HTSUS, refers to "a versatile hand tool with two handles and two jaws that are flat or serrated and are on a pivot, which must be squeezed together to enable the tool to grasp an object." *Id.*, 41 CIT at __, 222 F. Supp. 3d at 1221–22, 1224. Finally, the court determined as a matter of law that the term "vises, clamps and the like," as it appears in subheading 8205.70.0060, HTSUS, refers to "tools with a frame and two opposing jaws, at least one of which is adjustable, which are tightened together with a screw, lever, or thumbnut, to press firmly on an object and thereby hold the object securely in place while the user is working." *Id.*, 41 CIT at __, 222 F. Supp. 3d at 1225–26.

The court determined that Defendant had failed to establish as a matter of law that the subject merchandise possesses the qualities of a wrench and does not possess the qualities of pliers or vises or clamps. *Id.*, 41 CIT at __, 222 F. Supp. 3d at 1213–15, 1226–29. The court further determined, upon inspecting the physical samples of the subject merchandise entered into evidence by Plaintiff, that the subject hand tools may fit within the relevant tariff subheadings for pliers or for vises or clamps, but noted that "[t]he court need not reach that issue as all that is before the court is the Defendant's motion,

which is denied." *Id.*, 41 CIT at __, 222 F. Supp. 3d at 1228–29 (internal citations omitted).

On May 8, 2017, Plaintiff moved for summary judgment, arguing that undisputed facts support classification of the subject merchandise as a matter of law as pliers within subheading 8203.20.6030, HTSUS. *See* Mem. L. Supp. Pl.'s Mot. Summary J. 14–27, May 8, 2017, ECF No. 53 ("Pl.'s Br."). Defendant opposed Plaintiff's motion and moved the court to reconsider the conclusions reached in *Irwin Indus. Tool Co. See* Mem. L. Opp'n Pl.'s Mot. Summ. J. and Supp. Def.'s Mot. Reconsideration, Jun. 7, 2017, ECF No. 57 ("Def.'s Br."). Defendant argues that the court should reconsider the definitions of pliers and wrenches established in *Irwin Indus. Tool Co. Id.* at 5–6. Although Defendant "concedes that the tools at issue meet the Court's definition" of pliers, it argues that the court's definition of pliers is "overly inclusive," contending that the court erred because "the Court's definition of 'pliers' explicitly includes locking pliers."[3] *Id.* Defendant also argues that the court's definition of wrenches "necessarily excludes certain tools that are known and marketed as wrenches." *Id.* at 6. Additionally, Defendant requests the court to reconsider the relevancy of "use" to the meaning of the tariff terms at issue.[4] *Id.* at 7.

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[3] The court stated that pliers' "jaws may, or may not, lock together to hold the object while using the tool." *Irwin Indus. Tool Co.*, 41 CIT at __, 222 F. Supp. 3d at 1224.

[4] In *Irwin Indus. Tool Co.*, the court relied upon the Court of Appeals for the Federal Circuit precedent to find that

> [a]n eo nomine tariff term may implicate use in one of two ways: 1) a tariff term written as an eo nomine provision may nonetheless be controlled by use and, if it is, the court should declare it as such, [*GRK Canada, Ltd. v. United States*, 761 F.3d 1354, 1359, n.2 (Fed. Cir. 2014) ("*GRK II*")]; *see also StoreWALL, LLC,* 644 F.3d at 1365–67 (Dyk, J., concurring); or 2) a tariff term may imply that the use of the object is of "paramount importance" to its identity such that articles with the requisite physical characteristics will nonetheless be excluded if they are in fact designed and intended for another use. *GRK II*, 761 F.3d at 1358 (citing *United States v. Quon Quon Co.*, 46 CCPA 70, 73 (1959)).
>
> Here, although a wrench may indeed be designed for a use, nothing about the tariff term for "wrenches" suggests a type of use such that the court should declare the tariff term one controlled by use. *GRK II*, 761 F.3d at 1358–59 (quoting *Carl Zeiss, Inc.*, 195 F.3d at 1379). The word "use" or similar words such as "for" or "of a kind" do not appear in the tariff term. *See Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1467 (Fed. Cir. 1998). Furthermore nothing in the term itself, including the Section and Chapter Notes or the Explanatory Notes, indicates that, as a matter of law, the use of articles classified under the provision would outweigh the importance of the physical characteristics of the item. *See Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1363–64 (Fed. Cir. 1999); *see GRK II*, 761 F.3d at 1359, n.2 (citing *StoreWALL*, 644 F.3d at 1365–67 (Dyk, J., concurring)). Nothing indicates that an object must be considered a wrench if it can be used to wrench or turn a fastener. Therefore, as a matter of law, the tariff term for "wrenches" is an eo nomine term, not one controlled by use.
>
> This court must also consider whether use is of "paramount importance." *See GRK II*, 761 F.3d at 1358–59 (quoting *Quon Quon Co.*, 46 CCPA at 73). To say that use is of paramount importance is not to say that a product has a use. All products have uses.

JURISDICTION AND STANDARD OF REVIEW

The court has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [Tariff Act of 1930, as amended, 19 U.S.C. § 1515 (2012)]," 28 U.S.C. § 1581(a) (2012), and reviews such actions de novo. 28 U.S.C. § 2640(a)(1) (2012).

The court will grant summary judgment when "the movant shows that 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). In order to raise a genuine issue of material fact, it is insufficient for a party to rest upon mere allegations or denials, but rather that party must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing versions of the truth at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986); *Processed Plastic Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006); *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835–36 (Fed. Cir. 1984).

UNDISPUTED FACTS

Plaintiff is the importer of record of the subject merchandise in the 46 entries at issue in this case, which entered between November 11, 2012 and June 11, 2013. Pl.'s 56.3 Statement of Undisputed Material Facts ¶¶ 2, 5, May 8, 2017, ECF No. 53 ("Pl.'s 56.3 Statement"); Def.'s Resp. Pl.'s Rule 56.3 Statements of Undisputed Material Facts ¶¶ 2, 5, Jun. 7, 2017, ECF No. 57 ("Def.'s Resp. Pl.'s 56.3 Statement"). CBP liquidated all subject entries under subheading 8204.12.00, HTSUS.[5] Pl.'s 56.3 Statement ¶ 6; Def.'s Resp. Pl.'s 56.3 Statement ¶ 6. Plaintiff timely filed 14 protests challenging the classification of the subject merchandise. Pl.'s 56.3 Statement ¶ 7; Def.'s Resp. Pl.'s 56.3 Statement ¶ 7. Plaintiff paid all liquidated duties, charges, exactions, and fees on the entries at issue prior to the commencement of this action. Pl.'s 56.3 Statement ¶ 8; Def.'s Resp. Pl.'s 56.3 Statement ¶ 8.

The subject merchandise consists of the following styles of locking hand tools: "large jaw locking pliers," "curved jaw locking pliers,"

> . . . Although design and intended use is implicated in all tariff terms, it will only be of paramount importance when, as a factual matter, a product that satisfies the physical requirements of a tariff term is in fact designed and intended for another use. *See id.* A wrench is designed for turning fasteners without damaging the fastener's head. A wrench must possess certain physical characteristics (a frame with a singular handle; a head with jaws or sockets having surfaces that snugly or exactly fit and engage the head of a fastener) that are a function of the intended use of a wrench to exert pressure on the fastener to turn it without damaging the fastener's head.
>
> *Id.*

[5] Subheading 8204.12.00, HTSUS, covers "hand-operated spanners and wrenches . . . : Adjustable, and parts thereof." Subheading 8204.12.00, HTSUS.

"long nose locking pliers with wire cutter," "curved jaw locking pliers with wire cutter," and "straight jaw locking pliers." Pl.'s 56.3 Statement ¶ 33; Def.'s Resp. Pl.'s 56.3 Statement ¶ 33. The tools at issue are hand tools referred to, inter alia, as "locking pliers."[6] Pl.'s 56.3 Statement ¶ 3; Def.'s Resp. Pl.'s 56.3 Statement ¶ 3. Each of the styles of hand tools at issue have two handles and two serrated jaws on a fulcrum. Pl.'s 56.3 Statement ¶ 13; Def.'s Resp. Pl.'s 56.3 Statement ¶ 13. The subject hand tools possess "compound leverage systems that lock jaws and hold various shapes and sizes of work." Pl.'s 56.3 Statement ¶ 34; Def.'s Resp. Pl.'s 56.3 Statement ¶ 34. The subject merchandise is capable of gripping, holding, clamping, and/or pulling.[7] Pl.'s 56.3 Statement ¶ 35; Def.'s Resp. Pl.'s 56.3 Statement ¶ 35.

DISCUSSION

I. Motion to Reconsider

Defendant moves the court to reconsider its opinion.[8] *See* Def.'s Br. 3–7, 14–15. Specifically, Defendant requests that the court reconsider its definition of "pliers," which Defendant alleges is "overly inclusive,"

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[6] Defendant "admits that 'locking pliers' is one of numerous descriptions applied to the subject merchandise but denies any inference that the merchandise is classifiable as pliers under subheading 8203.20.60." Def.'s Resp. Pl.'s 56.3 Statement ¶ 3.

[7] In its response to Plaintiff's 56.3 Statement of Undisputed Material Facts, Defendant:

> Admits that Lucus Aff. ¶ 27 supports the contention that plaintiff's locking pliers may accomplish one or more of the following operations or uses – gripping, holding, clamping, pulling or cutting. Admits that Lucus Aff. ¶ 28 supports that contention that plaintiff's long nose locking pliers may accomplish one or more of the following operations or uses – gripping, holding, and clamping. Otherwise denies that the cited evidence supports this statement.

Def.'s Resp. Pl.'s 56.3 Statement ¶ 35. Defendant does not put the facts of the statement in dispute. In order to raise a genuine issue of material fact, it is insufficient for a party to rest upon mere allegations or denials, but rather that party must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing versions of the truth at trial. *Anderson*, 477 U.S. at 248–49; *Processed Plastic Co.*, 473 at 1170; *Barmag Barmer Maschinenfabrik AG*, 731 F.2d at 835–36; *see also Int'l Cargo & Sur. Ins. Co. v. United States*, 15 CIT 541, 542–43, 779 F. Supp. 174, 176 (1991) (the party opposing summary judgment must "designate 'specific facts'" to indicate the existence of a genuine issue for trial, quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986), quoting Fed. R. Civ. P. 56(e)). Each statement in an opponent's response controverting any statement of material fact in the movant's 56.3 statement must be followed by citation to evidence which would be admissible. USCIT R. 56.3(c). Defendant has not provided any support for its partial denial of Plaintiff's statement, and thus has not put the facts of the statement in dispute to raise a genuine issue of material fact.

[8] Plaintiff asserts that Defendant's motion is improper because Rule 54(b) requires finality and there has not been a final judgment in this case. *See* Pl.'s Reply Mot. Summary J. 9–10, July 12, 2017, ECF No. 59 ("Pl.'s Reply"). It appears that Plaintiff makes this argument focusing on the first part of Rule 54(b), which discusses final judgments. *See* USCIT R. 54(b). However, the second part of Rule 54(b) provides that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." USCIT R. 54(b). A

its definition of "wrenches," which Defendant argues is exclusive of certain products marketed as wrenches, and its determination that the tariff term covering wrenches is an eo nomine provision. *See id.* at 6. Defendant argues that the court possesses the authority to reconsider the opinion, as USCIT Rule 54(b) authorizes the court to "reconsider any of its interlocutory opinions and orders issued in advance of a final judgment." *Id.* at 4; *see* USCIT R. 54(b). For the reasons that follow, the motion to reconsider is denied.

Pursuant to USCIT Rule 54(b), "any order or other decision . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." USCIT R. 54(b). USCIT Rule 54(b) mirrors Rule 54(b) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. Proc. 54(b). Generally, a court has the discretion to grant a motion to reconsider brought under Rule 54(b) "as justice requires," meaning when the court determines that "reconsideration is necessary under the relevant circumstances." *Cobell v. Norton*, 355 F. Supp. 2d 531, 539 (D.D.C. 2005). Factors a court may weigh when contemplating reconsideration include whether there has been a controlling or significant change in the law or whether the court previously "patently" misunderstood the parties, decided issues beyond those presented, or failed to consider controlling decisions or data. *See, e.g., In re Papst Licensing GmbH & Co. KG Litigation*, 791 F. Supp. 2d 175, 182–83 (D.D.C. 2011); *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005). The movant carries the burden of proving that "some harm, legal or at least tangible," would accompany a denial of the motion. *Cobell*, 355 F. Supp. 2d at 540.

Under this standard, Defendant's motion must be denied. Defendant has not demonstrated circumstances requiring reconsideration, offering no reasons for reconsideration beyond its disagreement with the court's opinion. *See* Def.'s Br. 6. Defendant has not asserted that there has been a controlling or significant change in the law or that the court previously misunderstood the parties, decided issues beyond those presented, or failed to consider controlling decisions or data. *See Singh*, 383 F. Supp. 2d at 101. Instead, Defendant seeks to remake the same arguments already made and considered by the

court retains the power to revisit and revise interlocutory orders pursuant to Rule 54(b). *See Cobell v. Norton*, 355 F. Supp. 2d 531, 539 (D.D.C. 2005). Further, Plaintiff argues that Defendant is not entitled to reconsideration pursuant to Rule 59(e) because the motion was filed more than 30 days after the order was issued. Pl.'s Reply 11; *see* USCIT R. 59(e). However, Defendant does not move for reconsideration pursuant to USCIT Rule 59(e), and there is no time limit for a motion pursuant to USCIT Rule 54(b). *See* USCIT R. 54(b).

court, on the basis of the same record and under the same law. *See In re Papst Licensing GmbH & Co. KG Litigation*, 791 F. Supp. 2d at 182–83. Disagreement with the court's determinations, without more, is not sufficient cause for reconsideration. *See Singh*, 383 F. Supp. 2d at 101. Defendant also has not asserted or proven that some harm or injustice would result if the order is not reconsidered. *See Cobell*, 355 F. Supp. 2d at 540. Accordingly, Defendant has not demonstrated that justice requires reconsideration under these circumstances. Therefore, Defendant's motion for reconsideration is denied.

II. Summary Judgment Motion

Plaintiff argues that undisputed facts demonstrate that the subject merchandise meets the definition of pliers and requests the court to find that the subject merchandise is, as a matter of law, properly classifiable within 8203.20.6030, HTSUS.[9] *See* Pl.'s Br. 14–27. The court agrees with the Plaintiff.

Tariff classification is determined according to the General Rules of Interpretation ("GRI"), and, if applicable, the Additional U.S. Rules of Interpretation, of the HTSUS. *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011). The court must determine the correct classification of subject merchandise, notwithstanding the classifications proffered by the parties. *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). Determining the correct classification of merchandise involves two steps. First, the court determines the proper meaning of any applicable tariff provisions, which is a question of law. *See Link Snacks, Inc. v. United States*, 742 F.3d 962, 965 (Fed. Cir. 2014). Second, the court determines whether the subject merchandise properly falls within the scope of the tariff provisions, which is a question of fact. *Id.* Where no genuine "dispute as to the nature of the merchandise [exists], then the two-step classification analysis collapses entirely into a question of law." *Id.* at 965–66 (citation omitted).

To determine the proper meaning of applicable tariff provisions, the court first construes the language of the headings in question "and any relative section or chapter notes." GRI 1. The terms of the HTSUS "are 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.*

[9] Subheading 8203.20.6030, HTSUS, covers:

> Files, rasps, pliers (including cutting pliers), pincers, tweezers, metal cutting shears, pipe cutters, bolt cutters, perforating punches and similar hand tools, and base metal parts thereof: Pliers (including cutting pliers), pincers, tweezers and similar tools, and parts thereof: Other: Other (except parts): Pliers.

Subheading 8203.20.6030, HTSUS.

Corp. v. United States, 872 F.2d 1572, 1576 (Fed. Cir. 1989)); *see BenQ Am. Corp.*, 646 F.3d at 1376. The court defines HTSUS tariff terms relying upon its own understanding of the terms and may "consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Carl Zeiss, Inc.*, 195 F.3d at 1379. The court may also be aided by the Harmonized Commodity Description and Coding System's Explanatory Notes.[10] *StoreWALL, LLC v. United States*, 644 F.3d 1358, 1363 (Fed. Cir. 2011). In determining the common and commercial meaning of an eo nomine tariff term, the court should also consider if the tariff term nonetheless implicates the use of the article. *See GRK Canada, Ltd. v. United States*, 761 F.3d 1354, 1358–59 (Fed. Cir. 2014).

In *Irwin Indus. Tool Co.*, the court discerned the common and commercial meaning of the tariff terms at issue, aided by dictionary definitions and industry standards. *See Irwin Indus. Tool Co.*, 41 CIT at __, 222 F. Supp. 3d at 1216–26. The court discerned that the common and commercial meaning of the term "wrench" as it appears in subheading 8204.12.00, HTSUS, refers to "a hand tool that has a head with jaws or sockets having surfaces adapted to snugly or exactly fit and engage the head of a fastener (such as a bolt-head or nut) and a frame with a singular handle with which to leverage hand pressure to turn the fastener without damaging the fastener's head." *Id.*, 41 CIT at __, 222 F. Supp. 3d at 1221. The court further found that the common and commercial meaning of the term "pliers" as it appears in subheading 8203.20.6030, HTSUS, refers to "a versatile hand tool with two handles and two jaws that are flat or serrated and are on a pivot, which must be squeezed together to enable the tool to grasp an object." *Id.*, 41 CIT at __, 222 F. Supp. 3d at 1221–22, 1224. The court discerned that the common and commercial meaning of the term "vises, clamps and the like" refers to "tools with a frame and two opposing jaws, at least one of which is adjustable, which are tightened together with a screw, lever, or thumbnut, to press firmly on an object and thereby hold the object securely in place while the user is working." *Id.*, 41 CIT at __, 222 F. Supp. 3d at 1225–26.

Undisputed facts demonstrate that each of Plaintiff's hand tools at issue in this case are classifiable as a matter of law as pliers within subheading 8203.20.6030, HTSUS. Specifically, undisputed facts demonstrate that the products: 1) are versatile hand tools, 2) have

[10] The Explanatory Notes, while not controlling, provide interpretive guidance. *E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004). All citations to the Explanatory Notes are to the 2013 version, the most recently promulgated edition at the time of the entries of the subject merchandise. The 2012 version of the Explanatory Notes is the same in relevant part.

two handles, and 3) have two jaws, that are flat or serrated and are on a pivot, which can be squeezed together to enable the tools to grasp an object.

Curved jaw locking pliers

Undisputed facts demonstrate that Plaintiff's curved jaw locking pliers meet the requirements of the definition of pliers. The curved jaw locking pliers is a versatile hand tool, capable of gripping, holding, clamping, pulling or cutting. Pl.'s 56.3 Statement ¶ 35; Def.'s Resp. Pl.'s 56.3 Statement ¶ 35. Curved jaw locking pliers have two handles and two serrated jaws on a fulcrum. Pl.'s 56.3 Statement ¶ 13; Def.'s Resp. Pl.'s 56.3 Statement ¶ 13. The jaws close, and may or may not be locked, together to enable the tool to grasp an object. Pl.'s 56.3 Statement ¶¶ 34, 39; Def.'s Resp. Pl.'s 56.3 Statement ¶¶ 34, 39.

Curved jaw locking pliers with wire cutter

Undisputed facts demonstrate that Plaintiff's curved jaw locking pliers with wire cutter meet the requirements of the definition of pliers. The curved jaw locking pliers with wire cutter is a versatile hand tool, capable of gripping, holding, clamping, pulling or cutting. Pl.'s 56.3 Statement ¶ 35; Def.'s Resp. Pl.'s 56.3 Statement ¶ 35. Curved jaw locking pliers with wire cutter have two handles and two serrated jaws on a fulcrum. Pl.'s 56.3 Statement ¶ 13; Def.'s Resp. Pl.'s 56.3 Statement ¶ 13. The jaws close, and may or may not be locked, together to enable the tool to grasp an object. Pl.'s 56.3 Statement ¶¶ 34, 39; Def.'s Resp. Pl.'s 56.3 Statement ¶¶ 34, 39.

Long nose locking pliers with wire cutter

Undisputed facts demonstrate that Plaintiff's long nose locking pliers with wire cutter meet the requirements of the definition of pliers. The long nose locking pliers is a versatile hand tool, capable of gripping, holding, clamping, pulling or cutting. Pl.'s 56.3 Statement ¶ 35; Def.'s Resp. Pl.'s 56.3 Statement ¶ 35. Long nose locking pliers have two handles and two serrated jaws on a fulcrum. Pl.'s 56.3 Statement ¶¶ 48–49; Def.'s Resp. Pl.'s 56.3 Statement ¶¶ 48–49. The jaws close, and may or may not be locked, together to enable the tool to grasp an object. Pl.'s 56.3 Statement ¶¶ 34, 39; Def.'s Resp. Pl.'s 56.3 Statement ¶¶ 34, 39.

Large jaw locking pliers

Undisputed facts demonstrate that Plaintiff's large jaw locking pliers meet the requirements of the definition of pliers. The large jaw locking pliers is a versatile hand tool, capable of gripping, holding, clamping, or pulling. Pl.'s 56.3 Statement ¶ 35; Def.'s Resp. Pl.'s 56.3

Statement ¶ 35. Large jaw locking pliers have two handles and two serrated jaws on a fulcrum. Pl.'s 56.3 Statement ¶ 13; Def.'s Resp. Pl.'s 56.3 Statement ¶ 13. The jaws close, and may or may not be locked, together to enable the tool to grasp an object. Pl.'s 56.3 Statement ¶¶ 34, 39; Def.'s Resp. Pl.'s 56.3 Statement ¶¶ 34, 39.

Straight jaw locking pliers

Undisputed facts demonstrate that Plaintiff's straight jaw locking pliers meet the requirements of the definition of pliers. The straight jaw locking pliers is a versatile hand tool, capable of gripping, holding, clamping, or pulling. Pl.'s 56.3 Statement ¶ 35; Def.'s Resp. Pl.'s 56.3 Statement ¶ 35. Straight jaw locking pliers have two handles and two serrated jaws on a fulcrum. Pl.'s 56.3 Statement ¶ 13; Def.'s Resp. Pl.'s 56.3 Statement ¶ 13. The jaws close, and may or may not be locked, together to enable the tool to grasp an object. Pl.'s 56.3 Statement ¶¶ 34, 39; Def.'s Resp. Pl.'s 56.3 Statement ¶¶ 34, 39.

Finally, none of the models at issue is classifiable as "vises, clamps and the like." In *Irwin Indus. Tool Co.*, the court discerned that the common and commercial meaning of the tariff term "vises, clamps and the like" refers to tools with a frame and two opposing jaws, at least one of which is adjustable, which are tightened together with a screw, lever, or thumbnut, to press firmly on an object and thereby hold the object securely in place while the user is working. *See Irwin Indus. Tool Co.*, 41 CIT at __, 222 F. Supp. 3d at 1224–26. To support a determination that the subject merchandise is classifiable within the subheading for "vises, clamps and the like," undisputed facts would have to establish that: 1) the subject tools have a frame and two opposing jaws, at least one of which is adjustable, 2) the tools' jaws are tightened together with a screw, lever, or thumbnut, and 3) the tools' jaws press firmly on an object and thereby hold the object securely in place while the user is working. Facts have not been established to support a determination that the subject merchandise meets the requirements of this definition; to the contrary, undisputed facts demonstrate that the subject merchandise does not possess the characteristics required to meet this definition. At a minimum, although the subject merchandise has two jaws, Pl.'s 56.3 Statement ¶ 13; Def.'s Resp. Pl.'s 56.3 Statement ¶ 13, it has not been established that the jaws are opposing or that at least one of the jaws is adjustable. To the contrary, it has been established that the hand tools are composed of "two metal levers joined at a fulcrum or pivot that result in two handles on one side of the fulcrum and two shorter toothed jaws on the other side of the fulcrum," Pl.'s 56.3 Statement ¶ 13; Def.'s Resp. Pl.'s 56.3 Statement ¶ 13; this connection at the center of the

lever suggests that the jaws at the end of the lever are not directly opposed. Additionally, it has not been established that the jaws are tightened together using a screw, lever, or thumbnut. Instead, it has been established that the jaws are connected by a pivot at the center, Pl.'s 56.3 Statement ¶ 13; Def.'s Resp. Pl.'s 56.3 Statement ¶ 13, and that the tools function by gripping the handles together to open the jaws and locking the jaws on the object using the tools' "compound leverage system." Pl.'s 56.3 Statement ¶ 34; Def.'s Resp. Pl.'s 56.3 Statement ¶ 34. Therefore, the tools at issue in this case do not possess the characteristics required to meet the definition of vises or clamps. The subject merchandise is properly classifiable as "pliers" within subheading 8203.20.6030, HTSUS. *See Jarvis Clark Co.*, 733 F.2d at 878.

In opposing summary judgment with respect to each of these models, Defendant concedes the subject merchandise possesses the physical characteristics of "pliers," pursuant to the court's definition, Def.'s Br. 5, but attempts to resurrect arguments the court has already considered and rejected. Defendant argues that the court erred by not excluding from the definition of "pliers" tools that lock.[11] *Id.* at 5–6. Defendant again invokes *Assoc. Consumers v. United States*, 5 CIT 148, 565 F. Supp. 1044 (1983), to argue that the subject hand tools should be classified as wrenches.[12] *Id*. at 8–12. Defendant also once again argues that the use of the subject merchandise supports its

[11] Although Defendant argues that the court's definition for wrenches is too narrow, and the court's definition for pliers is too broad, Defendant provides just one dictionary definition for each tool, defining a wrench as "a hand tool that usu[ally] consists of a bar or lever with adapted or adjustable jaws, lugs, or sockets either at the ends or between the ends and is used for holding, twisting, or turning a bolt, nut, screwhead, pipe or other object," *id.* at 6 (quoting *Webster's Third New International Dictionary* 2639 (Philip Babcock Gove, Ph.D. and Merriam-Webster Editorial Staff eds., 1981)), and defining pliers as "small pincers [usually] with long roughened jaws for holding small objects or for bending and cutting wire." *Id.* at 5–6 (quoting *Webster's Third New International Dictionary* 1741 (Philip Babcock Gove, Ph.D. and Merriam-Webster Editorial Staff eds., 1981)). Neither of these definitions undercut the court's holding in *Irwin Indus. Tool Co.* Further, Defendant fails to address any of the multiple sources relied upon in the court's prior opinion *Irwin Indus. Tool Co.*, 41 CIT at __, 222 F. Supp. 3d at 1217–24. Defendant also invokes one of the colloquial names of several products not before the court ("locking wrenches," "Swedish pattern pipe wrenches," and "oil filter wrenches") to support its claim that the court's definition of wrenches is too narrow. Def.'s Br. 6–7, 12–13. The classification of these products is not before the court. Moreover, to the extent that Defendant references these products as anecdotal support for its desired definition, it appears that Defendant has selected just one of several names for these products, as Plaintiff points out that Swedish pattern pipe wrenches and oil filter wrenches are also sold as pliers. *See* Pl.'s Reply Mot. Summary J. 38–39, July 12, 2017, ECF No. 59.

[12] As the court explained in *Irwin Indus. Tool Co., Assoc. Consumers* interprets the prior statute, the TSUS, which was replaced by the HTSUS and "the Court's prior determination of a common meaning of a term, based on an interpretation of a tariff provision under the TSUS, is not controlling as to a determination under the HTSUS." *Irwin Indus. Tool Co.*, 41 CIT at __, 222 F. Supp. 3d at 1227. Although Defendant argues that the court's definitions in *Irwin Indus. Tool Co.* will "create an apparent conflict with the Federal Circuit" because

classification as wrenches.[13] *Id.* at 6–8. The court's prior opinion properly considered whether use was implicated in the meaning of the tariff term at issue as well as in the meaning of the other tariff terms raised by the Plaintiff. *See Irwin Indus. Tool Co.*, 41 CIT at __, 222 F. Supp. 3d at 1219–21, 1223–1224, 1225–26 (discussing *GRK Canada, Ltd.*, 761 F.3d at 1358–59), 1221–24 (discerning the meaning of the tariff term "pliers"), 1227 (discussing *Assoc. Consumers v. United States*, 5 CIT 148, 565 F. Supp. 1044). As discussed above, absent sufficient cause, which Defendant has not shown, the court will not revisit arguments made on the basis of the same law and facts that it has already considered. *See In re Papst Licensing GmbH & Co. KG Litigation*, 791 F. Supp. 2d at 182–83.

CONCLUSION

For the foregoing reasons, the subject merchandise at issue in this case is properly classifiable as "pliers" within subheading 8203.20.6030, HTSUS. Therefore, Plaintiff's motion for summary judgment is granted and Defendant's motion for reconsideration is denied. Judgment will enter accordingly.

Dated: September 21, 2017
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE

Associated Consumers, 5 CIT 148, 565 F. Supp. 1044, was affirmed by the Federal Circuit, Def.'s Br. 12, *Associated Consumers* is non-precedential and non-binding, as it was affirmed without opinion and interpreted a different statute. *See Associated Consumers*, 727 F.2d 1120 (Fed. Cir. 1983). CBP is not being asked to deviate from *Associated Consumers*; the case does not apply here.

[13] Defendant states that

> [i]n *Quon Quon*, the court found that the "woven rattan imports were not baskets because they were designed for use as patio furniture." Similarly, here, while the locking hand tools at issue may superficially resemble pliers in that they have jaws and two handles, they were designed and intended for use as wrenches.

Def.'s Br. 7 (citing *Irwin Indus. Tool Co.*, 41 CIT at __, 222 F. Supp. 3d at 1220). However, if a product does not possess the physical characteristics of a wrench, it does not become a wrench under *Quon Quon* simply because someone might use it as a wrench. As stated in the court's prior opinion,

> [a] wrench is designed for turning fasteners without damaging the fastener's head. A wrench must possess certain physical characteristics (a frame with a singular handle; a head with jaws or sockets having surfaces that snugly or exactly fit and engage the head of a fastener) that are a function of the intended use of a wrench to exert pressure on the fastener to turn it without damaging the fastener's head.

Irwin Indus. Tool Co., 41 CIT at __, 222 F. Supp. 3d at 1221. Moreover, Defendant has not raised any facts to support its assertion that the subject tools, which possess the physical characteristics of pliers, are not in fact used as pliers. *See* Def.'s Resp. 7.

Slip Op. 17–129

HOME DEPOT U.S.A., INC., Plaintiff, v. THE UNITED STATES, Defendant.

Before: Hon. Richard W. Goldberg, Senior Judge
Court No. 14–00061

[The court grants summary judgment in favor of Defendant.]

Dated: September 21, 2017

William Randolph Rucker, Drinker Biddle & Reath LLP, of Chicago, IL, for Plaintiff Home Depot U.S.A., Inc.

Amy M. Rubin, Assistant Director, International Trade Field Office, U.S. Department of Justice, of New York, NY, for Defendant. With her on the brief were *Edward F. Kenny*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, and *Chad A. Readler*, Acting Assistant Attorney General. Of Counsel on the brief was *Beth C. Brotman*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

BACKGROUND

This case arises from the classification of merchandise under the Harmonized Tariff Schedule of the United States ("HTSUS") by U.S. Customs and Border Protection ("Customs"). Plaintiff Home Depot U.S.A., Inc. ("Home Depot") is an importer and retailer of home improvement merchandise. Home Depot challenges Customs' classification of certain key-operated locking hardware articles ("entry locks" or "entry door knobs" or "subject articles").

The subject articles were entered between July and December of 2012 and liquidated by Customs between May and November 2013. *See* Summons, ECF No. 1. Customs liquidated the subject articles under HTSUS subheading 8301.40.6030, at a duty rate of 5.7% *ad valorem*. *See* Complaint ¶ 17, ECF No. 5. Home Depot insists that Customs should instead classify the subject articles under HTSUS subheading 8302.41.6045, at a duty rate of 3.9% *ad valorem*. *See* Complaint ¶¶ 24, 28, ECF No. 5.

Home Depot timely protested Customs' classification of its merchandise. Customs denied Home Depot's protest. Home Depot timely filed suit in this court to contest the denial of its protest. Home Depot and Defendant, the United States ("Defendant"), each filed a motion for summary judgment. Because Customs' appropriately classified the subject articles within HTSUS heading 8301, the court denies Home Depot's motion for summary judgment and grants Defendant's cross-motion for summary judgment.

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction over this action under 28 U.S.C. § 1581(a).

"The court shall grant summary judgment if the movant shows that 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). Summary judgment in a classification case is appropriate only if "the material facts of what the merchandise is and what it does are not at issue." *BASF Corp. v. United States*, 35 CIT __, __, 798 F. Supp. 2d 1353, 1356–57 (2011) (citation omitted).

DISCUSSION

"In a classification case, 'the court construes the relevant (competing) classification headings, a question of law; determines what the merchandise at issue is, a question of fact; and then' determines 'the proper classification under which [the merchandise] falls, the ultimate question in every classification case and one that has always been treated as a question of law.'" *BASF Corp.*, 35 CIT at __, 798 F. Supp. 2d at 1357 (quoting *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1366 (Fed. Cir. 1998)).

Merchandise is classified in accordance with the General Rules of Interpretation ("GRIs"). The GRIs are applied in numerical order. If the proper classification is achieved through a particular GRI, the remaining successive GRIs should not be considered. *See Mita Copystar Am. v. United States*, 160 F.3d 710, 712–13 (Fed. Cir. 1998).

Under GRI 1, the court must determine the appropriate classification "according to the terms of the headings and any relative section or chapter notes," HTSUS GRI 1, according all terms their "common commercial meaning," *Millennium Lumber Distrib., Ltd. v. United States*, 558 F.3d 1326, 1328–29 (Fed. Cir. 2009) (citation omitted). In construing tariff provisions, "[a] court may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citation omitted).

An article is classifiable under GRI 1 if it "is described in whole by a single classification heading or subheading" of the HTSUS. *La Crosse Tech., Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013) (quoting *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011)). "With regard to assessing an imported article pursuant to GRI 1, we consider a HTSUS heading or subheading an *eo nomine* provision when it describes an article by a specific name." *CamelBak Prods.*, 649 F.3d at 1364 (citation omitted). "Absent

limitation or contrary legislative intent, an *eo nomine* provision 'include[s] all forms of the named article[,]' even improved forms." *Id.* at 1364–65 (citation omitted). However, "[w]hen goods are in character or function something other than as described by a specific statutory provision—either more limited or more diversified—and the difference is significant, then the goods cannot be classified under an *eo nomine* provision pursuant to GRI 1." *See La Crosse Tech.*, 723 F.3d at 1358 (citation and internal quotation marks omitted).

"In order to determine whether the subject article is classifiable within an *eo nomine* provision, we look to whether the subject article is merely an improvement over or whether it is, instead, a change in identity of the article described by the statute." *CamelBak Prods.*, 649 F.3d at 1365 (citation omitted). "The criterion is whether the item possesses features *substantially in excess* of those within the common meaning of the term." *Id.* (quoting *Casio, Inc. v. United States*, 73 F.3d 1095, 1098 (Fed. Cir. 1996)).

"Several commercial factors also guide the court's assessment of whether articles fall within the scope of an *eo nomine* provision, including how the subject articles are regarded in commerce" and "how the subject articles are described in sales and marketing literature." *Id.* at 1368 (citations omitted).

For the reasons discussed below, the court holds that the subject articles are classifiable under heading 8301, and only heading 8301, pursuant to a GRI 1 analysis.

a. The Parties' Competing Tariff Provisions

The court begins by construing the parties' competing tariff provisions. Customs classified the subject articles under HTSUS subheading 8301.40.6030.[1] The Government argues that "[a]ll of the keyed entry locksets at issue are covered by Heading 8301 pursuant to GRI 1 in that they are ' . . . locks (key, combination or electrically operated).'" Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J. and in Supp. of Def.'s Cross-Mot. for Summ. J. 11, ECF No. 47 ("Def. MSJ"). Home Depot disagrees, insisting that "the subject entry door knobs are properly classified under Heading 8302 using a GRI 1 analysis." Pl.'s Mem. in Supp. of Mot. for Summ. J. 10, ECF No. 35 ("Home Depot MSJ"). The relevant portions of each HTSUS provision are excerpted below:

[1] Customs' classification rulings are not entitled to *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 231–234 (2001). Instead, "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Heading/ Subheading	Article Description
8301	Padlocks and locks (key, combination or electrically operated), of base metal; clasps and frames with clasps, incorporating locks, of base metal; keys and parts of any of the foregoing articles, of base metal:
8301.40	Other locks:
8301.40.60	Other:
8301.40.6030	Door locks, locksets and other locks suitable for use with interior or exterior doors (except garage, overhead or sliding doors).

Heading/ Subheading	Article Description
8302	Base metal mountings, fittings and similar articles suitable for furniture, doors, staircases, windows, blinds, coachwork, saddlery, trunks, chests, caskets or the like; base metal hat racks, hat-pegs, brackets and similar fixtures; castors with mountings of base metal; automatic door closers of base metal; and base metal parts thereof: Other mountings, fittings and similar articles, and parts thereof:
8302.41	Suitable for buildings: Other:
8302.41.60	Of iron or steel, of aluminum or of zinc: Suitable for interior and exterior doors (except garage, overhead or sliding doors):
8302.41.6045	Other.

See HTSUS § XV, Ch. 83, headings 8301, 8302.

i. HTSUS 8301

HTSUS heading 8301, an *eo nomine* provision, covers "[p]adlocks and locks (key, combination or electrically operated), of base metal."

Heading 8301 is found in § XV, Chapter 83 of the HTSUS. The Section Notes define "base metals" as:

> [I]ron and steel, copper, nickel, aluminum, lead, zinc, tin, tungsten (wolfram), molybdenum, tantalum, magnesium, cobalt, bismuth, cadmium, titanium, zirconium, antimony, manganese, beryllium, chromium, germanium, vanadium, gallium, hafnium, indium, niobium (columbium), rhenium and thallium.

HTSUS § XV, Note 3.

A "lock" is "a device for securing a door, gate, lid, drawer, or the like in position when closed, consisting of a bolt or system of bolts propelled and withdrawn by a mechanism operated by a key, dial, etc." *See* Dictionary.com, http://www.dictionary.com/browse/lock?s=t (last visited Sept. 14, 2017). And the Explanatory Notes ("ENs") for heading 8301 explain that the heading covers "[l]ocks for doors . . . ." 8301 EN (B).[2]

"Operated" means "to perform a function" or "to produce an appropriate effect." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/operate (last visited Sept. 12, 2017). Therefore, a "key-operated" lock indicates that a key performs a function, or produces an appropriate effect, for a "device for securing a door."

ii. HTSUS 8302

HTSUS heading 8302, Home Depot's proffered provision, covers "[b]ase metal mountings, fittings and similar articles suitable for . . . doors . . . ." This is also an *eo nomine* provision.

Heading 8302 is likewise found in § XV, Chapter 83 of the HTSUS. Therefore, "base metal" has the same meaning in heading 8302 as it does in heading 8301.

The relevant ENs explain that heading 8302 "covers general purpose classes of base metal accessory fittings and mountings, such as are used on furniture, doors, windows, coachwork, etc." 8302 EN. The ENs further explain that the term "[m]ountings, fittings and similar articles suitable for buildings" includes "handles and knobs for doors, including those for locks and latches." 8302 EN (D)(7).

In turn, a "knob[ ] for [a] door" or "doorknob" is "a knob that releases a door latch." Merriam-Webster Dictionary, merriam-webster.com/dictionary/doorknob (last accessed Sept. 14, 2017).

b. The Articles at Issue

There are no material facts at issue regarding the merchandise.[3] The subject articles are models made of stainless steel, brass, or nickel. The subject articles are packaged and sold with the following constituent parts: an exterior door knob with trim, an interior door knob with trim, a latch component, a flanged strike plate, keys, and

[2] The Explanatory Notes to the Harmonized Commodity Description and Coding System "are not legally binding but may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision." *Agfa Corp. v. United States*, 520 F.3d 1326, 1329 (Fed. Cir. 2008) (citation omitted).

[3] The court's factual findings regarding the subject articles are based on its review of (i) samples of the actual articles in their original packaging, Defendant's Physical Exhibits 2A, 2B, 2C, and 2D, *see* ECF No. 50, (ii) the articles' webpages, Home Depot MSJ, Ex. 2, ECF No. 35–2 ("Product Webpages"), and (iii) Home Depot's Response to Defendant's First Interrogs. Answer 7, Home Depot MSJ, Ex. 1, ECF No. 35–1 ("Pl. 1st Interrog. Resp.").

installation hardware. The latch component consists of a spring-loaded latch protruding from a frame that is capped with a plate. The knob and latch components include various base metal parts that support the components' function and allow for assembly of the product. Each knob has a locking feature. On the interior knob, there is a thumbturn. On the exterior knob, there is a slot for a key. The key slot is the visible portion of a keyed cylinder that is encased within the exterior knob and trim.[4]

The court must now determine whether the subject articles fall within either or both of the provisions. If both, the court will move onto the succeeding GRIs. HTSUS GRI 3 ("When... goods are, *prima facie*, classifiable under two or more headings, classification shall be elected" by reference to GRI 3). However, if the subject articles are described in whole by a single HTSUS heading, "the court is not to look to the subsequent GRIs." *R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1353 (Fed. Cir. 2014) (citations omitted).

c. The Subject Articles Are Described in Whole by Heading 8301

Customs classified the subject articles as "locks." For the following reasons, the court affirms this classification.

The subject articles are made of base metal, as that term is defined in Note 3 of HTSUS § XV. Steel and nickel are base metals, while brass is generally an alloy of copper and zinc, both of which are base metals. Each article is a "lock" in that it is a "device for securing a door . . . consisting of a bolt or system of bolts propelled and withdrawn by a mechanism by a key, dial, etc." *See* Dictionary.com, http://www.dictionary.com/browse/lock?s=t (last visited Sept. 14, 2017). And each article is "key-operated" in that a key produces an appropriate effect of locking or unlocking the device.[5]

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[4] In addition to the subject articles, i.e., "entry" door knobs, Home Depot also sells "passage" and "privacy" door knobs. Customs classifies passage and privacy door knobs under heading 8302, at a duty rate of 3.9% *ad valorem*. These types of door knobs share certain features with entry door knobs, in terms of components and appearance. The basic difference among the knobs is whether they lock and, if so, how. Passage door knobs do not lock and are commonly found on interior doors of houses. Pl.'s Statement of Material Facts Not in Issue ¶ 37, ECF No. 35 ("Pl. SMF"). Passage door knobs simply allow the user to grasp and turn the knob to open or close the door. Privacy and entry door knobs have locking mechanisms. Like entry door knobs, privacy door knobs have a thumbturn on the interior knob. Pl. SMF ¶ 48. Unlike entry door knobs, privacy door knobs have no keyed cylinder and can be unlocked from the outside by turning a slotted cylinder on the exterior knob with a flat object. Pl. SMF ¶ 49.

[5] Home Depot argues that the subject articles are not "key-operated" locks because the latch component of the subject articles is not directly propelled and withdrawn by the key. Home Depot MSJ 31. Rather, the key unlocks the knob, which then withdraws the latch when turned. But nothing in the meaning of the term "operate" or "lock" requires this direct effect. Indeed, the very definition of "lock" cited by Home Depot (and by Defendant, *see* Def. MSJ 12, and by the court) merely provides that the bolt is "propelled and withdrawn by a

As defined by the court and both parties, a "lock" is a "device" characterized by multiple components, including a bolt and a mechanism for propelling and withdrawing the bolt. That a lock consists of multiple parts is also made clear by the ENs to heading 8301, which explain that the heading includes "base metal *parts* of [padlocks and locks] clearly recognisable as such," including "bolts" and "cylinder barrels." 8301 EN 1 (emphasis added).

Critical to the court's analysis, knobs can be, and are here, parts of a lock. This conclusion is supported by the standards promulgated by the American National Standards Institute ("ANSI") and Builders Hardware Manufacturers Association ("BHMA").[6] Home Depot submitted each model of the subject articles for ANSI/BHMA testing and certification. *See* Pl. 1st Interrog. Resp. Answer 6(a). Each model was tested and certified under ANSI/BHMA Standard A156.2 (2011) ("Standard A156.2"), which establishes performance requirements for "bored and preassembled locks and latches . . . ." *Id.* Answer 6(b); *see also* Standard A156.2, Home Depot MSJ, Ex. 14, ECF No. 35–14. Standard A156.2 describes an "Entry Lock" as a:

> Dead locking latch bolt operated by lever from either side except when outside lever is locked by turn button or other locking device inside. When outside lever is locked, latch bolt is operated by key in outside lever or by operating inside lever. Turn button or other locking device shall be manually operated to unlock outside lever.

Standard A156.2 Function Description F81.[7] Standard A156.2 also provides that "levers" and "knobs," as well as "paddles" and "handlesets," are all interchangeable, as each constitutes "operating trim." Standard A156.2 General 3.3. Finally, the standard includes a drawing of a "Typical Preassembled Lock" that depicts a latch, a keyed cylinder, and two door handles, among other components. Standard A156.2 at 7.

mechanism operated by a key . . . ." Home Depot MSJ 31 (emphasis added). The subject articles' mechanism for propelling and withdrawing the bolt includes a knob. This fact does not compel Home Depot's conclusion that the subject articles are not key-operated locks.

[6] The ANSI is a standards organization and the BHMA is a trade association. Together, the organizations publish standards against which certain hardware-related products can be tested and certified.

[7] Home Depot's expert "testified that the subject entry door knobs were described by ANSI A156.2 as an 'F82B Entry Lock,'" rather than an F81 Entry Lock. Pl.'s Resp. to Def.'s Cross-Mot. for Summ. J. 3, ECF No. 55 (citing Colvin Expert Rep. 26, Home Depot MSJ, Ex. 5, ECF No. 35–5). Contrary to Home Depot's insistence, the distinction between the two Function Descriptions is not relevant to the court's analysis or disposition.

Standard A156.2 adds vital detail to the court's understanding of the term "lock" as a multi-component device.[8] To a substantial degree, the subject articles fit the Standard A156.2 description of an "Entry Lock." Most important to the parties' dispute, Standard A156.2 describes the subject articles' interior (inside) and exterior (outside) knobs (levers) as parts of a lock.

Moreover, Home Depot largely advertised the subject articles as "locks." On its website, Home Depot listed the subject articles as "knobs" or "knobsets." *See* Product Webpages. However, in the "Product Overview" section in each listing, Home Depot informed consumers that "[t]his lock features a radius latch with an adjustable backset and optional drive-in feature" and that "[w]hen used as a replacement lock only a screwdriver is need [sic] to make installation a snap." *See* Product Webpages at 8. The Product Overview also explains that the product "[i]ncludes keyed entry knob and single cylinder deadbolt." *Id*. In other words, the exterior knob is described as just one component of "this lock." On balance, Home Depot's online listing for the subject articles reveals that the product is held out as a lock by Home Depot to the customers its seeks to reach.

Standard A156.2 and Home Depot's Product Webpages are "commercial factors [that] guide the court's assessment of whether articles fall within the scope of [heading 8301,] an *eo nomine* provision." *See CamelBak Prods.*, 649 F.3d at 1368. In light of the terms of heading 8301, and guided by relevant commercial factors, the court finds that heading 8301 describes the subject articles in whole. In sum, a lock is a multi-component device, of which one component is a lever. In some types of locks, the lever is a door knob. Put differently, the interior and exterior knob components of the subject articles do not result in "a change in identity of the [locks] described by the statute." *See id.* at 1365. The fact that these particular locks incorporate door knobs, whereas some locks do not, does not mean that the subject articles "are in character or function something other than as described by" heading 8301. *See La Crosse Tech.*, 723 F.3d at 1358 (internal citation and quotation marks omitted). Of course, door knobs are not always parts of "key, combination or electrically operated" locks. And, when they are not, they may be properly classified under heading 8302, as discussed below.

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[8] *See Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1361 (Fed. Cir. 2001) ("Standards promulgated by industry groups such as ANSI . . . are often used to define tariff terms . . . ."). ANSI standards are a legitimate interpretive resource when those standards "are consistent with dictionary definitions but supplement those definitions where needed . . . ." *Id.* Here, the dictionary definition for "lock" cited by both parties, and adopted by the court, describes a "device" with a "mechanism operated by a key." Standard A156.2 is consistent with this definition while supplementing with additional detail regarding the features of the "device" and the operation of the "mechanism."

For these reasons, the subject articles are classifiable under HTSUS heading 8301.[9]

d. The Subject Articles Are Not Described in Whole by Heading 8302

For its part, Home Depot maintains that the subject articles are properly classified under heading 8302, as "[b]ase metal mountings, fittings and similar articles suitable for . . . doors . . ." pursuant to a GRI 1 analysis. Home Depot MSJ 10.

It is true that the base metal exterior and interior knob components of the subject articles operate to "release the latch" of the door in which they are installed. Thus, the knob components are plainly "knobs for doors" under 8302 EN (D)(7).

But the subject articles possess features "substantially in excess" of door knobs. *See CamelBak Prods., LLC*, 649 F.3d at 1365. Rather, the subject articles are, as a whole, "in character [and] function [ ] other than as described" in heading 8302. *See La Crosse Tech.*, 723 F.3d at 1358. As discussed, each article is a device for securing a door, consisting of many parts. Together, those parts constitute a lock. The interior and exterior knobs are just two of those many parts. So, while the subject articles *include* "knobs for doors, including those for locks," 8302 EN (D)(7), the subject articles are not described in whole by heading 8301 or by the term "knobs for doors."

Nevertheless, Home Depot insists that the subject articles are in fact door knobs, of which the lock is a mere feature or "improvement." *See* Home Depot MSJ 18. On this basis, Home Depot contends that Customs improperly excluded the subject articles from heading 8302. But this contention is based on a flawed premise. Home Depot makes much of the similarities between entry and privacy door knobs, framing the issue as follows: "are the entry door knobs merely an improvement over the door knobs covered by Heading 8302 or a completely different article classifiable in some other heading?" Home Depot MSJ 13–14. In other words, Home Depot starts from the perspective of privacy door knobs and contends that, if the differentiating features of entry door knobs are "merely an improvement" over privacy

[9] There is an additional consequence of the court's finding that the door knob components of the subject articles are "parts" of "locks." The relevant chapter notes provide that, "[f]or the purposes of [Chapter 83, which includes both headings 8301 and 8302], parts of base metal are to be classified with their parent articles." HTSUS Ch. 83, Note 1. A "part" is an "essential element or constituent; integral portion which can be separated, replaced, etc." *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1353 (Fed. Cir. 2002) (quoting Webster's New World Dictionary 984 (3d College Ed. 1988)). Lock parts, such as "knobs for . . . for locks or latches," might be properly classified under heading 8302 when they are entered in a stand-alone manner. *See* 8302 EN (D)(7). In other words, base metal knobs will not always have an identifiable parent article. However, these base metal knobs are "integral," "constituent" parts of their classifiable parent articles, i.e., locks.

door knobs, then entry door knobs must "remain" in heading 8302. *See* Home Depot MSJ 29–30. Home Depot has it backwards.

Pursuant to this court's definition of the term "lock," privacy door knobs are likely also "locks." Indeed, the ANSI/BHMA standards identify privacy door knobs as "locks" while testing and certifying these articles under the same standard, A156.2, as entry locks. *See* Standard A156.2 Function Descriptions F36, F37. And Home Depot describes privacy door knobs as "locks" in online advertising. *See* Home Depot MSJ, Ex. 7, ECF No. 35–7. However, heading 8301 is expressly limited to "key, combination or electrically operated" articles. Privacy door knobs, even if locks, are not "key, combination or electrically operated." Thus, contrary to Home Depot's insistence, the subject articles are not being excluded from heading 8302. Rather, privacy door knobs are expressly excluded from heading 8301.

In any event, the similarities between entry and any other door knobs are not automatically relevant to classification. There is nothing *per se* invalid about two substantially similar articles being classified under separate provisions, if indeed that is what the HTSUS calls for. An article is compared to the wording of the tariff provisions, not to other articles. Here, the disparate classification of entry and privacy door knobs is entirely consistent with the clear language of heading 8301.

At most, heading 8302 accurately describes the exterior and interior knob components of the subject articles. Accordingly, heading 8302 does not describe the subject articles in whole. Moreover, the door knob components do not render the subject articles "composite goods" subject to classification under GRI 3(b). The court does not reach GRI 3 because the subject articles are not *prima facie* classifiable under more than one heading. Rather, the subject articles are described in whole by heading 8301 and only heading 8301. *See Mita Copystar Am.*, 160 F.3d at 713 ("[I]t is not appropriate to reach GRI 3(b) if GRI 1 dictates the proper classification for particular merchandise").

"Having classified the product under the appropriate heading, we now turn to the subheadings." *Orlando Food Corp.*, 140 F.3d at 1442. Customs identified the most appropriate subheading, 8301.40.6030, which covers "[d]oor locks, locksets and other locks suitable for use with interior and exterior doors."

CONCLUSION

For the foregoing reasons, the court holds that Customs correctly classified the subject articles under HTSUS subheading 8301.40.6030. Accordingly, Plaintiff's motion for summary judgment

is denied and Defendant's cross-motion for summary judgment is granted. Judgment will be entered accordingly.

Dated: September 21, 2017
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
SENIOR JUDGE