

# U.S. Customs and Border Protection

Slip Op. 10–7

ASSOCIATION OF AMERICAN SCHOOL PAPER SUPPLIERS, Plaintiff, v. UNITED STATES, Defendant, and SHANGHAI LIAN LI PAPER PRODUCTS CO., LTD., Defendant-Intervenor.

Before: WALLACH, Judge  
Court No.: 09–00163  
**PUBLIC VERSION**

[Plaintiff’s Motion to Supplement Administrative Record is DENIED.]

Dated: January 25, 2010

*Wiley Rein, LLP (Alan Hayden Price)* for Plaintiff Association of American School Paper Suppliers.

*Tony West*, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*John J. Todor*); and *Joanna Theiss*, Office of Chief Counsel for Import Administration, Department of Commerce, Of Counsel, for Defendant United States.

*Garvey Schubert Barer (Ronald M. Wisla)* for Defendant-Intervenor Shanghai Lian Li Paper Products Co., Ltd.

## **OPINION**

**Wallach, Judge:**

### **I.**

#### **Introduction**

Plaintiff Association of American School Paper Suppliers (“AASPS”) moves to supplement the administrative record compiled by the U.S. Department of Commerce (“Commerce”) in the first administrative review of the antidumping duty order on certain lined paper products from the People’s Republic of China (“PRC”). The court has jurisdiction pursuant to 19 U.S.C. § 1581(c). AASPS requested oral argument pursuant to USCIT R.7(c). This request was DENIED as moot.<sup>1</sup> For the reasons set below AASPS’s Motion to Supplement Administrative Record is denied.

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<sup>1</sup> On December 1, 2009, the court denied as moot AASPS’s motion for oral argument. Oral argument was held on December 7, 2009 and no motion was necessary

## II. Background

Commerce entered an antidumping duty order on certain lined paper products from the People's Republic of China on September 28, 2006. *Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Lined Paper Products from the People's Republic of China; Notice of Antidumping Duty Orders: Certain Lined Paper Products from India, Indonesia and the People's Republic of China; and Notice of Countervailing Duty Orders: Certain Lined Paper Products from India and Indonesia*, 71 Fed. Reg. 56,949 (September 28, 2006) ("Antidumping Duty Order.") On September 28, 2007, Defendant-Intervenor Shanghai Lian Li Paper Products Co. Ltd. ("Lian Li") and several other parties requested that Commerce conduct from PRC. Memorandum from Marin Weaver, International Trade Compliance Analyst, China/NME Group, Office 8, to Wendy J. Frankel, Director, Office 8, AD/CVD Operations, *Re: Selection of Respondents for the Antidumping Review of Certain Lined Paper Products from the People's Republic of China*, (November 7, 2007) Confidential Record ("C.R.") 1, at 1. On October 1, 2007, AASPS also requested that Commerce conduct an administrative review related to the Antidumping Duty Order. *Id.* In response to these requests, Commerce initiated the first administrative review of the Antidumping Duty Order on certain lined paper products from PRC on October 31, 2007. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 72 Fed. Reg. 61,621 (October 31, 2007). The period of review for the first administrative review was April 17, 2006, through August 31, 2007. *Id.*

In response to Commerce's request for surrogate value information, Lian Li submitted the following information on April 1, 2008. *See Letter from Garvey Schubert Barer to Hon. Carlos M. Gutierrez, Secretary of Commerce, U.S. Department of Commerce, Re: Certain Lined Paper Products from China: Submission of Surrogate Value Information*, (April 1, 2008) P.R. 63

("Lian Li's April 1, 2008 Letter"). This submission included: Sundaram Multipap Ltd.'s ("Sundaram") 2006–2007 Chairman's Report; Sundaram's 2006–2007 Auditor's Report; Sundaram's Accounting Policy Statement; Notes to Accounts; Sundaram's first quarter results; and other Sundaram financial data (collectively the "Sundaram Financials"). *Id.*, at 1, Attachment 4.

Commerce published the preliminary results of the first administrative review on October 7, 2008. *Certain Lined Paper Products from the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Admin Review*, 73 Fed. Reg. 58,540 (October 7,

2008) (“*Preliminary Results*”). After publishing the *Preliminary Results*, Commerce sent Lian Li two additional supplemental questionnaires to which Lian Li submitted responses on October 16 and November 25, 2008. *Certain Lined Paper Products from the People’s Republic of China: Notice of Final Results of the Antidumping Duty Administrative Review*, 74 Fed. Reg. 17,160, 17,160 (April 14, 2009) (“*Final Results*”). From January 12 to January 16, 2009, Commerce conducted verification of Lian Li’s sales information. *Id.*

On April 14, 2009 Commerce published the *Final Results*. *See Final Results*. On April 17, 2009, AASPS filed its Complaint challenging the Final Results. *See Complaint*. Following the filing of the Complaint, on July 21, 2009, AASPS filed a motion to supplement the administrative record to include a copy of Sundaram’s 2006–2007 annual report. *See Plaintiff’s Motion to Supplement Administrative Record (“AASPS’s Motion”)*.

### III. Standard of Review

Except in very limited circumstances, this court’s review of Commerce’s determination is limited to the record before it. *See* 19 U.S.C. § 1516a(b)(2)(A). This is because the administrative record contains all information which was presented to, or obtained by, Commerce during the course of the administrative review. *See e.g., Camp v. Pitts*, 411 U.S. 138, 142, 93 S. Ct.1241, 36 L.Ed.2d 106 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S.420, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). If the administrative record is complete, the court’s review of Commerce’s determination is limited to “the record made before the agency which issued the decision.” S. Rep. No. 96–249, 96th Cong., 1st Sess., at 248 (1979), *as reprinted in* 2 Legislative History of the Trade Agreements Act of 1979.

The purpose of limiting review to the record actually before the agency is to guard against courts using new evidence to “convert the . . . standard into effectively *de novo* review.” *Murakami v. United States*, 46 Fed. Cl. 731,735 (2000), *aff’d*, 398 F.3d 1342 (Fed. Cir. 2005) (referring to “arbitrary and capricious” standard of review).<sup>2</sup> A

<sup>2</sup> The standard applied by the court to review factual findings made by Commerce during the course of antidumping proceedings is whether those findings are supported by “substantial evidence.” *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Even though the arbitrary and capricious standard requires a different level of scrutiny than the substantial evidence standard, *see KYD Inc. v. United States*, 613 F. Supp. 2d 1371,1375 n. 4, 31 ITRD 1261, CIT (2009), the Federal Circuit’s rationale in *Murakami* applies here as well. This is because the “substantial evidence” standard of review like the “arbitrary and capricious” standard, does not permit the court to conduct a *de novo* review; there is no absence of substantial evidence simply because the reviewing court would have reached a different conclusion based on the

court considering a request to supplement an administrative record should determine “whether supplementation of the record was necessary in order not ‘to frustrate effective judicial review.’” *Axiom Resource Mgmt. v. United States*, 564 F.3d 1374, 1381 (Fed. Cir. 2009) (quoting *Camp*, 411 U.S. at 142–3) (holding that court abused its discretion by allowing extra-record evidence without finding that lack of evidence would frustrate judicial review).

#### IV. Discussion

AASPS seeks to supplement the administrative record with a copy of Sundaram’s 2006–2007 annual report. AASPS’s Motion at 4. AASPS’s Motion is denied because: (1) Sundaram’s 2006–2007 annual report was not timely filed by AASPS during the administrative proceeding, *infra* Part IV. A; (2) Sundaram’s 2006–2007 annual report was publicly available during the administrative proceeding, *infra* Part IV, B; and (3) AASPS has not demonstrated that the existing administrative record is so incomplete as to frustrate meaningful review by this court, *infra* Part IV. C.

#### A ***AASPS Was Not Timely In Its Request To Supplement The Administrative Record***

AASPS did not submit in a timely fashion the Sundaram 2006–2007 annual report it now seeks to add to the administrative record. Commerce’s regulations provide detailed deadlines for the submission of factual information during an antidumping proceeding. See 19 C.F.R. § 351.301(b)(2). Specifically, “[f]or the final results of an administrative review,” “a submission of factual information is due no later than: . . . 140 days after the last day of the anniversary month.” *Id.* Accordingly, because the anniversary month was September 2006,<sup>3</sup> the deadline for AASPS to submit the Sundaram 2006–2007 annual report to Commerce was February 17, 2008. AASPS did not comply with this deadline.

Lian Li submitted the Sundaram Financials to Commerce on April 1, 2008. Lian Li’s April 1, 2008 Letter. While this date is past the February 17, 2008 deadline for information submissions mandated by same record.” *Cleo Inc. v. United States*, 501 F.3d 1291, 1296 (Fed. Cir. 2007) (citing *Universal Camera Corp v. NLRB*, 340 U.S. 474, 487–88, 71 S. Ct. 456, 95 L. Ed. 456 (1951)) (emphasis added).

<sup>3</sup> For purposes of 19 C.F.R. § 351.302(b), the anniversary month is the calendar month in which the anniversary of the date of publication of an order or suspension of investigation occurs. On September 28, 2006, Commerce entered an antidumping duty order on certain lined paper products from the PRC. Antidumping Duty Order, 71 Fed. Reg. 56,949.

19 C.F.R. § 351.301(b)(2), AASPS could have still submitted additional information to rebut the Sundaram Financials by asking Commerce for permission to submit information. *See* 19 C.F.R. § 351.301(c)(1). 19 C.F.R. § 351.301(c)(1) sets the time limits for certain submissions for rebuttal, clarification, or correction of factual information. *Id.* (“Any interested party may submit factual information to rebut, clarify, or correct factual information submitted by any other interested party at any time prior to the deadline provided . . . for submission of such factual information.”). AASPS did not submit any factual information related to the 2006–2007 Sundaram annual report throughout the investigation.

While AASPS discussed the Sundaram Financials in its March 6, 2009 case brief, it neither sought to admit any information related to the 2006–2007 Sundaram annual report nor provided any factual evidence to rebut the Sundaram Financials. *See Association of American School Paper Suppliers, Certain Lined Paper Products from the People’s Republic of China: Case Brief*, Inv. No. A–570–901 (March 6, 2009) C.R. 35, at 49–55. Indeed, AASPS admits that it did not make any attempt to obtain Sundaram’s annual report during the administrative review, “because *it was not in its interest to do so.*” Letter from Timothy Brightbill, Wiley Rein, to Hon. Evan J. Wallach, U.S. Court of International Trade, Re: Availability of 2006–2007 Annual Report of Sundaram Multi Pap Ltd (December 22, 2009) (“AASPS’s December 22, 2009 Letter”) at 1 (emphasis added). AASPS did not timely submit the 2006–2007 Sundaram annual report to Commerce and cannot supplement the administrative record with that information now that the submission period and general investigation are completed.

## B

### ***AASPS Has Not Demonstrated That Supplementation Of The Record Is Necessary Because The Information AASPS Seeks To Add To The Administrative Record Is Not New And Circumstances Have Not Changed Since The Administrative Review***

This court has in certain unique factual situations recognized various circumstances in which parties are allowed to supplement the administrative record certified by the agency.<sup>4</sup> A party may supple-

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<sup>4</sup> Courts may also expand review beyond the record or permit discovery: when the party demonstrates that there is a strong basis to believe that materials considered by the agency decision makers are not in the record, *see e.g., Ammex, Inc. v. United States*, 23 CIT 549, 556–57, 62 F. Supp. 2d 1148 (1999); *Sachs Auto. Prods. Co. v. States*, 17 CIT 290, 293 (1993); *Saha Thai Steel Pipe Co., Ltd. v. United States*, 11 CIT 257, 260–61, 661 F. Supp. 1198 (1987); to obtain background information necessary for the court to make an informed

ment the administrative record in the following circumstances: when at the time that supplementation of the record is sought, there is new, changed, or extraordinary information available that was not available during the investigation, *see Beker Indus. Corp. v. United States*, 7 CIT 313, 318 (1984); and when the party makes a strong showing of bad faith or improper behavior by agency decision makers. *See Fl. De Cecco di Filippo Fara San Marino S.p.A. v. United States*, 21 CIT 1124, 1126, 980 F. Supp. 485 (1997).

AASPS argues that supplementation of the administrative record is warranted on the basis of changed or new information.<sup>5</sup> AASPS's Motion at 4. Specifically, AASPS argues that Sundaram's 2006–2007 annual report should be admitted to the administrative record as new information for the purpose of showing that material information was misrepresented to the agency and that the final determination was improperly based on information that it was not what it was claimed to be. *Id.* However, AASPS concedes that this information was publicly available online during the entire investigation period. *See Id.* at 3.<sup>6</sup> AASPS admits that “[t]he file for Sundaram's 2006–2007 annual report was first created on September 29, 2007.” *See* AASPS's December 22, 2009 Letter at 1, Ex. 1. AASPS further states that it “believes that the [Sundaram 2006–2007 annual] report was publicly available from September 29, 2007 onwards.” *Id.* at 2. Accordingly, because the information AASPS seeks to admit is not new, supplementation on this basis is not appropriate.

This court has repeatedly held that judicial review must be based solely upon the administrative record made during the particular review proceeding which resulted in the determination subject to

decision *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988); and to explain the existing record and judge the adequacy of the procedures and facts considered, *Former Employees of Pittsburgh Logistics Sys., Inc. v. United States Sec'y of Labor*, 27 CIT 339, 343 (2003). Those alleging government bad faith must rebut the presumption “that public officials act in good faith when discharging their duties” through clear and convincing evidence. *SKF USA Inc. v. United States*, 29 CIT 969, 971, 391 F. Supp. 2d 1327(2005).

<sup>5</sup> AASPS alleges that Lian Li has committed fraud, *see* AASPS's Motion at 1, but does not specifically allege that Commerce itself perpetuated any fraud or misrepresentation during the course of the investigation. *See Id.* Courts have held that it is fraud or bad faith dealing on the part of the agency itself that would call for the court to supplement the agency record. *Ammex Inc. v. United States*, 27 CIT 1811, 1813 (2003) (When bad faith on the part of government officials is not alleged by petitioner, this court will not supplement the administrative record on that ground).

<sup>6</sup> The information that AASPS claims is new consists of publicly available information relating to Sundaram obtained from the websites [www.moneycontrol.com](http://www.moneycontrol.com) and [www.indiaonline.com](http://www.indiaonline.com) by financial consultants hired by Lian Li for the purposes of obtaining surrogate value information in the underlying administrative proceeding. Defendant Intervenor's Response to Plaintiff's Motion to Supplement Administrative Record at 2.

judicial review. *See e.g. Beker*, 7 CIT at 313–18 (Plaintiff sought to add information and documents from proceedings before or during the review in question; this court denied the request because Plaintiff could have sought access to most, if not all, of this information and attempted to introduce it into the record at the agency level.); *Nakajima All Co., Ltd. v. United States*, 2 CIT 25 (1981).<sup>7</sup> The scope of the record for purposes of judicial review must be based upon information which was “before the relevant decision-maker” and was presented and considered “at the time the decision was rendered.” *Beker*, 7 CIT at 315 (quotation omitted.) “This information, which constitutes the formal record is the only information upon which the factual findings and legal conclusions underlying the challenged determination could have been based.” *Id.* at 316. “An attempt to supplement the record now in the fashion attempted by plaintiff is tantamount to seeking *de novo* review through the back door.” *Id.* at 317.

In this case, AASPS has offered no evidence that the Sundaram 2006–2007 annual report qualifies as “new . . . information.” *See* AASPS’s Motion at 4. Because AASPS has made no showing that it could not have taken steps to place the Sundaram 2006–2007 annual report before the administrative decision-maker, “the court should not allow it belatedly to expand the record with this information.” *Beker*, at 318. Accordingly, as in *Becker*, supplementation of the existing administrative record is not appropriate.

### C

#### ***AASPS Has Not Made A Sufficient Showing That The Existing Administrative Record Is Incomplete So As To Frustrate Meaningful Judicial Review***

AASPS claims that Commerce “has relied on data that was materially misrepresented and/or potentially or actually submitted under false pretenses.” AASPS’s Motion at 4. According to AASPS, throughout the course of the administrative review, AASPS “clearly and plainly alleged on numerous occasions that the document was not what Lian Li said it was.” *Id.* at 2. AASPS asks the court to admit the Sundaram 2006–2007 annual report because it alleges: (1) Commerce misrelied on the information submitted by Lian Li *id.* at 1; (2) this

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<sup>7</sup> In *Nakajima*, 2 CIT 25, at 25 Plaintiff moved to amend and supplement the administrative record in an action under 19 U.S.C. § 1516a by adding two documents claimed to have come to the attention of counsel after the action had been commenced. This court agreed with Defendant and Defendant-Intervenor that the granting of such a motion would be contrary to 19 U.S.C. § 1516a which provides that determinations in antidumping proceedings are reviewed upon the administrative record. *Id.* at 25–26. This court also noted that this scope of review, predicated solely upon the basis of the administrative record, is in accord with general principles of judicial review of administrative action. *Id.* at 26.

information “compromised the accuracy of the proceedings,” *id.* at 5 (quotation omitted); and (3) that inclusion (of the report) is necessary because it “may influence the court’s own determinations.” *Id.* at 5. AASPS provides no record support for these particular arguments. See AASPS’s Motion 2–5. This court has held that when a party does not demonstrate that an administrative record was so incomplete as to “frustrate meaningful review” supplementation of the administrative record is not warranted. *Ammex Inc. v. United States*, 27 CIT 1811, 1812 (2003).

The existing administrative record before this court is clearly not so incomplete as to “frustrate meaningful review.” *Id.* During the administrative review proceedings, Commerce conducted on-site verifications of Lian Li’s submitted financial information from January 12 to January 16, 2009. See Memorandum from Cindy Robinson and Victoria Cho, Case Analysts, Office 3, U.S. Department of Commerce, to the File, Re: the First Administrative Review of Certain Lined Paper Products from the People’s Republic of China: Verification of the Sales and Factors of Production Responses of Shanghai Lian Li Paper Products Co., Ltd. (February 26, 2009), CR 33, (“Commerce’s Verification Report on Lian Li”) at 1. On February 26, 2009, after conducting the on-site verification of Lian Li, Commerce issued three separate reports regarding verification of factors of production for Shanghai MiaoPanFang Paper Products Co., Ltd. (“MPF”), Shanghai Sentian Paper Products Co. Ltd. (“Sentian”) <sup>8</sup>, and Lian Li respectively. See Memorandum from Cindy Robinson and Victoria Cho, Case Analysts, Office 3, U.S. Department of Commerce, to the File, Re: the First Administrative Review of Certain Lined Paper Products from the People’s Republic of China: Verification of the Factors of Production Responses of Shanghai MiaoPanFang Paper Products Co., Ltd. (“MPF”) (February 26, 2009), CR 32; Memorandum from Cindy Robinson and Victoria Cho, Case Analysts, Office 3, U.S. Department of Commerce, to the File, Re: the First Administrative Review of Certain Lined Paper Products from the People’s Republic of China: Verification of the Factors of Production Responses of Sentian Paper Products Co. Ltd. (“Sentian”) (February 26, 2009), CR 34; Commerce’s Verification Report on Lian Li at 2 (“No particular issues or factual observations arose . . . which may require further consideration by [Commerce].”)

Commerce’s verification reports did not state that Lian Li’s submissions were so incomplete and inaccurate as to not comply with Com-

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<sup>8</sup> MPF and Sentian are two producers of merchandise that Lian Li purchases. See *Section A: Response of Shanghai Lian Li Paper Product Co., Ltd.* ITA Case No. A570–901, (December 6, 2007) CR at 3.



merce's standards. *See id.* Commerce conducts verifications in order to test the information provided by a party for completeness and accuracy. *Micron Tech., Inc. v. United States*, 19 CIT 829, 849, 893 F. Supp. 21 (1995) (citation omitted). As long as "Commerce applies a reasonable standard to verify materials submitted, and the verification is supported by such relevant evidence as a reasonable mind might accept, the Court will not impose its own standard to superceding that of Commerce." (citation omitted) *Hercules, Inc. v. United States*, 11 CIT 710, 726, 673 F. Supp. 454 (1987).

Throughout the administrative proceeding, Commerce requested additional data from Lian Li and Lian Li timely provided information to Commerce: supplying six additional supplemental questionnaires upon request.<sup>9</sup> During this time, AASPS submitted to Commerce nine separate comments regarding the perceived inadequacy of Lian Li's submitted section reports and supplemental questionnaires (collectively, "AASPS's Deficiency/Rebuttal Comments").<sup>10</sup> In these nine documents AASPS has clearly documented its objections to Lian Li's data submissions and the quality of the data submitted. AASPS's Deficiency/Rebuttal Comments, which are part of the existing administrative record, clearly state AASPS's allegations against Lian Li.<sup>11</sup> Accordingly, the existing record is not so incomplete as to required supplementation.

## V. Conclusion

For the foregoing reasons, it is hereby ORDERED that Plaintiff's Motion to Supplement Administrative Record is DENIED.

Dated: January 25, 2010

New York, NY

/s/ Evan J. Wallach  
EVAN J. WALLACH, JUDGE

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<sup>9</sup> From December 6, 2007, to January 9, 2009 (the first day of Commerce's on-site verification), Commerce and Lian Li corresponded sixteen times regarding submission of Lian Li's data: (December 6, 2007 (CR 2); December 13, 2007 (CR 3); January 4, 2008 (CR 5); January 10, 2008 (CR 6); January 22, 2008 (CR 8); January 23, 2008 (CR 9); February 6, 2008 (CR 11); February 27, 2008 (CR 12); March 6, 2008 (CR 12); April 1, 2008 (CR 15); April 11, 2008(2) (CR 17, CR 18); April 23, 2008 (CR 20); October 2, 2008 (CR 25); October 16, 2008 (CR 26); and January 6, 2008) (CR 30).

<sup>10</sup> From December 6, 2007, to January 9, 2009, AASPS wrote to Commerce nine separate times regarding the inadequacies of Lian Li's data submissions: (January 17, 2008 (CR 7); January 31, 2008 (CR 10); March 12, 2008 (CR 14); April 8, 2008 (CR 16); April 15, 2008 (CR 19); May 1, 2008 (CR 21); October 27, 2008 (CR 27); December 17, 2008 (CR 29); and January 9, 2009 (CR 31).

<sup>11</sup> *See id.*

## Slip Op. 10–14

LEMANS CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Judge Judith M. Barzilay

Court No. 06–00038

**Public Version**

[Defendant's Motion for Summary Judgment is granted, and Plaintiff's Cross-Motion for Summary Judgment is denied.]

Dated: February 8, 2010

*Rodriguez, O'Donnell, Gonzalez & Williams, P.C. (Thomas J. O'Donnell, Jessica R. Rifkin, and Lara A. Austrins), for Plaintiff LeMans Corporation.*

*Tony West, Assistant Attorney General; Barbara S. Williams, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Alexander Vanderweide); and Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs & Border Protection (Michael W. Heydrich), of counsel, for Defendant United States.*

**OPINION****Barzilay, Judge:****I.****Introduction**

This case concerns the U.S. Customs & Border Protection's ("Customs") classification of certain motocross jerseys, motocross pants, and motorcycle jackets under Chapters 61 and 62 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Defendant United States moves the court for summary judgment, arguing that Customs classified the subject merchandise under the appropriate provisions of the HTSUS. Plaintiff LeMans Corporation ("LeMans" or "Plaintiff") contests the classification and cross-moves the court for summary judgment, alleging that subheadings within Chapter 95 of the HTSUS covering sports equipment most accurately describe the subject jerseys, pants, and jackets. In view of the applicable General Rules of Interpretation ("GRIs") and for the reasons explained below, the court grants Defendant's Motion for Summary Judgment and denies Plaintiff's Cross-Motion for Summary Judgment.

**II.****Background****A. The Subject Merchandise**

LeMans imported the subject merchandise into the United States through the ports of Chicago and Los Angeles between July 20, 2004

and September 17, 2004.<sup>1</sup> Summons 3–4. The merchandise consists of “highly specialized” jerseys, pants, and jackets “designed, engineered, and produced exclusively for use while participating in motocross activities and other power sports riding.” Pl.’s Resp. to Def.’s First Interrogs. & Reqs. for Produc., Def. Mot. for Summ. J. Ex. C at 5 (“Pl. Resp. to Def. First Interrogs.”). The dual purposes of the goods “prevent injury to the rider from abrasion and impacts with motorcycle parts and the surrounding elements, as well as . . . provide optimal fit and comfort while participating in the sport.” Pl. Resp. to Def. First Interrogs. 5.

Synthetic, abrasion-resistant mesh and ventilated knit patterned fabric, which also wicks away moisture, makes up the five motocross jerseys at issue.<sup>2</sup> Pl. Resp. to Def. First Interrogs. 6. “The jerseys have padded elbows for abrasion and impact protection” and “form an integrated protection system” with the use of “a tacky silicon print on the lower back to keep the jersey tucked into the motocross pant when riding.” Pl. Resp. to Def. First Interrogs. 6. An oversized, multi-panel cut allows for a non-binding fit so that other safety equipment, which if permanently affixed in the good would result in improper fit and inadequate safety,<sup>3</sup> may be worn under the jersey. Pl. Resp. to Def. First Interrogs. 6.

Six different models comprise the subject pants,<sup>4</sup> and riders generally use the goods off-road on motocross tracks, supercross tracks, or on other off-road courses. Dep. of Jeffrey T. Hart, Def. Mot. for Summ. J. Ex. B at 12:12–16 (“Hart Dep.”). Heavy-duty nylon provides riders with impact and abrasion protection, and the pants contain additional comfort features, such as “mesh panels for venting, heat resistant inner leg areas (made of leather or man[-]made fibers) to prevent burns from the engine and exhaust pipe, and spandex and stretch panels to allow freedom of movement and a non[-]binding fit in the legs, seat, and crotch area.” Pl. Resp. to Def. First Interrogs. 5. To ensure freedom of movement, the pants also include [[ ]] hip padding instead of alternative rigid protective elements.<sup>5</sup> Pl. Resp. to Def. First Interrogs. 5.

<sup>1</sup> Entry Nos. 279–9313291–2, 279–9313582–4, 279–9313588–1, 279–9313790–3, 279–9313997–4, 279–9316067–3, 279–9316419–6, 279–9317228–0, 279–9317410–4, 279–3205158–7, 279–3205173–6, 279–3205154–6. Summons 3–4.

<sup>2</sup> The relevant jersey models include the Men’s and Boy’s Phase S5, Men’s and Boy’s Core S5, and the Men’s AC S5. Compl. ¶ 8.

<sup>3</sup> The typical safety equipment worn under the jerseys consist of chest, kidney, and elbow guards. Pl. Resp. to Def. First Interrogs. 6.

<sup>4</sup> The pertinent pant models include the AC S5, Core S5, Core S5 Youth, XCR, M1 Kids, and M1. Compl. ¶ 7.

<sup>5</sup> The Core, XCR, and M1 models contain [[ various types of padding, ]] approximately [[ ]] thick, while the AC model includes [[ other certain padding ]]. Pl. Resp. to Def. First

Finally, the LeMans motorcycle jackets at issue are the Super Duty, Merc, Tarmac, and the Airtex Sport.<sup>6</sup> Compl. ¶ 9. Heavy-duty materials provide protection to the rider on the public street from impact and abrasion injuries “which may result from a crash or fall, including the initial impact and the sliding contact with the pavement.” Pl. Resp. to Def. First Interrogs. 6. Internal armor pads, constructed of [[ special material ]], appear in the shoulders and elbows, “the highest impact areas in the event of crashes or falls.” Pl. Resp. to Def. First Interrogs. 6. The jackets also feature a [[ ]] back pad for added protection. Pl. Resp. to Def. First Interrogs. 6. LeMans designed the jackets to fit closely to the rider’s body and tapered the sleeves snugly around the wrist “to keep the jacket in proper position while riding or during a crash.” Pl. Resp. to Def. First Interrogs. 6. The jackets also accommodate a rider’s posture with a cut that has longer sleeves and fuller shoulders, with zippered vents or mesh providing “airflow into the jacket for various riding conditions.” Pl. Resp. to Def. First Interrogs. 6–7.

In summary, all the subject merchandise are readily recognizable as articles of clothing albeit with certain specialized protective features, some minimal, some more significant.

## B. The Subject Classification

Customs classified the subject merchandise under five subheadings within Chapters 61 and 62 of the HTSUS.<sup>7</sup> The agency entered the relevant motocross jerseys as “Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: Of man-made fibers: Other” under subheading 6110.30.30 of the HTSUS at a duty rate of 32% *ad valorem*. Compl. ¶¶ 13, 20. Customs classified the subject motocross pants as “Garments, made up of fabrics of heading Interrogs. 5. The two Core, XCR, M1, and AC models also incorporate [[ ]] padding [[ ]] in the seat or tail area. Pl. Resp. to Def. First Interrogs. 5. [[ Various ]] patches on the upper seat area provide additional impact protection in the Core, XCR, and M1 models. Pl. Resp. to Def. First Interrogs. 5.

<sup>6</sup> More specifically, the Super Duty contains a “heavyweight waxed cotton chassis with leather sleeves,” shoulder and elbow armor pads that meet more stringent European standards, “[a ] back pad, and zippered chest vents.” Pl. Resp. to Def. First Interrogs. 7. The Merc consists of a “heavyweight Dynax Nylon chassis, [European]-approved shoulder and elbow armor pads, [a ] back pad and ribbed spandex panels under the arms for ventilation, [and a] zipper cover on bottom of [the] front zipper to prevent scratches to the motorcycle gas tank.” Pl. Resp. to Def. First Interrogs. 7. Finally, the Tarmac includes a “heavyweight knitted polyester mesh chassis . . . , [European]-approved shoulder and elbow armor pads, [a ] back pad, [and] leather elbows,” while the Airtex Sport contains a “heavyweight polyester mesh chassis, [European]-approved shoulder and elbow armor pads, [a ] back pad, [as well as an] adjustable waist band, reflective logo on [the] back to enhance nighttime visibility, [and] rubber coated snaps to prevent scratches to the motorcycle gas tank.” Pl. Resp. to Def. First Interrogs. 7.

<sup>7</sup> All citations to the HTSUS refer to the 2004, as determined by the date of importation for the merchandise.

5602, 5603, 5903, 5906 or 5907: Other men's or boy's garments: Of man-made fibers: Other" under subheading 6210.40.50 of the HTSUS at a duty rate of 7.1% *ad valorem*.<sup>8</sup> Compl. ¶¶ 11, 19. Finally, Customs found that the various motorcycle jackets fit within three separate provisions of Heading 6201, HTSUS, and classified and liquidated the Airtex Sport and Merc models under subheading 6201.93.30 at a duty rate of 7.1% *ad valorem*, the Tarmac jacket under 6201.93.35 at a rate of 27.7% *ad valorem*, and the Super Duty model under 6201.92.15 at a rate of 6.2% *ad valorem*.<sup>9</sup> Compl. ¶¶ 14–15, 21; Answer ¶ 15.

### III.

#### Subject Matter Jurisdiction & Standard of Review

The Court has exclusive jurisdiction over all civil actions commenced under 19 U.S.C. § 1515 that contest Customs's denial of a

<sup>8</sup> Headings 5602, 5603, 5903, 5906, and 5907 of the HTSUS cover certain fabrics. Heading 5602 includes "Felt, whether or not impregnated, coated, covered or laminated," while Heading 5603 provides for "Nonwovens, whether or not impregnated, coated, covered or laminated." Under the other three provisions, Heading 5903 encompasses "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902," Heading 5906 comprises "Rubberized textile fabrics, other than those of heading 5902," and Heading 5907 concerns "Textile fabrics otherwise impregnated, coated or covered; painted canvas being theatrical scenery, studio back-cloths or the like."

<sup>9</sup> Heading 6201 of the HTSUS covers in pertinent part:

6201	Men's or boys' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets), other than those of heading 6203[(which covers "Men's or boys' suits, ensembles, suit-type jackets, blazers, trousers, bib and brace overalls, breeches and shorts (other than swimwear)"]):
	...
	Anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets)
	...
6201.92	Of cotton.
	...
	Other:
6201.92.15	Water resistant.
	...
6201.93	Of man-made fibers:
	...
	Other
	...
	Other
	...
	Other
6201.93.30	Water resistant.
6201.93.35	Other.

protest. 28 U.S.C. § 1581(a). An action before the court warrants summary judgment “if the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” USCIT R. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine issue of material fact exists only when the court could resolve a factual element under the applicable law in favor of either party. *See Marriott Int’l Resorts, L.P. v. United States*, 586 F.3d 962, 968 (Fed. Cir. 2009) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–49 (1986)). If no dispute over a material fact would impact the outcome of the suit and the action focuses solely on the proper classification of the merchandise, as in this case, the court may grant summary judgment. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed Cir. 1998).

The court applies a two-step analysis when determining whether Customs properly classified the imported merchandise. *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999) (citing *Bausch & Lomb, Inc.*, 148 F.3d at 1365). The court first must ascertain the meaning of the terms within the relevant tariff provision and subsequently determine whether the subject merchandise fits within those terms. *Id.* The first step presents a question of law, *Franklin v. United States*, 289 F.3d 753, 757 (Fed. Cir. 2002), while the second concerns issues of fact. *Pillowtex Corp.*, 171 F.3d at 1373. Normally, the factual component of the Customs classification garners a presumption of correctness. 28 U.S.C. § 2639(a)(1). However, that presumption does not apply to Customs’s decision when no factual disputes surround the subject merchandise. *Intercontinental Marble Corp. v. United States*, 27 CIT 654, 655 n.3, 264 F. Supp. 2d 1306, 1309 n.3 (2003), *aff’d*, 381 F.3d 1169 (Fed. Cir. 2004).

#### IV. Discussion

##### A. The General Rules of Interpretation

The GRIs govern the classification of goods under the HTSUS. *Boen Hardwood Flooring, Inc. v. United States*, 357 F.3d 1262, 1264 (Fed. Cir. 2004). The court applies the GRIs in numerical order and once a particular rule provides proper classification, the court may not consider any subsequent GRI. *See Mita Copystar Am. v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998). The products in this case are subject to classification pursuant to the first rule, GRI 1, which holds that “classification shall be determined according to the terms of the headings and any relative section or chapter notes.” GRI 1; *see also Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir.

1998). Absent contrary legislative intent, the court must construe HTSUS terms “according to their common and commercial meanings.” *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citation omitted). The Explanatory Notes (“EN”) that accompany each Chapter of the HTSUS provide persuasive assistance to the court in ascertaining the correct classification of the merchandise, though the explanations do not constitute legally binding authority. *See Lonza, Inc. v. United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995). Once it determines that the particular heading controls the analysis, the court must look to the subheadings to find the correct classification for the merchandise. *See Orlando Food Corp.*, 140 F.3d at 1440. Therefore, under GRI 1, determining the most appropriate classification for the merchandise involves a “close textual analysis of the language of the headings and the accompanying explanatory notes.” *Bauer Nike Hockey USA, Inc. v. United States*, 27 CIT 1645, 1652, 305 F. Supp. 2d 1345, 1351 (2003), *rev’d on other grounds*, 393 F.3d 1246 (Fed. Cir. 2004) (“*Bauer*”).

## B. The Classification of the Subject Merchandise

While Defendant maintains that it correctly classified the merchandise under Chapters 61 and 62 of the HTSUS, Def. Mot. for Summ. J. 8, 21–28, LeMans argues that two provisions under Heading 9506 (subheading 9506.91.00, at a duty rate of 4.6% *ad valorem*, or in the alternative 9506.99.60, at a rate of 4% *ad valorem*) best describe the subject jerseys, pants and jackets.<sup>10</sup> Pl. Mot. for Summ. J. 3–23. Moreover, Plaintiff contends that “the specialized nature and purpose of [its] goods preclude them from classification in [C]hapters 61 or 62.” Pl. Mot. for Summ. J. 23. The central question in this case is whether the subject merchandise constitute “other sports equipment”

<sup>10</sup> Heading 9506 provides in relevant part:

9506	Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof:
	...
	Other:
9506.91.00	Articles and equipment for general physical exercise, gymnastics or athletics; parts and accessories thereof.
	...
	...
9506.99	Other
	...
9506.99.60	Other.

classifiable under Chapter 95 or whether Customs correctly classified the goods in the first instance as certain apparel under Chapters 61 and 62. Because the motocross jerseys, motocross pants, and motorcycle jackets are described by the terms of the respective headings in Chapters 61 and 62, and are wearing apparel, the court agrees with Customs's classification of the subject merchandise.

### 1. The Motocross Jerseys & Pants

The subject motocross jerseys constitute a knitted "sweater" under the plain language of Heading 6110. Neither the HTSUS nor the legislative history defines the term sweater. Under the common meaning of those terms, see *Carl Zeiss, Inc.*, 195 F.3d at 1379, a sweater describes "a knitted or sometimes crocheted elastic jacket or pullover made in various styles and of various materials and usu[ally] having ribbing around the neck, cuffs, and lower edge," and a pullover comprises "a garment (as a sweater, shirt, or blouse) that is put on by being pulled over the head and is usu[ally] made without a placket or similar opening."<sup>11</sup> *Webster's Third New International Dictionary* 1840, 2308 (2002). A garment typifies "an article of outer clothing (as a coat or dress) usu[ally] exclusive of accessories," and clothing means a "covering for the human body or garments in general: all the garments and accessories worn by a person at any one time." *Webster's Third New International Dictionary* 428, 936 (2002); see also *H.I.M./Fathom, Inc. v. United States*, 21 CIT 776, 781, 981 F. Supp. 610, 615 (1997) (citing *Webster's Third New International Dictionary* 428, 936 (1993)). In relevant part, the EN to 6110 adds that the heading covers "a category of knitted or crocheted articles . . . designed to cover the upper parts of the body (jerseys, pullovers, cardigans, waistcoats and similar articles)." EN 61.10. The jerseys consist of synthetic, knit-patterned fabrics cut in assorted designs and made with various mesh and ventilated materials that cover the human body at a particular time, *i.e.*, while engaging in motocross activities and other power sports riding. Pl. Resp. to Def. First Interrogs. 5–6. Each of the jerseys has a small placket, and an individual must pull the article over his head to wear it. See, *e.g.*, Men's Core S5 Jersey, Pl. Mot. for Summ. J. Ex. 12. This description fits closely with the terms of Heading 6110, and because the goods are wearing apparel, see *Admiral Craft Equip. Corp. v. United States*, 82 Cust. Ct. 162, 164 (1979) (not reported in F. Supp.), the court upholds Customs's classification of the jerseys under subheading 6110.30.30 of the HTSUS.

<sup>11</sup> A "placket" is "a finished slit in a garment." *Webster's Third New International Dictionary* 1728 (2002).



Similarly, using the HTSUS-defined meaning of relevant terms and the common understanding of “garment,” see *Carl Zeiss, Inc.*, 195 F.3d at 1379, the language of Heading 6210 controls the classification of the motocross pants. As a garment, the pants cover the human body, and an individual wears the article of outer clothing at a particular time — when she rides on motocross tracks, supercross tracks, or other off-road courses. Hart Dep. at 12:13–16. Moreover, the pants include certain textile fabrics that fall under Headings 5903 and 5906,<sup>12</sup> Note 1 to Chapter 59, HTSUS, in that the articles consist of some combination of the following: heavy-duty nylon mesh, heavy-duty ballistic woven nylon fabric, heavy-duty woven polyester, heavy-duty polyester, and Keprotec®.<sup>13</sup> Pl.’s Statement of Undisputed Material Facts ¶ 40; Def.’s Resp. to Pl.’s Statement of Undisputed Material Facts ¶ 40. These man-made fibers form the “mesh panels for venting, heat resistant inner leg areas,” and the stretch panels “in the legs, seat, and crotch area.” Pl. Resp. to Def. First Interrogs. 5. The pants also conform to the relevant EN to Heading 6210. EN 62.10 (stating that heading covers “all garments made up of . . . textile fabrics (other than knitted or crocheted fabrics) of heading 59.03, 59.06 or 59.07”) (emphasis removed). The description of the pants situates the article squarely within the terms of Heading 6210 and the class of goods used as wearing apparel. See *Admiral Craft Equip. Corp.*, 82 Cust. Ct. at 164. Therefore, the court also upholds Customs’s classification of the pants under subheading 6210.40.50 of the HTSUS.

## 2. The Motorcycle Jackets

The common definition of an “overcoat” encompasses the subject motorcycle jackets and, therefore, the plain text of Heading 6201 covers these articles. A word not defined by the HTSUS or in legislative history, an overcoat connotes “a coat worn over a suit or other clothing,” and “coat” indicates “an outer garment (as a raincoat) usu[ally] with long sleeves, a collar, and a single-breasted or double-breasted front opening made of fabric, fur, or plastic and varying in length and style according to fashion and use.” *Webster’s Third New International Dictionary* 433, 1607 (2002). An individual wears the jackets over other clothing and at a particular time, such as when he

<sup>12</sup> The term “textile fabric” applies to, *inter alia*, fabrics made of man-made fibers produced by the polymerization of organic monomers, such as polyester and polyurethane, as well as those fibers made through the chemical transformation of natural organic polymers. Note 1(a)–(b) to Chapter 54, HTSUS.

<sup>13</sup> Keprotec is a unique blend of several synthetic fibers — Cordura®, Dyanfil TS-70, Kevlar®, and polyurethane fibers. Pl.’s Statement of Undisputed Material Facts ¶ 47; Def.’s Resp. to Pl.’s Statement of Undisputed Material Facts ¶ 47.

rides on the public street. Pl. Resp. to Def. First Interrogs. 6. The jackets also vary in length and style to accommodate a rider's posture, with a cut that has longer sleeves and fuller shoulders. Pl. Resp. to Def. First Interrogs. 6–7. LeMans designed the Men's and Boys' articles to consist of a combination of the following materials: heavy-duty polyester knitted and mesh fabrics; Dynax nylon; and a heavy-weight waxed cotton chassis. Pl.'s Statement of Undisputed Material Facts at ¶ 82; Def.'s Resp. to Pl.'s Statement of Undisputed Material Facts at ¶ 82. The jackets do not amount to “Men's or boys' suits, ensembles, suit-type jackets, blazers, trousers, bib and brace overalls, [or] breeches and shorts (other than swimwear)” under Heading 6203.<sup>14</sup> In finding that the description of the jackets conform with the text of Heading 6201 and identify with wearing apparel, *see Admiral Craft Equip. Corp.*, 82 Cust. Ct. at 164, the court upholds Customs's classification of the garments under subheadings 6201.92.15, 6201.93.30, and 6201.93.35.

### **C. The Subject Goods Are Not Eligible for Classification Under Chapter 95 of the HTSUS**

After providing what it understands as the controlling definition for “equipment,” Pl. Mot. for Summ. J. 3–4, LeMans avers that the jerseys, pants, and jackets constitute “sports equipment” under Heading 9506. Pl. Mot. for Summ. J. 5–23. In the event that the subject goods are classifiable both as other sports equipment under Chapter 95 and apparel in Chapters 61 and 62, LeMans argues that GRI 3(a) compels the court to find that Chapter 95 more specifically describes the subject merchandise. Pl. Mot. for Summ. J. 29–30. The court is not persuaded by either argument.

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<sup>14</sup> A “suit” is “a set of garments composed of two or three pieces made up, in respect of their outer surface, in identical fabric and comprising,” *inter alia*, a garment designed to cover the upper part of the body and another article that covers the lower part of the body. Note 3(a) to Chapter 62, HTSUS. Importantly, “[a]ll of the components of a ‘suit’ must be of the same fabric construction, color, and composition,” *id.*, a requirement that places the subject jackets outside of this definition. That requirement also prevents classification of the merchandise as either an “ensemble” or a “suit-type jacket” under Heading 6203. Note 3(b) to Chapter 62, HTSUS; *Webster's Third New International Dictionary* 1206 (2002) (defining “jacket” as “a garment like a coat for the upper body usu[ally] having a front opening, collar, lapels, sleeves, and pockets, made in varying lengths from waist to hip, and worn separately or as part of a suit”). Moreover, the different nature of a blazer disqualifies it as an accurate description of the merchandise. *Webster's Third New International Dictionary* 232 (2002) (defining “blazer” as “a single-breasted sports jacket of flannel or other fabric in bright stripes or solid color made usu[ally] with a notched collar, patch pockets, and sometimes decorated edges). Finally, unlike the jackets at issue, the terms breeches, overalls, shorts, and trousers all address articles that cover the lower body in part. *See Webster's Third New International Dictionary* 274, 1606, 2102, 2453 (2002).

The EN to Heading 9506 demonstrates that the subject merchandise is of a different nature and character than those classifiable as “sports equipment” under Chapter 95. To qualify as “equipment” for a sport, the good should generally provide “what is necessary, useful, or appropriate.” See *Webster’s Third New International Dictionary* 768 (2002) (defining “equipment” as “the equipping of a person or thing” and “equip” as “to provide with what is necessary, useful, or appropriate”); see also *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1354 (Fed. Cir. 2002) (explaining that “definition offered for ‘equipment’ includes those articles that are necessary and specifically designed for use in athletics and other sports”). While the subject merchandise arguably constitutes useful, if not necessary, articles to motocross and motorcycle riding, Subsection B of EN 95.06 distinguishes the subject merchandise from articles typically classified under Heading 9506.<sup>15</sup> The examples listed in Subsection B center on

<sup>15</sup> In relevant part, the EN states that Heading 9506 covers requisites for other sports, such as

- (1) Snow-skis and other snow-ski equipment, (e.g., ski-fastenings (ski-bindings), ski brakes, ski poles).
- (2) Water-skis, surf-boards, sailboards and other water-sport equipment, such as diving stages (platforms), chutes, divers’ flippers and respiratory masks of a kind used without oxygen or compressed air bottles, and simple underwater breathing tubes (generally known as “snorkels”) for swimmers or divers.
- (3) Golf clubs and other golf equipment, such as golf balls, golf tees.
- (4) Articles and equipment for table-tennis (ping-pong), such as tables (with or without legs), bats (paddles), balls and nets.
- (5) Tennis, badminton or similar rackets (e.g., squash rackets), whether or not strung.
- (6) Balls, other than golf balls and table-tennis balls, such as tennis balls, footballs, rugby balls and similar balls (including bladders and covers for such balls); water polo, basketball and similar valve type balls; cricket balls.
- (7) Ice skates and roller skates, including skating boots with skates attached.
- (8) Sticks and bats for hockey, cricket, lacrosse, etc.; chistera (jai alai scoops); pucks for ice hockey; curling stones.
- (9) Nets for various games (tennis, badminton, volleyball, football, basketball, etc.).
- (10) Fencing equipment: fencing foils, sabres and rapiers and their parts (e.g., blades, guards, hilts and buttons or stops), etc.
- (11) Archery equipment, such as bows, arrows and targets.
- (12) Equipment of a kind used in children’s playgrounds (e.g., swings, slides, seesaws and giant strides).
- (13) Protective equipment for sports or games, e.g., fencing masks and breast plates, elbow and knee pads, cricket pads, shin-guards.
- (14) Other articles and equipment, such as requisites for deck tennis, quoits or bowls; skate boards; racket presses; mallets for polo or croquet; boomerangs; ice axes; clay pigeons and clay pigeon projectors; bobsleighs (bobsleds), luges and similar non-motorised vehicles for sliding on snow or ice.

non-clothing articles and do not describe apparel like the subject merchandise. Although Example 13 suggests that some apparel-like items might fall under Heading 9506, those examples consist almost entirely of certain internal guards or pads pieced together by minimal textile components, a description that does not fit the subject merchandise. See Pl. Mot. for Summ. J. Exs. 7–17. In fact, the type of merchandise represented in Example 13 more accurately describes the products that riders typically will attach directly to their body, with the subject merchandise worn over those hard guards and braces. Pl.’s Statement of Undisputed Material Facts ¶¶ 18, 58, 120; Def.’s Resp. to Pl.’s Statement of Undisputed Material Facts ¶¶ 18, 58, 120; Hart Dep. 10:4–23, 13:13, 14:19, 19:7–13, 27:24, 29:11, 40:1, 43:20. That riders rely on hard protection worn underneath the jerseys, pants, and jackets illustrates the nature of the subject goods as apparel and not sports equipment. Moreover, Note 1(e) to Chapter 95 provides additional support for the conclusion that goods like the subject merchandise do not constitute sports equipment. Chapter 95, Note 1(e), HTSUS (explaining that Chapter 95 does not cover, *inter alia*, “[s]ports clothing or fancy dress, of textiles, of [C]hapter 61 or 62”). Thus, Heading 9506 does not control the classification of the subject merchandise.

LeMans does not convince the court that the Federal Circuit meant to provide an authoritative definition of “equipment” in *Bauer*, or that the analysis therein governs the classification of the subject merchandise in this case. 393 F.3d 1246.<sup>16</sup> In that case, Customs had classified ice hockey pants — constructed primarily of an exterior nylon or polyester textile shell and an interior assembly of hard nylon plastic guards and soft polyurethane, polyethylene, or polyester foam padding attached to a belt — under subheading 6211.33.00 of the HTSUS,<sup>17</sup> a classification upheld by this Court. *Bauer Nike Hockey USA, Inc.*, 27 CIT at 1651–61, 305 F. Supp. 2d at 1351–59. On appeal, Plaintiff Bauer Nike Hockey USA, Inc. alleged that its merchandise was more appropriately classifiable under subheading 9506.99.25.<sup>18</sup> *Bauer*, 393 F.3d at 1250. The Federal Circuit disagreed with how this Court construed the term “equipment,” *id.* at 1250–51, but in so doing did not give its opinion on what constituted a controlling definition of

<sup>16</sup> To be sure, the Bauer decision can be read to caution against an overly restrictive interpretation of “equipment.” 393 F.3d at 1250–51.

<sup>17</sup> This subheading provides covers “track suits, ski-suits and swimwear; other garments” comprised “[o]f man-made fibers.” 6211.33.00, HTSUS.

<sup>18</sup> Subheading 9605.99.25 controls the classification of certain sports equipment — “[i]ce-hockey and field-hockey articles and equipment, except balls, and parts and accessories thereof.” 9506.99.25, HTSUS.

that term. *See id.* The Federal Circuit explained that “equipment” defines “the equipping of a person or thing” and that “equip” means “to provide with what is necessary, useful or appropriate.” *Id.* at 1251 (citing *Webster’s Third New International Dictionary* 768 (1993)) (quotation marks omitted). The Federal Circuit noted that the definition for equipment “provides no support for the Court of International Trade’s conclusion that an item must be necessary to be equipment because the definition uses the disjunctive, ‘or,’ in the definition of ‘equip,’ not the conjunctive, ‘and.’” *Id.* Moreover, in finding that Chapter 95 covered the merchandise at issue in *Bauer*, the Federal Circuit reached its decision using GRI 3(a). *Id.* at 1252–53. In this case, the court bases its decision on GRI 1 and finds no need to resort to an analysis under GRI 3. Therefore, the court finds that *Bauer* does not control its analysis.

The Customs classification of certain gear after the Federal Circuit’s decision in *Bauer* further demonstrates that the subject goods are distinct from those classifiable under Heading 9506. In 2005, Customs classified under Heading 9506 a shin-guard made of hard plastic with an ethylene-vinyl acetate foam backing permanently encased in a specially-fitted polyester sock, noting that the “hard protective guard is specially-fitted to the polyester sock in which it is encased and it is not removable.” HQ 967738 (Sept. 21, 2005). However, later that year, Customs determined that knitted polyester and cotton shorts and pants with high-density foam padding designed for soccer goalkeepers did not constitute sports equipment under Heading 9506, but instead classified the soccer pants and shorts under Heading 6114, HTSUS. HQ 967957 (Dec. 9, 2005). Customs reasoned that while the articles contained various protective features, the padding appeared “in isolated areas where goalkeepers are most likely to make contact with the ground. Th[at] padding is insubstantial, offering only some cushioning from the ground and protection against ground abrasions.” *Id.* Similar to the soccer pants and shorts, the subject merchandise incorporates limited padding to isolated areas of the article, and they do not contain nor are predominantly comprised of hard plastic like the shin-guards in HQ 967738 or the ice hockey pants in *Bauer*. *See* Pl. Mot. for Summ. J. Exs. 7–17.

Finally, as previously noted, the terms of the relevant headings within Chapters 61 and 62 describe the subject merchandise. Because GRI 1 resolves this classification inquiry, the court need not consider any subsequent GRI. *See Mita Copystar Am.*, 160 F.3d at 712.

**V.**  
**Conclusion**

Using GRI 1, the court upholds Customs's classification of the subject merchandise under the relevant provisions of Chapters 61 and 62 of the HTSUS.

Dated: February 8, 2010

New York, New York

*/s/ Judith M. Barzilay*

JUDITH M. BARZILAY, JUDGE