

Decisions of the United States Court of International Trade

Slip Op. 04-56

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

WARNER-LAMBERT COMPANY, Plaintiff, UNITED STATES, Defendant.

Court No. 02-00254

Plaintiff, Warner-Lambert Company (“WLC”), challenges the classification of its merchandise by the Bureau of Customs and Border Protection of the Department of Homeland Security (“Customs”) under Harmonized Tariff Schedule of the United States (“HTSUS”), subheading 1704.90.35, 19 U.S.C. § 1202 (2000), as a sugar confectionery with a duty rate of 5.6 percent *ad valorem*. WLC claims that the imported merchandise is a sugar-free product that should be classified under HTSUS subheading 3306.90.00, which provides for preparations for oral or dental hygiene that are free of duty. Customs counterclaims that if the Court finds, as a matter of fact, that the merchandise at issue is sugar-free, then proper classification of the merchandise is under HTSUS subheading 2106.90.99, which provides for food preparations not elsewhere specified or included, dutiable at the rate of 6.4 percent *ad valorem*.

Held: Pursuant to the findings of facts and conclusions of law, judgment is entered in favor of Customs on its counterclaim ordering classification of the subject merchandise under HTSUS subheading 2106.90.99 and reliquidation of the subject entries accordingly.

[Judgment is entered in favor of Customs on its counterclaim.]

June 1, 2004

Rode & Qualey (Patrick D. Gill) for Warner-Lambert Company, plaintiff.
Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Civil Division, Commercial Litigation Branch, United States Department of Justice (*Bruce N. Stratvert*); of counsel: *Chi S. Choy*, Office of the Assistant Chief Counsel for International Trade Litigation, Bureau of Customs and Border Protection of the Department of Homeland Security, for the United States, defendant.

OPINION

TSOUCALAS, Senior Judge: Plaintiff, Warner-Lambert Company (“WLC”), challenges the classification of its merchandise by the

Bureau of Customs and Border Protection of the Department of Homeland Security (“Customs”) under Harmonized Tariff Schedule of the United States (“HTSUS”), subheading 1704.90.35, 19 U.S.C. § 1202 (2000), as a sugar confectionary with a duty rate of 5.6 percent *ad valorem*. WLC claims that the imported merchandise is a sugar-free product that should be classified under HTSUS subheading 3306.90.00, which provides for preparations for oral or dental hygiene that are free of duty. Customs counterclaims that if the Court finds, as a matter of fact, that the merchandise at issue is sugar-free, then proper classification of the merchandise is under HTSUS subheading 2106.90.99, which provides for food preparations not elsewhere specified or included, dutiable at the rate of 6.4 percent *ad valorem*.

DISCUSSION

WLC, a wholly-owned subsidiary of Pfizer, Inc., *see* Disclosure of Corporate Affiliations & Financial Interest, and importer of Certs® Powerful Mints (“subject merchandise”), filed a timely protest pursuant to 19 U.S.C. § 1514 (2000) challenging classification of its merchandise. In its complaint, WLC claims that: (1) the principal active ingredient in the subject merchandise is Retsyn®, a registered trade name of plaintiff; and (2) Retsyn®, along with the other breath freshening ingredients, promotes oral and dental hygiene. *See* Compl. ¶11. A bench trial was held on March 30 and 31, 2004. In accordance with USCIT R. 52(a), the Court enters judgment in favor of defendant pursuant to the following findings of fact and conclusions of law.

I. Findings of Fact

1. The merchandise at issue is Certs® Powerful Mints.
2. The subject merchandise was described on plaintiff’s invoices as Powerful Mints Spearmint, Certs® Peppermint Standard, and Certs® Spearmint Standard but all constitute Certs® Powerful Mints.
3. The subject merchandise was classified under HTSUS subheading 1704.90.35 which reads:

1704	Sugar confectionery (including white chocolate), not containing cocoa:
1704.10.00	Chewing gum, whether or not sugarcoated kg 4%
1704.90	Other:
	Confections or sweetmeats ready for consumption:
1704.90.10	Candied nuts . . . kg . . . 4.5%

Other:

1704.90.25	Cough drops . . kg . . Free
1704.90.35	Other 5.6%

4. Certs® Powerful Mints do not contain sugar.

Customs counterclaims that if the Court finds that Certs® Powerful Mints do not contain sugar, then proper classification for the subject merchandise is under HTSUS subheading 2106.90.99, which provides for a duty rate of 6.4 percent *ad valorem* for “Food preparations not elsewhere specified or included: Other: Other: Other: Other: Other.”

6. The imported product is marketed and advertised and consumers perceive Certs® Powerful Mints as a breath freshening agent which combats oral malodor.

7. Oral malodor or halitosis is commonly referred to as bad breath.

8. The principle active ingredient in Certs® Powerful Mints is Retsyn®, a registered trade name of plaintiff.

9. Retsyn® contains copper gluconate and partially hydrogenated cottonseed oil and flavoring agents in the form of peppermint and/or spearmint.

10. The peppermint or spearmint flavoring agents in the imported product masks oral malodor.

11. In 1982, the United States Food and Drug Administration (“FDA”) published a monogram in the Federal Register, *see* Pl.’s Ex. 2, stating that the dead-space gases of a malodorous mouth consist mainly of minute traces of highly odoriferous volatile sulfur compounds, the most common and abundant of which are hydrogen sulfide and methyl mercaptan.

12. The same monogram explained that oral malodor can be controlled by masking, purging, neutralizing or bacterial inhibition.

13. Copper gluconate in Retsyn® reacts with the volatile sulfur compounds, hydrogen sulfide and methyl mercaptan to produce non-odorous materials in the oral cavity (neutralizing).

14. Micronized fat in the form of partially hydrogenated cottonseed oil absorbs sulfides and methyl mercaptan which are the main contributors to oral malodor.

15. Consumption of Certs® Powerful Mints increases salivation in the oral cavity thereby purging bacteria located in the oral cavity.

16. The subject merchandise contains an amount of copper gluconate and partially hydrogenated cottonseed oil sufficient to neutralize the quantities of volatile sulfur compounds normally present in the mouth.

17. WLC claims that the Certs® Powerful Mints are properly classifiable under HTSUS 3306.90.00 which reads:

3306	Preparations for oral or dental hygiene, including denture fixative pastes and powders; yarn used to clean between the teeth (dental floss), in individual retail packages:
3306.10.00	Dentifrices . . . X . . . Free
3306.20.00	Yarn used to clean between the teeth (dental floss) . kg . Free
3306.90.00	Other kg . . . Free

18. Certs® Powerful Mints contain sorbitol, natural flavoring (specifically Retsyn®), maltodextrin, aspartame, magnesium stearate and Blue 1. See Pl.'s Exs. 3, 4 (Interrog. 4).

19. Plaintiff's expert witness testified that the subject merchandise is a non-medicated, cosmetic product, Tr. 86, that has not received the American Dental Association's "Seal of Acceptance." Tr. 107.

20. The trial and pleadings lack any claim that Certs® Powerful Mints are used for therapeutic or prophylactic purposes or that they are designed to treat any specific disease.

21. Plaintiff's expert, Dr. Jack W. Vincent, testified that halitosis is commonly caused by "bacteria metabolizing protein and amino acid and emitting a highly foul smelling compound such as hydrogen sulfide, methyl mercaptan and dimethyl sulfide, among others. There is also an extrinsic source of oral malodor that most generally comes from foods that are eaten; commonly onions, garlic, . . . can leave an odor on the breath." Tr. 19.

22. Dr. Vincent also testified that the "most effective way to control malodor is through very effective oral hygiene procedures [such as] brushing thoroughly with a dentifrice, using dental floss or another device to clean in between the teeth and also some mechanism of controlling the growth of bacteria on the tongue, most commonly done by tongue scraping. These are activities that are ordinarily done in the home because it requires facilities in which to do it. There are other methods that are used that are somewhat more portable in nature that can be used during the day. Mouth rinsing is a bit more portable, but still it [is] rather cumbersome. . . . [T]here are [also] portable fresheners such as Certs products that can be used on demand, very discretely and provide the breath freshening capability for an individual at any time." Tr. 20–21.

23. Defendant's expert, Dr. Andrew Spielman, testified that "Certs . . . based on [the] evaluation of the scientific evidence [] do not promote oral hygiene . . . [b]ecause they do not provide mechanical removal of bacteria. They provide masking effect. They may provide some inhibition, but not to the extent that [other] oral hygiene products [provide]." Tr. 189–191.

24. Dr. Spielman also testified that “an oral perfume that contained anti-bacterial agent[s], would [] fit within the category of a preparation for oral or dental hygiene.” Tr. 191.

II. Conclusions of Law

The Court has jurisdiction over this dispute pursuant to 28 U.S.C. § 1581(a) (2000). Determining whether imported merchandise was classified under the appropriate tariff provision entails a two-step process. *See Sabritas, S.A. de C.V. v. United States*, 22 CIT 59, 61, 998 F. Supp. 1123, 1126 (1998). First, the proper meaning of specific terms in the tariff provision must be ascertained. Second, whether the imported merchandise falls within the scope of such term, as properly construed, must be determined. *See Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994). The first step is a question of law and the second is a question of fact. *See id.*; *see also Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997). Pursuant to 28 U.S.C. § 2639(a)(1) (2000), Customs’ classification is presumed correct and the party challenging the classification bears the burden of proving otherwise. *See Universal Elecs.*, 112 F.3d at 491. This presumption, however, applies only to Customs’ factual findings, such as whether the subject merchandise falls within the scope of the tariff provision, and not to questions of law, such as Customs’ interpretation of a particular tariff provision. *See Sabritas*, 22 CIT at 61, 998 F. Supp. at 1126; *see also Universal Elecs.*, 112 F.3d at 491; *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995). To determine whether the party challenging Customs’ classification has overcome Page 9 Court No. 02–00254 the statutory presumption of correctness, this Court must consider whether “the government’s classification is correct, both independently and in comparison with the importer’s alternative.” *Jarvis Clark Co., v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

A. Classification Under Heading 1704

As a preliminary matter, this Court finds that classification of Certs® Powerful Mints under HTSUS subheading 1704.90.35 is improper because the subject merchandise does not contain sugar. Therefore, the issue remains whether classification of Certs® Powerful Mints under Heading 3306 covering preparations for oral hygiene is proper.

B. Classification Under Heading 3306

The meaning of a tariff term is a question of law to be decided by the court. *See Hasbro Indus., Inc. v. United States*, 879 F.2d 838, 840 (Fed. Cir. 1989). When a tariff term is not clearly defined in either the HTSUS or its legislative history, the correct meaning of the term is generally resolved by ascertaining its common and commercial meaning. *See W.Y. Moberly, Inc. v. United States*, 924 F.2d 232,

235 (Fed. Cir. 1991). In order to determine the common meaning of a tariff term, the court may rely on its own understanding of the term, as well as consult dictionaries, lexicons and scientific authorities. *See Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 943 (1988).

HTSUS heading 3306 provides for preparations for oral or dental hygiene.¹ The definition of the phrase “preparations for oral hygiene” is not, *per se*, set forth in any standard or technical lexicon. However, the term “preparation” is defined as “1. the act or process of making ready[;] 2. a medicine made ready for use[; and] 3. an anatomic or pathologic specimen made ready and preserved for study.” *Dorland’s Illustrated Medical Dictionary* 1351 (27th ed. 1988); *see Stedman’s Medical Dictionary* 1215 (12th ed. 1961); *The Macmillan Medical Dictionary* 348 (2d ed. 1953). Plaintiff and defendant’s experts agree that the term “oral” pertains to the mouth and “hygiene” relates to the preservation of health. Tr. 104, 110, 190–191; *see Webster’s II New Riverside University Dictionary* 826 (1988). “Preparations for oral hygiene,” therefore, are medicines made ready for the practice of preserving the health of the mouth or oral cavity. In order for the subject merchandise to fit within this description, it must satisfy the terms of the heading. *See Sabritas*, 22 CIT at 62, 998 F. Supp. at 1126–27.

Trial testimony confirmed that Certs® Powerful Mints are marketed, advertised and primarily purchased by consumers as breath mints. Plaintiff’s expert testified that the Retsyn®, contained in the subject merchandise, combats bad breath since copper gluconate, cottonseed oil and natural flavoring neutralize and mask bacteria in the mouth which commonly cause bad breath. Tr. 19–22. Moreover, consumption of the product results in an increase in salivation which causes a physical rinse-out or dislodgement (purging) of accumulated volatile sulfur compounds or a reduction of the number of bacteria in the mouth (specifically, a result of swallowing). Tr. 32–33. These three measures, however, are not specifically referred to in the FDA’s monogram as “hygienic measures.” Only antimicrobial measures, such as using a germ killing mouthwash “intended to treat or prevent disease,” aide in the preservation of oral health, which is the thrust of the FDA’s monogram. *See Pl.’s Ex. 2*, (47 Fed. Reg. at 22,844). Although the monogram recognizes that certain cosmetic products can combat oral malodor, use of such products must reach an antimicrobial result to be considered a preparation for oral or dental hygiene. *See id.* (stating that “articles that are cosmetic, but which are also intended to treat or prevent disease” can be consid-

¹The evidence presented in plaintiff’s case does not address the issue of whether Certs® Powerful Mints combat a condition pertaining to dental hygiene. Rather, plaintiff’s case is limited to the claim that the subject product combats oral malodor, which WLC claims to be a condition of oral hygiene.

ered drugs and that “[b]ecause oral malodor is caused mainly by gram-negative anaerobes, *only antimicrobial ingredients known to be effective against the causative organism are effective in suppressing the malodor*”) (emphasis added).

Neither testimony nor evidence presented establishes that Certs® Powerful Mints effect the health of the oral cavity. Accordingly, the subject product can not be considered a preparation for oral hygiene. WLC asks this Court to find that the Explanatory Notes to Heading 3306 cover, among other preparations, mouthwashes and oral perfumes, “thus, embracing the imported product which acts as an oral perfume.” WLC’s Proposed Findings of Fact & Conclusions of Law at 7 ¶3. Pursuant to Rule 1 of the General Rules of Interpretation (“GRI 1”), however, the definition and scope of terms of a particular provision is to be determined by the wording of the statute and any relevant section or chapter notes. *See Sabritas*, 22 CIT at 62, 998 F. Supp. at 1126–27. The Explanatory Notes are not legally binding, although they generally indicate the proper interpretation of the HTSUS. *See Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992) (quotation omitted). The Court recognizes that the Explanatory Notes to Heading 3306 include oral perfumes in the list covering preparations for oral hygiene. However, the Explanatory Notes do not specifically include or exclude the subject merchandise from Heading 3306. *See Bausch & Lomb, Inc. v. United States*, 21 CIT 166, 174–75, 957 F. Supp. 281, 288 (1997), *aff’d*, 148 F.3d at 1363. The trial testimony revealed that many products, including an Page 13 Court No. 02–00254 ordinary candy mint (not containing Retsyn®), mask odor.² Tr. 69–71. Following the logic presented by plaintiff would lead to an absurd finding that the subject merchandise preserves the health of the oral cavity simply because it perfumes the mouth. Such a finding would be anomalous to the FDA’s conclusion that to be considered a preparation for oral hygiene, a product must treat or prevent disease. *See* Pl.’s Ex. 2; *see also* Findings of Fact ¶¶19, 20 (stating that Retsyn® (Certs) does not treat disease, rather it is a cosmetic product).

C. Classification Under Heading 2106

Customs’ classification rulings are entitled to “a respect proportional to [their] ‘power to persuade.’” *United States v. Mead*, 533 U.S. 218, 235 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Customs’ rationale for classification of the subject merchandise under HTSUS Heading 2106 is set forth in Headquarters Rul-

²The evidence presented by plaintiff regarding the effectiveness of Retsyn® in chemically neutralizing volatile sulfur compounds is irrelevant. Plaintiff’s expert testified that Certs® Powerful Mints are cosmetic products and that the Retsyn® they contain do not inhibit or kill bacteria.

ing Letter (“HQL”) 963764, dated January 11, 2002. Customs explains:

To be classified in heading 3306, HTSUS, the product must be described by the terms of the heading. The [Explanatory Notes] to heading 3306 identify certain types of articles which are covered by that heading. These are: dentifrices, tooth-pastes, denture cleaners, mouth washes and oral perfumes, denture fixative pastes, powders and tablets, and yarn used to clean between the teeth (dental floss). Breath mints are not included among this listing. They also do not appear among the many articles used in the care of teeth and mouth enumerated in *The Handbook of Nonprescription Drugs*.

[Customs] do[es] not dispute the claim that the Certs® products may help reduce or control bad breath. However, they are packaged, labeled and marketed as mints. Mints do not appear anywhere among the examples of oral health products listed by the [Explanatory Notes].

....

The Certs® Powerful Mints contain only synthetic sweetening agents and cannot be classified in Chapter 17. because they contain no medicinal substances, and no claim has been made that they are intended to be used for therapeutic or prophylactic purposes, or that they are designed to treat a[] specific disease or condition, they are precluded from consideration as medicaments of Chapter 30.

....

The [Explanatory Notes] to heading 21.06 state that the heading includes, *inter alia*, “[e]dible tablets with a basis of natural or artificial perfumes (e.g., vanillin), . . . [s]weets, gums and the like (for diabetics, in particular) containing synthetic sweetening agents (e.g., sorbitol) instead of sugar.” These exemplars describe articles akin to Certs® Powerful Mints.

HQL 963764 at 5–7 (Jan. 11, 2002). This explanation is thorough in its consideration and contains valid reasoning and, therefore, is entitled to *Skidmore* deference. *See Mead*, 533 U.S. at 218; *see also Jewelpak Corp. v. United States*, 297 F.3d 1326, 1331 (Fed. Cir. 2002); *Heartland By-Prods., Inc. v. United States*, 264 F.3d 1126, 1133 (Fed. Cir. 2001). Accordingly, Customs’ classification Page 15 Court No. 02–00254 of Certs® Powerful Mints in HQL 963764 under Heading 2106 is proper and, therefore, affirmed.

Conclusion

Customs improperly classified the subject merchandise under

HTSUS subheading 1704.90.35 as a sugar confectionery with a duty rate of 5.6 percent *ad valorem*. The Court finds, however, that the subject merchandise is properly classified under HTSUS subheading 2106.90.99, as a food preparation not elsewhere specified or included, dutiable at the rate of 6.4 percent *ad valorem*. Accordingly, judgment will be entered in favor of Customs on its counterclaim. Customs shall classify the imported merchandise under HTSUS subheading 2106.90.99 and reliquidate the subject merchandise accordingly.

Slip Op. 04–57

TIMBER PRODUCTS CO., Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 01–00216

[Plaintiff's motion for summary judgment denied; judgment entered for Defendant.]

Decided: June 2, 2004

Sandler, Travis & Rosenberg, P.A. (Beth C. Ring) for Plaintiff.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Acting Attorney in Charge, *Mikki Graves Walser*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Michael W. Heydrich*, Attorney, Of Counsel, Office of the Assistant Chief Counsel, U.S. Bureau of Customs and Border Protection, for Defendant.

OPINION

Pogue, Judge: This action is now before the Court on crossmotions for summary judgment. Plaintiff Timber Products Co. (“Plaintiff”) challenges the classification by the U.S. Bureau of Customs and Border Protection (“Customs”)¹ of certain entries of plywood from Brazil under subheading 4412.14.30 of the Harmonized Tariff Schedule of the United States (“HTSUS”), 19 U.S.C. § 1202 (1994),²

¹ Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. See Homeland Security Act of 2002, Pub. L. No. 107–296 § 1502, 2002 U.S.C.A.N. (116 Stat.) 2135, 2308; Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108–32, at 4 (2003).

² Subheading 4412.14.30, HTSUS, reads:

4412	Plywood, veneered panels and similar laminated wood (con): Plywood consisting solely of sheets of wood, each ply not exceeding 6 mm in thickness (con):
4412.14	Other, with at least one outer ply of nonconiferous wood:
...	

a basket provision for plywood with at least one outer ply of nonconiferous wood. Subheading 4412.14.30, HTSUS (1997).³ Plaintiff contends that the entries should be classified under subheading 4412.13.40, HTSUS,⁴ which explicitly provides, among other things, for plywood with at least one outer ply of “virola.” *Id.* Although Plaintiff admits that it cannot show that the entries consisted of plywood with at least one outer ply of wood from a tree of the “virola” genus,⁵ it claims a commercial designation for the term “virola” which includes the merchandise at issue. Plaintiff, however, has failed to produce sufficient evidence to support either its asserted commercial designation or the applicability of the asserted commercial designation to its merchandise under USCIT R. 56; therefore, Plaintiff’s motion for summary judgment is denied, and judgment is entered for Defendant.

BACKGROUND

Plaintiff imported the subject entries of plywood⁶ from Brazil be-

4412.14.30 Other.

Subheading 4412.14.30, HTSUS (1997).

³The complaint alleges, and the answer admits, that the subject entries of merchandise were imported in 1996 and 1997. *See* Compl. of Timber para. 1; Answer of Customs para. 1. The Court uses the 1997 version of the HTSUS for the sake of convenience; while it differs slightly from the 1996 version, it does not differ in any way which makes for a difference in this case. *Cf.* heading 4412.13.30, HTSUS (1996), *with* heading 4412.13.40, HTSUS (1997).

⁴Subheading 4412.13.40, HTSUS reads:

4412	Plywood, veneered panels and similar laminated wood: Plywood consisting solely of sheets of wood, each ply not exceeding 6 mm in thickness:
4412.14	Other, with at least one outer ply of nonconiferous wood: Not surface covered, or surface covered with a clear or transparent material which does not obscure the grain, texture or markings of the face ply:
. . . .	
4412.13.40	Other: With at least one outer ply of the following tropical woods: Dark Red Meranti, Light Red Meranti, White Lauan, Sipo, Limba, Okoumé, Obeche, Acajou d’Afrique, Sapelli, Virola, Mahogany, Palissandre de Para, Palissandre de Rio or Palissandre de Rose.

Subheading 4412.14.30, HTSUS.

⁵A “genus” is “[a] classificatory group comprehending a number of species (sometimes a single species) possessing certain common structural characteristics distinct from those of any other group.” VI *The Oxford English Dictionary* 456 (2d ed. 1989).

⁶Plywood, for purposes of heading 4412, consists of three or more sheets of wood which are glued and pressed together. Harmonized Commodity Description and Coding System, Explanatory Note 44.12 (2d ed. 1996) at 681. Each sheet is known as a “ply.” *Id.* At least with regards to Brazil, plywood is manufactured by mills which shave logs into sheets or veneers. *See* Pl.’s Mem. Supp. Mot. Summ. J. at 6–7 (“Pl.’s Br.”). The mills attempt to match veneers by color, but the species of woods involved in making the plywood are considered irrelevant. *Id.* Thus, one piece of plywood may consist of various types of wood, and indeed, a single ply may consist of more than one type of wood. *Id.*; *see also infra* pp. 18–20.

tween 1996 and 1997. *See* Pl.'s Br. at 1. On its shipping and entry documents, it listed the merchandise as "Sumauma (C. Petanda) Plywood," "Faveira (Parkia spp.) Plywood," "Amesclao (T. Burseaeifolia) Plywood," "Brazilian White Virola Rotary Cut Plywood,"⁷ "White Virola Plywood," "White Virola (Virola spp.) Plywood," and "Edaiply Faveira (Parkia spp.)." *Id.* at 4–5.⁸ Because these woods are not separately listed in the HTSUS, Customs classified the entries under subheading 4412.14.30, HTSUS, as plywood with at least one outer face of nonconiferous wood. *See* Complaint of Timber para. 6, Answer of Customs para. 6; *cf.* subheading 4412.14.30, HTSUS, *with* subheading 4412.13.40, HTSUS. Plaintiff contends, however, that "sumauma," the two species of "faveira," and "amesclao,"⁹ along with other woods, are known by a definite, general, and uniform commercial designation in the U.S. wholesale trade as "virola," and therefore ought to be classified as plywood with at least one outer ply of "virola."¹⁰

⁷ Plaintiff contends that "white virola" does not refer to any particular species of tree, but only to lighter colored wood of any of the species which it argues are commercially known as "virola." Pl.'s Stmt. Mat. Facts para. 10. Defendant agrees that the term denotes "lighter shades of wood," although not "regardless of the species." Def.'s Resp. to Pl.'s Stmt. Mat. Facts para. 10.

⁸ The words in parentheses designate the scientific names of the species of tree which Plaintiff claims forms the outer ply of the imported plywood. Scientific names are based on taxonomy, the hierarchy of biological classification comprised of kingdom, phylum, class, order, family, genus, and species. *See McGraw-Hill Concise Encyclopedia of Science and Technology* 1847–48 (2d ed. 1989). Commonly, species are referred to by a scientific name which includes two parts: the first initial or word designates the genus, the second word or abbreviation designates the species. "Spp." stands for *species plurales*, indicating that all species of the given genus are referred to.

Rather than giving the full scientific names, Plaintiff refers to "Sumauma (C. Petanda)," "Faveira (Parkia spp.)," "Amesclao (T. Burseaeifolia)," and "Edaiply Faveira (Parkia spp.);" throughout its submissions as "sumauma," "faveira," and "amesclao." *See, e.g.,* Pl.'s Br. at 1 n.1, 5, 21. The Court adopts this method of reference, for purposes of brevity only.

⁹ It appears that the names "sumauma," "faveira," and "amesclao," were provided on the entry papers for the plywood at issue only for regulatory purposes, and not as a reflection of the true nature of the imported wood. *See* Pl.'s Br. at 5, 8. Rather, Plaintiff appears to admit that there is no way of knowing whether the plywood at issue had one outer ply of any of these woods. Because of the manner in which the plywood is created, it is highly improbable that one sheet would be made of a single species. *See id.* at 7. Any given shipment will contain numerous wood types. *See id.* at 7–8.

¹⁰ In *Russell Stadelman & Co. v. United States*, the Court dealt with a challenge to the classification of similar merchandise under a previous, differently-worded version of the HTSUS. *See Russell Stadelman & Co. v. United States*, 23 CIT 1036, 83 F. Supp. 2d 1356 (1999). Rather than the term "virola," that version of the HTSUS employed the term "baboen." *See* 23 CIT at 1046 n.11, 83 F. Supp. 2d at 1364 n.11. In *Russell Stadelman & Co.*, plaintiff claimed that plywood invoiced as having at least one outer ply of "sumauma," "faveira," or "mangue" should be classified as plywood with at least one outer ply of "baboen." *See* 23 CIT at 1037, 83 F. Supp. 2d at 1357. The Court found that only certain woods of the genus "virola" were classifiable as "baboen," and thus that the subject merchandise was not embraced by the provision asserted by plaintiff. *See* 23 CIT at 1037, 1046 n.11, 83 F. Supp. 2d at 1357, 1364 n.11. The Court moreover found that plaintiff failed to prove a commercial designation for "baboen," as the proof it adduced related to identifying

STANDARD OF REVIEW

Under USCIT Rule 56, summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” USCIT R. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In determining whether a genuine issue of fact exists, the Court reviews the evidence submitted drawing all inferences against the moving party. *See United States v. Pan Pac. Textile Group Inc.*, 27 CIT ____ , ____ , 276 F. Supp. 2d 1316, 1319 (2003) (internal citation omitted); *see also Matsushita Elecs. Indus. Co v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citations omitted).

In a classification case, on factual issues, Custom’s decision enjoys a presumption of correctness. *See Universal Elecs. Co. v. United States*, 112 F.3d 488, 493 (Fed. Cir. 1997). To overcome this presumption, a plaintiff must provide evidence that a reasonable mind could find sufficient to establish that Customs’ decision is incorrect, *see id.* at 492, i.e., to avoid summary judgment against it, such a party must proffer evidence sufficient to enable a reasonable mind, drawing all inferences in that party’s favor, to conclude that a substantial issue of material fact exists requiring trial. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (stating that summary judgment will not lie where a dispute about a material fact is genuine, such that a reasonable trier of fact could return a verdict for nonmoving party).¹¹ This obligation exists with respect to each element which is essential to a party’s case. As is specifically relevant here, summary judgment must be entered against a party who fails to adduce the minimally necessary evidence on an element which is essential to its case, and upon which it would have the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. at 322–23.

In the absence of genuine factual issues, the “‘propriety of the summary judgment turns on the proper construction of the HTSUS, which is a question of law.’” *Toy Biz, Inc. v. United States*, 27 CIT ____ , ____ , 248 F. Supp. 2d 1234, 1241 (2003) (quoting *Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1466 (Fed. Cir. 1998);

the merchandise as “virola,” rather than as “baboen,” which was the term actually used by the statute. *See* 23 CIT at 1044–45, 83 F. Supp. 2d at 1363.

The instant case differs from *Russell Stadelman & Co.* in that Congress has changed the wording of the tariff schedule to provide for plywood with at least one outer ply of “virola,” rather than one outer ply of “baboen.” However, the majority of the deposition and affidavit testimony that plaintiff provides as proof of its asserted commercial designation for the term “virola” in this case was first provided to the Court in *Russell Stadelman & Co.*. *See* Pl.’s Br. at 3.

¹¹ Similarly, a party facing a properly supported motion for summary judgment may not rest on mere allegations that a genuine issue of material fact exists. *See* USCIT R. 56(e), *United States v. JICK (USA) Indus. Corp.*, 22 CIT 980, 981, 27 F. Supp. 2d 199, 200 (1998).

Nat'l Advanced Sys. v. United States, 26 F.3d 1107, 1109 (Fed. Cir. 1994)).

DISCUSSION

This case primarily turns on Plaintiff's attempt to prove a commercial designation for the term "virola." The term "virola" is not statutorily defined. The term appears in several provisions of the tariff schedule within Chapter 44, which deals with wood products generally.¹² Chapter 44, HTSUS. Some of these provisions specifically reference "virola," others only reference "tropical wood," but it is understood that "virola" falls within this category.¹³ Within the text of the HTSUS itself, there is no definition of "virola."

Where a tariff term is not statutorily defined, it is assumed to carry its common meaning. *Mita Copystar America v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) ("When a tariff term is not defined in either the HTSUS or its legislative history, the term's correct meaning is its common meaning.") (citing *Lynteq, Inc. v. United States*, 976 F.2d 693, 697 (Fed. Cir. 1992); *Winter-Wolff, Inc. v. United States*, 22 CIT 70, 74, 996 F. Supp. 1258, 1261 (1998) (citations omitted)).

The Court generally looks to standard lexicographic sources to de-

¹²In addition to subheading 4412.13.40, which covers plywood not exceeding 6 mm in thickness, with at least one outer ply of "virola," "virola" is referenced either by name or by way of subheading note 1 to Chapter 44 (*infra* note 13) in subheading 4403.49.00 (covering "[w]ood in the rough, whether or not stripped of bark or sapwood, or roughly squared . . . Other, of tropical wood specified in subheading note 1 to this chapter . . . Other"), subheading 4407.24.00 (covering "[w]ood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6 mm . . . Of tropical wood specified in subheading note 1 to this chapter: Virola"), and subheading 4408.39.00 (covering "[v]eneer sheets and sheets for plywood (whether or not spliced) and other wood sawn lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness not exceeding 6 mm . . . Of tropical wood specified in subheading note 1 to this chapter . . . Other"). See subheadings 4403.49.00, 4407.24.00, and 4408.39.00, HTSUS.

¹³Subheading note 1 to Chapter 44 reads as follows:

1. For the purposes of subheadings 4403.41 to 4403.49, 4407.24 to 4407.29, 4408.31 to 4408.39 and 4412.13 to 4412.99, the expression "tropical wood" means one of the following types of wood:

Abura, Acajou d'Afrique, Afrormosia, Ako, Alan, Andiroba, Aningré, Avodiré, Azobé, Balau, Balsa, Bossé clair, Bossé foncé, Cativo, Cedro, Dabema, Dark Red Meranti, Dibétou, Doussié, Framiré, Freijo, Fromager, Fuma, Geronggang, Ilomba, Imbuia, Ipé, Iroko, Jaboty, Jelutong, Jequitiba, Jongkong, Kapur, Kempas, Keruing, Kosipo, Kotibé, Koto, Light Red Meranti, Limba, Louro, Maçaranduba, Mahogany, Makoré, Mansonia, Mengkulang, Meranti Bakau, Merawan, Merbau, Merpuah, Mersawa, Moabi, Niangon, Nyatoh, Obeche, Okoumé, Onzabilli, Orey, Ovengkol, Ozigo, Padauk, Paldao, Palissandre de Guatemala, Palissandre de Para, Palissandre de Rio, Palissandre de Rose, Pau Marfim, Pulai, Puna, Ramin, Sapelli, Saqui-Saqui, Sepetir, Sipo, Sucupira, Suren, Teak, Tiama, Tola, Virola, White Lauan, White Meranti, White Seraya, Yellow Meranti.

Subheading note 1, Chapter 44, HTSUS.

termine the common meaning of a tariff term. See *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988) (internal citations omitted). Also helpful are the Explanatory Notes to the HTSUS, which, although not binding, provide guidance in interpreting the HTSUS. See *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 n.1 (Fed. Cir. 1999) (citation omitted); see also *Russell Stadelman & Co. v. United States*, 23 CIT 1036, 1039–40, 83 F. Supp. 2d 1356, 1359 (1999) (internal citations omitted).

The Court has located two lexicographic sources that define “virola.” *A Dictionary of Plant Sciences* defines “virola” as “[a] genus of plants some of which are big trees and an important source of timber.” *A Dictionary of Plant Sciences* at 471 (2d ed. 1998). *Webster’s Third New International Dictionary* defines “virola” as “a genus of chiefly So. American forest trees (family Myristicaceae) which yield pale to reddish brown wood.” *Webster’s Third New International Dictionary* at 2556 (1993). These definitions appear to limit the term to trees of the genus “virola.”

An annex to the Explanatory Notes for Chapter 44 contains a chart which compares the woods listed in subheading note 1 of Chapter 44 against the scientific names of the trees which are denoted by that name, as well as common names for the trees over a variety of countries. Harmonized Commodity Description and Coding System, Annex: Appellation of Certain Tropical Woods (2d ed. 1996) at 690.¹⁴ This chart indicates that the scientific names corresponding to the term “virola” are “virola spp.” Harmonized Commodity Description and Coding System, Annex: Appellation of Certain Tropical Woods (2d ed. 1996) at 713. The word “virola” in the phrase “virola spp.” refers to the genus of the covered trees; the word “spp.” is an abbreviation of “*species plurales*.” *Russell Stadelman & Co. v. United States*, 23 CIT at 1037 n.1, 83 F. Supp. 2d at 1357 n.1. Thus, all species of the genus “virola” are covered under the pilot-name “virola” as used in the Explanatory Notes. The common meaning of the term “virola” would then appear to encompass any wood of a tree of the genus “virola,” but not the wood of trees of other genera.¹⁵

¹⁴The names which appear in subheading note 1 to Chapter 44, and which appear in the first column of the chart in the annex to the Explanatory notes:

are designated according to the pilot-names recommended by the International Technical Association for Tropical Timber (l’Association technique internationale des bois tropicaux) (ATIBT). The pilot-name is based on the popular name employed in the principal country of production or of consumption.

The relevant pilot-names, together with corresponding scientific and local names, are listed in the Annex to the Explanatory Notes to this Chapter.

Harmonized Commodity Description and Coding System, Subheading Explanatory Note, Chapter 44 (2d ed. 1996) at 671.

¹⁵Neither “sumauma,” “faveira,” nor “amesclao” are trees of the “virola” genus. Plaintiff invoiced its entries as “Sumauma (C. Petanda) Plywood,” “Faveira (Parkia spp.) Plywood,” “Amesclao (T. Burseaeifolia) Plywood,” and “Edaiply Faveira (Parkia spp.).” See Pl.’s Br.

The law would have the Court assume that the common meaning and the commercial meaning of the tariff term at issue are identical. *Winter-Wolff, Inc. v. United States*, 22 CIT at 74, 996 F. Supp. at 1261 (internal citations omitted). Plaintiff, however, contends that they are not, and that there is an established commercial meaning within the trade for “virola” which is considerably more expansive than the “common” meaning, and which describes the merchandise at issue. Where it is argued that the common and commercial meanings differ, the commercial meaning will not prevail unless a party can demonstrate that the commercial meaning is “definite, uniform, and general” throughout the trade. *Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097 (Fed. Cir. 1984) (quoting *Moscablades Bros. v. United States, Inc.*, 42 C.C.P.A. 78, 82 (1954)).¹⁶

Accordingly, to establish that its proposed commercial designation of “virola” displaces the common meaning of that tariff term, Plaintiff must prove that the term “virola” has a commercial meaning in the trade “which is general (extending over the entire country), definite (certain of understanding) and uniform (the same everywhere in the country,” and that this commercial meaning encompasses Plaintiff’s merchandise. *Rohm & Haas Co. v. United States*, 5 CIT 218, 226, 568 F. Supp. 751, 757 (1983) (citing *S.G.B. Steel Scaffolding &*

at 4–5. Plaintiff has identified its “faveira” as being wood of the genus “parkia,” rather than the genus “virola.” “Sumauma” and “amasclao,” as entered by Plaintiff, are likewise not of the genus “virola.” The “C.” in “*C. Petanda*” would apparently stand for the genus “ceiba.” See *Russell Stadelman & Co. v. United States*, 23 CIT at 1036 n.1, 83 F. Supp. 2d at 1357 n.1; Harmonized Commodity Description and Coding System, Annex: Appellation of Certain Tropical Woods (2d ed. 1996) at 700. The “T.” in “*T. Burseaefolia*” would appear to stand for the genus “trattinickia.” See Universidad de Cordoba, Principales especies maderables comercializadas, at <http://www.uco.es/organiza/servicios/jardin/cd1/Maderas%20CITES/anexoII.htm> (last visited May 24, 2004) (listing “trattinickia spp.” and “tetragastris spp.” as the scientific names corresponding to the commercial name “amesclao”); Manejoflorestal.org, Lista de espécies madeiras, at <http://www.manejoflorestal.org/guia.cfm?cap=12> (last visited May 24, 2004) (listing “breu” and “amescla” as common names of “*Trattinickia burseaefolia* Mart”) (the Court reads that Plaintiff’s use of “burseaefolia” is most likely a misspelling of “burseraefolia”). Plaintiff also invoiced some entries as “Brazilian White Virola Rotary Cut Plywood,” “White Virola Plywood,” and “White Virola (*Virola* spp.) Plywood,” but in stating that the genres on the entry papers were listed only for regulatory purposes, appears to admit that the wood represented in these entries may not be of the genus “virola.” See Pl.’s Br. at 4–5; see *supra* notes 7, 9.

¹⁶The term “virola” was placed into the HTSUS by presidential proclamation, rather than by act of Congress. See Proclamation No. 6857, 60 Fed. Reg. 64,817, 64,887, 64,889 (Dec. 15, 1995), Proclamation No. 6948, 61 Fed. Reg. 56,385, 56,393 (Oct. 31, 1996). The first proclamation, among other things, struck “baboen” from the list of woods in subheading note 1 to chapter 44, and replaced it with “virola.” See Proclamation No. 6857, 60 Fed. Reg. at 64,889 (Dec. 15, 1995). The second proclamation amended subheading 4412.13 to provide specifically for plywood “with at least one outer ply of . . . virola,” rather than the more general previous reference to plywood “with at least one outer ply of tropical wood specified in subheading note 1 to this chapter.” See Proclamation No. 6948, 61 Fed. Reg. at 56,393 (Oct. 31, 1996); *cf.* subheading 4412.13, HTSUS (1996), with subheading 4412.13.40, HTSUS (1997). Nonetheless, the logic and substance of the requirements articulated in *Rohm & Haas Co.* still hold.

Shoring Co. v. United States, 82 Cust. Ct. 197, 206, C.D. 4802 (1979) (internal citations omitted)). Each of these constitutes an essential element of Plaintiff's claim.

Plaintiff, however, has failed to produce evidence which a reasonable mind, even drawing all inferences in Plaintiff's favor, could find sufficient to fulfill the *Rohm & Haas Co.* test. Plaintiff has failed to make a sufficient initial showing of a commercial meaning that is definite, general, and uniform; in addition, Plaintiff has failed to show that even if its purported commercial meaning were accepted, the merchandise in issue would be described by it. In evaluating the evidence Plaintiff has put forth, the Court first discusses the requirements of generality, uniformity, and definiteness, and then discusses the suitability of Plaintiff's purported commercial meaning to the merchandise at issue.

Plaintiff has produced affidavits and deposition evidence from persons who identify themselves as wholesalers of plywood, and who testify as to a general use for the term "virola" among such wholesalers. However, if an article or good is only known by a certain name "in one trade or branch of trade," no commercial designation can follow. *Maddock v. Magone*, 152 U.S. 368, 372 (1894). In this case, it is not the meaning of "plywood" that is being construed; it is the meaning of "virola." "Virola," whatever it may be, is imported by trades other than the plywood trade, as evidenced by the term's several appearances throughout Chapter 44 of the HTSUS. More specifically, the HTSUS contemplates the importation of "virola" by those who import wood in the rough, wood sawn or chipped lengthwise, as well as veneer sheets and sheets for plywood (whether or not spliced) and other wood sawn lengthwise. *See supra* note 12.

Even if Plaintiff's purported commercial designation for the term "virola" were to be found consistent within the plywood trade, without evidence as to the term's usage in the other trades importing "virola," the Court cannot find that Plaintiff has made a sufficient initial demonstration of a general meaning for the term. Where a single term is used multiple times over the course of a statute, the courts presume that the meaning of the term remains consistent. *See, e.g., RHP Bearings Ltd. v. United States*, 288 F.3d 1334, 1346–47 (Fed. Cir. 2002); *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001).¹⁷ There is no sign or indication that

¹⁷ Both *RHP Bearings Ltd.* and *SKF USA Inc.* involved a term in the dumping statutes which, in addition to being used multiple times, was also statutorily defined. *See RHP Bearings Ltd. v. United States*, 288 F.3d at 1346–47; *SKF USA Inc. v. United States*, 263 F.3d at 1382. Although "virola" is not defined in the text of the HTSUS, the Court cannot see why the lack of a statutory definition should permit the definition of "virola" to change from provision to provision, especially in light of a definition in the Explanatory Notes. Moreover, even were there no definition occurring in the Explanatory Notes, it is inappropriate for the Court to allow the word "virola" to take on different meanings with each provision in the absence of any indication that this was intended by Congress.

Congress intended for more than one meaning of “virola” to be applied in construing the terms of the HTSUS. Therefore, to show a “general” commercial meaning for the term “virola,” it is necessary for Plaintiff to place before the Court evidence with regard to the term’s use generally. This it has failed to do.

Plaintiff argues that it is not required to put forth evidence with regard to any merchandise other than that which is at issue here. *See* Pl.’s Resp. to Def.’s Mot. to Dismiss in Part for Lack of Subject Matter Jurisdiction and Cross-Mot. for Summ. J. at 21 (“Pl.’s Resp.”). Although this might be true in another case, the Court cannot agree with the proposition as applied here because of the number of different tariff provisions that use the term “virola.” The statutory construction dilemma is unavoidable here.¹⁸

Plaintiff’s failure to meet its initial burden of proof with regard to generality also applies to the requirement of uniformity. Because Plaintiff has produced only the testimony of plywood wholesalers, the Court cannot determine whether wholesalers of other trades located in various portions of the country and importing “virola” wood into the United States *uniformly* use the same definition of “virola” asserted by Plaintiff. Without some such proof, a commercial meaning of “virola” that satisfies principles of statutory construction cannot follow.

Plaintiff’s threshold showing also fails the requirement of definiteness. To be definite, a purported commercial meaning must be “certain of understanding.” *S.G.B. Steel Scaffolding & Shoring Co. v. United States*, 82 Cust. Ct. 197, 206 (1979). Plaintiff’s claimed commercial meaning of “virola” encompasses more than wood of the “virola” genus; it would include wood of “near species,” which Plaintiff contends include “sumauma,” “faveira,” and “amesclao.” Pl.’s Br.

¹⁸Moreover, the single case which Plaintiff cites for the proposition that no evidence is necessary with regard to the meaning of “virola” in other trades that import “virola” is inapposite. Plaintiff cites *Am. Net & Twine Co. v. Worthington*, 141 U.S. 468 (1891). *See* Pl.’s Resp. at 21 n.8. Contrary to Plaintiff’s claim, that case does not stand for the proposition that the meaning a term in contention holds in other, similar trades that use the term is irrelevant. Rather, that case is simply one recognizing that an *eo nomine* provision which was specific in its reference to a particular use prevailed over a more general, otherwise applicable provision. *See Am. Net & Twine Co. v. Worthington*, 141 U.S. at 472. The case involved linen thread which was imported into the United States as “gilling twine” for the repair of fishing nets. *Id.* at 471. The Supreme Court found that, although the merchandise was classifiable as linen thread, because it had been imported into the country solely for use in the repair of nets, and because Congress, in providing for “gilling twine,” obviously intended the classification of goods used as such, the thread at issue should be classified as “gilling twine,” rather than as linen thread, in recognition of its intended use. *Id.* at 474. Moreover, although the language of commercial designation is used in the case, the case is so factually distinct as to have no bearing on the issues before the Court in this action because in that case, there was no question as to what materials Plaintiff’s product consisted of; the question focused entirely on the product’s use. The instant case focuses on whether or not the material of which Plaintiff’s plywood is made is, in fact, “virola”; the question does not rise to one of material fact, however, because of Plaintiff’s failure to put forth sufficient evidence to meet its initial burden under USCIT R. 56. *See infra* pp. 18–20.

at 1. All told, Plaintiff contends that there are approximately thirty-five species of trees which are commercially known as “virola.” Pl.’s Br. at 5. However, Plaintiff at no time identifies those species, and none of the affiants or deponents whose testimony Plaintiff places before the Court identifies them.

Plaintiff argues that it is not required to identify the thirty-five “near species,” other than to show that “sumauma,” “faveira,” and “amesclao” are among them, because this suffices to satisfy the requirement that its commercial meaning be “certain of understanding.” See Pl.’s Resp. at 20, 24. On the contrary, however, to the extent that the terms used in the HTSUS are meant to enable a Customs officer to classify a good, a definition that includes “approximately thirty-five” otherwise unnamed species of wood, without more, cannot be considered definite. Inasmuch as the definition inherently includes unknown species, it cannot be “certain of understanding” for purposes of administering the HTSUS.¹⁹

Finally, Plaintiff has failed to make an initial showing that its purported commercial designation would apply to the merchandise before the Court. Plaintiff effectively concedes that the wood names listed on its entry papers do not in fact reflect the actual species composition of the entries, but were chosen for regulatory purposes. See Pl.’s Br. at 5, 8. In other words, Plaintiff’s entries may not consist entirely of “sumauma,” “faveira,” and “amasclao,” the three woods that Plaintiff asserts are known commercially as “virola.” Certainly the true identity of the outer ply is unknown. If Plaintiff is unable to identify the species composition of its entries, it cannot make the necessary threshold demonstration that the entries could be classified under a commercial designation that is based on species identification.²⁰ Plaintiff has failed to produce evidence that the

¹⁹Plaintiff apparently relies again on the notion that it need not put forth evidence with regard to merchandise not actually before the Court, and relies on *United States v. Fung Chong Co.*, 34 C.C.P.A. 40 (1946) for the proposition that it need not show what is excluded from the meaning of a tariff term, but only that its merchandise is included therein. See Pl.’s Resp. at 24. *Fung Chong Co.*, however, involved the failure to prove a commercial designation of the term “orange.” The Court there held that in the absence of proof of the term’s meaning, testimony that the merchandise at issue was excluded from the term was insufficient to establish commercial designation. *United States v. Fung Chong Co.*, 34 C.C.P.A. at 44. Certainly, *Fung Chong Co.* does not help the Plaintiff here. Here, Plaintiff’s refusal to identify the species on the basis that they are not before the Court is not sufficient where Plaintiff seeks to include these species in its purported commercial designation.

²⁰Given the nature of the evidence in this case, Plaintiff’s insistence on a commercial meaning predicated on species appears particularly problematic. Plaintiff did not advance a commercial meaning of “virola,” that, rather than emphasizing particular species, emphasized certain qualities of the wood, such as its durability and strength. The affidavit and deposition evidence from Plaintiff’s witnesses coalesces far more strongly around the idea that “virola” refers to wood of certain physical characteristics, rather than wood from certain species. See Bennett Aff., Pl.’s Ex. 2 para. 4, Heitzmann Aff., Pl.’s Ex. 5 para. 6, Stadelman Aff. II, Pl.’s Ex. 3 para. 2, Rego Aff., Pl.’s Ex. 7 para. 4, Hall Depo., Def.’s Ex. E at 67, Rego Depo. I, Pl.’s Ex. 9 at 67, Rego Depo. II, Def.’s Ex. B at no. 10. Consequently, Plaintiff’s

merchandise contained in its entries is encompassed by its asserted commercial designation of “virola.”²¹ Accordingly, Plaintiff, having failed to meet its threshold burden of proof on its motion for summary judgment, has failed show that it is entitled to judgment as a matter of law.²²

CONCLUSION

Plaintiff has failed to produce sufficient evidence which, even drawing all inferences in its favor, could demonstrate the existence of a commercial designation for “virola” that is definite, general, and uniform; moreover, Plaintiff has failed to adduce proof demonstrating that its merchandise would be embraced by the commercial designation it advances in this litigation. Plaintiff has failed to show that it is entitled to judgment as a matter of law in this case. Plaintiff’s motion for summary judgment is therefore denied, and judgment is entered for the Defendant.

insistence on a commercial meaning based on species exposes this basic fault in Plaintiff’s proof: although the actual species makeup of the wood at issue is unknown, Plaintiff still contends that it is made up of approximately thirty-five species known as “virola,” rather than wood of a durability, or color, or strength which could mark it commercially as “virola.”

²¹ Plaintiff points the Court to *Neuman & Schwiers Co. v. United States*, for the proposition that its evidence is sufficient to carry its burden on summary judgment. See Pl.’s Resp. at 25–27; *Neuman & Schwiers Co. v. United States*, 24 C.C.P.A. 127 (1936). The evidence in *Neuman & Schweiers Co.* consisted of ten witnesses for the plaintiff who all testified that plaintiff’s product was commercially known and sold in the trade as “sauce.” *Neuman & Schwiers Co. v. United States*, 24 C.C.P.A. at 132–33. None of the witnesses contradicted each other, nor were any witnesses who testified to the contrary produced by the government. See *id.* at 129–130. In this case, Plaintiff has likewise produced a series of statements by witnesses who have no particular contradictions in their testimony that “sumauma,” “faveira,” and “amasclao” are all commercially known as “virola.” The government has produced no affiants or deponents to contradict the evidence of Plaintiff’s witnesses. In *Neuman & Schwiers Co.*, however, the definition of “sauce” was clearly established by the witnesses, and shown to be general, uniform, and definite with regards to the wholesaling of “sauce.” This case is clearly distinguishable. As laid out above, Plaintiff has failed to show a commercial meaning of “virola” that is used generally and uniformly by wholesalers of that good, and moreover has failed to provide a meaning which is “definite.”

²² The Court’s disposition of this case renders moot Plaintiff’s motion in limine to strike exhibits and Defendant’s motion to dismiss in part for lack of subject matter jurisdiction. See Pl.’s Mem. Supp. Mot. in Limine to Strike Exhibits; Def.’s Mem. Supp. Mot. to Dismiss in Part of Lack of Juris. & Cross-Mot. Summ. J. at 6–8.

