

Decisions of the United States Court of International Trade

Slip Op. 05–116

HONTEX ENTERPRISES, INC., D/B/A LOUISIANA PACKING CO., Plaintiff,
v. UNITED STATES, Defendant, and CRAWFISH PROCESSORS ALLI-
ANCE, THE LOUISIANA DEPARTMENT OF AGRICULTURE AND FOR-
ESTRY, AND BOB ODOM, COMMISSIONER, Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 00-00223
PUBLIC VERSION

[United States Department of Commerce's antidumping duty review determination
on crawfish tail meat from China remanded]

Dated: August 31, 2005

Coudert Brothers LLP (John M. Gurley and Matthew J. McConkey), for the plaintiff.
Peter D. Keisler, Assistant Attorney General, Civil Division, United States Depart-
ment of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Divi-
sion, United States Department of Justice; *Jeanne E. Davidson*, Deputy Director, In-
ternational Trade Section, Commercial Litigation Branch, Civil Division, United
States Department of Justice (*David S. Silverbrand*); of counsel, Office of the Chief
Counsel for Import Administration, United States Department of Commerce (*Marisa
Beth Goldstein*), for the defendant.

Adduci, Mastriani & Schaumberg, L.L.P. (James Taylor, Jr. and Will E. Leonard),
John C. Steinberger, of counsel, for the defendant-intervenors.

OPINION AND ORDER

Eaton, Judge: This matter is before the court following a second remand to the United States Department of Commerce (“Commerce” or the “Department”). In *Hontex Enterprises, Inc. v. United States*, 28 CIT ___, 342 F. Supp. 2d 1225 (2004) (“*Hontex II*”), this court remanded Commerce’s findings contained in the *Final Results of Determination Pursuant to Court Remand* (Dep’t Commerce Aug. 12, 2003) (“*First Remand Determination*”) for further analysis and explanation. Now before the court is Commerce’s determination on remand. See *Final Results of Determination Pursuant to Court Remand* (Dep’t Commerce Oct. 18, 2004) (“*Second Remand*”).

Determination”). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). For the reasons set forth below, this matter is again remanded to Commerce to take action in conformity with this opinion.

BACKGROUND

The facts of this case have been related in detail in previous opinions of this court. See *Hontex Enters., Inc. v. United States*, 27 CIT ___, ___, 248 F. Supp. 1323, 1325–28 (2003) (“*Hontex I*”); *Hontex II*, 28 CIT at ___, 342 F. Supp. 2d at 1226–28. The facts relevant to this inquiry are as follows.

On October 29, 1998, Commerce initiated a review of the anti-dumping duty order covering crawfish tail meat from the People’s Republic of China (“PRC”). See *Initiation of Antidumping and Countervailing Duty Admin. Review, Requests for Revocation in Part and Deferral of Admin. Review*, 63 Fed. Reg. 58,009 (ITA Oct. 29, 1998). As part of that review, Ningbo Nanlian Frozen Foods Company (“NNL”) and Huaiyin Foreign Trading Company (5) (“HFTC5”) submitted questionnaire responses. See, e.g., *Questionnaire Resp. of [NNL] and La. Packing Co.*, Pub. R. Doc. 19 (Dec. 8, 1998); *Questionnaire Resp. of [HFTC5]*, Pub. R. Doc. 24 (Dec. 22, 1998). After reviewing the questionnaire responses, Commerce had questions concerning the relationship between NNL and HFTC5. See *Letter from Commerce to law firm of Arent Fox Kintner Plotkin & Kahn of 1/12/00*, Pub. R. Doc. 141. These questions arose when it was found that a “Mr. Wei”—who was listed on NNL’s business license as its Vice General Manager—had signed several HFTC5 documents and had represented himself to United States officials as being in charge of HFTC5’s crawfish export business to the United States. *Id.* NNL responded to these concerns by stating that, while Mr. Wei did work for both NNL and HFTC5 during the period of review, his work for NNL was not related to his work for HFTC5. See *Letter from law firm of Arent Fox Kintner Plotkin & Kahn to Commerce of 1/31/00*, Conf. R. Doc. 21.

Commerce then informed NNL and HFTC5 that it would conduct verification of their questionnaire responses and noted that it would be exploring the relationship among Mr. Wei, NNL, and HFTC5. Commerce specifically asked that Mr. Wei be present at verification to answer questions. See *NNL Verification Outline*, Pub. R. Doc. 176 Attach. at 3. (“Please make certain that Mr. Wei is available for this portion of the verification.”). At NNL’s verification, various NNL officials, Mr. Edward Lee (part-owner of NNL), and Mr. Wei all answered questions about Mr. Wei’s relationship with both NNL and HFTC5. See *Verification Report for [NNL] in the Antidumping Duty Review of Freshwater Crawfish Tail Meat (crawfish) from the PRC*, Pub. R. Doc. 188 at 5–10 (“*NNL Verification Memo*”).

While NNL participated in verification, HFTC5 did not. *See Freshwater Crawfish Tail Meat (crawfish) from the PRC Admin. Review: Attempts to conduct verification at HFTC5*, Pub. R. Doc. 187. Thus, Commerce was unable to directly verify the information HFTC5 provided about Mr. Wei's relationship with that company. It is not in dispute, however, that Mr. Wei performed various tasks for HFTC5 during the period of review. *See Supplemental Questionnaire Resp. of NNL and LA Packing Co.*, Pub. R. Doc. 169 Attach. at 2–6; *see also Freshwater Crawfish Tail Meat (crawfish) from the PRC Admin. Review: Meeting with U.S. Customs Service, American Embassy, Beijing PRC*, Pub. R. Doc. 191 (“*Customs Memo*”).

After analysis of the questionnaire responses and the information collected at verification, Commerce determined that there was a “web of control relationships” between HFTC5 and NNL and so “collapsed” the companies and treated them as single entity. *See Relationship of [NNL] and [HFTC5]*, Pub. R. Doc. 218 at 9 (“*Relationship Memo*”). Because HFTC5 had not participated in verification, Commerce determined that it was to receive the PRC-wide antidumping duty rate. *Id.* Because NNL was to be “collapsed” with HFTC5, it received the PRC-wide rate as well. *Id.*; *see also Freshwater Crawfish Tail Meat From the PRC: Final Results of Admin. Antidumping Duty and New Shipper Reviews, and Final Rescission of New Shipper Review*, 65 Fed. Reg. 20,948, 20,949 (ITA Apr. 19, 2000) (“*Final Results*”). The PRC-wide antidumping duty rate was ultimately established to be 201.63%. *See Final Results*, 63 Fed. Reg. at 20,949.

Plaintiff¹ then commenced this action challenging various aspects of Commerce's determinations contained in the *Final Results*. *See generally Hontex I*. After review of the *Final Results* the court determined that: (1) while the methodology that Commerce used to determine whether NNL and HFTC5 should be collapsed was a proper interpretation of the antidumping statute as far as it went, a more complete analysis was needed, *see Hontex I*, 27 CIT at ____, 248 F. Supp. 2d at 1343-44; and (2) substantial evidence did not support Commerce's determination that a “web of control relationships” existed between NNL and HFTC5 such that Commerce could “collapse” the companies and treat them as a single entity. *See id.* at ____, 248 F. Supp. 2d at 1345. The court remanded the action to Commerce so that it could more fully explain its non-market economy (“NME”) collapsing methodology and identify specific record evidence supporting its determination that NNL and HFTC5 should be collapsed.

On remand, Commerce revisited its collapsing methodology and again found that NNL and HFTC5 should be collapsed and treated

¹As a domestic importer of the subject merchandise, Hontex is an “interested party” within the meaning of 19 U.S.C. § 1677(9)(A) (2000), and is entitled to challenge Commerce's determination pursuant to 19 U.S.C. § 1516a(a)(2) (2000). In addition to being a domestic importer of the subject merchandise, Hontex is also part-owner of NNL.

as a single entity. See *First Remand Determination* at 3. Once again, Plaintiff questioned Commerce's determination and urged the court to reject the results of the *First Remand Determination*.

In *Hontex II* the court found that Commerce's NME-collapsing methodology was a reasonable interpretation of the antidumping statute. *Hontex II*, 28 CIT at ___, 342 F. Supp. 2d at 1234. The court also found, however, that Commerce's determination that NNL and HFTC5 should be collapsed was not supported by substantial evidence and so again remanded the matter for further proceedings in accordance with that opinion. *Id.* at ___, 342 F. Supp. 2d at 1246.

Commerce published the results of its analysis of the second remand on October 18, 2004. In the *Second Remand Determination* Commerce continued to find that NNL and HFTC5 should be collapsed because "[a]fter re-examining and weighing all of the record evidence, we continue to find that there was a significant potential for manipulation of prices and export decisions and, therefore, that HFTC5 and [NNL] should be collapsed and subject to the same antidumping duty rate." *Second Remand Determination* at 1–2. Plaintiff again contests Commerce's findings and, thus, this matter is again before the court.

STANDARD OF REVIEW

When reviewing a final determination in an antidumping or countervailing duty investigation, "[t]he 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). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence is "more than a mere scintilla." *Consol. Edison*, 305 U.S. at 229. The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Huaiyin*, 322 F.3d at 1374 (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

DISCUSSION

I. COMMERCE'S COLLAPSING METHODOLOGY

As previously noted, in *Hontex II* this court found Commerce's NME collapsing methodology, as set out in the *Second Remand Determination*, to be a reasonable interpretation of the antidumping statute. See *Hontex II*, 28 CIT at ___, 342 F. Supp. 2d at 1234 ("Commerce has satisfied the court's remand instructions by setting out its NME collapsing methodology."). In essence, Commerce uses

a methodology similar to the one it uses for collapsing market economy companies.² See *Hontex I*, 27 CIT at ____, 248 F. Supp 2d at 1338–40 (setting out Commerce’s market economy collapsing methodology); see also 19 U.S.C. § 1677(33),³ 19 C.F.R. § 351.102(b)⁴, .401(f)⁵. Using this methodology Commerce must first determine whether two or more entities are “affiliated.” Two or more entities are affiliated where they share various control relationships whereby one entity is “legally or operationally in a position to exercise restraint or direction over” the other and that such relationship provides one entity the “significant potential for the manipulation of price or production” of the other. See *Hontex I*, 27 CIT at ____, 248 F.

² Commerce’s market economy collapsing methodology, now contained in its regulations, has been found to be a reasonable interpretation of the antidumping statute. See 19 C.F.R. § 351.401(f); *Koenig & Bauer-Albert AG v. United States*, 24 CIT 157, 160, 90 F. Supp. 2d 1284, 1287 (2000) (citing *Asociacion Colombiana de Exportadores de Flores v. United States*, 22 CIT 173, 201, 6 F. Supp. 2d 865, 893 (1998); *Queen’s Flowers de Colom. v. United States*, 21 CIT 968, 971–72, 981 F. Supp. 617, 622–23 (1997)) (“Commerce’s collapsing practice has been approved by the court as a reasonable interpretation of the antidumping statute.”).

³ 19 U.S.C. § 1677(33) provides, in relevant part:

The following persons shall be considered to be “affiliated” or “affiliated persons”: . . .

(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

(G) Any person who controls any other person and such other person.

For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.

⁴ 19 C.F.R. § 351.102(b) provides:

“Affiliated persons” and “affiliated parties” have the same meaning as in section 771(33) of the Act [19 U.S.C. § 1677(33)]. In determining whether control over another person exists . . . the Secretary will consider the following factors, among others: corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships. The Secretary will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. The Secretary will consider the temporal aspect of a relationship in determining whether control exists; normally, temporary circumstances will not suffice as evidence of control.

⁵ 19 C.F.R. § 301.401(f) provides:

(1) In general. In an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production.

(2) Significant potential for manipulation. In identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include:

(i) The level of common ownership;

(ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and

(iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

Supp. 2d at 1339 (citing 19 C.F.R. § 351.401(f), *Marine Harvest (Chile) S.A. v. United States*, 26 CIT 1295, 1298 n.8, 244 F. Supp. 2d 1364, 1368 n.8 (2002); *Certain Cut-To-Length Carbon-Quality Steel Plate Prods. From Indon.*, 64 Fed. Reg. 41,206, 41,209 (ITA July 29, 1999) (prelim. determination)). In addition to price and production decisions, in the case of NME entities, the “significant potential for . . . manipulation” extends to exporters and their export decisions. *Hontex II*, 28 CIT at ____ , 342 F. Supp. 2d at 1234. In support of a determination that two companies are affiliated, Commerce must also consider the “temporal aspect” of the relationship as “normally, temporary circumstances will not suffice as evidence of control.” 19 C.F.R. § 351.102(b); see *Hontex II*, 28 CIT at ____ , 342 F. Supp. 2d at 1233. Once two entities are determined to be affiliated, and the significant potential for manipulation has been found, Commerce may then “collapse” them and give then a single antidumping duty margin. See 19 C.F.R. § 351.401(f)(1); *Hontex II*, 28 CIT at ____ , 342 F. Supp. 2d at 1232–33 (quoting 19 C.F.R. § 351.401(f)(1)).

As the court has previously found the collapsing methodology used in this action to be a reasonable interpretation of the antidumping statute, and as Commerce has continued to use that methodology in the *Second Remand Determination*, the only question remaining is whether Commerce’s conclusion that NNL and HFTC5 should be collapsed is supported by substantial evidence.

II. COLLAPSING NNL AND HFTC5

A. Commerce’s Theory of Affiliation

In the *Second Remand Determination* it is not entirely clear what theory Commerce is relying on to support its finding that NNL and HFTC5 are affiliated such that collapsing them into a single entity and giving them a single antidumping duty margin would be proper. At oral argument, however, counsel for Commerce clarified the Department’s reasoning. Specifically, counsel stated that NNL and HFTC5 were affiliated because Mr. Lee had the potential to control the export and/or pricing decisions of both companies. According to Commerce’s theory, Mr. Lee exercised control over NNL as its part-owner and over HFTC5 through Mr. Wei. As explained by counsel:

Court:	Did Mr. Lee control both companies?
Counsel:	Mr. Lee did not specifically control both companies. However, Mr. Wei Wei had the potential to control both companies and . . . Mr. Wei Wei is an agent of Mr. Lee. Therefore, if you follow the logic yes, Mr. Lee would have a potential to control both companies through Mr. Wei Wei.

- Court: Please tell me which one it is, if it's Mr. Lee in control, if it's HFTC5 in control. Tell me what the Commerce Department's theory is. . . . I understand that Mr. Wei Wei exercised control, but is it the Commerce Department's position that he was exercising control on his own behalf[?]
- Counsel: No, on Mr. Lee's behalf. . . .
- Court: So if you would just tell me what the theory is here.
- Counsel: Okay. Mr. Lee owns Louisiana Packing Company. He also owns [NNL]. Therefore he clearly controls both of those companies. His agent, Mr. Wei Wei, had the potential to control and make pricing decision on behalf of HFTC5. Therefore, if you follow the logic that Mr. Wei Wei is acting as Mr. Lee's agent, Mr. Lee has the potential to control pricing decisions for both companies.
- Court: For both companies?
- Counsel: Yes, Your Honor.

Oral Argument Transcript of 3/30/2005 ("Transcript") at 33.

B. *The Affiliation of NNL and HFTC5*

Following Commerce's collapsing methodology, it is first necessary to determine whether NNL and HFTC5 were affiliated through a control relationship. As previously noted, Commerce stated that it was adhering to the statutory definitions of affiliation and control. *See First Remand Determination* at 5–6 (quoting 19 U.S.C. § 1677(33)(F), (G)); *Relationship Memo* at 4 (quoting 19 U.S.C. § 1677(33)(F), (G)). Thus, since it is Commerce's finding that NNL and HFTC5 were affiliated because Mr. Lee "controlled" them both, the court begins its analysis by reviewing whether the record supports such a finding.

1. *Mr. Lee and Control of NNL*

As stated by counsel for Commerce at oral argument it is the Department's determination that Mr. Lee directly controlled NNL. *See Transcript* at 33:17–19. In support of this finding Commerce points to several pieces of evidence, including that Mr. Lee was the sole owner of Louisiana Packing which was, in turn, part- owner of NNL. *See First Remand Determination* at 22. Next, Commerce cites evidence that Mr. Wei, at Mr. Lee's direction, performed various tasks for NNL, including signing the joint venture documents that formed NNL and inspecting several shipments of crawfish tail meat. *Id.* In addition, Mr. Lee was present at, and an active participant in, NNL's

verification. *Id.* at 22–23. The court agrees that Commerce’s determination that Mr. Lee “controlled” NNL is supported by substantial. Indeed, there can be little doubt that Mr. Lee was able to directly control NNL’s pricing and/or export decisions as part-owner of that company. *See, e.g., Letter from Arent Fox Kintner Plotkin & Kahn to Commerce of 3/20/00*, Conf. R. Doc. 34, Ex. 3 (“I [(Mr. Lee)] informed the Department of Commerce verifiers that the prices negotiated for crawfish sales between [NNL] and Louisiana Packing Company were conducted solely by Mr. Lin Zhong Nan and myself on the telephone.”).

2. *Mr. Lee and Control of HFTC5*

The court next examines whether Mr. Lee was able to control HFTC5. As stated by counsel for Commerce at oral argument, the Department’s theory in this regard is that Mr. Lee indirectly controlled HFTC5 through Mr. Wei.⁶ *See Transcript* at 33:19–23. Counsel further explained the significance of Mr. Lee being able to control HFTC5 and NNL by stating that “there was a potential for price manipulation between [the] two companies and that potential arises from . . . Mr. Wei. . . .” *Id.* at 31:16–18.

While Commerce’s theory of control hinges on Mr. Lee’s relationship with Mr. Wei, what is missing from Commerce’s analysis is any evidence tending to suggest that Mr. Lee was “legally or operationally in a position to exercise restraint or direction” over Mr. Wei’s activities at HFTC5. First, absent from this analysis are any of the normal indicia of affiliation between Mr. Lee and HFTC5 set out in the regulations. *See* 19 C.F.R. § 351.102(b). That is, there is no suggestion that Mr. Lee or his family members or his companies have any ownership interest in HFTC5. Rather, Commerce’s analysis relies entirely on the relationship between Mr. Lee and Mr. Wei. This analysis, though, falls short. An examination of the record reveals that there is neither: (1) evidence of Mr. Lee ever actually exercising control over Mr. Wei at HFTC5; nor (2) any evidence of Mr. Lee’s potential to control Mr. Wei’s activities at that company. Indeed, while Commerce provides great detail as to Mr. Wei’s activities on behalf of HFTC5, none of this evidence links Mr. Lee to Mr. Wei’s activities at that company. *See, e.g., NNL Verification Memo*, Pub. R. Doc. 188 at 5–7 (detailing questions posed to Mr. Wei about his relationship with HFTC5); *see also Customs Memo*, Pub. R. Doc. 191 (detailing Mr. Wei’s contacts with the United States Customs Service). The only evidence on the record of anyone having control over Mr. Wei’s activi-

⁶[[

ties at HFTC5 is that he took his orders from a person identified as HFTC5's "general manager."⁷ See, e.g., *Letter from law firm of Arent Fox Kintner Plotkin & Kahn to Commerce of 1/31/00*, Pub. R. Doc. 146 at 5 ("[A]ll actions undertaken by Mr. Wei with respect to HFTC (5) in 1998 were done with explicit instructions from the General Manager of HFTC (5). He did not take, and had no authority to take, any unilateral or independent actions with regard to HFTC (5). . . ."); *NNL Verification Memo*, Pub. R. Doc. 188 at 5 ("Mr. Wei explained that the general manager of HFTC5 would sometimes contact him for assistance because he was familiar with the crawfish business, spoke English, and had contacts with many of HFTC5's U.S. customers. Upon HFTC5's request, Mr. Wei would contact U.S. customers on HFTC5's behalf by writing letters and faxes and by making phone calls." (citation omitted)); *id.* at 6 ("[A]t the request of the general manager of HFTC5, Mr. Wei contacted U.S. Customs to seek its assistance."); *id.* at 6–7 ("Mr. Wei stated that the General Manager [of] HFTC5 believed the 91.5% duty rate was HFTC5's alone and that using [Mr. Wei's] stamp would help Customs identify genuine HFTC5 shipments. Mr. Wei stated that HFTC5's general manager asked him to obtain the stamp. . . ."). Indeed, counsel's comments at oral argument highlight the flaw in Commerce's reasoning: there is simply no evidence on the record of this antidumping review that Mr. Wei was acting as Mr. Lee's "agent" at HFTC5. While there is ample evidence that Mr. Lee was acquainted with Mr. Wei and that Mr. Wei was working as Mr. Lee's "agent" at NNL, this evidence does not support a further inference that Mr. Wei was working as Mr. Lee's "agent" at HFTC5. Therefore, substantial evidence does not support the conclusion that Mr. Lee "controlled" HFTC5.⁸

CONCLUSION

Because the court finds that Commerce's determination that Mr. Lee was in a position to "control" HFTC5 is not supported by substantial evidence, the court cannot find that Commerce's determination that NNL and HFTC5 should be collapsed is justified. Therefore, this matter is again remanded to Commerce to either: (1)(a) find that Mr. Lee did not control HFTC5 within the meaning of 19 U.S.C. § 1677(33)(F) & (G), and (b) find that NNL and HFTC5 were not affiliated, and (c) find that NNL and HFTC5 should not be col-

⁷The court notes that this is not a new observation. In *Hontex I* the court found that "the evidence shows that Mr. Wei's actions on behalf of [NNL and HFTC5] were performed at the direction of some other person—for HFTC5 it was the 'General Manager[']'. . . ." *Hontex I*, 27 CIT at _____, 248 F. Supp. 2d at 1346.

⁸As the court does not find that substantial evidence supports Commerce's conclusion that Mr. Lee controlled HFTC5 the court need not, at this time, address Commerce's determination with respect to the "temporal" aspect of Mr. Lee's control of HFTC5. See *Hontex II*, 28 CIT at _____, 342 F. Supp. 2d at 1233.

lapsed and given a single antidumping margin, and (d) find that NNL is entitled to a separate company-specific antidumping margin and calculate that margin using the verified information on the record; or (2)(a) re-open the record in order to gather additional evidence of Mr. Lee's control relationship with HFTC5 during the period of review, and (b) place such additional information on the record, and (c) conduct an analysis that takes into account any such new evidence, including the temporal aspect of any such new evidence. The results of Commerce's review are due on November 29, 2005, comments are due on December 29, 2005, and replies to such comments are due on January 9, 2006.



Slip Op. 05-117

BEFORE: CARMAN, JUDGE

INTERNATIONAL CUSTOM PRODUCTS, INC, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Court No. 05-00341

[Plaintiff's Emergency Motion to Enforce Judgment and Expedite Briefing is denied in part and granted in part.]

Dated: September 1, 2005

Mayer, Brown, Rowe & Maw, LLP (Simeon Munchick Kriesberg, Andrew A. Nicely, Priti Seksaria Agrawal), Washington, D.C., for Plaintiff.

Peter D. Keisler, Assistant Attorney General; Barbara S. Williams, Attorney in Charge, International Trade Field Office; Edward F. Kenny, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, for Defendant.

OPINION & ORDER

CARMAN, JUDGE: This case is before this Court pursuant to Plaintiff's Emergency Motion to Enforce Judgment and to Expedite Briefing ("Plaintiff's Motion"). Plaintiff contests the imposition of a greatly increased import bond requirement by the Bureau of Customs and Border Protection ("Customs") on certain imported product referred to as "white sauce." After due consideration of the parties' briefs and oral argument had on this matter in open court on August 11, 2005, this Court grants Plaintiff's Motion in so far as it relates to expedited briefing but denies Plaintiff's Motion as it relates to Customs's imposition of new bond requirements. The rationale of the Court is set forth below.

BACKGROUND

The facts that give rise to this dispute were set forth in this Court's June 15, 2005, opinion. *Int'l Custom Prods., Inc. v. United States*, 29 CIT, Slip Op. 05-71 (June 15, 2005). The Court presumes familiarity with that opinion and the facts recited therein.

On May 18, 2005, the Revenue Division of Customs Office of Finance ("Revenue Division") notified Plaintiff that Plaintiff must post a \$10.6 million continuous-entry bond due to the increased duty liability resulting from the Notice of Action issued by Customs on April 18, 2005.¹ Upon notification of this Court's oral judgment, which was delivered on June 2, 2005, the Revenue Division "agreed that the basis for the \$10.6 million continuous-entry bond was invalidated by the Court's judgment." (Pl.'s Mem. of P. & A. in Supp. of Pl.'s Emergency Mot. to Enforce J. and to Expedite Briefing ("Pl.'s Mem.") at 4.) On June 13, 2005, the Revenue Division rescinded its May 18, 2005, notice and advised Plaintiff that it would be required instead to post a \$400,000 continuous-entry bond. (Pl.'s Mem. at 4.)

On June 17, 2005, Plaintiff attempted to enter its white sauce through the Port of Philadelphia ("Port"). (Pl.'s Mem. at 4.) The Port rejected Plaintiff's entry. (Pl.'s Mem. at 4.) On June 20, 2005, this Court denied Customs's motion for stay of judgment pending appeal. Also on June 20, 2005, and on June 21, 2005, the Port informed Plaintiff that it was imposing new bond requirements on all entries of Plaintiff's white sauce. (Pl.'s Mem. at 1.) The Port demanded that Plaintiff post single-entry bonds of three times the value of the entered goods. (Pl.'s Mem. at 4.) In addition, the Port required that Plaintiff pay two times the applicable duties and fees before white sauce might be placed in a bonded warehouse. (Pl.'s Mem. at 1.)

The Port informed Plaintiff that it had two reasons for imposing the new requirements. Firstly, Customs does not consider that this Court's June 15, 2005, opinion has any affect on future entries. (Pl.'s Mem. at 2, 5.) Secondly, Customs claimed that the new requirements were necessary to protect the public fisc in the event the Court of Appeals reverses this Court's judgment. (Pl.'s Mem. at 2, 5.)

Plaintiff objects to Customs's imposition of the new bond requirements and brought its motion in response thereto.

PARTIES' CONTENTIONS

I. Plaintiff's Contentions

Plaintiff's Motion is premised on the notion that Customs's imposition of new bond requirements is inconsistent with this Court's June 2, 2005, judgment. Plaintiff states that this Court has jurisdiction to

¹The April 18, 2005, Notice of Action was declared null and void by this Court's oral judgment of June 2, 2005, and its June 15, 2005, declaratory judgment and slip opinion.

enforce its own judgments. (Pl.'s Mem. at 6.) Plaintiff argues that "this Court's judgment will have 'little effect' if Customs is allowed to increase [Plaintiff's] bond based on the purported protection of revenue to be derived from the eventual collection of tariffs that the Court has ruled cannot lawfully be collected." (Pl.'s Mem. at 7 (quoting *Abbott Labs. v. Novopharm Ltd.*, 104 F.3d 1305, 1309 (Fed. Cir. 1997).) Plaintiff argues that the Court has jurisdiction to grant its requested relief because Customs's new bond requirements, which Plaintiff cannot satisfy, render "this Court's judgment a nullity." (Reply in Supp. of Pl.'s Emergency Mot. to Enforce J. ("Pl.'s Reply") at 2.) Therefore, Plaintiff urges this Court to exercise its "inherent power to enforce its judgments and continue proceedings until its judgment is satisfied." (Pl.'s Reply at 3 n.1 (quoting *Am. Grape Growers Alliance for Fair Trade v. United States*, 9 CIT 568, 570, 622 F. Supp. 295 (1985).) Further, Plaintiff asserts that Customs's imposition of the new import requirements is an example of "administrative sanctions" designed to subvert this Court's judgment. (Pl.'s Mem. at 8 (quoting *United States v. Hanover Ins. Co.*, 18 CIT 991, 1000, 869 F. Supp. 950 (1994), *aff'd*, 82 F.3d 1052 (Fed. Cir. 1996).)

Plaintiff interprets this Court's declaratory judgment and opinion as making "clear that the judgment is not limited to entries made prior to the issuance of the Notice of Action." (Pl.'s Reply at 2.) According to Plaintiff, "[i]f the Notice of Action was null and void, it was null and void with respect to the 86 specified entries, as well as with respect to 'all shipments' to which the reclassification announced in the Notice of Action expressly applied." (Pl.'s Reply at 5.) Plaintiff also stated that "[d]eclaring the classification ruling to be in 'full force and effect' until the ruling is revoked or modified in accordance with law would be superfluous if the Court's judgment were limited to 86 specific entries in a nullified Notice of Action." (Pl.'s Reply at 6.) Finally, Plaintiff propounded that this Court's declaratory "judgment extends to all shipments of white sauce." (Pl.'s Reply at 6.)

Because the new import requirements are intended to evade the Court's judgment, Plaintiff submits that Customs must be enjoined from continuing to impose the new requirements. (Pl.'s Mem. at 9.) Plaintiff claims that Customs's action in resetting Plaintiff's import bond amount was not justified in light of this Court's judgment. (Pl.'s Mem. at 9–10.) Plaintiff argues that neither of Customs's stated justifications for raising Plaintiff's import bond amount was reasonable. (Pl.'s Mem. at 10 (citing *Hera Shipping, Inc. v. Carnes*, 10 CIT 493, 497, 640 F. Supp. 266 (1986).) Plaintiff states that "Customs is not free to impose a bond requirement based on the anticipated collection of revenues inconsistent with" the classification of white sauce Customs provided in ruling letter NYRL D86228 (Jan. 20, 1999), which ruling was held by this Court to be in full force and effect. (Pl.'s Mem. at 10–11.) Plaintiff dubs Customs's efforts in imposing the new import requirements as a "wishful pursuit" of duties to

which this Court ruled Customs is not entitled. (Pl.'s Mem. at 12.) Plaintiff argues that Customs impermissibly imposed a "punitive bond requirement" as "a stay of judgment by administrative fiat." (Pl.'s Reply at 7.) Accordingly, Plaintiff prays that this Court "enjoin Customs from imposing bond requirements that are incompatible with its judgment of June 2, 2005." (Pl.'s Mem. at 12–13.)

II. Defendant's Contentions

Defendant argues that this Court should not hear Plaintiff's motion because "jurisdiction is transferred to the appellate court, and the district court is divested of jurisdiction over all matters relating to the appeal." (Def.'s Resp. to Pl.'s Emergency Mot. to Enforce J. ("Def.'s Resp.") at 6.) Defendant reasons that there is no reason for the Court to concurrently consider issues that are also before the appellate court. (Def.'s Resp. at 6.) Defendant further posits that it is inefficient for the Court to rule on Plaintiff's Motion "because the non-prevailing party would have to file a second appeal regarding the judgment already on appeal." (Def.'s Resp. at 7.)

Additionally, Defendant asserts that this Court lacks subject matter jurisdiction to hear Plaintiff's claims concerning the bond issue. (Def.'s Resp. at 7.) Defendant points out that the entries about which Plaintiff takes issue in its Motion to Enforce Judgment were not covered by the Notice of Action, which was the subject of the Court's June 2, 2005, judgment. (Def.'s Resp. at 7.) Defendant challenges Plaintiff's assertion that this Court's jurisdiction can be engrafted over entries unrelated to the original causes of action and pleadings in this case. (Def.'s Resp. at 7.)

The government also submits that Customs acted within its discretion in setting the new bond requirements. (Def.'s Resp. at 10.) According to Defendant, "Customs imposed the single entry bond requirement on ICP to protect the public revenue and assure compliance with the quota laws, in the event that the Court's decision in *International Custom Products* is reversed on appeal. . . ." (Def.'s Resp. at 10.) Defendant states that its action is within the "broad discretion" accorded the port director "to protect the revenue and assure compliance with the law." (Def.'s Resp. at 12.)

JURISDICTION

This Court retains supplemental jurisdiction over matters "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." *United States v. Hanover Ins. Co.*, 18 CIT 991, 992, 869 F. Supp. 950 (1994), *aff'd*, 82 F.3d 1052 (Fed. Cir. 1996) ("Hanover I"). "[A]bsent a stay pending appeal, a court retains jurisdiction to supervise its judgments and enforce its orders." *Id.* at 993 (citation omitted). This "Court has inherent power to oversee the implementation of its judgment and hold supplemental proceedings necessary for the proper effectuation of its

judgment.” *Heraeus-Amersil, Inc. v. United States*, 10 CIT 438, 440, 638 F. Supp. 342 (1986), *aff’d*, 795 F.2d 1575 (Fed. Cir. 1986) (citation omitted). Further, this Court “has the inherent power to determine the effect of its judgments and issue injunctions to protect against attempts to attack or evade those judgments.” *United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1054 (Fed. Cir. 1996) (“Hanover II”). Moreover, if “a party’s conduct is in violation, or evasive, of a prior judgment, the Court of International Trade also has authority to enjoin that conduct regardless of whether the conduct amounts to civil contempt.” *Id.*

Despite the government’s arguments to the contrary, this Court’s continuing jurisdiction over this matter does not turn on whether an appeal has been filed. “If we assume the power of a court to enforce its judgments, th[e]n the pendency of an appeal, or the pendency, in conjunction with that appeal, of motions for stay of the judgment, *have no bearing.*” *Am. Grape Growers Alliance for Fair Trade v. United States*, 9 CIT 568, 568–69, 622 F. Supp. 295 (1985) (emphasis added). This Court “cannot assume anything about what will happen on appeal, and for [this Court] to refrain from acting on any suppositions about future events would be both presumptuous and improper.” *Id.* at 569.

Although an appeal was recently filed in this case and Defendant requested that the Court of Appeals issue a stay of judgment, the Court of Appeals declined to do so. *Int’l Custom Prods., Inc. v. United States*, No. 05–1444 (Fed. Cir. Aug. 4, 2005). “[E]nforceability of this Court’s judgments should be unquestioned, and a stay is the only way to put off that enforceability.” *Am. Grape Growers*, 9 CIT at 570. Thus, this Court has jurisdiction to rule on the post-judgment matters before it.

DISCUSSION

Although this Court has jurisdiction to enforce its June 2, 2005, judgment, it agrees with the government that the Court lacks subject matter jurisdiction over Customs’s imposition of new bond requirements on Plaintiff’s imported white sauce. This Court disagrees with Plaintiff’s interpretation that the June 2, 2005, declaratory order applied to future importations of Plaintiff’s white sauce. The Court had jurisdiction over only those matters before it as defined by Plaintiff’s Amended Complaint, and the Amended Complaint was limited to the April 18, 2005, Notice of Action and entries included thereon. Plaintiff cannot bootstrap a new cause of action, one that arose after the filing of its Amended Complaint, onto its already adjudicated claims by urging this Court to exercise its inherent powers to enforce its own judgments.

This case is distinguishable from the Hanover Insurance cases. *Hanover I*, 18 CIT at 991; *Hanover II*, 82 F.3d at 1052. In those cases, Customs sought recovery of unpaid antidumping duties and

interest from Hanover, a surety for the indebted importer. *Hanover II*, 82 F.3d at 1053. The Court of International Trade (“CIT”) dismissed Customs’s case as time barred by the statute of limitations. *Id.* Thereafter, Customs “continued to demand payment and threatened Hanover with administrative sanctions.” *Id.* The sanctions included refusing to accept imported merchandise underwritten by Hanover bonds and requesting that Hanover be removed from the list of approved sureties. *Id.* “Hanover then filed a motion for civil contempt in the prior action before the Court of International Trade arguing that the threatened administrative actions contravened the order dismissing the case pursuant to the statute of limitations.” *Id.* Customs argued “that its actions did not violate [the CIT’s] order because [the order] only prevented enforcement of the debt by legal process; the order did not extinguish Customs’ right to collect.” *Id.* Both the CIT and Court of Appeals rejected Customs’s argument after an analysis of the effect of the statute imposing the statute of limitations.

In *Hanover I and II*, Customs sought to secure by administrative means the very relief it had been denied through judicial recourse. At present, Customs – through its administrative action of imposing new bond requirements – is *not* seeking to do what the Court has told it that it *Int’l Custom Prods., Inc. v. United States* Page 10 05–00341 cannot. This Court’s June 2, 2005, judgment relates solely to the Notice of Action and entries included thereon. The Notice of Action was an attempt by Customs to improperly change the tariff classification of Plaintiff’s white sauce. As the bond requirements relate only to a security, the new bond requirements are not an effort to change the tariff classification on Plaintiff’s imported white sauce. Further, should the government prevail on its appeal, the new bond requirements nevertheless will not affect those entries covered by this Court’s June 2, 2005, judgment.

Had Plaintiff wished to protect itself from future Customs administrative action regarding its white sauce importations, Plaintiff should have pleaded a different case in the first instance and sought a temporary restraining order or injunction from this Court. Having failed to do so, this Court’s jurisdiction is limited to only the April 18, 2005, Notice of Action and entries included thereon. As the entries about which Plaintiff now complains were not included in the Notice of Action, this Court has no jurisdiction over Customs’s imposition of the new bond requirements. If Plaintiff feels sufficiently aggrieved by Customs’s actions, it is free to file a new case and plead an appropriate cause of action therefor. *See Carolina Tobacco Co. v. U.S. Customs Serv.*, 28 CIT, Slip Op. 04–20 (Mar. 4, 2004), *aff’d*, 402 F.3d 1345 (Fed. Cir. 2005).

Given the Court’s decision that it lacks subject matter jurisdiction over Plaintiff’s claim, the Court cannot reach the issue of whether Customs’s imposition of the new bond requirements was reasonable.

CONCLUSION

For the foregoing reasons, this Court holds that it does not have subject matter jurisdiction over the issue – the increased import bond requirements – about which Plaintiff complains. Accordingly, this Court denies in part and grants in part Plaintiff’s Emergency Motion to Enforce Judgment and to Expedite Briefing. Specifically, the Court granted Plaintiff’s request for expedited briefing but denies Plaintiff’s request to enforce judgment.

Slip Op. 05-118

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

SIMON MARKETING, INC. and PERSECO SYSTEM SERVICES, L.P., Plaintiffs, v. UNITED STATES, Defendant.

Court No. 00-00332

[Plaintiff’s motion for summary judgement is denied; defendant’s cross-motion for summary judgment is granted.]

September 1, 2005

Neville Peterson LLP (Michael K. Tomenga, Lawrence J. Bogard, George W. Thompson, and Laura Martino) for Simon Marketing, Inc. and Perseco System Services, L.P., plaintiffs.

Peter D. Keisler, Assistant Attorney General; Barbara S. Williams, Attorney-in-Charge; International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (Mikki Graves Walser); of counsel: Michael W. Heydrich, Office of the Assistant Chief Counsel for International Trade Litigation, Bureau of Customs and Border Protection, for United States, defendant.

OPINION

TSOUCALAS, Senior Judge: Before the Court is a motion and cross-motion for summary judgment pursuant to USCIT R. 56 arguing there are no genuine issues as to any material facts. Plaintiffs, Simon Marketing, Inc. and Perseco System Services, L.P. (“Simon”) challenge the classification of its merchandise under the 1998 Harmonized Tariff Schedule of the United States (“HTSUS”) by the Bureau of Customs and Border Protection¹ (“Customs”). Simon contends that the merchandise is properly classified as “other toys”

¹The United States Customs Service was renamed the Bureau of Customs and Border Protection of the Department of Homeland Security, effective March 1, 2003. See *Homeland Security Act of 2002*, Pub. L. No. 107-296, § 1502, 116 Stat. 2135 (2002); *Reorganization Plan for the Department of Homeland Security*, H.R. Doc. No. 108-32 (2003).

under HTSUS subheading 9503.90.00, which is duty free. Customs cross-moves for summary judgment stating that the Court should sustain its classification under HTSUS subheading 9102.91.20 as a “watch,” with a duty rate of 3.9 percent *ad valorem* on the movement and case and 5.3 percent *ad valorem* on the battery.

JURISDICTION

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

STANDARD OF REVIEW

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

DISCUSSION

I. Factual Background

This dispute is ripe for summary judgment and the relevant facts are outlined below. Simon entered the merchandise subject to this action in October 1998. *See* Mem. P. & A. Supp. Pls.’ R. 56. Mot. Summ. J. (“Simon’s Mem.”) at 2; Def.’s Mem. Opp’n Pls.’ Mot. Summ. J. Supp. Def.’s Cross-Mot. Summ. J. (“Customs’ Mem.”) at 2. The subject merchandise is one of three promotional articles known as the “Pop Topper,” which was sold at McDonald’s in conjunction with the release of the movie “A Bug’s Life.”² *See* Customs’ Mem. at 2; Pls.’ Am. Statement Material Facts Not Dispute (“Simon’s Facts”) ¶¶ 11 & 15. The Pop Topper was sold separately from the Happy Meals program and could be purchased for \$1.99. *See* Simon’s Facts ¶ 15. The Pop Topper measures two and a half inches by two and a fourth inches and is shaped to represent an old-fashioned soda bottle cap. *See* Simon’s Facts ¶ 13; Customs’ Mem. at 2–3. A dark red cap is latched and hinged to an inner green main body piece, which fits securely under the cap. *See* Simon’s Facts ¶ 13; Customs’ Mem. at 2–3.

² Both parties acknowledge that only the “Pop Topper” is subject to this action and that the three articles together comprised the “Clip-Tock Watch Collection” promotion. *See* Customs’ Mem. at 2; Simon’s Facts ¶ 11.

The inside face of the green body piece depicts two one-dimensional characters thematically tied to “A Bug’s Life” around a quarter-inch by half-inch opto-electronic digital display that tells the date or the time. *See* Simon’s Facts ¶ 13; Customs’ Mem. at 2–3. The Pop Topper also has a split ring and chain allowing it to be attached to other articles, such as backpacks or belt loops. *See* Simon’s Mem. at 5; Customs’ Mem. at 2–3.

Customs classified the merchandise under HTSUS subheading 9102.91.20, as “other watches, electronically operated, with opto-electronic display only” with a duty rate of 3.9 percent *ad valorem* on the watch and 5.3 percent *ad valorem* on the battery. *See* Customs’ Mem. at 3–4. On November 3, 1998, Customs issued Headquarters Ruling Letter NY D84205 (“NY D84205”) holding that the subject merchandise was classifiable under subheading 9102.91.20. *See* Customs’ Mem. Ex. B. In reaching its decision, Customs stated that while the watch case is “thematically tied to a movie and could be said to have a toy-like motif, the items themselves do not evoke the same response as a toy.” *Id.* Customs further stated that “[w]ithin the watch industry, humorous motifs are a common occurrence.” *Id.*

Simon filed a timely protest and application for further review challenging Customs’ classification and sought reliquidation of the merchandise under subheading 9503.90.00 as “other toys.” *See* Compl. ¶ 25; *see also* Headquarters Ruling Letter 963793 (“HQ 963793”) (May 18, 2000) at Customs’ Mem. Ex. C. Both Simon’s protest and application for further review were denied because Simon incorrectly completed the protest form indicating that it had not received an adverse administration decision from Customs when in fact NY D84205 had already been issued. *See* Customs’ Mem. Ex. C. Simon then commenced this action on January 31, 2002. *See* Compl. Parties then filed their respective motions for summary judgment. On May 20, 2005, the Court heard oral arguments from the parties.

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

9101	Wrist watches, pocket watches and other watches, including stop watches with case of precious metal or of metal clad with precious metal
...	
9102	Wrist watches, pocket watches and other watches, including stop watches, other than those of heading 9101:
...	
	Other:
9102.91	Electronically operated:

9102.91.20	With opto-electronic display only . . . 3.9% on the movement and case + 5.3% on the battery
9503	Other toys; reduced-size (“scale”) models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof:
. . .	
9503.90.00	Other . . . Free

II. Contentions of the Parties

A. Simon’s Contentions

Simon argues that Customs wrongly liquidated the Pop Topper as “other watches” under HTSUS subheading 9102.91.20 rather than its appropriate classification as “other toys” under subheading 9503.90.00. *See* Simon’s Mem. at 6. Simon contends that based on Rule 1 of the General Rules of Interpretation (“GRI”), the Additional United States Rules of Interpretation (“ARI”), and the *Harmonized Commodity Description and Coding System, Explanatory Notes*, (2nd ed. 1996) (“*Explanatory Notes*”), the Pop Topper should be classified under heading 9503 because it was designed specifically for amusement and therefore within the common meaning of term “toys.” *See id.* at 6–19. Simon argues that the Pop Topper’s principal use is that of amusement rather than utility. *See id.* at 10 & 12–17; Pls.’ Mem. P. & A. Opp’n Def.’s Cross-Mot. Summ. J. Reply Def.’s Opp’n Pl.’s Mot. Summ. J. (“Simon’s Reply”) at 9. Thus, the Pop Topper should have been classified as a “toy” even though it has the capacity to measure time. *See* Simon’s Mem. at 12–17. Simon emphasizes the effort spent in producing the amusement value of the Pop Topper because it “stimulate[s] the imagination and [has] manipulation features that entice children into active play.” Simon’s Mem at 13. Simon notes that the battery is permanently sealed inside the Pop Topper, thereby limiting its ability to function as a watch for a finite period of time. *See* Simon’s Mem. at 13–14; Simon’s Reply at 9–13. Moreover, the cost of a replacement battery is more than the price of the article indicating that “the timekeeping function was unimportant.” *See* Simon’s Mem. at 14; *see also* Simon’s Reply at 25–26 (“[I]t is not economically practical to use the Pop Topper as a watch beyond the relatively short life span of its battery.”). Since the Pop Topper’s utilitarian value is incidental to its amusement value, it should have been classified under heading 9503. *See* Simon’s Mem. at 12–14.

Relying on the *Explanatory Notes* to Chapters 91 and 95 of the HTSUS, Simon argues that the Pop Topper falls within the type of articles considered “toy watches” under heading 9503. *See id.* at 17–19. Simon asserts that the *Explanatory Notes* to Chapter 91 exclude watches without movement but do not “exhaust the universe of ex-

cludable toy watches.” *Id.* at 18. Therefore, an article capable of measuring time but designed principally for another purpose is excluded from classification under Chapter 91. *See* Simon’s Reply at 5. Since the Pop Topper was designed mainly for amusement and not utility, it is a type of “toy watch” supported by the *Explanatory Notes* for classification under Chapter 95. *See id.* at 5–6.

Simon argues, in the alternative, that if the Pop Topper is *prima facie* classifiable under both headings 9503 and 9102, then GRI 3³ requires classification under heading 9503 as the most specific provision. *See* Simon’s Mem. at 21–28. Finally, Simon asserts that Customs ruling NY D84205 warrants no deference by the Court. *See id.* at 29–30. NY D84205 warrants no deference because it was not adopted after a public notice and comment period and is inconsistent with Customs’ previous classifications of similar articles. *See id.*

B. Customs’ Contentions

Customs replies that its classification decisions, NY D84205, and HQ 963793, are entitled to respect pursuant to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See* Customs’ Mem. at 6–10. Moreover, Customs asserts that its classification of the Pop Topper is consistent with its prior treatment of similar merchandise. *See id.* Customs argues that based on GRI 1, ARI 1 and the *Explanatory Notes*, the Pop Topper is *prima facie* classifiable under heading 9102 because it falls within the meaning and scope of the term “watch” and not “toy.” *See id.* at 12–25. Customs concludes that because the Pop Topper is a battery powered, clip-on watch with an opto-electronic display designed to tell time, it “is a watch within the statutory meaning of that term and within the ordinary and common meaning of” the term “watch” as it is used in the United States. *Id.* at 13–14. Thus, the Pop Topper is appropriately classified under subheading 9102.91.20 because it is a fully functioning digital watch. *See id.* Customs further states that Simon’s assertion that the Pop Topper is classifiable under heading 9503 is wrong. *See* Customs’ Mem. at 15. Heading 9503 has been found to be a principle use provision by the court, thus governed by ARI 1(a). *See id.* at 16. Customs argues that the Pop Topper is principally used as a watch and not a toy because it was designed, marketed, and sold as a watch. *See id.* at 18. Simon made specific decisions during the design and advertising process, such as choosing a digital over analog timepiece and designating the Pop Topper as a part of the “Clip-Tock Watch Collection.” *See id.* at 18–19.

³GRI 3 states that “When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows: (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. . . .”

Customs also refutes Simon's contention that the *Explanatory Notes* to Chapters 91 and 95 support classifying the Pop Topper as a toy. *See* Customs' Mem. at 25–26. Specifically, the *Explanatory Notes* to Chapter 91 exclude toy watches, “such as those without clock or watch movements (heading 95.03 or 95.05).” *Id.* at 25. Customs argues that the “toy watches” excluded from Chapter 91 are articles without watch movements, meaning they do not tell time but merely look like watches. *See id.* Since the watch aspect of the Pop Topper has watch movement rather than merely being the semblance of a watch, it is properly classified under heading 9102. *See id.* at 25–26.

Finally, Customs argues that even if the Pop Topper was *prima facie* classifiable under both headings 9102 and 9503, Customs' classification is still correct pursuant to GRI 3(a). *See id.* at 27–29. Customs argues that the term “watches” is a more specific description of the Pop Topper than the term “toys” because the latter term can encompass “potentially [] anything for the amusement of children or adults.” *Id.* at 28. Customs also states that the Pop Topper is neither a “mixture, composite good, made up of different components, nor a good put up in sets for retail sale.” *Id.* at 29. Accordingly, classification pursuant to GRI 3(b) is unnecessary. *See id.*

III. Analysis

A. Motion for Summary Judgment

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

The ultimate question in every tariff classification is one of law; “whether the merchandise is properly classified under one or an-

other classification heading.” *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). Where, as in the instant case, there is no disputed material issue of facts to be resolved by trial, disposition by summary judgment is appropriate. Pursuant to 28 U.S.C. § 2640(a) (1994), Customs’ classification decisions are subject to *de novo* review based upon the record before the Court. Accordingly, the Court must determine “whether the government’s classification is correct, both independently and in comparison with the importer’s alternative.” *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

B. *Skidmore* Respect

As a preliminary matter, the Court finds that Customs’ decisions in NY D84205 and HQ 963793 are not entitled to *Skidmore* respect. In *Skidmore*, 323 U.S. at 140, the Supreme Court set forth the factors a reviewing court is to consider in determining how much weight an agency’s decision is to be afforded. The amount of respect an agency’s decision is afforded by a court “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control.” *Id.* The power to persuade of each Customs’ classification ruling may vary depending on the *Skidmore* factors articulated in *United States v. Mead*, 533 U.S. 218 (2001). See *Structural Indus., Inc. v. United States*, 356 F.3d 1366, 1370 (Fed. Cir. 2004). The Court recognizes that Customs classification rulings are entitled to “a respect proportional to [their] ‘power to persuade,’” *Mead*, 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140), but the Court has an “independent responsibility to decide the legal issue regarding the proper meaning and scope of the HTSUS terms.” *Mead Corp. v. United States*, 283 F.3d 1342, 1346 (Fed. Cir. 2002) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)).

NY D84205 merely states as its reasoning that “[a]lthough the cases for the watches are thematically tied to a movie and could be said to have a toy-like motif, the items themselves do not evoke the same response as a toy. Within the watch industry, humorous motifs are a common occurrence.” Customs’ Mem. Ex. B. The Court finds that Customs’ explanation is cursory and without meaningful explanation. Therefore, NY D84205 is not entitled to *Skidmore* respect. Similarly, HQ 963793 is also not entitled to *Skidmore* respect. Customs’ reasoning for denying Simon’s request for further review was based upon the fact that Simon had checked a “no” box in answer to the question of whether an adverse administrative decision regarding the subject merchandise existed. See Customs’ Mem. Ex. C. Customs’ denial of Simon’s request was not a substantive examination of the issues and therefore is not persuasive regarding the issue presently before the Court. Both of Customs’ classification ruling letters

failed to exhibit a thorough and valid reasoning giving them the “power to persuade”. See *Mead*, 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140).

C. Classification Under GRI 1

The proper classification of merchandise entering the United States is directed by the GRIs and the ARIs of the HTSUS. See *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). The Court begins its analysis with GRI 1. See *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001). GRI 1 states that “classification shall be determined according to the terms of the headings and any relative section or chapter notes. . . .” GRI 1; see also *Sabritas*, 22 CIT at 62, 998 F. Supp. at 1126–27 (noting that the definition and scope of the terms of a particular provision is to be determined by the wording of the statute and any relevant section or chapter notes). Only after comparing headings, if a question persists, may the Court look to the subheadings for the correct classification. See *Orlando Food*, 140 F.3d at 1440. If the proper classification cannot be determined by reference to GRI 1, then it becomes necessary to refer to the succeeding GRIs in numerical order. See *N. Am. Processing*, 236 F.3d at 698. Additionally, the *Explanatory Notes* are not legally binding on the United States, yet they “generally indicate the ‘proper interpretation’ of provisions within the HTSUS . . . [and] are persuasive authority for the Court when they specifically include or exclude an item from a tariff heading.” *Sabritas*, 22 CIT at 62, 998 F. Supp at 1127; see also *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994).

Both Simon and Customs argue that the Pop Topper is *prima facie* classifiable under GRI 1. See Simon’s Mem. at 8; Customs’ Mem. at 12. The dispute essentially lies with whether the utilitarian aspect of the Pop Topper, *i.e.* the watch, is incidental to its amusement value or whether its amusement value is incidental to its utilitarian purpose. Simon argues that the Pop Topper is classifiable as a toy under heading 9503 because it was designed for and used principally for amusement and thus within the common meaning of “other toys.” See Simon’s Mem. at 9–12. Simon asserts that the Pop Topper’s ability to tell time is merely incidental to its amusement value. See *id.* at 12. Customs, however, maintains that the Pop Topper is a watch under heading 9102 because it falls within the meaning and scope of the term “watch.” See Customs’ Mem. at 11–25. Customs further argues that the Pop Topper falls within the “class or kind” of articles known as watches because it was designed, marketed, and sold as a watch. See *id.* at 18–25. For the reasons set forth below, the Court finds that the Pop Topper is principally used as a watch and any amusement derived from it is incidental.

The Pop Topper is a fully functioning digital watch designed to simulate a bottle cap with an inside graphical face. It is well settled

that “when amusement and utility become locked in controversy, the question becomes one of determining whether the amusement is incidental to the utilitarian purpose, or the utilitarian purpose is incidental to amusement.”⁴ *Ero Indus., Inc. v. United States*, 24 CIT 1175, 1181, 118 F. Supp. 2d 1356, 1361 (2000) (citations omitted). In classification cases “the merchandise itself is often a potent witness.” *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1578 (Fed. Cir. 1989) (citations omitted). For the Pop Topper to be appropriately classified as a toy, its principal and not incidental use must be that of amusement. While the Pop Topper has eye-catching caricatures and minimal manipulability, the Court finds that it is not principally used for amusement. Rather, based on its shape, design, and minimal interactive value, the Pop Topper is an article that closely resembles a pocket watch that can tell time. See Simon’s samples.⁵ Without the watch aspect, the Pop Topper would be a plastic article with two one-dimensional inanimate characters from “A Bug’s Life” printed on it. Simon has failed to meet its burden of showing that such an article would be principally used for amusement purposes. Thus, the Pop Topper was properly classified under heading 9102.

The *Explanatory Notes* to the HTSUS also indicate that the Pop Topper was properly classified under heading 9102 rather than heading 9503. The *Explanatory Notes* to Chapter 91 state that “this Chapter *excludes* . . . c) toy clocks and watches . . . such as those without clock or watch movements⁶ (*heading 95.03 or 95.05*).” *Explanatory Notes*, 91 at 1663 (emphasis retained). The *Explanatory Notes* to heading 95.03 states that “[m]any of the toys of this heading are mechanically or electrically operated [including] . . . (16) Toy clocks and watches.” *Explanatory Notes*, 95 at 1712. Simon argues that when the *Explanatory Notes* to Chapters 91 and 95 are read together, the Pop Topper is encompassed in heading 9503 and excluded from heading 9102. The “such as” language in the *Explanatory Notes*

⁴Parties cite a long string of cases where the Court has examined the utility versus amusement use of an article only to show that the analysis is often fact-specific to the particular article in question. See e.g., *Ero Indus.*, 24 CIT 1175, 118 F. Supp. 2d 1356 (holding that amusement value of a tent was the primary use of the article); *Minnetonka Brands, Inc. v. United States*, 24 CIT 645, 110 F. Supp. 2d 1020 (2000) (holding that bubble bath containers were “toys” rather than “plastic bottles”); *W. Stamping Corp. v. United States*, 61 Cust. Ct. 152, 289 F. Supp. 1016 (1968) *aff’d* 57 C.C.P.A. 6, 417 F.2d 316 (1969) (holding that cheaply constructed typewriters had utility as “typewriters” rather than “toys”); *N.Y. Merch. Co., Inc. v. United States*, 62 Cust. Ct. 38, 294 F. Supp. 971 (1969) (holding that vinyl baseball gloves were “baseball equipment” rather than “toys”).

⁵Simon submitted a Pop Topper sample to the Court as part of its submissions (“Simon’s samples”).

⁶Watch movements is defined as “devices regulated by a balance-wheel and hairspring, quartz crystal or any other system capable of determining intervals of time, with a display or a system to which a mechanical display can be incorporated.” *Explanatory Notes*, 91 at 1663. The fact that the Pop Topper has watch movement is not disputed by the parties. See Simon’s Mem. at 5; Customs’ Mem. at 3.

to Chapter 91 “requires that all ‘toy watches’ be excluded from Chapter 91 regardless of whether they possess watch movement.” *See* Simon’s Reply at 7. Customs argues, however, that when the two *Explanatory Notes* are read together, the types of “toy watches” excluded from heading 9102 are those articles that do not have watch movements. *See* Customs’ Mem. at 25–26. The Court finds that Customs properly read these *Explanatory Notes* together.

“Toy watches” are articles that resemble watches and can be manipulated to exhibit time, but do not keep or tell time on their own. Simon argues that the *Explanatory Notes* to Chapter 91 “make clear that not all devices capable of measuring time are to be classified under Chapter 91.” Simon’s Reply at 6. Simon argues that the list of exclusions to Chapter 91 encompasses toy clocks such as those without clock or watch movements. *See id.* at 6–7. Simon asserts that because the list of exclusions is not exhaustive, then articles with clock and watch movements may be excluded from classification under Chapter 91. *See id.* While Simon is correct that the exclusions named in the *Explanatory Notes* to Chapter 91 is not an exhaustive list, the article at issue must fall within the scope of the demonstrative examples presented. The exclusions listed may apply to merchandise with watch movements where the watch component is entirely incidental to its principal use. The Pop Topper’s principal use, however, is that of a watch. The Court holds that the Pop Topper is not the type of merchandise encompassed by the term “toy watch” in the *Explanatory Notes* to Chapters 91 and 95. Consequently, the Pop Topper may not be excluded from classification under Chapter 91.

Although the Pop Topper is not a “toy watch” under Chapters 91 and 95, the issue remains whether it has sufficient amusement value to be correctly classified as “other toys” under heading 9503. Heading 9503 is a “principle use” provision and thus governed by ARI 1(a). *See Minnetonka*, 24 CIT at 651, 110 F. Supp. 2d at 1026. ARI 1(a) states that

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

(emphasis added). “Principle use” is defined as the use “which exceeds any other single use of the article.” *Minnetonka*, 24 CIT at 651, 110 F. Supp. 2d at 1027 (citations omitted). Further, it is the ordinary use of the “class or kind” of merchandise to which the subject merchandise belongs “even though particular imported goods may be put to some atypical use.” *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1364 (Fed. Cir. 1999). The “class or kind” of articles considered “toys” under heading 9503 are articles whose principle use is “amusement, diversion or play, rather than practicality.” *Min-*

netonka, 24 CIT at 651, 110 F. Supp. 2d at 1027. The court has adopted certain factors to determine whether an article falls within a particular “class or kind” of merchandise (“*Carborundum* factors”). See *United States v. Carborundum Co.*, 63 C.C.P.A. 98, 536 F.2d 373 (1976). The *Carborundum* factors include: (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchasers; (3) the channels, class, or kind of trade in which the merchandise moves; (4) the environment of sale; (5) usage, if any, in the same manner as merchandise which defines the class; (6) the economic practicality of so using the import; and (7) the recognition in the trade of the use. See *Minnetonka*, 24 CIT at 651–52, 110 F. Supp. 2d at 1027. Here, the Pop Topper must belong to the “class or kind” of merchandise whose principle use is “amusement, diversion or play, rather than practicality” to be classified as a “toy.” See *Minnetonka*, 24 CIT at 651, 110 F. Supp. 2d at 1026.

Simon bears the burden of proving classification under heading 9503. See *Universal Elecs.*, 112 F.3d at 491. Simon argues that the Pop Topper is designed and mainly used for amusement, see Simon’s Mem. at 12–17, but provides no compelling evidence to substantiate its claim. Rather, by Simon’s own admission, heading 9102 covers watches designed principally to measure time, while heading 9503 covers toys and toy watches “*principally used* for amusement, even if capable of measuring time.” See Simon’s Reply at 3 (emphasis added). While the Pop Topper may provide some amusement value, it is not inherent that the article is principally used as a toy. Also, the fact that the Pop Topper was designed for children does not resolve whether it is principally used as a toy or a watch.

When examining the Pop Topper under the *Carborundum* factors, the Court finds that it is not an article of the “class or kind” of merchandise whose principle use is amusement, diversion or play. The Pop Topper has the general physical characteristics of a clip-on pocket watch with an opto-electronic digital display capable of telling the date and the time. While the graphics printed on the inside face of the Pop Topper serve to enhance and promote a user’s imagination, the practical usage of the article as a time telling device cannot be dismissed. The size and colorful nature of the article merely indicates that the Pop Topper was designed for children. Any amusement value derived from the Pop Topper, however, is minimal and limited to the fixed one-dimensional graphics, which themselves do not move or cannot be manipulated in any way. The watch aspect of the Pop Topper is its dominant feature and exceeds any other use of the article. See *Minnetonka*, 24 CIT at 651, 110 F. Supp. 2d at 1027. The Pop Topper was also marketed and advertised as a watch. See Simon’s samples; Simon’s Mem. Ex. 2. The box the Pop Topper comes in is labeled “Clip-Tock Watch Collection.” See Simon’s samples (emphasis added). Included inside the packaging is a separate printed insert with instructions on how to set and switch the time and date

on the display. *See id.* Furthermore, Simon intended the Pop Topper to be a watch because it chose to design and advertise the Pop Topper as a watch. *See* Simon's samples; Simon's Mem. Ex. 2, 4, 5. The Court notes that subject merchandise was not a part of the "Clip-Tock *Toy* Watch Collection" or "Clip-Tock *Toy* Collection." In fact, Simon did not refer to the Pop Topper as a "toy" anywhere on the packaging or in its marketing research materials. *See* Simon's samples; Simon's Mem. Ex. 2. The reasonable expectations of the purchasers were to receive a watch.

The Pop Topper was a promotional article for the movie "A Bug's Life," which could only be purchased at McDonald's, and was sold separately from the Happy Meals⁷ program. While the Pop Topper was \$1.99, consumers considered the price a good value and were purchasing a watch because of an attachment to the promoted movie. *See* Simon's Mem. Ex. 5. Simon's own marketing research shows that the price was not unreasonably low for a watch and followed consumer expectations. *See id.* Simon's contention that replacing the battery is not economically practical is also unpersuasive because the value to a single consumer cannot be contemplated. Thus, any amusement value derived from the Pop Topper is incidental to its utilitarian aspect. The Pop Topper is of the "class or kind" of articles considered "watches" and not "toys" because its principal use is to tell time. To classify every eye-catching, child-friendly article as a toy, simply because it enhances a child's imagination, is to unacceptably blur the HTSUS headings defeating their purpose and leading to absurd results. Since the Pop Topper is *prima facie* classifiable under heading 9102 pursuant to GRI 1, examination under the remaining GRIs is unnecessary.

CONCLUSION

The Court finds that Customs' decisions in NY D84205 and HQ 963793 are not entitled to *Skidmore* respect. The Court also holds that based on its shape, design, and minimal interactive value, the Pop Topper is principally used as a watch and any amusement derived therefrom is incidental to its utilitarian aspect. Accordingly, Customs properly classified the Pop Topper under subheading 9102.91.20. For the foregoing reasons, Simon's motion for summary judgment is denied and Customs' cross-motion for summary judgment is granted. Judgment will be entered accordingly.

⁷ The Happy Meals program is McDonald's traditional disbursement of toys and could arguably be a channel of trade for toys. *See* Simon's Mem. at 5-6.

SLIP OP. 05-119

ROGER L. INGMAN, Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Before: Jane A. Restani,
Chief Judge
Court No. 05-00268

[Defendant's motion to dismiss suit challenging Trade Adjustment Assistance for Farmers benefits denial granted.]

Dated: September 2, 2005

Roger L. Ingman, pro se plaintiff.
Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Delfa Castillo*); *Jeffrey Kahn*, of counsel, Office of General Counsel, Department of Agriculture, for the defendant.

OPINION

Restani, Chief Judge: This matter is before the court on the government's motion to dismiss. Plaintiff Roger Ingman, appearing *pro se*, has orally opposed the motion.

FACTUAL AND PROCEDURAL BACKGROUND

Ingman operated a licensed fishing operation in Alaska during the 2003 salmon season. AR at 3-4. On October 7, 2004, the United States Department of Agriculture ("USDA") announced via a press release that it was recertifying a petition for Alaska salmon fisherman under the Trade Adjustment Assistance for Farmers program ("TAA"). *See* Press Release 0228-04, "USDA Grants Assistance to Alaska Salmon Fishermen Under Trade Adjustment Assistance Program" (October 7, 2004) [hereinafter Press Release 0228-04], *available at*, http://www.fas.usda.gov/scripts/w/PressRelease/pressrel_frm.asp. The USDA determined that increasing imports of farmed salmon contributed to a decline in the price of salmon in Alaska during the 2003 marketing period. *Id.* Thus, affected Alaska fisherman could apply for technical assistance and cash benefit for the 2005 salmon season. *See id.* The press release announced that "Alaska salmon license and permit holders seeking assistance must apply between October 15, 2004, and January 13, 2005." *Id.*

Subsequently, the USDA published a notice on this subject in the Federal Register. *See Trade Adjustment For Farmers*, 69 Fed. Reg. 60,350 (Dep't Agric. Oct. 8, 2004). In the notice, the USDA announced that "Salmon fisherman holding permits and licenses in the State of Alaska will be eligible for fiscal year 2005 benefits during a 90-day period beginning on October 15, 2004. The application period

closes on January 13, 2005.”¹ *Id.* The notice then went on to give the appropriate contact information. *Id.* This information was also posted on the USDA’s website. AR at 18. In addition, various other advertisements of benefit-availability were published in Alaska during the relevant period. *See* Letter from U.S. Dep’t of Justice (Aug. 10, 2005), Attach. 1, 2, 4, 5.

Although Ingman was eligible to apply for TAA benefits, the USDA received his application on January 28, 2005, 15 days after the announced deadline. AR at 3. Ingman admits that his application was late, stating in his letter of appeal that he “was unable to meet the deadline of January 13, 2005.” Letter from Ingman (March 9, 2005), AR at 16. In a letter dated March 1, 2005, the USDA denied Ingman’s application because it was not received by the January 13, 2005, deadline. Letter from USDA (March 1, 2005), AR at 17. Despite his tardiness in filing, Ingman argues that the deadline should be tolled. *See* Letter from Ingman, AR at 16. Ingman alleges that his tardiness was the result of the USDA sending his application to the incorrect address, and offers the USDA’s original letter as proof. *Id.* at 16–18.²

The Government moves to dismiss based on lack of jurisdiction and failure to state a claim. For the reasons set forth below, the government’s motion is granted.

I. JURISDICTION

Pursuant to 19 U.S.C. § 2395, the Court of International Trade has exclusive jurisdiction over any action commenced to review a final determination of the Secretary of Agriculture with respect to denial of trade adjustment assistance. The USDA challenges subject matter jurisdiction under this provision on two grounds: (A) the Secretary of Agriculture did not make a determination reviewable by this court; and (B) Ingman did not exhaust his administrative remedies.

The determination of subject matter jurisdiction is a threshold inquiry. *Steel Co. v. Citizens For A Better Env’t*, 523 U.S. 83, 94–95 (1998). Whether to grant a motion to dismiss for want of jurisdiction

¹This is in accordance with 19 U.S.C. § 2401e(a)(1) (2004), which reads:

Payment of[a] adjustment assistance under this chapter [19 USCS § § 2401 et seq.] shall be made to an adversely affected agricultural commodity producer covered by a certification under this chapter [19 USCS § § 2401 et seq.] who files an application for such assistance . . .

²A conference with plaintiff and subsequent correspondence from the government (not contradicted by plaintiff) has confirmed that the application Ingman received was sent three months prior to the deadline to his daughter’s address—an address that Ingman had used in the past. In addition, Ingman had received benefits previously and presumably was personally familiar with the program through such receipt of benefits, as well as through the widespread advertising of the program.

is a question of law. *JCM, Ltd. v. United States*, 210 F.3d 1357, 1359 (Fed. Cir. 2000).

“The party seeking to invoke this Court’s jurisdiction bears the burden of proving the requisite jurisdictional facts.” *Former Employees of Sonoco Prods. Co. v. United States Sec’y of Labor*, 273 F. Supp. 2d 1336, 1338 (CIT 2003), *aff’d*, 372 F.3d 1291 (Fed. Cir. 2004), *reh’g en banc denied*, No. 03–1557, 2004 U.S. App. LEXIS 20715 (Sept. 8, 2004) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). At the same time, “the Court assumes ‘all well-pled factual allegations are true,’ construing ‘all reasonable interferences in favor of the nonmovant.’” *United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047, 1051 (1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)).

A. The Secretary Of Agriculture Made A Reviewable Determination.

First, the USDA argues that no reviewable determination was made by the Secretary of Agriculture (“the Secretary”). Section 2395 of title 19 of the United States Code reads in pertinent part as follows:

[A]n agricultural commodity producer (as defined in section 2401(2) of this title) *aggrieved by a determination* of the Secretary of Agriculture under section 2401b of this title . . . may, *within sixty days after notice of such determination*, commence a civil action in the United States Court of International Trade *for review of such determination*.

. . . .

. . . The Court of International Trade shall have jurisdiction to affirm the action of . . . the Secretary of Agriculture, as the case may be, or set such action aside, in whole or in part.

19 U.S.C. § 2395 (2004) (a) & (c) (emphasis added).

The USDA argues that 19 U.S.C. § 2395 grants the Court of International Trade jurisdiction to review only “determinations” of the Secretary, and when it denied Ingman’s application because of his untimely submission, it made no such determination. Def.’s Mot. To Dismiss at 6. The USDA argues that the Secretary merely applied 19 U.S.C. § 2401e(a)(1), which allows submission of applications for only ninety days after he certifies eligibility, and thus the Secretary made no reviewable determination. *Id.*

In its March 1, 2005, letter, the USDA admitted to Ingman that it had “reviewed the information that [Ingman] provided to the Farm Service Agency with [his] application and . . . made a *final determination* that [he was] ineligible for a cash payment.” AR at 17 (emphasis added). Furthermore, the USDA wrote that Ingman “may request review of [the] *final determination* by contacting the United States

Court of International Trade. . .” *Id.* (emphasis added). It was not until its Motion to Dismiss that the USDA denied that it had made a determination.

Yet, even absent this admission, the distinction the USDA draws between a determination based on a deadline and a determination based on other characteristics is both without precedent and unconvincing. To prohibit judicial review of an agency’s application of deadlines to TAA applications would leave applicants with no method of appeal even in the face of clear agency error. The USDA offers no explanation as to why this, and not other agency determinations, deserves absolute deference. Therefore, as the Court of International Trade is given exclusive jurisdiction over final determinations of the Secretary of Agriculture regarding TAA applications, and the USDA has characterized its actions as a final determination, without offering any plausible reason why they are not, this court finds that it has subject matter jurisdiction.

B. Ingman Exhausted His Administrative Remedies.

Second, the USDA argues that Ingman did not exhaust his administrative remedies.³ 28 U.S.C. § 2637(d) (2000) states that “[i]n any civil action not specified in this section, the Court of international Trade shall, where appropriate, require the exhaustion of administrative remedies.”

“The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency’s consideration before raising these claims to the Court.” *Fabrique de Fer de Charleroi S.A. v. United States*, 25 CIT 741, 743, 155 F. Supp. 2d 801, 805 (2001); see also *Unemployment Comp. Comm’n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946) (“A reviewing court usurps the agency’s function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action”). A plaintiff’s administrative remedies are exhausted once an agency issues its final negative determination denying his petition and allowing him to pursue judicial review in the Court of International Trade under 19 U.S.C. § 2395(a). See *Former Employees of Quality Fabricating, Inc. v. Dep’t of Labor*, 343 F. Supp. 2d 1272, 1282–1283 (CIT 2004) (finding that plaintiffs had exhausted their administrative remedies sufficiently to allow judicial review under 19 U.S.C. § 2395(a) when the Department of Labor issued its final negative determination of their petition for NAFTA TAA benefits).

³It is not clear that this ground actually goes to subject matter jurisdiction rather than failure to state a claim. The court sees no reason to explore this issue, as plaintiff has exhausted his remedies.

In the present case, the USDA argues that agency review of an application for TAA benefits was available to Ingman had he submitted his application during the specified period. Def.'s Mot. to Dismiss at 6–7. It argues that, because Ingman did not avail himself of this opportunity by submitting a timely application, he did not exhaust his administrative remedies, and therefore this court lacks jurisdiction to hear this case. *Id.*

As previously discussed, the FAS announced in its letter to Ingman that its determination denying him TAA benefits was final. See discussion *supra* at Part I.A. Additionally, the USDA cites no additional procedure for administrative review that Ingman could pursue. Therefore, the court concludes that Ingman exhausted his administrative remedies.

II. FAILURE TO STATE A CLAIM

Alternatively, the USDA argues that pursuant to Rule 12(b)(5) of this court, Ingman has failed to state a claim on which relief could be granted because he does not allege facts sufficient to make him eligible to for TAA benefits. Although Ingman failed to file a formal response to the USDA's motion to dismiss, the court interprets Ingman's position as follows: Although Ingman admits he did not meet the statutory deadline for submission of his application, equity dictates that the deadline should be tolled.

A. Plaintiff Did Not Meet The Deadline For TAA Benefits.

The USDA argues that Ingman presents no issue of material fact. "On a motion to dismiss for failure to state a claim, factual allegations made in the complaint are assumed to be true and all inferences are drawn in favor of the plaintiff." *Amoco Oil Co. v. United States*, 23 CIT 613, 613, 63 F. Supp. 2d 1332, 1334 (1999); see also *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 215 (Fed. Cir. 1993). "Dismissal is proper only 'where it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief.'" *Amoco Oil Co.*, 23 CIT at 613, 63 F. Supp. 2d at 1334 (quoting *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1565 (Fed. Cir. 1988)).

The USDA argues that there is no issue of material fact because Ingman admits to having been unable to meet the January 13th deadline, a prerequisite for the USDA to review an application for TAA. The USDA made a similar argument before this court in *Deane v. United States Sec'y of Agric.*, No. 05–0020 (CIT May 17, 2005) (unpublished order) (dismissing complaint with prejudice). In *Deane*, as here, the plaintiff was an Alaska fisherman seeking review of a negative final determination by the USDA on his application for TAA benefits. See *Deane*, Def.'s Mot. to Dismiss (March 19, 2005), at 4. The USDA received the plaintiff's application for TAA benefits on

May 17, 2004, almost five months after the announced January 20, 2004 deadline. *Id.* Although the plaintiff alleged that he already completed an application with another government agency, which was lost, he offered no proof of that fact. *See Deane*, Pl.'s Resp. (Apr. 23, 2005). This court granted the USDA's motion to dismiss. *See Deane*, Order (May 17, 2005).

Similarly, in the present case, Ingman admits in his letter of appeal that he did not meet the January 13th deadline. He does not challenge that deadline in any way.

B. Equitable Tolling Is Not Appropriate.

Ingman presumably argues that as his tardiness was a result of the USDA's error in sending his application to the incorrect address, equity dictates that the court toll the deadline set forth in 19 U.S.C. § 2401e(a)(1) for submission of his application. The Supreme Court has extended the doctrine of equitable tolling to statutes of limitations for filing suits against the government. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95–96 (1990).

In *Irwin*, the Court held that “the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.” *Id.* Nonetheless, “[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute.” *United States v. Beggerly*, 524 U.S. 38, 48 (1998). Applying this standard, the court has found that equitable tolling is permitted under the TAA statute. *See Former Employees of Quality Fabricating, Inc. v. United States*, 259 F. Supp. 2d 1282 (CIT 2003) (denying defendant's motion to dismiss where plaintiff missed the deadline for appealing a negative determination by the Department of Labor on her request for TAA because the agency published the determination only in the federal register and not on its website, where it had told her to look).

In the present case, however, there is no evidence that USDA misled Ingman or that he used “due diligence” in either determining the existence of his claim or procuring an application. In *Quality Fabricating*, the court found the plaintiff acted with due diligence because the Department of Labor instructed employees that they could refer to its website or the Federal Register. *Id.* at 1286–87. Because the plaintiff regularly checked the Department of Labor's website and the Department of Labor failed to post her status there, the court permitted tolling of the statute of limitations. *Id.*

Conversely, Ingman does not allege that he made a similar effort to ascertain his status as a potential recipient of TAA benefits or that he took steps to procure an application. In the Federal Register, the USDA provided both an email address and a phone number for applicants to request information, *see Trade Adjustment for Farmers*, 69 Fed. Reg. at 60,350, and in its press release, the USDA pro-

vided web addresses where applicants could obtain local contact information and the actual application, see Press Release 0228–04. Additionally, applications were available at local Farm Service Agency service centers. *Id.* Ingman alleges only that he waited passively for the USDA to mail him his application and his response was late as a result of the USDA's error in sending what was essentially a courtesy copy to a non-current address. These actions do not give rise to tolling of the statute.

Moreover, Ingman's status as a *pro se* plaintiff does not change the court's treatment of the matter. Although leniency with respect to mere formalities normally is extended to a *pro se* party, when the matter concerns the time limitations placed on the consent of the United States to suit, a court may not take a similarly liberal view and set a different rule for *pro se* litigants. *See Kelley v. United States Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987) (finding that plaintiffs who missed the sixty day deadline to appeal the Department of Labor's final determination on their application for TAA were not entitled to leniency simply because of their status as *pro se* applicants).

CONCLUSION

Because Ingman neither alleges that he satisfied the statutory filing deadline, nor do the facts warrant equitable tolling, the government's motion to dismiss for failure to state a claim is granted.



Slip Op. 05–120

PROCESSED PLASTIC COMPANY, *Plaintiff*, v. UNITED STATES, *Defendant*.

Court No. 00–09–00458

[Defendant's motion for summary judgment granted.]

Decided: September 6, 2005

Stack & Filpi Chartered (Paul F. Stack and Cori A. Szczucki), for Plaintiff.

Peter D. Keisler, Assistant Attorney General; Barbara S. Williams, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (James A. Curley); Michael W. Heydrich, Office of the Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, U.S. Department of Homeland Security, Of Counsel; for Defendant.

OPINION

RIDGWAY, Judge:

At issue in this action is the decision of the U.S. Customs Service (“Customs”)¹ denying the protest filed by plaintiff Processed Plastic concerning the tariff classification of plastic children’s backpacks and beach bags that it imported from China.

The Government contends that Customs properly classified the backpacks and beach bags as “[t]ravel, sports and similar bags . . . [o]ther,” under subheading 4202.92.45 of the Harmonized Tariff Schedule of the United States (“HTSUS”) (1999), dutiable at the rate of 20% *ad valorem*.² *See generally* Defendant’s Brief in Support of its Motion for Summary Judgment (“Def.’s Brief”); Defendant’s Brief in Reply to Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment (“Def.’s Reply Brief”). Processed Plastic asserts that the merchandise instead should be classified as “[o]ther toys, put up in sets or outfits, and parts and accessories thereof,” under subheading 9503.70.00 of the HTSUS, duty-free.³ *See generally* Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment (“Pl.’s Response Brief”).

Pending before the Court is the Government’s motion for summary judgment.⁴ Processed Plastic opposes the motion, claiming that disputed issues of material fact exist, necessitating a trial.

As discussed more fully below, however, this matter is ripe for summary judgment. Further, the merchandise at issue is properly classified as “[t]ravel, sports and similar bags . . . [o]ther” under subheading 4202.92.45 of the HTSUS. Customs’ classification is there-

¹Since the events at issue here, the U.S. Customs Service has been renamed the Bureau of Customs and Border Protection of the U.S. Department of Homeland Security. *See Homeland Security Act of 2002*, Pub. L. No. 107–296 § 1502, 2002 U.S.C.A.N. (116 Stat. 2135, 2308); *Reorganization Plan for the Department of Homeland Security*, H.R. Doc. No. 108–32 (2003).

²In its entirety, subheading 4202.92.45 reads:

Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper . . . Other . . . With outer surface of sheeting of plastic or of textile materials: Travel, sports and similar bags . . . Other.

All references to the HTSUS herein are to the 1999 version.

³In its entirety, subheading 9503.70.00 covers: “Other toys; reduced-size (“scale”) models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof: Other toys, put up in sets or outfits, and parts and accessories thereof.”

⁴Jurisdiction lies under 28 U.S.C. § 1581(a) (2000). Customs classification decisions are subject to *de novo* review pursuant to 28 U.S.C. § 2640.

fore sustained, and the Government's motion for summary judgment is granted.

I. *Applicable Standards*

Customs classification decisions are reviewed through a two-step analysis – first, construing the relevant tariff headings (a question of law); and, second, determining under which of those headings the merchandise at issue is properly classified (a question of fact). *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citing *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997)).

Under USCIT Rule 56, summary judgment is appropriate where “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 . . . the moving party is entitled to . . . judgment as a matter of law.” USCIT R. 56(c). Summary judgment thus may be appropriate in a customs classification case “when there is no genuine dispute as to the underlying factual issue of what exactly the merchandise is.” *Bausch & Lomb*, 148 F.3d at 1365 (citation omitted).⁵ Indeed, the Court of Appeals has hailed summary judgment as a “salutary procedure . . . to avoid unnecessary expense to the parties and wasteful utilization of the jury process and judicial resources.” *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835 (Fed. Cir. 1984).

Where a party has filed a properly-supported motion for summary judgment in accordance with Rule 56, the non-movant bears the burden of coming forward with “‘specific facts showing that there is a genuine issue for trial.’” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis added) (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968)). See also *Chem. Eng. Corp. v. Essef Indus., Inc.*, 795 F.2d 1565, 1571 (Fed. Cir. 1986) (same); USCIT R. 56(e).

To be sure, “the judge's function” at the summary judgment stage “is not himself to weigh the evidence and determine the truth of the matter.” *Anderson v. Liberty Lobby*, 477 U.S. at 249. Further, “the established facts, as well as any inferences of fact drawn from such facts, must be viewed in a light most favorable to the opposing party.” *Barmag*, 731 F.2d at 836 (citing *United States v. Diebold*, 369 U.S. 654 (1962)). However, “the court may not simply accept a party's statement that a fact is challenged. . . . The party opposing the

⁵ Pursuant to 28 U.S.C. § 2639(a)(1), Customs' classification is presumed correct. However, that “presumption of correctness” attaches only to Customs' factual determinations. The presumption thus has no relevance at this stage of the proceedings, because summary judgment may be entered only if there is no genuine dispute as to any material fact – and, if there is no factual dispute, Customs does not need the benefit of any presumption. See *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995).

motion must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts *set forth in detail* in an affidavit by a knowledgeable affiant.” *Barmag*, 731 F.2d at 835–36 (emphasis added) (citation omitted).

Thus, “[m]ere conclusory assertions do not raise a *genuine* issue of fact.” *Pure Gold, Inc. v. Syntex*, 739 F.2d 624, 627 (Fed. Cir. 1984). And “[a] non-movant runs the risk of a grant of summary judgment by failing to disclose the evidentiary basis for its claim.” *Pure Gold*, 739 F.2d at 627 (citation omitted).

Moreover, a factual dispute is “genuine” only “if the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Anderson v. Liberty Lobby*, 477 U.S. at 248. The fact that “some evidence has been introduced” is not sufficient – by itself – to create a genuine issue of material fact. *Anderson v. Liberty Lobby*, 477 U.S. at 251 (quoting *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L.Ed. 867 (1872)). Further, “[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Anderson v. Liberty Lobby*, 477 U.S. at 249–50 (internal citations omitted). Thus, at the summary judgment stage, the question to be answered is “whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson v. Liberty Lobby*, 477 U.S. at 250.

An extension of this rule is that a moving party is entitled to summary judgment if it can show that the nonmoving party has failed to establish an essential element of its claim. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). “In such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Celotex*, 477 U.S. at 322–23. In determining materiality, “the substantive law will identify which facts are material.” *Anderson v. Liberty Lobby*, 477 U.S. at 248. “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Id.* (citations omitted).

II. Background

The merchandise at issue in this action includes three items – identified in import documents as the “Barbie backpack,” the “Pooh backpack,” and the “Barbie beach bag” – imported into the United States from China in 16 separate entries between February and May 1999.

Samples of the backpacks and beach bags are in evidence. The basic physical characteristics of the merchandise are therefore not in dispute. See Def.’s Exhs. A, B (samples of Pooh and Barbie back-

packs); Def.'s Exh. C (sample of Barbie beach bag). Most importantly (for purposes of this case), as discussed in greater detail below, it is undisputed that the imported merchandise is carried by children to transport lightweight personal effects, such as the domestically-manufactured plastic beach toys with which the backpacks and beach bag are packaged for retail sale.

A. *The Barbie and Pooh Backpacks*

The overall shape and construction of the Barbie backpack and the Pooh backpack are identical. The backpacks are rectangular, consisting of a top panel, front and back panels, and two side panels, all made of polyvinyl chloride ("PVC") plastic sheeting. The front panels are transparent, so that any objects placed inside the backpacks are clearly visible. In contrast, the top, side, and back panels are made of colored PVC plastic sheeting – pink for the Barbie backpack, and blue for the Pooh backpack. The backpacks have plastic mesh bottoms, which are double-stitched to the front, back, and side panels. The seam formed between the mesh bottom and those four panels is reinforced with a one-inch strip of PVC sheeting.

Each backpack is approximately 11 inches high, nine inches wide, and three-and-a-half inches deep. (In other words, it is roughly the same size as a two-ream stack of standard printer paper.) Two straps made of woven nylon webbing are attached to the back panel at the top and the bottom, and are designed so that the backpack can be worn on a child's back. The length of the straps can be adjusted by means of buckles, to tailor the fit of the backpack to the individual child.

In addition, each of the backpacks closes with a zipper – with two zipper pulls – which runs all the way from one lower corner of the backpack to the other, in both directions. This design affords maximum access to any toys or other items that a child carries or stores in the backpack. To further facilitate its use, there is a loop in the middle of the top of the back panel, so that the backpack can be hung on a hook for convenience.

The only differences between the two backpacks are their respective color schemes and imprinted images. The clear front panel of the Barbie backpack features a small (two-by-three inch) image of Barbie (who is pictured from the torso up, sporting a sun hat). The Pooh backpack features a two-and-a-half inch tall image of Winnie the Pooh on the front panel, as well as slightly larger images of Pooh (and Tigger too –) on the side panels. The side and top panels of the Pooh backpack also feature very small, faint sand pail-and-shovel designs.

B. *The Barbie Beach Bag*

Much like the backpacks, the Barbie beach bag is made of PVC plastic sheeting, with a circular plastic mesh bottom. The fronts of the Barbie beach bag and the Barbie backpack both feature the same image of Barbie in a sunhat. Unlike the Barbie backpack, however, the beach bag is a sling-style, cylindrical-shaped bag of a top-opening duffel type – approximately 12 inches high and nine inches in diameter – and is made almost entirely of *clear* plastic (except for the plastic mesh bottom). As with the backpacks, objects carried or stored inside the beach bag are thus clearly visible.

The beach bag's clear plastic sheeting is joined at the bottom to a one-inch wide ring of pink plastic sheeting, which forms a circle around the outside edge of the mesh bottom of the bag. Plastic piping and a one-inch strip of PVC sheeting reinforce the double-stitched seam between the bottom and the rest of the bag. A one-inch wide "collar" made of pink plastic is stitched all around the circular top of the beach bag.

In addition, two braided cords are attached to the bottom of the beach bag by a metal ring and a woven nylon webbing loop, and threaded through metal grommet-reinforced holes all around the top of the bag. The braided cords serve a dual purpose of forming both a double cord strap and a drawstring-style closure to secure the contents of the beach bag. The design of the double-braided cord straps allows the beach bag to be carried either as a backpack or slung over a child's shoulder.

C. *The Importation and Retail Sale of the Merchandise*

The backpacks and beach bags are imported by themselves – empty – from China. After the merchandise is imported, various domestically-manufactured plastic beach toys are inserted into the backpacks and beach bags, which are then repackaged individually for retail sale.

Processed Plastic's advertisements depict children carrying the backpacks on their backs. Other advertisements show the beach bag slung over a little girl's shoulder, via the double-braided shoulder strap. All the advertisements note that the backpacks and beach bags are sold at retail with a sand pail, shovel, molds, a sieve, and other sand toys inside. Declaration of Kevin P. Gorman ("Gorman Decl."), Atts. 1–5 (advertisements for Barbie and Pooh backpacks, and Barbie beach bag).

III. *Analysis*

Emphasizing Note 1(1) to Chapter 42 of the HTSUS (which excludes from the scope of that chapter goods that are classifiable un-

der chapter 95),⁶ Processed Plastic argues – in short – that the goods here are not “backpacks” (or, in the case of the beach bags, “similar containers”) *because* they are “toys” under heading 9503.⁷ *See, e.g.*, Pl.’s Response Brief at 4–5, 12–13.⁸ Distilled to its essence, Processed Plastic’s affirmative case that the merchandise at issue is a “toy” consists of two types of evidence: (1) evidence as to the asserted play, amusement, or diversion value of the goods (hereinafter, “play value”), and (2) evidence as to how the goods are advertised, marketed, merchandised, displayed, and sold.

Processed Plastic’s evidence and arguments are, however, insufficient to establish the existence of a genuine issue of material fact. Nor do they cast doubt on Customs’ classification of the backpacks and beach bag under heading 4202 of the HTSUS. As detailed below, Processed Plastic’s merchandise is properly classified under subheading 4202.92.45.

A. *Processed Plastic’s Claim Under Heading 9503*

Processed Plastic’s chief contention is that summary judgment is inappropriate because, it asserts, the principal use of its merchandise is in dispute. *See, e.g.*, Pl.’s Statement of Material Facts ¶¶ 1 (“The primary use of the imported merchandise is to provide amusement and diversion for children . . .”), 2 (“The imported merchandise

⁶Note 1 to chapter 42 provides, in relevant part: “This chapter does not cover . . . (1) articles of chapter 95. . . .”

Although it cites no authority for the proposition, Processed Plastic asserts that “[t]his note clearly contemplates the scenario[] present in this case.” Pl.’s Response Brief at 5. In fact, the Court has identified only one case in which Note 1(1) has been invoked to classify as a “toy” under chapter 95 merchandise which would otherwise have been classified under heading 4202 – the specific part of chapter 42 that is at issue here. And that case is nothing like this one. *See* HQ 958180 (Jan. 18, 1996) (classifying under heading 9503 “small, sturdy,” *miniature* replicas of vintage luggage which are “marketed as accessories to dolls in ‘The American Girls Collection,’ a line of historically authentic books, dolls, and related accessories” very popular with young girls in this country).

⁷As Processed Plastic observes, “[a]lthough the term ‘toy’ is not defined [in the HTSUS], the courts have defined a toy as an object whose principal use is *amusement, diversion or play*.” *See* Pl.’s Response Brief at 5 (emphasis added) (*citing Minnetonka Brands, Inc. v. United States*, 24 CIT 645, 650–51, 110 F. Supp. 2d 1020, 1026 (2000); *Ero Indus., Inc. v. United States*, 24 CIT 1175, 1180, 118 F. Supp. 2d 1356, 1360 (2000)). Heading 9503 is thus a “principal use” provision. *See, e.g., Ero Indus.*, 24 CIT at 1180, 118 F. Supp. 2d at 1360 (noting application of Additional U.S. Rule of Interpretation 1(a) to “use” provisions such as heading 9503). *See also* Pl.’s Response Brief at 13 (noting that “[h]eading 9503 is a use provision.”).

“[A]s their names suggest, . . . principal use provisions classify [merchandise] by use.” *Clarendon Marketing, Inc. v. United States*, 144 F.3d 1464, 1467 (Fed. Cir. 1998) (citation omitted). In contrast, “[a]n *eo nomine* classification provision is one which describes [merchandise] by a specific name.” *Id.* (citation omitted).

⁸As the Government succinctly puts it: “The basis of the plaintiff’s claim is that the proper classification of the imported merchandise is under subheading 9503.70.00, HTSUS. *See* Complaint ¶ 9. According to the plaintiff, because the merchandise is classifiable under 9503.70.00, it cannot be classified under subheading 4202.92.45, HTSUS, because Note 1(1) to Chapter 42 precludes such classification.” Def.’s Reply Brief at 8 (citations omitted).

was chiefly designed for the amusement and diversion of children.”). However, the evidence that it has proffered is – as a matter of law – insufficient to preclude summary judgment. Processed Plastic has failed to establish the existence of a dispute of material fact.

Processed Plastic’s evidence on “play value” is little more than a series of bald statements along the lines of “the function of [the backpacks and the beach bag] is to provide amusement and diversion for children by giving them a plastic toy that serves as a sand and water sieve and in which they can insert or remove other small toys.” See Pl.’s Response to Def.’s Statement of Material Facts ¶¶ 12–13.⁹ However, conclusory assertions such as these cannot suffice to preclude summary judgment. See generally Schwarzer, Hirsch & Barrans, *The Analysis and Decision of Summary Judgment Motions* at 48 (Federal Judicial Center 1991) (“FJC Monograph”).¹⁰

⁹As catalogued immediately below, all the statements on which Processed Plastic relies to establish “play value” are broad, formulaic combinations of the same small handful of phrases, variously preceded by a reference to “use,” “function,” or “design.” But repetition is no substitute for the specificity which is required by USCIT Rule 56(e) and conspicuous by its absence here.

See Pl.’s Statement of Facts ¶ 1 (“The primary use of the imported merchandise is to provide amusement and diversion for children by giving them a clear plastic beach toy that can be used as a water and sand sieve and in which they can insert and remove other lightweight toys.”); Pl.’s Statement of Facts ¶ 2 (“The imported merchandise was chiefly designed for the amusement and diversion of children.”); Declaration of David Bergman (“Bergman Decl.”) ¶ 5 (“The merchandise was primarily designed to provide amusement and diversion for children by giving them a clear plastic beach toy which they could use as a sand and water sieve and in which they can insert and remove small, lightweight objects.”); Report of Jay Byrd (“Byrd Rept.”) ¶ 2.6 (“the primary function of the merchandise at issue is for a child to play with the vinyl beach bag and beach toys near sand and water”); Pl.’s Response to Def.’s Interrog. 14 (“The function of the imported merchandise is to provide amusement and diversion for children by giving them a clear plastic beach toy in which they can insert and remove other small plastic toys. . . .”); Pl.’s Response to Def.’s Interrog. 19(b) (“The principal use of the imported merchandise is for children’s amusement and diversion. . . .”).

Citing *Ero Industries* (and apparently alluding to the Barbie and Pooh images on its own merchandise), Processed Plastic argues in its brief that “the imported merchandise in this case *per se* has amusement value.” Pl.’s Response Brief at 6–8. However, Processed Plastic’s affidavits and other evidence are utterly devoid of any discussion of how the images on the backpacks and beach bag assertedly “create imagery and foster fantasy play.” *Id.* at 8. Only one of Processed Plastic’s witnesses even mentions “fantasy play” – and that reference goes only to one of the three items at issue and is, more importantly, completely conclusory. See Bergman Decl. ¶ 4 (asserting, with no elaboration, that “[t]his advertisement [of the Pooh backpack], and specifically the language, ‘a great way to begin your adventure,’ clearly illustrates that the bag is designed for the . . . fantasy play of children.”).

The mere fact that an article incorporates graphics of popular children’s characters does not necessarily make that article a “toy” for tariff purposes. A child’s sweater does not become a “toy” simply because it is decorated with images of Winnie the Pooh or Barbie. “To classify every eye-catching, child-friendly article as a toy, simply because it enhances a child’s imagination, is to unacceptably blur the HTSUS headings defeating their purpose and leading to absurd results.” *Simon Mktg., Inc. v. United States*, No. 00–00332, slip. op. 05–118 at 23 (CIT Sept. 1, 2005).

¹⁰In cases such as this, litigants claiming a “toy” classification typically proffer specific, detailed testimony or other evidence to establish “play value” – for example, documentation of factors considered in the design process, results of “test marketing,” or the testimony of

“It is well settled that ‘a conclusory statement on the ultimate issue does not create a genuine issue of fact.’” *Applied Cos. v. United States*, 144 F.3d 1470, 1475 (Fed. Cir. 1998) (quoting *Imperial Tobacco Ltd. v. Philip Morris, Inc.*, 899 F.2d 1575, 1581 (Fed. Cir. 1990)).¹¹ Instead, a party opposing summary judgment “must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts *set forth in detail* in an affidavit by a knowledgeable affiant. Mere denials or conclusory statements are insufficient.” *Barmag*, 731 F.2d at 835–36 (emphasis added).

Thus, for example, where summary judgment was granted in a trademark registration case based in part on a finding that “sweats” is a generic term for fleece sportswear, even a counter-affidavit from the opposing party’s president attesting that “sweats” is *not* a generic term “would have availed little.” *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 1564 (Fed. Cir. 1987). Absent the production of additional evidence elaborating on and substantiating that position, summary judgment would have been appropriate in any event. “Mere conclusory statements and denials do not take on dignity by placing them in affidavit form.” *Id.* (citations omitted). See also *Techsearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1372 (Fed.

child psychologists or parents describing with particularity the specific ways in which children interact with the asserted “toy.” See, e.g., *Minnetonka*, 24 CIT 645, 110 F. Supp. 2d 1020 (witnesses included, *inter alia*, mother who testified “that her child carries the merchandise under his arm like a little doll, talks to the goods and makes the goods kiss each other,” as well as expert “in the field of semiotics (the study of cultural signs or cultural meaning)”); *Dan-Dee Imports, Inc. v. United States*, 7 CIT 241 (1984) (importer’s evidence included affidavit from mother of two-and-a-half year old girl, detailing little girl’s interaction with asserted toy); *Creative Playthings v. United States*, 80 Cust. Ct. 192 (1978) (importer presented, *inter alia*, testimony of psychologist from Educational Testing Service specializing in “cognitive development and social behavior of young children,” who had observed children’s use of article in their activities); *United States v. Topps Chewing Gum*, 58 CCPA 157, 440 F.2d 1384 (1971) (evidence included results of “test marketing” to children; witnesses presented included four children, as well as psychologist who had observed how children, in general, used the article); *United States v. Grunberg*, 41 CCPA 1 (1953) (witnesses testifying in support of “toy” classification included “recreation and playground directors,” who detailed their observations as to specifically how children use article).

Indeed, to survive a motion for summary judgment, Processed Plastic would not only have had to identify “specific facts” to establish the existence of a material dispute warranting a trial; but, in addition, Processed Plastic’s evidence would have to clearly distinguish between any “play value” inherent in the imported merchandise here at issue – *i.e.*, the backpacks and beach bag – as opposed to the “play value” of the product as it is sold at retail (where it is prepackaged with an assortment of domestically-manufactured plastic beach toys), or even the “play value” of the beach toys alone. In other words, a trial would be warranted only if Processed Plastic presented evidence of “play value” that was more than merely conclusory, *and* that evidence focused specifically on the intrinsic “play value” of the backpacks or beach bags themselves (*i.e.*, the imported merchandise subject to tariff classification here).

¹¹ As the Court of Federal Claims has observed, this is indeed a proposition with “an impressive pedigree.” See *Becho, Inc. v. United States*, 47 Fed. Cl. 595, 602 n.6 (2000) (collecting authorities). See also *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888–89 (1990) (where court of appeals reversed district court’s entry of summary judgment, the appellate court erred in “‘assuming’ that general averments [by a party opposing summary judgment] embrace the ‘specific facts’ needed to sustain the complaint”).

Cir. 2002) (citations omitted) (same); *Medical Instrumentation & Diagnostics Corp. v. Elekta AB*, 344 F.3d 1205, 1220 (Fed. Cir. 2003) (in contrast to another patent case where summary judgment was properly granted, expert here “did not simply make a conclusory statement that, in his opinion, the claims were invalid. . . . Rather, for each claim limitation, he connected it with disclosures in the prior art that he believed taught each particular limitation.”).

Measured against this standard, the conclusory representations of Processed Plastic and its witnesses as to the “play value” of the merchandise – which do little more than parrot the tariff definition of a “toy” – lack the requisite substance and specificity, and are insufficient as a matter of law.¹²

Moreover, because “play value” is the *sine qua non* of a “toy,” the lack of any real proof of “play value” renders immaterial Processed Plastic’s remaining assertions of fact concerning its “toy” claim – spe-

¹² Quite apart from its conclusory nature, Processed Plastic’s evidence concerning “play value” is plagued by other infirmities as well.

For example, it is well-established that a party cannot defeat summary judgment with an affidavit that is inconsistent with a prior statement, absent a reasonable explanation for the discrepancy. *See, e.g., Applied Cos.*, 144 F.3d at 1473–75 (summary judgment in favor of government not precluded by declaration of government contractor’s CFO attesting that company previously effected “set-off” where that statement was “irreconcilable” with company’s correspondence with federal government); *Sinskey v. Pharmacia Ophthalmics, Inc.*, 982 F.2d 494, 497–98 (Fed. Cir. 1992) (in assessing existence of genuine issue of fact, court properly disregarded party’s declaration which “was in direct conflict” with party’s earlier testimony at deposition). *See generally* FJC Monograph at 48.

Here, Processed Plastic’s current assertions that the backpacks and beach bag are for children’s use as “sand and water sieve[s]” are fundamentally inconsistent with its prior statements to the effect that “[t]he bottoms [of the backpacks and the beach bag] . . . are perforated with large holes *for the sole purpose of permitting water to run out.*” *See* Plaintiff’s Statement in Support of Protest at 3 (emphasis added); *see also* Pl.’s Response to Def.’s Interrog. 15 (“The imported merchandise has a sieve bottom *designed to drain sand and water*”) (emphasis added); Byrd Rept. ¶ 2.3 (*quoting* catalog, which describes Pooh backpack as having “*a sieve bottom to drain sand and water*”) (emphasis added); Processed Plastic’s website (Pl.’s Exh. 8) (promoting Barbie beach bag as having “*a sieve bottom to drain sand and water*”) (emphasis added); Pooh Backpack advertisements (Gorman Decl., Atts. 1–3) (Pooh backpack “has a sieve bottom *to drain sand and water*”) (emphasis added); Barbie beach bag advertisements (Gorman Decl., Atts. 4–5) (Barbie beach bag “has a sieve bottom *to drain sand and water*”) (emphasis added).

Processed Plastic has failed to even acknowledge – much less explain – this discrepancy between its *current* position on this alleged use of the merchandise and its *prior* statements on the subject (which are consistent with the position of the Government here). *See, e.g.,* Gorman Decl. ¶ 8 (“[t]he mesh bottom *allows water and beach sand to drain* from the contents of the backpack and bag”) (emphasis added). Accordingly, the discrepancy constitutes a second, independent basis for rejecting Processed Plastic’s conclusory assertions that the backpacks and beach bag are designed to be used by children to sift sand and water, and thus have “play value.”

Similarly, it is noteworthy that Processed Plastic’s advertisements depict children *carry[ing]* the backpacks and beach bag – *not* using them as “sand and water sieve[s]” and not “insert[ing] and remov[ing] other lightweight toys.” *See, e.g.,* Gorman Decl., Atts. 1–3, 5 (advertisements for Pooh backpack and Barbie beach bag). Processed Plastic’s advertisements are thus basically inconsistent with its current assertions that children use the backpacks and beach bag as “sand and water sieve[s]” and as something “in which they can insert and remove other lightweight toys.” Again, however, Processed Plastic has offered no explanation.

cifically, its allegations concerning matters such as the advertising, marketing, merchandising, display, and sale of the merchandise. *See* Pl.'s Statement of Material Facts ¶ 3 (asserting that a dispute of material fact exists as to whether "[t]he imported merchandise is located in toy departments of select retail stores").¹³

As a matter of substantive law, evidence as to the advertising, marketing, and merchandising of an article may well be probative; but it is never alone dispositive. *See, e.g., S. Y. Rhee Importers v. United States*, 61 CCPA 2, 4, 486 F.2d 1385, 1387 (1973) ("the manner in which an article is bought and sold is not necessarily determinative of its classification"); *Rainin Instrument Co., Inc. v. United States*, 27 CIT ____ , ____ , 288 F. Supp. 2d 1360, 1366 (2003) (and authorities cited there) ("while the marketing of merchandise is a factor to be considered in determining its classification . . . , it is not dispositive") (citations omitted); *Minnetonka*, 24 CIT at 649, 654, 110 F. Supp. 2d at 1025, 1029 (although "[t]he subject merchandise is sold in the children's toiletries section of stores, rather than the toy section," it is nevertheless properly classified as a toy).

Similarly, as a matter of evidence and procedure, the Supreme Court has emphasized that – where a party fails to establish an es-

¹³ *See* Plaintiff's Statement in Support of Protest at 3 (catalog "demonstrates that the product is promoted and sold solely as a toy"); Pl.'s Response to Def.'s Interrog. 19(b) (merchandise "is advertised as a child's toy"); Bergman Decl. ¶ 4 (advertisements were located in toy catalogs, "surrounded by advertisements for other toys"); Byrd Rept. ¶ 2.4 (merchandise "was located exclusively in the Toy Department of Fred's Stores . . . [so] the merchandise was surrounded only by other toys"); Byrd Rept. ¶ 2.7 ("Fred's also sells backpacks [which] are located . . . in the Stationery and School Supplies Department" of the store); Pl.'s Response to Def.'s Interrog. 19(b) ("the imported merchandise is distributed in retail alongside other toys"); Disney License Agreement ¶ 2.A.(2) (allowing sales only to "toy and seasonal department buyers" for "(1) mass market Retailers . . . , (2) value-oriented department stores . . . , (3) value-oriented specialty stores, (4) toy stores, (5) warehouse clubs, and (6) drug chains"); Mattel License Agreement ¶ G (listing authorized "Channels of Distribution" as "Specialty," "Direct Mail (catalog sales)," "Mid-Tier Store," "Mass Market," "Supermarket," "Drug Store," "Warehouse Club," and "Military Bases"); Pl.'s Response to Def.'s Interrog. 19(b) ("the imported merchandise . . . is recognized in the trade as a toy"); Processed Plastic's website (describing company as "leading domestic manufacturer of plastic toys"); Website of Toy Industry Association, Inc. (listing Processed Plastic as a member of association); Barbie Licensee List (listing Processed Plastic under "Toys/Activities" retailers); Pooh Licensee List (listing Processed Plastic under "Toys & Sporting Goods" retailers); Gorman Decl., Atts. 1–5 (backpack and beach bag advertisements); Attachment to Plaintiff's Statement in Support of Protest (Pooh backpack advertisement); Def.'s Exhs. A, B & G (Pooh and Barbie backpack hangtags); Processed Plastic's website (Barbie backpack advertisement).

It is worth noting, too, that neither Processed Plastic nor the retailers who sell its merchandise to the public promote the backpacks and beach bag separate and apart from the plastic beach toys that are packaged inside them for retail sale. But it is only the imported goods – the *empty* backpacks and beach bag – that are at issue here. Thus, even if its advertisements could be said to have "toy" appeal, Processed Plastic would need to adduce evidence specific to the backpacks and beach bags themselves (distinct from their beach toy contents). Similarly, even assuming the truth of Processed Plastic's claim that the backpacks and beach bag are sold only to toy buyers, and retailed exclusively in toy departments and toy stores, it would not necessarily speak to the marketing, merchandising, display and sale of the imports at issue here – the *empty* backpacks and beach bag.

sential element of its claim at the summary judgment stage – “there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Celotex*, 477 U.S. at 322–23. *See also Anderson v. Liberty Lobby*, 477 U.S. at 248 (“As to materiality . . . [o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”).

Since Processed Plastic has failed to come forward with even a scintilla of evidence to support its claims concerning the “play value” of the goods at issue, the other facts that it seeks to establish *vis-a-vis* classification as a “toy” are unavailing. In other words, as a matter of law, absent evidence of “play value,” no jury (or other factfinder) could reasonably find that the backpacks and beach bag are “toys.” *See generally Anderson v. Liberty Lobby*, 477 U.S. at 252 (“The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient” to preclude summary judgment; “there must be evidence on which the jury could reasonably find for the plaintiff.”).¹⁴

¹⁴ As explained in section II.C and elsewhere above, Processed Plastic fills the backpacks and beach bags with “various lightweight beach toys” after the bags are imported, but before they are distributed for retail sale. Pointing to that fact, Processed Plastic contends that the merchandise at issue in this action (*i.e.*, the *empty* backpacks and beach bag) should be classified as “other toys, put up in sets,” under HTSUS subheading 9503.70.00. *See* Pl.’s Response Brief at 14–15.

Because Processed Plastic has failed to make its case as to heading 9503, there is no need here to reach the issue of its claimed subheading. *See* General Rule of Interpretation (“GRI”) 1 (requiring the classification of merchandise “according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to [GRIs 2 through 6]”); *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998) (“Only after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise.”) (*citing* GRIs 1 & 6).

But, in any event, Processed Plastic’s “sets” argument lacks merit. “Sets” are defined in the Explanatory Notes to subheading 9503.70.00 as “two or more different types of articles (principally for amusement), put up in the same packing for retail sale without repacking.” *See Harmonized Commodity Description and Coding System: Explanatory Notes*, 9503.70 (2d ed. 1996) (“*Explanatory Notes*”).

Because the merchandise at issue is imported *without* the plastic beach toys, it is not imported in “sets,” which – by definition – requires that the imported merchandise consist of “two or more different types of articles.” As a matter of both law and logic, one item does not a set make. *Cf. M.H. Garvey Co. v. United States*, 70 Cust. Ct. 14, 19 (1973) (where customs broker introduced evidence that – after importation – inexpensive fishing reels were packaged with other fishing tackle and “included in a fishing kit sold nationally,” court noted: “There is no evidence that the imported fishing reels are themselves toys, aside from their use with a fishing kit of sorts. . . . Assuming, without deciding, that the fishing kit is a toy, the imported fishing reels imported separately are at best a part of the fishing kit and, therefore, separately dutiable.”) (citations omitted).

Further, because the plastic beach toys are placed in the imported merchandise after importation, and that product is then placed “within external packaging,” the imported merchandise here is “repacked” for retail sale. Thus, the merchandise at bar also does not fulfill that part of the definition of a “set” which requires that it be “put up in the same packing for retail sale *without repacking*.” (Emphasis added.)

Processed Plastic also has failed to establish the existence of a dispute of material fact as to the classification of the Barbie and Pooh backpacks and the Barbie beach bag as “backpacks” and “similar containers” under heading 4202. Apart from its naked assertions that the backpacks and beach bags are principally used for the “amusement and diversion” of children and are assertedly marketed and merchandised as “toys” (discussed above), Processed Plastic raises only two other alleged facts which, it contends, are both material and in dispute, and preclude classification under heading 4202 – specifically, the weight-bearing capacity of the backpacks and the beach bag, and their use to “organize” items. *See* Pl.’s Statement of Material Facts ¶¶ 4 (“The bottom of the imported merchandise will deform if it is forced to hold weight greater than three pounds.”), 5 (“The imported merchandise is not capable of organizing items as it consists wholly of one single compartment.”). Processed Plastic’s position, however, has no merit.

At the summary judgment stage, Processed Plastic’s factual assertions must be taken as true. But, even so, any dispute as to the weight-bearing capacity of the backpacks and beach bag simply is not material. Nothing in the language of heading 4202 (or, for that matter, any other provision of the HTSUS) requires that merchandise classified under that heading have any specific weight-bearing capacity.¹⁵ Heading 4202 is an *eo nomine* provision.¹⁶ As a matter of law, such provisions “ordinarily include all forms of the named article.” *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). Heading 4202 thus includes all forms of backpacks and similar containers, whether they are designed for use by children or adults.¹⁷

¹⁵ Indeed, Processed Plastic’s own definition of “backpack” does not require any specific weight-bearing capacity. *See* Pl.’s Response to Def.’s Interrog. 22(a) (defining “backpack” as “a bag with two straps that is used to carry objects of varying weight on your back”) (emphasis added).

¹⁶ Heading 4202 is an *eo nomine* provision. *See* Def.’s Brief at 13 (citing *Totes, Inc. v. United States*, 69 F.3d 495, 498–99 (Fed. Cir. 1995)); Pl.’s Response Brief at 13 (noting that “[h]eading 4202 is an *eo nomine* provision”).

¹⁷ There is no need here to go so far as to say that merchandise can be classified under heading 4202 with no regard whatsoever for its weight-bearing capacity.

For purposes of this case, it suffices to note that Processed Plastic obviously concedes that the backpacks and beach bag are capable of carrying children’s plastic toys to the beach (which is precisely how the merchandise is marketed). *See, e.g.*, Gorman Decl., Atts. 1–3 (backpack advertisements), 4–5 (beach bag advertisements). Moreover, Processed Plastic acknowledges that the backpacks and beach bag can also be used to carry children’s other personal effects as well. *See, e.g.*, Pl.’s Response to Def.’s Statement of Material Facts ¶¶ 12–13 (admitting that backpacks “are used to carry children’s toys to the beach,” and that beach bag is “used to carry children’s toys *and dolls* to the beach” (emphasis added) – even though dolls are not included among the items packaged with the backpacks and beach bag when they are marketed for retail sale). And Processed Plastic further admits that the backpacks and the beach bag can carry at least three pounds – whether a swimming suit, sunglasses, and flip flops, or pajamas for a slumber party/“sleep-over,” art sup-

Processed Plastic fares no better on its claim that – because they consist of single compartments – the backpacks and beach bag cannot be used to “organize” items. Again, even assuming the truth of that assertion, it is not material here.

Just as nothing in the language of the HTSUS requires that merchandise classified under heading 4202 have any specific weight-bearing capacity, so too there is no requirement for multiple compartments. *See Carl Zeiss*, 195 F.3d at 1379 (absent express restrictions, *eo nomine* provisions “ordinarily include all forms of the named article”).¹⁸ Indeed, some of the exemplars specifically listed in heading 4202 – shopping bags, for example – typically consist of a single compartment.

Moreover, the capacity to “organize” does not necessarily require multiple compartments. For example, a grocery bag or shopping bag (one of the exemplars listed in heading 4202) allows a shopper to “organize” purchases for transport – heavier items on the bottom,

plies, action figures, the ubiquitous “juice boxes,” or other lightweight articles. *See, e.g.*, Pl.’s Statement of Material Facts ¶ 4 (asserting that the merchandise cannot “hold weight greater than three pounds”).

Indeed, contrary to Processed Plastic’s implication, there is logically no point in designing a toddler or young child’s backpack or beach bag such that it has the capacity to carry heavy objects, since children of such tender years themselves cannot carry much weight. In many respects, the children’s backpacks and beach bag at issue in this case are basically “junior editions” of *adult* backpacks and beach bags. Thus, instructive here is the line of precedent that distinguishes between a non-functional “toy” version of an article and “a ‘junior edition’ of a larger, more expensive article . . . [which] performs the same function on a smaller scale.” *New York Merch. Co. v. United States*, 62 Cust. Ct. 38, 42, 294 F. Supp. 971, 974 (1969).

In *New York Merchandise*, for example, vinyl junior baseball gloves were properly classified as baseball equipment rather than “toys,” because they were found to be suitable for use in regular or organized games of baseball by children under the age of eight. 62 Cust. Ct. at 44, 294 F. Supp. at 976. In contrast, in *Ero Industries*, tent-like “playhouses,” “play or slumber tents,” and “vehicle tents” made of lightweight plastic and designed for children were properly classified as “toys” rather than tents, because – unlike tents – “the imports were neither designed nor constructed for protection against the elements” (and a child’s need for protection from the elements is no less than that of an adult). *Ero Indus.*, 24 CIT at 1185–87, 118 F. Supp. 2d at 1364–65. Processed Plastic’s reliance on *Ero Industries* is thus misplaced. *See* Pl.’s Response Brief at 5–8 (discussing *Ero Industries*). Much like the “junior edition” baseball glove in *New York Merchandise*, the back packs and beach bag in this case fulfill the same functions that backpacks and beach bags do for adults – albeit on a *smaller* scale, and for *much smaller* persons. *See, e.g.*, Def.’s Exh. G (hangtag advising that Pooh backpack is intended for children as young as “36 months”); *see also* section III.B, *infra* (discussing functionality of backpacks and beach bag here at issue).

Processed Plastic’s attempts to invoke *Carson* are also unavailing. *Carson, Pirie, Scott & Co. v. United States*, 2 Ct. Cust. App. 386 (1911). *See* Pl.’s Response Brief at 7–8. Due to its design and construction, the “Teddy bear” doll/muff in *Carson* could afford “little if any warmth . . . [to] the hands of a child in cold weather.” Accordingly, the muff was properly classified as a toy, rather than as clothing. In contrast, in the case at bar, even Processed Plastic concedes that the backpacks and beach bag are worn by children to carry their personal effects. Indeed, that is precisely how Processed Plastic advertises its merchandise.

¹⁸Even Processed Plastic doesn’t define “backpack” to require multiple compartments. *See* Pl.’s Response to Def.’s Interrog. 22(a) (defining “backpack” as “a bag with two straps that is used to carry objects of varying weight on your back”).

lighter items on top. Further, simply “containing” items is at least a rudimentary form of “organization.”¹⁹

In any event, the classification of the backpacks and beach bag under heading 4202 does not stand or fall on their use to “organize” items. As discussed further in section III.B below, the “essential purposes” of articles classified under heading 4202 include – in addition to “organizing” – “storing, protecting, and carrying” other articles. *SGL, Inc. v. United States*, 122 F.3d 1468, 1471 (Fed. Cir. 1997); *Totes*, 69 F.3d at 498; see also *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 n.4 (Fed. Cir. 2003) (“the essential characteristics of the exemplars listed in Heading 4202 are to organize, store, protect and carry various items”). And merchandise can be classified under heading 4202 even if it serves only one of the four stated purposes. *Jewelpak Corp. v. United States*, 24 CIT 249, 253 n.7, 97 F. Supp. 2d 1192, 1196 n.7 (2000).

The bottom line here is that Processed Plastic does not dispute that the backpacks and beach bag are capable of storing, protecting, and carrying children’s personal items. Any dispute as to whether they can also be used to “organize” is therefore immaterial to their classification under heading 4202, and cannot defeat summary judgment. *Celotex*, 477 U.S. at 322–23; *Anderson v. Liberty Lobby*, 477 U.S. at 248.

In sum, Processed Plastic has failed to establish the existence of any genuine dispute of material fact to justify a trial in this case. However, that does not end the analysis.

B. Customs’ Classification Under Heading 4202

That Processed Plastic has failed to establish the existence of a dispute of material fact does not necessarily entitle the Government to summary judgment; nor does it necessarily result in the classification of the backpacks and beach bags under subheading 4202.92.45. Under USCIT Rule 56(c), summary judgment is to be granted only where “there is no genuine issue as to any material fact” and “the moving party is entitled to . . . judgment as a matter of law.” Thus, notwithstanding the conclusion in section III.A above, the Government’s motion should be granted only if its papers establish all material facts, and if judgment in its favor is appropriate under the circumstances.

Indeed, in a customs classification case such as this, the Court “cannot determine the correct result simply by dismissing the importer’s alternative as incorrect.” *Jarvis Clark Co. v. United States*,

¹⁹ Any harried parent of a toddler will attest that beach toys contained in a backpack or beach bag are more “organized” than the same toys scattered all over the living room floor.

733 F.2d 873, 878 (Fed. Cir. 1984). Rather, the Court is duty-bound “to find the *correct* result.” *Id.*²⁰

Discounting the conclusory assertions of Processed Plastic and its witnesses concerning the principal use of the imported merchandise (for the reasons set forth in section III.A above), a review of the undisputed evidence in this case – particularly the merchandise samples themselves – compels the conclusion that the backpacks and beach bag are properly classified under subheading 4202.92.45.

1. *The Barbie and Pooh Backpacks*

The Government maintains that Customs properly classified the subject merchandise under HTSUS heading 4202. That heading embraces, among other things, “traveling bags . . . knapsacks and backpacks . . . and similar containers . . . of sheeting of plastics. . . .” Subheading 4202.92.45, in turn, covers “travel, sports and similar bags.”²¹ Additional U.S. Note 1 to heading 4202 further specifies:

For the purposes of heading 4202, the expression “*travel, sports and similar bags*” means goods, other than those falling in subheadings 4202.11 through 4202.39, of a kind designed for carrying clothing and other personal effects during travel, including *backpacks* and shopping bags of this heading, but does not include binocular cases, camera cases, musical instrument cases, bottle cases and similar containers.

(Second emphasis added.) Thus, pursuant to the express terms of Additional U.S. Note 1, the phrase “travel . . . and similar bags” means articles “of a kind designed for carrying clothing and other personal effects during travel, *including backpacks*.” (Emphasis added.) Backpacks therefore are described *eo nomine* in heading 4202. *Carl Zeiss*, 195 F.3d at 1379. And, by virtue of Additional U.S. Note 1, backpacks are also included within the provision for

²⁰Neither party addressed the Court’s *Jarvis Clark* obligation. And the Government virtually ignored Processed Plastic’s “toys” argument altogether, focusing its defensive efforts instead on debunking Processed Plastic’s claim that the empty backpacks and beach bags constitute “sets.” See Def.’s Brief at 17–21; Def.’s Reply Brief at 2–4. Much of the Government’s argument was – in essence – “*you lose* [on the ‘sets’ subheading], *therefore I win* [on everything, and Customs’ classification is necessarily upheld].” But that is not a proper paradigm in a classification case.

Thus, although the Government established that the merchandise at issue cannot be classified under subheading 9503.70.00, it did not address whether the goods could be classified elsewhere under heading 9503. As discussed in section III.A above, however, Processed Plastic failed to make a case for classification under that heading. Moreover, it appears from the record – and particularly the merchandise samples themselves – that no real case for such a classification *can* be made. The Government’s failure to brief Processed Plastic’s asserted claim to classification under heading 9503 (other than the “sets” argument) is therefore of no real consequence here.

²¹“The expression ‘sports bags’ includes articles such as golf bags, gym bags, tennis racket carrying bags, ski bags and fishing bags.” *Explanatory Notes*, 42.02.

“travel . . . and similar bags” found in subheading 4202.92.45.

Dictionaries define the term “backpack” virtually self-referentially – almost as a “pack” carried on one’s “back”:

backpack n. . . . 1. a load carried on the back (as by knapsack).

Webster’s Third New International Dictionary (Unabridged) 159 (1986).

backpack n. A pack or knapsack carried on the back, as by campers.

Funk & Wagnalls New International Dictionary 105 (1987).

back-pack A pack carried on the back;

The Oxford English Dictionary 868 (2d ed. 1989).

Applying the commonly-accepted definition of “backpack” to the merchandise at issue, the Barbie and Pooh backpacks are plainly “backpacks” for tariff purposes, and thus properly classifiable under subheading 4202.92.45 pursuant to the express terms of that provision. Indeed, the Barbie and Pooh backpacks are listed as “backpacks” in the relevant entry papers;²² and even Processed Plastic’s own advertisements identify the merchandise as the “Pooh Summer Adventure Beach *Backpack*” and the “Barbie Beach *Backpack*.” (Emphasis added.)²³ The hangtag attached to the Pooh backpack similarly identifies it as a “Beach *Backpack*.” (Emphasis added.)²⁴

As discussed in section II.A above, an examination of the sample merchandise reveals that the Barbie and Pooh backpacks each have two adjustable shoulder straps, so that the backpacks can be carried on children’s backs in transit and used to carry their personal effects. And Processed Plastic’s own advertisements depict children *carrying on their backs* the “Pooh Summer Adventure Beach Backpack . . . *loaded with toys* for the beach.” (Emphasis added.)²⁵ (The Barbie backpack – which is of precisely the same design – is obviously used in the same way.)

Moreover, as even Processed Plastic concedes, the backpacks can be used to carry things other than the beach toys with which they are sold – including children’s personal effects such as other toys,

²² See, e.g., Invoice in Entry No. 0158248–8 under Protest No. 3901–99–101508 (Def.’s Exh. D).

²³ See Def.’s Exh. F (advertisement submitted by Processed Plastic with Protest 3901–99–101507); Gorman Decl., Atts. 1–3; Processed Plastic’s website (Barbie backpack advertisement).

²⁴ See Def.’s Exh. G (Pooh backpack hangtag). (Note that the hangtag attached to the sample Barbie backpack – Def.’s Exh. B – actually appears to be the hangtag for the Barbie *beach bag*, rather than the Barbie backpack.)

²⁵ See Gorman Decl., Atts. 1–3 (backpack advertisements).

dolls, a swimsuit or other clothing, sunglasses, or similar items.²⁶ The Barbie and Pooh backpacks thus fall squarely within the ordinary meaning of “backpack,” because they are carried on the back of a child, and are used to transport toys or other personal effects (for example, to the beach).

The Barbie and Pooh backpacks also constitute “backpacks” for tariff purposes because they serve the purposes of *organizing*, *storing*, and *protecting* toys or other personal effects – the other three essential characteristics shared by the exemplars listed in heading 4202 of the HTSUS. See *Totes*, 69 F.3d at 498; *SGI*, 122 F.3d at 1471; *Len-Ron Mfg. Co.*, 334 F.3d at 1309 n.4.²⁷

Like “carrying,” the other three essential characteristics are self-evident from even the most cursory inspection of the sample merchandise. See Def.’s Exhs. A, B (samples of Pooh and Barbie backpacks); see also Gorman Decl. ¶ 9 (Barbie and Pooh backpacks are “designed to be carried on the back of a child for the purpose of *organizing, holding, storing, protecting* and *transporting* toys, dolls and other personal effects,” as evidenced by samples themselves, and by advertisements) (emphasis added).²⁸

As discussed in section III.A, for example, the backpacks serve to “organize” a child’s toys and other personal effects simply by *containing* them. The backpacks may also be used to further organize objects – for example, by weight or bulk (with larger and heavier items placed in the bottom, and smaller and lighter items on top). Processed Plastic’s own advertisements depict the backpacks in an upright position with the zipper closed. In those advertisements, the contents of the backpack are clearly visible through the clear PVC

²⁶ See, e.g., Pl.’s Response to Def.’s Statement of Material Facts ¶¶ 12–13 (admitting that backpacks “are used to carry children’s toys to the beach,” and that beach bag is “used to carry children’s toys and dolls to the beach” (emphasis added) – even though dolls are not included among the items packaged with the backpacks and beach bag when they are marketed for retail sale); Pl.’s Response to Def.’s Interrog. 19(b) (conceding that merchandise can be used to carry “child sized lightweight object *such as [i.e., not limited to] the beach toys that are distributed at retail with the product*”) (emphasis added); Gorman Decl. ¶ 8 (“the backpacks . . . can also be used to carry a child’s swimsuit, sunglasses and other personal effects”).

²⁷ As section III.A notes, merchandise can be classified under heading 4202 even if it serves only one of the four purposes deemed the “essential characteristics.” *Jewelpak Corp.*, 24 CIT at 253 n.7, 97 F. Supp. 2d at 1196 n.7.

²⁸ The Government’s affidavit and other evidence are at least more substantive than the conclusory evidence on which Processed Plastic has relied. Compare section III.A, *supra* (discussing conclusory nature of Processed Plastic’s evidence). Moreover, Processed Plastic’s proposed classification – heading 9503 – is a principal use provision, and detailed affidavits or other such evidence would be needed to establish the specifics of the asserted use. In contrast, the Government’s claimed classification – heading 4202 – is an *eo nomine* provision. And merchandise samples are available for inspection and comparison to the exemplars identified in the HTSUS. The samples are themselves “potent witnesses,” which serve to illustrate, corroborate, and substantiate the statements of the Government’s witness. See, e.g., *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1578 (Fed. Cir. 1989) (citations omitted) (samples are potent witnesses).

plastic front panel, and can be seen to be “stored” within the structure of the backpack, in an “organized” fashion. Moreover, the contents of the backpack are obviously “protected” from outside elements by the plastic backpack itself, as well as its zippered closure. *See* Gorman Decl., Atts. 1–3 (backpack advertisements). The Barbie and Pooh backpacks thus not only “carry,” but also help “organize,” “store,” and “protect” children’s personal effects.

In sum, the backpacks here at issue are included *eo nomine* under heading 4202, and share the essential characteristics of articles of that heading. Further, because such backpacks are specifically listed in the definition of “travel, sports and similar bags” as that phrase is used in subheading 4202.92.45, they are properly classified thereunder.²⁹ Customs’ determination to that effect must therefore be sustained.

2. *The Barbie Beach Bag*

Customs’ classification of the Barbie beach bag is equally correct. The beach bag is included under heading 4202 as a “similar container,” and is properly classified under subheading 4202.92.45 as a “similar bag.”³⁰

The beach bag shares with the other “containers” listed *eo nomine* in heading 4202 the essential characteristics of organizing, storing, protecting, and carrying various items. *See Totes*, 69 F.3d at 498; *SGI*, 122 F.3d at 1471; *Len-Ron Mfg. Co.*, 334 F.3d at 1309 n.4.³¹ It also has the essential characteristic of the other “bags” listed *eo nomine* under subheading 4202.92.45 – that is, it serves to “carry[]

²⁹ Classification under subheading 4202.92.45 is proper both independently and in comparison with all other alternatives. *See Jarvis Clark*, 733 F.2d at 878. To the extent that the backpacks and beach bag could be said to have any “play value” whatsoever, examination of the merchandise itself (as well as analysis of the other evidence in the case) establishes that its principal use is not amusement, diversion, or play, Processed Plastic’s conclusory assertions to the contrary notwithstanding. *See* Def.’s Response to Pl.’s Interrog. 5 (“The imported merchandise . . . is . . . principally used to provide storage, protection, organization, and portability.”).

³⁰ The terms “similar containers” and “similar bags” invoke the principle of statutory construction known as *ejusdem generis*:

Under the rule of *ejusdem generis*, which means “of the same kind,” where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified. As applicable to classification cases, *ejusdem generis* requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* [by name] in order to be classified under the general terms.

Totes, 69 F.3d at 498 (quoting *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994)).

³¹ As explained above, merchandise can be classified under heading 4202 even if it serves only one of the four purposes deemed the “essential characteristics.” *Jewelpak Corp.*, 24 CIT at 253 n.7, 97 F. Supp. 2d at 1196 n.7.

clothing and other personal effects during travel.” See Additional U.S. Note 1 to heading 4202.

The beach bag is large enough to allow several lightweight items to be organized and stored inside it, in much the same manner as the backpacks. See Def.’s Exh. C (sample Barbie beach bag). Like the backpacks, the beach bag serves to “organize” a child’s toys and other personal effects simply by containing them. And, like the backpacks, the beach bag too may be used to further organize objects (such as by weight or bulk). Indeed, one of Processed Plastic’s advertisements depicts the beach bag in an upright position, secured by means of its drawstring closure. In that advertisement, the contents of the beach bag are clearly visible, and can be seen to be “stored” within the structure of the bag, in an “organized” fashion. Moreover, the contents of the beach bag are “protected” from outside elements by the plastic beach bag itself, as well as its drawstring closure. See Gorman Decl., Att. 4 (beach bag advertisement).

Processed Plastic’s own advertisements similarly depict the beach bag as a means of “*carrying* clothing and other personal effects during travel.” See Additional U.S. Note 1 to heading 4202 (emphasis added). The advertisements emphasize that “[t]he Barbie beach bag is beautifully styled for [a] little girl to *carry* her sand toys and Barbie dolls *to the beach*.” (Emphasis added.) One advertisement even shows a little girl carrying her personal effects inside the beach bag, with the bag’s drawstring strap slung over her shoulder.³² See Gorman Decl., Atts. 4–5 (beach bag advertisements). Processed Plastic’s advertisements thus portray the Barbie beach bag as it is used by children to carry their toys, dolls, and other personal effects during travel (for example, to the beach).

In sum, the Barbie beach bag shares the essential characteristics of articles of heading 4202. See Gorman Decl. ¶ 10 (Barbie beach bag is “designed to be carried over the shoulder of a child, or on the back of a child, for the purpose of *organizing, holding, storing, protecting* and *transporting* toys, dolls and other personal effects”) (emphasis added). Further, just as the Barbie and Pooh backpacks are described by the language of subheading 4202.92.45, the Barbie beach bag is as well. By its terms, that subheading covers “travel, sports and *similar bags*” (emphasis added) – that is, bags “of a kind designed for carrying clothing and other personal effects during travel” – such as the beach bag at issue here. The Barbie beach bag is thus properly classified under subheading 4202.92.45. Customs’ determination to that effect therefore must be sustained.

³² As explained in section II.B above, the Barbie beach bag is designed so that it can also be carried on a child’s back – like a backpack – by means of its drawstrings. Gorman Decl. ¶¶ 7, 10. (By the same token, people occasionally simply sling backpacks over the shoulders, rather than wearing them on their backs. Examination of the Barbie and Pooh backpacks reveals that they could be slung over a child’s shoulder too.)

IV. *Conclusion*

For all the reasons set forth above, the backpacks and beach bag at issue are properly classified under subheading 4202.92.45 of the HTSUS. Customs' classification of the merchandise is therefore sustained, and the Government's motion for summary judgment is granted.

Judgment will enter accordingly.