


U.S. Customs and Border Protection



PROPOSED REVOCATION OF TWO RULING LETTERS, MODIFICATION OF ONE RULING LETTER, AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN WIRELESS HEADPHONES AND EARPHONES

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of two ruling letters, modification of one ruling letter, and proposed revocation of treatment relating to the tariff classification of certain wireless headphones and earphones.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke or modify three ruling letters concerning tariff classification of certain wireless headphones and earphones under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before August 2, 2025.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Shannon L. Stillwell, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Arrangements to inspect submitted comments should be made in advance by calling Ms. Shannon L. Stillwell at (202) 325–0739.

FOR FURTHER INFORMATION CONTACT: Dwayne Rawlings, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325-0092.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke or modify three ruling letters pertaining to the tariff classification of certain wireless headphones and earphones. Although in this notice, CBP is specifically referring to Headquarters Ruling Letter ("HQ") H251033, dated July 31, 2014 (Attachment A), New York Ruling Letter ("NY") N308565, dated January 16, 2020 (Attachment B), and HQ H245902, dated January 28, 2015 (Attachment C), this notice also covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the three identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In HQ H251033, NY N308565, and HQ H245902, CBP classified certain wireless headphones and earphones in heading 8517, HTSUS, specifically in subheading 8517.62.00, HTSUS, which provides for “Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus.” CBP has reviewed HQ H251033, NY N308565, and HQ H245902 and has determined the ruling letters to be in error. It is now CBP’s position that the subject earphones or earbuds are properly classified, in heading 8518, HTSUS, specifically in subheading 8518.30.20, HTSUS, which provides for “Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers; audio-frequency electric amplifiers; electric sound amplifier sets; parts thereof: Headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers: Other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke HQ H251033 and NY N308565, modify HQ H245902, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H346387, set forth as Attachment D to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

HQ H251033

July 31, 2014

CLA-2 OT:RR:CTF:TCM H251033 LWF

CATEGORY: Classification

TARIFF NO.: 8517.62.00

PORT DIRECTOR

SERVICE PORT OF LOS ANGELES/LONG BEACH SEAPORT

U.S. CUSTOMS AND BORDER PROTECTION

301 E. OCEAN BLVD.

LONG BEACH, CA 90802

ATTN.: DIRIK LOKUS, SENIOR IMPORT SPECIALIST

RE: Application for Further Review of Protest No. 2704–13–102440; Classification of a wireless stereo headset with microphone and a USB dongle transceiver from China

DEAR PORT DIRECTOR:

This is in reference to the Application for Further Review (“AFR”) of Protest No. 2704–13–102440, timely filed on November 20, 2013, by Sony Computer Entertainment America LLC (“SCEA”). The AFR concerns U.S. Customs and Border Protection’s (CBP) classification of a wireless stereo headset with microphone and a USB dongle transceiver under the Harmonized Tariff Schedule of the United States (HTSUS).

FACTS:

The merchandise at issue is SCEA’s Model No. 98085, “Wireless Stereo Headset for Playstation®3,” a wireless stereo headset with microphone and a USB dongle transceiver (“the Headset”; picture below at Fig. 1). The Headset consists of a pair of dual (circumaural) full size earphones combined in the same housing with a microphone, a radio transceiver, a rechargeable lithium polymer battery, a power input, and LED (light emitting diode) indicator, and controls. The Headset has controls for powering the device on and off, adjusting the main volume, balancing audio and voice levels, and displaying battery power. The adjustable microphone attached to the left earphone possesses a multi-color LED indicator light that provides information on the transmission/reception status and state of battery charge. The Headset is presented in a box for retail sale.

When the USB dongle transceiver is connected to a Playstation®3 videogame console or other automatic data processing (ADP) machine, the Headset transceiver utilizes a wireless connection via 2.4GHz radio frequency with the USB transceiver to transmit voice and audio content between the videogame console and the Headset, thereby allowing a user to listen to audio content from the videogame console or ADP machine and communicate with fellow gamers via the Headset’s incorporated microphone. Additionally, when connected to a Playstation®3 videogame console, the Headset also transmits battery information and audio settings to the console, which displays the information on-screen.



Fig. 1: SCEA's Model No. 98085, "Wireless Stereo Headset for Playstation®3"

The instant Protest/AFR was timely filed on November 20, 2013 and concerns several shipments of SCEA Headsets, entered between July 12, 2012 and January 2, 2013 at the Service Port of Los Angeles/Long Beach Seaport. CBP liquidated the entries of Headsets under tariff classification subheading 8518.30.20, HTSUS, which provides for "Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof: Headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers: Other." As the basis for classification under subheading 8518.30.20, HTSUS, CBP cites to Headquarters Ruling Letter ("HQ") 950591, dated December 23, 1991, in which CBP classified a cordless, infrared stereo headphone system (without microphone) in subheading 8518.30.20, HTSUS.

SCEA asserts that the Headsets are properly classified under subheading 8517.62.00, HTSUS, which provides for "Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers; audio-frequency electric amplifiers; electric sound amplifier sets; parts thereof: Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus." In support of its position, SCEA cites to several recent New York Ruling Letters ("NY") that have classified various wireless headsets in heading 8517, HTSUS.

ISSUE:

Whether the Headsets are classified under heading 8517, HTSUS, as other apparatus for the transmission or reception of voice, images or other data, or under heading 8518, HTSUS, as headphones and earphones, whether or not combined with a microphone.

LAW AND ANALYSIS:

Initially, CBP notes that the matter protested is protestable under 19 U.S.C. § 1514(a)(2) as a decision on classification. The protest was timely filed, within 180 days of liquidation for entries made on or after December 18, 2004. (Miscellaneous Trade and Technical Corrections Act of 2004, Pub.L. 108–429, § 2103(2)(B)(ii), (iii) (codified as amended at 19 U.S.C. § 1514(c)(3) (2006)). Further Review of Protest No. 2704–13–102440 is properly accorded to Protestant pursuant to 19 C.F.R. § 174.24(a), because the decision against which the protest was filed is alleged to be inconsistent with a ruling of the Commissioner of Customs or his designee, or with a decision made at any port with respect to the same or substantially similar merchandise.

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provision of law for all purposes. GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order.

The 2012 and 2013 HTSUS headings under consideration are the following:

8517 Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof:

* * * * *

8518 Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers; audio-frequency electric amplifiers; electric sound amplifier sets; parts thereof:

* * * * *

Note 3 to Section XVI, HTSUS, states:

Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only that component or as being that machine which performs the principal function.

* * * * *

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System

at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTS and are thus useful in ascertaining the proper classification of merchandise. It is CBP's practice to follow, whenever possible the terms of the ENs when interpreting the HTSUS. *See* T.D. 89-90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The ENs to Section XVI, provide, in relevant part, as follows:

(VI) **MULTI-FUNCTION MACHINES
AND COMPOSITE MACHINES**

(Section Note 3)

In general, multi-function machines are classified according to the principal function of the machine.

...

Composite machines consisting of two or more machines or appliances of different kinds, fitted together to form a whole, consecutively or simultaneously performing **separate** functions which are generally complementary and are described in different headings of Section XVI, are also classified according to the principal function of the composite machine.

...

For the purposes of the above provisions, machines of different kinds are taken to be **fitted together to form a whole** when incorporated one in the other or mounted one on the other, or mounted on a common base or frame or in a common housing.

* * * * *

The EN to heading 85.17, HS, states, in relevant part:

This heading covers apparatus for the transmission or reception of speech or other sounds, images or other data between two points by variation of an electric current or optical wave flowing in a wired network or by electromagnetic waves in a wireless network. The signal may be analogue or digital. The networks, which may be interconnected, include telephony, telegraphy, radio-telephony, radio-telegraphy, local and wide area networks.

...

(II) **OTHER APPARATUS FOR TRANSMISSION OR
RECEPTION OF VOICE, IMAGES OR OTHER DATA,
INCLUDING APPARATUS FOR COMMUNICATION IN A
WIRED OR WIRELESS NETWORK (SUCH AS A LOCAL OR
WIDE AREA NETWORK)**

...

(F) Transmitting and receiving apparatus for radio-telephony and radio-telegraphy.

This group includes:

(1) Fixed apparatus for radio-telephony and radio-telegraphy (transmitters, receivers and transmitter-receivers). Certain types, used mainly in large installations, include special devices such as secrecy devices (e.g., spectrum inverters), multiplex devices (used for sending more than two messages simultaneously) and certain receivers, termed "diversity receivers", using multiple receiver technique to overcome fading.

- (2) Radio transmitters and radio receivers for simultaneous interpretation at multilingual conferences.
- (3) Automatic transmitters and special receivers for distress signals from ships, aircraft, etc.
- (4) Transmitters, receivers or transmitter/receivers of telemetric signals.
- (5) Radio-telephony apparatus, including radio-telephony receivers, for motor vehicles, ships, aircraft, trains, etc.
- (6) Portable receivers, usually battery operated, for example, portable receivers for calling, alerting or paging.

* * * * *

The Subheading EN to subheading 8517.62, HS, states:

Subheading Explanatory Note.

Subheading 8517.62

This subheading includes cordless handsets or base units, when presented separately.

* * * * *

In determining whether SCEA's wireless Headset is appropriately classified in heading 8517 or heading 8518, HTSUS, CBP emphasizes, that GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and *any relative section or chapter notes*. (Emphasis added). Because the instant Headset housing integrates several component pieces that together perform functions in combination with a separate USB transceiver dongle, CBP calls attention to Note 3 to Section XVI, HTSUS, which contains instructions pertaining to the classification of composite machines.

Note 3 to Section XVI, HTSUS, directs that unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole are to be classified as if consisting only of that component or as being that machine which performs the principal function. As described above, the instant Headset consists, in relevant part, of a pair of circumaural, full size earphones that are combined in the same housing with a microphone, and a radio transceiver microchip mounted on a printed circuit board. Together, those components (which are in and of themselves "machines"),¹ perform separate but complementary functions described in different headings of Section XVI. See Note 2 to Section XVI, HTSUS; EN(II) to Section XVI, HS. The microphone converts sound waves into electric current. The transceiver receives electrical current from the microphone, converts it into data signals and, in connection with the USB transceiver dongle, transmits those signals via radio waves to the Playstation®3 videogame console. Conversely, the Headset transceiver also converts data signals it receives from the USB transceiver dongle into electric current and transmits them to the Headset's earphones, where the earphones convert electric current into sound waves. As such, CBP finds that the separate, complementary functions of the earphones, microphone, and transceivers strongly support the classification of the Headset as a composite machine, pursuant to Note 3 to Section XVI, HTSUS.

¹ The earphones, microphone, and transceiver microchip are each considered a "machine" for tariff purposes. See Note 5 to Section XVI, HTSUS.

In accord with Note 3 to Section XVI, HTSUS, the Headset is classified as if consisting only of that component or as being that machine which performs the device's principal function. CBP has found the analysis developed and utilized by the courts in relation to "principal use" (the "*Carborundum* factors") to be a useful aid in determining the principal function of such machines. Generally, the courts have provided several factors, which are indicative but not conclusive, to apply when determining whether merchandise falls within a particular class or kind. They include: (1) general physical characteristics; (2) expectation of the ultimate purchaser; (3) channels of trade, environment of sale (accompanying accessories, manner of advertisement and display); (4) use in the same manner as merchandise that defines the class; (5) economic practicality of so using the import; and (6) recognition in the trade of this use. See *United States v. Carborundum Co.*, 63 C.C.P.A. 98, 102, 536 F.2d 373, 377 (1976), *cert. denied*, 429 U.S. 979 (1976); *Lennox Collections v. United States*, 20 Ct. Int'l Trade 194, 196 (1996); *Kraft, Inc. v. United States*, 16 Ct. Int'l Trade 483, 489 (1992); and *G. Heileman Brewing Co. v. United States*, 14 Ct. Int'l Trade 614, 620 (1990). See also HQ W968223, dated January 12, 2007, and HQ 966270, dated June 3, 2003.

Here, CBP finds that the *Carborundum* factors, when considered in total, indicate that the principal function of SCEA's wireless Headset is to receive and transmit radio signals to and from the videogame console or other device to which it is paired. The transmission function, which is performed by the transceivers, enables a user to wirelessly connect to a videogame console or ADP machine to send and receive voice and audio content between the Headset, the videogame console or ADP machine, and other online users. Moreover, CBP finds that the central role of the Headset's transceivers is reflected in the expectations of the ultimate consumers and the channels of trade by which the Headsets are sold. Specifically, the product name, "*Wireless Stereo Headset for Playstation®3*" (emphasis added), indicates that the instant merchandise is advertised and distinguished from other, wired headsets by consumers' recognition of the term "wireless." As such, CBP concludes that the transceivers perform the principal function of the SCEA wireless Headset, and pursuant to Note 3 to Section XVI, HTSUS, the device shall be classified as if consisting only of the transceivers.

By application of GRI 1, transceivers for the transmission of voice, images, or other data are classified in heading 8517, HTSUS, which provides for, "Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof." Accordingly, SCEA's Headset is classified in subheading 8517.62, HTSUS, pursuant to Note 3 to Section XVI, as other machines for the reception, conversion, and transmission or regeneration of voice, images, or other data. See EN 85.17(F); and Subheading EN 8516.62, HS. Classification of the instant SCEA Headset in subheading 8517.62, HTSUS, is consistent with several prior CBP ruling letters that classified substantially similar headsets for the wireless transmission of voice and data in the identical subheading. See, e.g., NY 246030, dated September 27, 2013; NY N022195, dated February 20, 2008; and NY N022222, dated February 19, 2008.

Heading 8518, HTSUS, which provides, in pertinent part, for, "headphones and earphones, whether or not combined with a microphone," does not fully

describe SCEA's Headset because the heading text does not account for transceivers. As discussed above, transceivers enable the Headset to perform functions that distinguish it from the articles classified in heading 8518, HTSUS—namely, forming a wireless connection with the videogame console or ADP machine to transmit and receive voice and audio data and transmitting other data necessary for on-screen Headset battery and audio status displays.² Further, CBP notes that prior CBP rulings classifying wireless infrared (IR) receiver headsets in heading 8518, HTSUS, are not dispositive of the classification of the SCEA Headset, because the technical characteristics and functional capabilities of such devices substantially differ from one another. *See, e.g.*, HQ 089160, dated August 2, 1991; and HQ 950951.

In HQ 089160, CBP classified an IR stereo headphone system consisting of a cordless IR headphone receiver, an IR transmitter plugged into the headphone output jack on an audio or video component, and AC adapter in heading 8518, HTSUS, finding that “the frequency of oscillation of infrared is much higher than that of radiotelephony, radiotelegraphy, radiobroadcasting, or television” and consequently, is not encompassed by the terms of headings 8525, HTSUS, and 8527, HTSUS.³ *See also* HQ 950591 (classifying a substantially similar IR stereo headphone system in heading 8518, HTSUS, and cited by the Port in the instant matter as basis for classifying SCEA's Headset in heading 8518, HTSUS). Here, CBP notes that the EN to heading 85.17, HS, similarly describes “wireless networks” as including “radio-telephony” and “radio-telegraphy” networks, and does not include the term “infrared.” Moreover, unlike the instant SCEA Headset, the IR stereo headphone systems in HQ 089160 and HQ 950591 were not capable of forming a wireless connection with an audio or video component, and the cordless IR headphone receivers did not transmit voice, audio, or other data to the audio or video component. As such, CBP concludes that the IR stereo headphone systems substantially differ from the SCEA Headset, and that rulings HQ 089160 and HQ 950591 are not dispositive of the classification of the instant merchandise.

² In NY R00209, dated April 26, 2004, CBP classified the “AT&T Cordless/Cellular Headset EH 500” in subheading 8518.30.20, HTSUS, as headphones and earphones, whether or not combined with a microphone. However, because the 2004 ruling letter did not state whether the headset at issue in NY R00209 possessed a transceiver, CBP is unable to conclude that the SCEA Headset and merchandise in NY R00209 are substantially similar. As such, the NY R00209 is not dispositive of the classification of the instant SCEA Headset.

³ CBP notes that prior to 2007, heading 8517, HTSUS, provided for, “Electrical apparatus for line telephony or line telegraphy, including line telephone sets, with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones; parts thereof.” However, the HTSUS was amended in 2007, pursuant to 19 U.S.C. § 3005, to reflect changes recommended by the World Customs Organization, and the scope of heading 8517, HTSUS, was expanded to include, in pertinent part, “other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527, or 8528.” Additionally, the 2007 amendments deleted subheading 8525.10.80, HTSUS, (considered by CBP in HQ 089160 for the classification of the IR stereo headphone system), and moved certain articles formerly of heading 8525, HTSUS, to newly created subheadings under heading 8517, HTSUS. The proclaimed changes were effective for goods entered or withdrawn from warehouse for consumption on or after February 3, 2007. *See* Presidential Proclamation 8097, 72 Fed. Reg. 453, 2 (January 4, 2007).

HOLDING:

By application of GRI 1, (Note 3 to Section XVI, HTSUS), SCEA's "Wireless Stereo Headset for Playstation®3," Model No. 98085, is classified in heading 8517, HTSUS. Specifically, the Headset is classifiable in subheading 8517.62.00, HTSUS, which provides for, "Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers; audio-frequency electric amplifiers; electric sound amplifier sets; parts thereof: Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus." The column one, general rate of duty is *free*. You are instructed to **APPROVE** the protest.

In accordance with Sections IV and VI of the *CBP Protest/Petition Processing Handbook* (HB 3500-08A, December 2007, pp. 24 and 26), you are to mail this decision, together with the CBP Form 19, to the protestant no later than 60 days from the date of this letter. Any re-liquidation of the entry or entries in accordance with the decision must be accomplished prior to mailing the decision.

Sixty days from the date of the decision, the Office International Trade, Regulations and Rulings, will make the decision available to CBP personnel, and to the public on the CBP Home Page on the World Wide Web at <http://www.cbp.gov> by means of the Freedom of Information Act, and other methods of public distribution.

Sincerely,

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division

N308565

January 16, 2020

CLA-2-85:OT:RR:NC:N2:209

CATEGORY: Classification

TARIFF NO.: 8517.62.0090, 9903.88.15

LISA MURRIN
SENIOR CONSULTANT
EXPEDITORS TRADEWIN LLC
795 JUBILEE DRIVE
PEABODY, MA 01960

RE: The tariff classification of wireless earbuds from China

DEAR MS. MURRIN:

In your letter dated December 20, 2019, you requested a tariff classification ruling on behalf of your client, Zagg, Inc.

The items concerned are wireless earbuds referred to as the IFrogz® Airtime Premier, model number IFIETWS43B. The earbuds are imported in retail packaging along with a charging case, and a USB-C charging cable. The earbuds provide the essential character to this set.

The IFrogz® Airtime Premier earbuds use Bluetooth 5.0 to wirelessly connect to an audio source. They feature an integrated microphone on each earbud for hands-free phone calls and execute remote control and navigation of the source device through tap sequences on both earbuds (i.e. tap right ear bud to decrease volume, or answer phone).

The applicable subheading for the IFrogz® Airtime Premier wireless earbuds, model number IFIETWS43B, will be 8517.62.0090, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof: Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other.” The general rate of duty will be Free.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 8517.62.0090, HTSUS, unless specifically excluded, are subject to an additional 15 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.15, in addition to subheading 8517.62.0090, HTSUS, listed above.

The HTSUS is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, you may refer to the relevant parts of the USTR and CBP websites, which are available at <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions> and <https://www.cbp.gov/trade/remedies/301-certain-products-china>, respectively.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at <https://hts.usitc.gov/current>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Steven Pollichino at steven.pollichino@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

HQ H245902

January 28, 2015

CLA-2 OT:RR:CTF:TCM H245902 LWF

CATEGORY: Classification

TARIFF NO.: 8517.12.00; 8517.62.00

PORT DIRECTOR
AREA PORT OF DALLAS
U.S. CUSTOMS & BORDER PROTECTION
P.O. Box 619050
DFW AIRPORT, TX 75261-9050

RE: Internal Advice Request; Classification of an equal number of mobile phone handsets, batteries, and wireless earphones, imported in the same container and segregated in separate shipping boxes by kind

DEAR PORT DIRECTOR:

This letter is in response to your memorandum dated August 6, 2013, requesting internal advice in accordance with 19 C.F.R. § 177.11, concerning importations made by Samsung Telecommunications America, Inc. (“STA”). At issue is U.S. Customs and Border Protection’s (CBP) classification under the Harmonized Tariff Schedule of the United States (HTSUS) of an equal number of mobile phone handsets, batteries, and Bluetooth wireless earphones, imported in the same container, but segregated in separate shipping boxes by kind and not packaged for retail sale. The request for internal advice is based upon your disagreement with STA’s claim that the merchandise is properly classified pursuant to General Rule of Interpretation (“GRI”) 3(b), which provides for mixtures, composite goods, and goods put up in sets for retail sale. Additionally, you seek internal advice concerning the possible application of Note 4 to Section XVI, HTSUS, which controls the classification of machines consisting of individual components intended to contribute together to a clearly defined function of Chapter 84 or Chapter 85.

FACTS:

The merchandise is described as shipments of equal numbers of mobile phone handsets, batteries, and Bluetooth wireless earphones that are imported in the same shipping container, but segregated in separate shipping boxes by kind. In their condition as imported, the articles are not packaged for retail sale.

There is no dispute concerning the tariff classification of the individual mobile phone handsets, batteries, and Bluetooth wireless earphones. The mobile phone handsets are classified under subheading 8517.12.00, HTSUS, which provides for “Telephone sets, including telephones for mobile networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof: Telephone sets, including telephones for cellular networks or for other wireless networks: Telephones for cellular networks or for other wireless networks.” The batteries are classified under subheading 8507.60.00, HTSUS, which provides for “Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof: Lithium-ion batteries.” The Bluetooth wireless earphones are classified under subheading 8517.62.00, HTSUS, which provides for “Telephone

sets, including telephones for mobile networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof: Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus.”

This request for internal advice concerns STA’s May 8, 2013 entry of equal numbers of mobile phone handsets, batteries, and Bluetooth wireless earphones at the Area Port of Dallas. Specifically, the request is based upon the Port’s disagreement with STA’s claim that the merchandise is properly classified pursuant to General Rule of Interpretation (“GRI”) 3(b), which provides for mixtures, composite goods, and goods put up in sets for retail sale. Additionally, the Port seeks internal advice concerning the possible application of Note 4 to Section XVI, HTSUS, which controls the classification of machines consisting of individual components intended to contribute together to a clearly defined function of Chapter 84 or Chapter 85.

ISSUE:

Whether the an entry of an equal number of mobile phone handsets, batteries, and Bluetooth wireless earphones, imported in the same container, but segregated in separate shipping boxes by kind and not packaged for retail sale, is classified pursuant to GRI 3(b), as a retail set, or whether Note 4 to Section XVI, HTSUS, controls the classification of the instant merchandise.

LAW AND ANALYSIS:

Merchandise imported in the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context, which requires otherwise, by the Additional U.S. Rules of Interpretation. GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The following HTSUS provisions will be referenced:

- 8507 Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof:
- 8517 Telephone sets, including telephones for mobile networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof:

* * * * *

GRI 2(a) states as follows:

Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or failing to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

* * * * *

Note 4 to Section XVI, HTSUS, states:

Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function.

* * * * *

The Explanatory Notes to the Harmonized Commodity Description and Coding System (ENs) represent the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. See T.D. 89-90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The EN to GRI 2(a) provides, in relevant part, as follows:

RULE 2(a)

(Articles presented unassembled or disassembled)

(V) The second part of Rule 2 (a) provides that complete or finished articles presented unassembled or disassembled are to be classified in the same heading as the assembled article. When goods are so presented, it is usually for reasons such as requirements or convenience of packing, handling or transport.

* * * * *

The ENs to Section XVI, provide, in relevant part, as follows:

(V) UNASSEMBLED MACHINES

(See General Interpretative Rule 2 (a))

For convenience of transport many machines and apparatus are transported in an unassembled state. Although in effect the goods are then a collection of parts, they are classified as being the machine in question and not in any separate heading for parts. The same applies to an incomplete machine having the features of the complete machine (see Part (IV) above), presented unassembled (see also in this connection the General Explanatory Notes to Chapters 84 and 85). However, unassembled components in excess of the number required for a complete machine or for an incomplete machine having the characteristics of a complete machine, are classified in their own appropriate heading.

...

(VII) FUNCTIONAL UNITS

(Section Note 4)

This Note applies when a machine (including a combination of machines) consists of separate components which are intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or, more frequently, Chapter 85. The whole then falls to be classified in the heading appropriate to that function, whether the various components (for convenience or other reasons) remain separate or are interconnected by piping (carrying air, compressed gas, oil, etc.), by devices used to transmit power, by electric cables or by other devices.

For the purposes of this Note, the expression “intended to contribute together to a clearly defined function” covers only machines and combinations of machines essential to the performance of the function specific to the functional unit as a whole, and thus excludes machines or appliances fulfilling auxiliary functions and which do not contribute to the function of the whole.

The following are examples of functional units of this type within the meaning of Note 4 to this Section:

...

(9) Welding equipment consisting of the welding head or tongs, with a transformer, generator or rectifier to supply the current (heading 85.15).

...

(11) Radar apparatus with the associated power packs, amplifiers, etc. (heading 85.26).

* * * * *

This internal advice request concerns the tariff classification of an equal number of mobile phone handsets, batteries, and Bluetooth wireless earphones, imported in the same container, but segregated in separate shipping boxes by kind and not packaged for retail sale. As an initial matter, CBP notes that there is no dispute concerning the individual classification, pursuant to GRI 1, of STA’s mobile phone handsets, batteries, and Bluetooth wireless earphones when imported separately. The batteries are described by the text of heading 8507, HTSUS, and the mobile phone handsets and Bluetooth earphones are both classified in heading 8517, HTSUS.

Moreover, there is no dispute that, following importation into the United States, STA repackages an individual mobile phone handset, battery, and Bluetooth wireless earphone together for retail sale. Upon purchase, a consumer inserts the battery into the mobile phone to ready the device for use. Consequently, because the batteries and mobile phone units are separately packed for shipment and later assembled to form a functioning mobile device, the batteries and cell phones are considered unassembled for purposes of tariff classification. As such, GRI 2(a)—which governs the classification of unassembled articles—applies. GRI 2(a) states:

Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or failing to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

Similarly, the EN to GRI 2(a) clarifies that unassembled goods are usually so presented “for reasons such as requirements or convenience of packing, handling or transport,” and the EN to Section XVI further explains, in relevant part, that:

For convenience of transport many machines and apparatus are transported in an unassembled state. Although in effect the goods are then a collection of parts, they are classified as being the machine in question and not in any separate heading for parts.

* * * *

Consistent with the explanation provided by the EN to GRI 2(a), the instant merchandise consists of at least two types of articles—mobile phone handsets and batteries—which are presented unassembled at the time of importation and are subject to post-import assembly operations in the United States. There is no evidence to suggest that the STA merchandise is separately packaged and offered for individual sale after importation. Accordingly, if STA’s equal number of mobile phone handsets and batteries are determined to possess the essential character of a complete mobile phone, GRI 2(a) instructs that the mobile phone handsets and batteries shall be classified together as telephone sets of heading 8517, HTSUS. *See* New York Ruling Letter (“NY”) N049055, dated February 4, 2009 (classifying an equal number of separately packaged mobile phone handsets, batteries, battery covers, and chargers as telephone sets of heading 8517, HTSUS, by application of GRI 2(a)).

Nonetheless, CBP is mindful that the presence of additional machinery—namely Bluetooth wireless earphones—in STA’s entries of mobile phones and batteries requires novel analysis and discussion. After importation, STA repackages the mobile phones and wireless earphones for retail sale in consumer packaging that contains one handset, battery, and wireless earphone. In the case of electrical machinery and equipment of Chapter 85, Section XVI, Section Note 4, HTSUS, (“Section Note 4, HTSUS”) requires that:

Where a machine (including a combination of machines) consists of individual components... intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function. Section Note 4, HTSUS.

Consequently, because mobile phones and wireless earphones are both articles of Chapter 85, Section Note 4, HTSUS, requires that they be classified as a whole if they are intended to contribute together to a clearly defined function covered by of the headings in Chapter 84 or 85.”¹

The phrase in Section Note 4, HTSUS, “intended to contribute together to a clearly defined function,” is clarified by EN(VII) to Section Note 4, HTSUS, which states in relevant part:

For the purposes of this Note, the expression “intended to contribute together to a clearly defined function” covers only machines and combinations of machines essential to the performance of the function specific

¹ Mobile phone handsets, batteries, and Bluetooth wireless earphones are each considered a “machine” for tariff purposes. *See* Note 5 to Section XVI, HTSUS.

to the functional unit as a whole, and thus excludes machines or appliances fulfilling auxiliary functions and which do not contribute to the function of the whole.

* * * * *

Similarly, the courts have provided guidance on the application of Section Note 4, HTSUS, and specifically, have commented that under certain circumstances, batteries can be considered essential to the function specific to portable electronic devices. See *Dell Products LP v. United States*, 714 F. Supp. 2d 1252, 1258 (C.I.T. 2010), *aff'd*, 642 F.3d 1055 (Fed. Cir. 2011). In *Dell Products*, the U.S. Court of International Trade (CIT) considered whether secondary batteries, manufactured for use with specific laptop computers, could be classified as “automatic data processing machines” under heading 8471, HTSUS, when they were packaged for importation and sale with laptop computers that already contained a primary battery. The CIT ultimately concluded that the secondary batteries are not “functional units” and are not classifiable under heading 8471, HTSUS, pursuant to GRI and Section Note 4, HTSUS, because they are not essential to the portable computing function of the notebook computer. *Dell Products*, 714 F. Supp. 2d 1252 at 1259. However, in reaching this conclusion, the CIT distinguished the role of primary and secondary batteries when presented for importation with portable electronic devices, and in so doing, highlighted the court’s interpretation of Section Note 4, HTSUS, that certain batteries for portable electronic devices may be classified as a “whole” with the device with which they are imported.

In the case of secondary batteries in *Dell Products* that were packaged with a laptop and primary battery, the CIT wrote that the laptop’s portable computing function was completely served by the combination of the primary battery encased in the computer and the power adapter. *Dell Products*, 714 F. Supp. 2d 1252 at 1258. Moreover, the CIT commented that because the “whole” laptop computers were equipped with primary batteries and were capable of performing the portable computing function without being packaged with an additional battery, the secondary battery was not “essential” to the computer’s portable computing function. *Id.* at 1259 (*citing* Section Note 4, HTSUS; ENs, Section Note 4, HTSUS).²

When the instant mobile phones and wireless earphones are considered in the context of *Dell Products*, CBP finds that the STA mobile phone batteries are akin to the “primary batteries” discussed in *Dell Products*, because the batteries provide the primary power source for the performance of the portable mobile phone handset. Pursuant to Section Note 4, HTSUS, where a machine consists of individual components intended to contribute together to a clearly defined function covered by one of the heading in Chapter 85, then the whole falls to be classified in the heading appropriate to that function. Here, the “clearly defined function” of the mobile phone handset is its portable telephone function. See ENs, Section Note 4, HTSUS. Similar to the primary batteries in *Dell Products* that were deemed essential to the portable computing function of the notebook computer, the STA batteries are likewise

² Specifically, the CIT called attention to two examples of combinations of machines in EN(VII) to Section Note 4, HS—“(9) Welding equipment consisting of the welding head or tongs, **with a transformer, generator or rectifier to supply the current**” and “(11) Radar apparatus **with the associated power packs**, amplifiers, etc.”—in which machines that provide the primary power source to a “functional unit” are classified as “whole” under Section Note 4, HTSUS. (Emphasis added).

essential to the operation of the mobile phone handsets because they provide the primary power source for the performance of the mobile phone handset's portable telephone function. *Dell Products*, 714 F. Supp. 2d 1252 at 1258.

Unlike the STA batteries, however, the Bluetooth wireless earphones do not contribute to the operation of the mobile phone handsets and consequently, do not contribute to the clearly defined function of the handsets and batteries. Specifically, the earphones are not “**essential** to the performance of the function specific to the functional unit as a whole.” EN(VII), Section Note 4, HS (emphasis added). The STA earphones are capable of utilizing a wireless connection with the mobile phone headsets via radio transceivers to transmit voice communications between the two devices. However, because the mobile phone handsets already feature microphones and speakers that enable a user to send and receive voice communications without the use of the separate wireless earphones, it would be inaccurate to conclude that the STA Bluetooth wireless earphones perform an operation or provide a capability that is essential to the handset's portable telephone function. Consequently, the Bluetooth wireless earphones are not described as “functional units” for tariff purposes under the terms of Section Note 4, HTSUS, and must be classified separate, under subheading 8517.62.00, HTSUS, as other machines for the reception, conversion and transmission or regeneration of voice, images or other data, in accordance with GRI 1. *See* Subheading EN 8517.62, HS.

Finally, CBP notes that in their condition as imported, the STA mobile phone handsets, batteries, and wireless earphones are not classifiable as “retail sets,” pursuant to GRI 3(b), because the merchandise is not imported in a condition suitable for sale directly to users without repacking.³ GRI 3(b) provides that when imported merchandise is, *prima facie*, classifiable under two or more headings, “[g]oods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character.” The term “set” as used in GRI 3(b) carries specific meaning and is defined in detail by EN(X) to GRI 3(b), which states:

For the purpose of this Rule, the term ‘goods put up in sets for retail sale’ shall be taken to mean goods which:

- (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings . . . ;
- (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
- (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

* * * * *

³ GRI 3(b) states, in pertinent part, as follows:

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:

...

- (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Here, although the merchandise at issue is, *prima facie*, classifiable under two or more subheadings, in accordance with GRI 3(b),⁴ CBP finds that the STA mobile phone handsets, batteries, and wireless earphones are not “put up in a manner suitable for sale directly to users without repacking” and therefore, cannot be classified as a retail set. EN(X) to GRI 3(b). As discussed *supra*, the STA mobile phone handsets, batteries, and wireless earphones are packed in separate shipping boxes at the time STA enters the merchandise into the United States. CBP is mindful that after importation, STA repackages the mobile phone handsets, batteries, and earphones for retail sale in consumer packaging that contains one handset, battery, and wireless earphone. However, it is well established that merchandise is classified based on its condition as imported. *See United States v. Citroen*, 223 U.S. 407 (1912). Consequently, CBP finds that STA’s mobile phone handsets, batteries, and wireless earphones are not—in their condition as imported—suitable for sale directly to users without repacking, when they are entered in separate shipping boxes in bulk. As such, the merchandise does not fall within the meaning of “set” as contemplated by GRI 3(b) and must instead be classified in accordance with the analysis contained above.

HOLDING:

By application of GRI 1 and GRI 2(a), the mobile phone handsets and batteries are classified in heading 8517, HTSUS. Specifically, the handsets and batteries are classified in subheading 8517.12.00, HTSUS, which provides for “Telephone sets, including telephones for mobile networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof: Telephone sets, including telephones for cellular networks or for other wireless networks: Telephones for cellular networks or for other wireless networks.” The 2015 column one, general rate of duty under subheading 8517.12.00, HTSUS, is free.

By application of GRI 1, the Bluetooth wireless earphones are classified in heading 8517, HTSUS. Specifically, the earphones are classified in subheading 8517.62.00, HTSUS, which provides for “Telephone sets, including telephones for mobile networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof: Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area

⁴ GRI 6 states, in pertinent part, as follows:

For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

The mobile phone handsets and batteries are classifiable under subheading 8517.12.00, HTSUS, pursuant to Section Note 4, HTSUS. The Bluetooth wireless earphones are classifiable under subheading 8517.62.00, HTSUS).

network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus.” The 2014 column one, general rate of duty under subheading 8517.62.00, HTSUS, is free.

Sixty days from the date of this decision, the Office of International Trade, Regulations and Rulings, will make this decision available to CBP personnel, and to the public, on the CBP Home Page at <http://www.cbp.gov>, by means of the Freedom of Information Act, and other methods of publication.

Sincerely,

MYLES B. HARMON,

Director

Commercial and Trade Facilitation Division

ATTACHMENT D

HQ H346387
OT:RR:CTF:EMAIN H346387 DSR
CATEGORY: Classification
TARIFF NO.: 8518.30.20

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RE: Tariff classification of a wireless stereo headset with microphone and a USB dongle transceiver from China; mobile phone handsets, batteries, and wireless earphones imported together; wireless earbuds from China; revocation of HQ H251033 and NY N308565; modification of HQ H245902

DEAR PORT DIRECTORS AND MS. MURRIN,

This letter is in reference to the tariff classification of certain wireless headphones and earphones. U.S. Customs and Border Protection (CBP) has identified three published rulings that need to be reconsidered so that CBP does not have in force rulings that may be inconsistent with CBP's current views.

Each of the rulings classified the relevant merchandise in subheading 8517.62.00, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus." After reviewing the rulings, CBP has determined that the classifications of the subject articles are incorrect, and CBP is therefore revoking them for the reasons set forth herein.

FACTS:

The merchandise considered in Headquarters Ruling Letter (HQ) H251033 (July 31, 2014) is described as follows:

The merchandise at issue is SCEA's Model No. 98085, "Wireless Stereo Headset for Playstation®3," a wireless stereo headset with microphone and a USB dongle transceiver ("the Headset"; picture below at Fig. 1). The Headset consists of a pair of dual (circumaural) full size earphones combined in the same housing with a microphone, a radio transceiver, a

rechargeable lithium polymer battery, a power input, and LED (light emitting diode) indicator, and controls. The Headset has controls for powering the device on and off, adjusting the main volume, balancing audio and voice levels, and displaying battery power. The adjustable microphone attached to the left earphone possesses a multi-color LED indicator light that provides information on the transmission/reception status and state of battery charge. The Headset is presented in a box for retail sale.

When the USB dongle transceiver is connected to a Playstation®3 videogame console or other automatic data processing (ADP) machine, the Headset transceiver utilizes a wireless connection via 2.4GHz radio frequency with the USB transceiver to transmit voice and audio content between the videogame console and the Headset, thereby allowing a user to listen to audio content from the videogame console or ADP machine and communicate with fellow gamers via the Headset's incorporated microphone. Additionally, when connected to a Playstation®3 videogame console, the Headset also transmits battery information and audio settings to the console, which displays the information on-screen.



Fig. 1: SCEA's Model No. 98085, "Wireless Stereo Headset for Playstation®3"

The merchandise considered in HQ H245902 (January 28, 2015) is described as follows:

... shipments of equal numbers of mobile phone handsets, batteries, and Bluetooth wireless earphones that are imported in the same shipping container but segregated in separate shipping boxes by kind. In their condition as imported, the articles are not packaged for retail sale.

The merchandise considered in New York Ruling Letter (NY) N308565 (January 16, 2020) is described as follows:

The items concerned are wireless earbuds referred to as the IFrogz® Airtime Premier, model number IFIETWS43B. The earbuds are imported in retail packaging along with a charging case, and a USB-C charging cable. The earbuds provide the essential character to this set.

The IFrogz® Airtime Premier earbuds use Bluetooth 5.0 to wirelessly connect to an audio source. They feature an integrated microphone on each earbud for hands-free phone calls and execute remote control and

navigation of the source device through tap sequences on both earbuds (i.e. tap right ear bud to decrease volume, or answer phone).

ISSUE:

Whether the merchandise at issue is classified under heading 8517, HTSUS, which provides for, in pertinent part, apparatus for the reception, conversion and transmission or regeneration of voice, images or other data, or under heading 8518, HTSUS, which provides for, in pertinent part, headphones and earphones, whether or not combined with a microphone.

LAW AND ANALYSIS:

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. If the goods cannot be classified solely based on GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The 2025 HTSUS provisions under consideration in this ruling are as follows:

8517 Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof:

* * *

8518 Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers; audio-frequency electric amplifiers; electric sound amplifier sets; parts thereof:

In addition, in interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

With regard to the merchandise of HQ H245902, this ruling only concerns the classification of the wireless headphones – the classifications of the mobile phone handsets and batteries remain unchanged.

With regard to NY N308565, CBP’s position remains unchanged that the earbuds in the set of considered goods provide the essential character to the set. To that end, we now re-examine the classification of the earbuds.

In HQ H251033, CBP determined that the subject headset integrates components that together perform functions in combination with a separate USB transceiver dongle, and applied Note 3 to Section XVI, HTSUS. CBP concluded that the headset is a “composite machine” consisting of earphones that are combined in the same housing with a microphone and a radio transceiver microchip, and that those components perform separate but

complementary functions described in different headings of Section XVI, HTSUS. The issue presently before us is to determine the principal function of the wireless headset in accordance with Note 3 to Section XVI, HTSUS.

The EN to heading 85.17 states, in pertinent part, the following:

This heading covers apparatus for the transmission or reception of speech or other sounds, images or other data between two points by variation of an electric current or optical wave flowing in a wired network or by electromagnetic waves in a wireless network. The signal may be analogue or digital. The networks, which may be interconnected, include telephony, telegraphy, radio-telephony, radio-telegraphy, local and wide area networks.

...

(II) OTHER APPARATUS FOR TRANSMISSION OR RECEPTION OF VOICE, IMAGES OR OTHER DATA, INCLUDING APPARATUS FOR COMMUNICATION IN A WIRED OR WIRELESS NETWORK (SUCH AS A LOCAL OR WIDE AREA NETWORK)

...

(F) Transmitting and receiving apparatus for radio-telephony and radio-telegraphy.

This group includes:

(1) Fixed apparatus for radio-telephony and radio-telegraphy (transmitters, receivers and transmitter-receivers) . . .

The EN to heading 85.18 provides, in pertinent part, the following:

This heading covers microphones, loudspeakers, headphones, earphones and audio-frequency electric amplifiers of all kinds presented separately, regardless of the particular purpose for which such apparatus may be designed (e.g., telephone microphones, headphones and earphones, and radio receiver loudspeakers).

The heading also covers electric sound amplifier sets.

...

(C) HEADPHONES AND EARPHONES, WHETHER OR NOT COMBINED WITH A MICROPHONE, AND SETS CONSISTING OF A MICROPHONE AND ONE OR MORE LOUDSPEAKERS

Headphones and earphones are electroacoustic receivers used to produce low-intensity sound signals. Like loudspeakers, described above, they transform an electrical effect into an acoustic effect; the means used are the same in both cases, the only difference being in the powers involved.

The heading covers headphones and earphones, whether or not combined with a microphone, for telephony or telegraphy; headsets consisting of a special throat microphone and permanently-fixed earphones (used, for example, in aviation); line telephone handsets which are combined microphone/speaker sets for telephony and which are generally used by telephone operators; headphones and earphones for plugging into radio or television receivers, sound reproducing apparatus or automatic data processing machines....

The wireless earphones that are the subject of HQ H251033, HQ H245902 and NY N308565 are composite machines as described in Note 3 to Section XVI, HTSUS, and are therefore classified according to the principal function of the headphones. Specifically, Note 3 states the following:

Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

The subject articles incorporate a transceiver that allows the articles to wirelessly interface with other devices. For example, users can use them to wirelessly receive and control audio from external devices, and also adjust features such as incoming audio volume, audio track control and two-way voice communication.

Applying the legal text of Note 3 to Section XVI, we find that the wireless transmission and reception functions executed by the transceivers in the subject headphones are not indicative of a principal function of “the reception or transmission of voice, images, or other data.” Rather, the wireless connectivity facilitated by the transceivers is directly analogous to the connectivity found in wired headphones. *See* NY N302512, dated February 9, 2019 (where CBP classified wired headphones with similar control functionality under heading 8518, HTSUS). The wireless headphones and earphones each incorporate a primary component (the speaker/microphone assembly) and support components such as the wireless transceiver modules. All components work together to facilitate the principal function of sound reproduction. Notably, there is no exclusionary language in heading 8518, HTSUS, that limits the heading to headphones and earphones of the wired variety. Therefore, we find that the headphones and earphones of HQ H251033, HQ H245902 and NY N308565 are properly classified as headphones of heading 8518, HTSUS.

HOLDING:

By application of GRIs 1 (Note 3 to Section XVI) and 6¹, the subject earphones or earbuds are classified in heading 8518, HTSUS, specifically in subheading 8518.30.20, HTSUS, which provides for “Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers; audio-frequency electric amplifiers; electric sound amplifier sets; parts thereof: Headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers: Other.” The column one, general rate of duty is free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided at <https://hts.usitc.gov/>.

¹ The retail set at issue in NY N308565, the essential character of which is imparted by the wireless earbuds, is classified by application of GRIs 1 (Note 3 to Section XVI), 3(b), and 6.

EFFECT ON OTHER RULINGS:

HQ H251033 and NY N308565 are revoked, and HQ H245902 is modified, in accordance with this decision.

Sincerely,

YULIYA A. GULIS,

Director

Commercial and Trade Facilitation Division

**PROPOSED REVOCATION OF TWO RULING LETTERS
AND PROPOSED REVOCATION OF TREATMENT
RELATING TO THE COUNTRY OF ORIGIN OF A BRAKE
HOSE**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of two ruling letters, and proposed revocation of treatment relating to the country of origin of a brake hose.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke two ruling letters concerning the country of origin of a brake hose. Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before August 2, 2025.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Shannon L. Stillwell, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Arrangements to inspect submitted comments should be made in advance by calling Ms. Shannon L. Stillwell at (202) 325–0739.

FOR FURTHER INFORMATION CONTACT: Reema R. Bogin, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at reema.bogin@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibil-

ity in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke two ruling letters pertaining to the country of origin of a brake hose. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) N302378, dated February 15, 2019 (Attachment A) and NY N331974, dated May 3, 2023 (Attachment B), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the two identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An importer’s failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N302378, CBP found that the merchandise was substantially transformed in China such that the country of origin for marking purposes was China. In NY N331974, CBP found that the merchandise was substantially transformed in Thailand such that the country of origin for duty purposes was Thailand. CBP has reviewed NY N302378 and NY N331974 and has determined the ruling letters to be in error. It is now CBP’s position that cutting the brake hoses to length and attaching fittings to the brake hoses in China in NY N302378, and in Thailand in NY N331974, did not substantially transform the merchandise.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N302378 and NY N331974 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H325607, set forth as

Attachment C to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

N302378

February 15, 2019

MAR-2:OT:RR:NC:N2:206

CATEGORY: Marking; Country of Origin

STEPHEN MICHAEL RIDOLPHI
J JUAN BRAKE SYSTEMS
C/ MIGUEL SERVET, 21-23
GAVA-BARCELONA, 08850
SPAIN

RE: The country of origin marking of brake hoses.

DEAR MR. RIDOLPHI:

This is in response to your letter dated December 18, 2018, requesting a ruling on the country of origin marking for Teflon and Nylon steel-braided hoses. Descriptive literature and pictures were provided with your request.

The two items under consideration have been identified as Teflon Steel-Braided Hoses and Nylon Steel-Braided Hoses.

You state in your request that the Teflon and Nylon hoses with steel wire braided around are produced in Spain. The raw materials, such as Teflon, Nylon, and steel wire are supplied by European companies. After the hoses are unpacked, they are put through machines, where the steel wire is braided around it. Finally, the outer nylon cover is extruded on top at the Spanish supplier. Once the outer sheath is extruded on the tubes, it is then repackaged for shipment to your facility in China.

In China, the brake hoses are assembled with steel fittings and/or ZAMAK clamps, the latter of which are supplied by European companies. Once this simple assembly is complete the braided brake hoses are packaged for shipment to the United States.

The marking statute, section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article.

The "country of origin" is defined in 19 CFR 134.1(b) as "the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the 'country of origin' within the meaning of this part.

For tariff purposes, the courts have held that a substantial transformation occurs when an article emerges from a process with a new name, character or use different from that possessed by the article prior to processing. *United States v. Gibson-Thomsen Co., Inc.*, 27 CCPA 267, C.A.D. 98 (1940); *National Hand Tool Corp. v. United States*, 16 CIT 308 (1992), *aff'd*, 989 F. 2d 1201 (Fed. Cir. 1993); *Anheuser Busch Brewing Association v. The United States*, 207 U.S. 556 (1908) and *Uniroyal Inc. v. United States*, 542 F. Supp. 1026 (1982).

However, if the manufacturing or combining process is merely a minor one that leaves the identity of the article intact, a substantial transformation has not occurred. *Uniroyal, Inc. v. United States*, 3 CIT 220, 542 F. Supp. 1026,

1029 (1982), *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983). Substantial transformation determinations are based on the totality of the evidence. See Headquarters Ruling (HQ) W968434, date January 17, 2007, citing *Ferrostaal Metals Corp. v. United States*, 11 CIT 470, 478, 664 F. Supp. 535, 541 (1987).

In our further communication, you stated that the Teflon and Nylon steel hose is shipped from Spain to China in spools, where it is cut to a specific brake hose length. You also supplied pictures of the hose in its imported condition to China. This office has determined that in the condition the hose is imported into China, it is a simple tubing of base metal of heading 8307, Harmonized Tariff Schedule of the United States (HTSUS). It is not identifiable as a brake hose, and is not classifiable as such in the tariff. Once further processed in China, the hose becomes identifiable as a brake hose, which is classified in subheadings 8708.99.81, HTSUS, if used for vehicles, or 8714.10.00, HTSUS, if used for motorcycles.

As a result, it is the opinion of this office that a substantial transformation occurs in China; thus, the country of origin of the Teflon and Nylon Steel-Braided Hoses will be China. Therefore, the Teflon and Nylon Steel-Braided Brake Hoses are considered a product of China for marking purposes at the time of importation into the United States.

Effective July 6, 2018, the Office of the United States Trade Representative (USTR) imposed an additional tariff on certain products of China classified in the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(b), HTSUS. The USTR imposed additional tariffs, effective August 23, 2018, on products classified under the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(d), HTSUS. Subsequently, the USTR imposed further tariffs, effective September 24, 2018, on products classified under the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(f) and U.S. Note 20(g), HTSUS. For additional information, please see the relevant Federal Register notices dated June 20, 2018 (83 F.R. 28710), August 16, 2018 (83 F.R. 40823), and September 21, 2018 (83 F.R. 47974). Products of China that are provided for in subheading 9903.88.01, 9903.88.02, 9903.88.03, or 9903.88.04 and classified in one of the subheadings enumerated in U.S. Note 20(b), U.S. Note 20(d), U.S. Note 20(f) or U.S. Note 20(g) to subchapter III shall continue to be subject to antidumping, countervailing, or other duties, fees and charges that apply to such products, as well as to those imposed by the aforementioned Chapter 99 subheadings.

Products of China classified under subheadings 8708.99.81, HTSUS, unless specifically excluded, are subject to the additional 10 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.03, in addition to subheading 8708.99.81, HTSUS, listed above.

The tariff is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Notice cited above and the applicable Chapter 99 subheading.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, please contact National Import Specialist Liana Alvarez at liana.alvarez@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

N331974

May 3, 2023

OT:RR:NC:N2:201

CATEGORY: Country of Origin

QINGQING ZHUGE
KINTETSU WORLD EXPRESS
145-68 228TH STREET, UNIT 1
SPRINGFIELD GARDENS, QUEENS, NY 11413

RE: The country of origin of a brake hose

DEAR MR. ZHUGE:

In your letter dated April 3, 2023, you requested a country of origin ruling determination on a motorcycle brake line assembly (Front Brake Hose) on behalf of your client, Nichirin TN Inc., located in Lewisburg, Tennessee.

In your request, you state that this Front Brake Hose is used on Harley Davidson motorcycles. It is assembled in Thailand from materials/components from Thailand, Japan, China, Germany, United States and Poland. Descriptive literature and pictures were provided with your request.

The item under consideration has been identified as Part# 000-S22-1H3 (Motorcycle Front Brake Hose). The Front Brake Hose has an inner tube made of fluorine resin, SUS wire braiding and thermoplastic urethane outer cover. The brake hose assembly is comprised of subassemblies L2ASSY and L1ASSY. These assemblies are comprised of:

- 1) Hoses
- 2) Pipe Fittings
- 3) Banjo Fittings
- 4) Flange Bearings
- 5) Shrink Tube
- 6) Grommets
- 7) Bolts
- 8) Washers
- 9) Brackets
- 10) 3M Tape

The finished Front Brake Hose assembly is used to deliver braking force to the brake pads via hydraulic pressure and brake fluid.

You state that the Front Brake Hose assembly is composed primarily of bulk roll Japanese origin hose (fluorine resin, SUS wire braiding and thermoplastic urethane outer cover), which is imported into Thailand where it is cut to specific length and then crimped. Additionally, you state that the fittings used are imported into Thailand from China, Germany, United States and Thailand. The finished brake hoses are then packaged for export to the United States.

Section 134.1(b), Customs Regulations (19 C.F.R. § 134.1(b)), defines “country of origin” as the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation to render such other country the “country of origin”.

To determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item’s components, extent of the processing that occurs within a country, and whether such processing

renders a product with a new name, character, and use are primary considerations in such cases. Additionally, factors such as the resources expended on product design and development, the extent and nature of post-assembly inspection and testing procedures, and worker skill required during the actual manufacturing process will be considered when determining whether a substantial transformation has occurred. No one factor is determinative.

19 C.F.R. § 134.1(b) provides in pertinent part as follows: Country of origin means the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation to render such other country the 'country of origin' with origin in the meaning of this part. For tariff purposes, the courts have held that a substantial transformation occurs when an article emerges from a process with a new name, character or use different from that possessed by the article prior to processing. *United States v. Gibson-Thomsen Co., Inc.*, 27 CCPA 267, C.A.D. 98 (1940); *National Hand Tool Corp. v. United States*, 16 CIT 308 (1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993); *Anheuser Busch Brewing Association v. The United States*, 207 U.S. 556 (1908) and *Uniroyal Inc. v. United States*, 542 F. Supp. 1026 (1982).

Regarding the country of origin of the subject Front Brake Hose, the components/materials and the assembly operations performed in Thailand, which consists of the adding of fittings, bolts, grommets, shrink tape, etc. to the Japanese bulk hose transforms the bulk hose into a new commercial article. The cutting and addition of these fittings substantially changes the bulk hose's identity. Therefore, based upon the facts presented, it is the opinion of this office that the assembly process performed in Thailand is complex and meaningful and results in a substantial transformation of the non-Thai origin parts of the brake hose assembly. Therefore the country of origin of the brake line sub assembly (Front Brake Hose) is Thailand.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 CFR Part 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Matthew Sullivan at matthew.sullivan@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

HQ H325607
OT:RR:CTF:VSP H325607 RRB
CATEGORY: Origin

STEPHEN MICHAEL RIDOLPHI
J JUAN BRAKE SYSTEMS
C/ MIGUEL SERVET, 21-23
GAVA-BARCELONA, 08850
SPAIN

RE: Revocation of NY N302378 and NY N331974; Country of origin of a brake hose

DEAR MR. RIDOLPHI:

This is to inform you that U.S. Customs and Border Protection (“CBP”) has reconsidered New York Ruling Letter (“NY”) N302378, dated February 15, 2019, concerning the country of origin marking of Teflon and Nylon steel-braided brake hoses. We have also reconsidered NY N331974, dated May 3, 2023, which addresses the country of origin for duty purposes of substantially similar merchandise. For the reasons set forth below, we hereby revoke NY N302378 and NY N331974 with respect to the country of origin marking and country of origin for duty purposes, respectively, of the subject brake hoses.

FACTS:

In NY N302378, the brake hoses at issue were described as follows:

The two items under consideration have been identified as Teflon Steel-Braided Hoses and Nylon Steel-Braided Hoses.

You state in your request that the Teflon and Nylon hoses with steel wire braided around are produced in Spain. The raw materials, such as Teflon, Nylon, and steel wire are supplied by European companies. After the hoses are unpacked, they are put through machines, where the steel wire is braided around it. Finally, the outer nylon cover is extruded on top at the Spanish supplier. Once the outer sheath is extruded on the tubes, it is then repackaged for shipment to your facility in China.

In China, the brake hoses are assembled with steel fittings and/or ZAMAK clamps, the latter of which are supplied by European companies. Once this simple assembly is complete the braided brake hoses are packaged for shipment to the United States.

In NY N302378, CBP found that the merchandise was substantially transformed in China such that the country of origin for marking purposes was China.

In NY N331974, the brake hoses at issue were described as follows:

In your request, you state that this Front Brake Hose is used on Harley Davidson motorcycles. It is assembled in Thailand from materials/components from Thailand, Japan, China, Germany, United States and Poland. Descriptive literature and pictures were provided with your request.

The item under consideration has been identified as Part# 000-S22-1H3 (Motorcycle Front Brake Hose). The Front Brake Hose has an inner tube made of fluorine resin, SUS wire braiding and thermoplastic urethane outer cover. The brake hose assembly is comprised of subassemblies L2ASSY and L1ASSY. These assemblies are comprised of:

- 1) Hoses
- 2) Pipe Fittings
- 3) Banjo Fittings
- 4) Flange Bearings
- 5) Shrink Tube
- 6) Grommets
- 7) Bolts
- 8) Washers
- 9) Brackets
- 10) 3M Tape

The finished Front Brake Hose assembly is used to deliver braking force to the brake pads via hydraulic pressure and brake fluid.

You state that the Front Brake Hose assembly is composed primarily of bulk roll Japanese origin hose (fluorine resin, SUS wire braiding and thermoplastic urethane outer cover), which is imported into Thailand where it is cut to specific length and then crimped. Additionally, you state that the fittings used are imported into Thailand from China, Germany, United States and Thailand. The finished brake hoses are then packaged for export to the United States.

In NY N331974, CBP found that the merchandise was substantially transformed in Thailand such that the country of origin for duty purposes was Thailand.

ISSUE:

What is the country of origin of the subject brake hoses for marking and duty purposes?

LAW AND ANALYSIS:

Section 304 of the Tariff Act of 1930, as amended (19U.S.C. § 1304), provides that, unless excepted, every article of foreign origin imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such a manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. § 1304 was that the ultimate purchaser should be able to know by an inspection of the markings on the imported goods the country of which the good is the product. "The evident purpose is to mark the goods so at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." *United States v. Friedlaender & Co.*, 27 C.C.P.A. 297 at 302 (1940).

The regulations implementing the requirements and exceptions to 19 U.S.C. § 1304 are set forth in Part 134, Customs and Border Protection Regulations (19 C.F.R. Part 134).

19 C.F.R. § 134.1(b) provides as follows:

"Country of origin" means the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a

substantial transformation in order to render such other country the “country of origin” within the meaning of this part;

When determining the country of origin for purposes of applying current trade remedies under Section 301, the substantial transformation analysis is applicable. *See, e.g.*, Headquarters Ruling (“HQ”) H301619, dated November 6, 2018. The test for determining whether a substantial transformation will occur is whether an article emerges from a process with a new name, character, or use different from that possessed by the article prior to processing. *See Texas Instruments, Inc. v. United States*, 681 F.2d 778 (C.C.P.A. 1982). This determination is based on the totality of the evidence. *See Nat’l Hand Tool Corp. v. United States*, 16 CIT 308 (1992), *aff’d*, 989 F.2d 1201 (Fed. Cir. 1993).

To determine whether a substantial transformation occurs, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item’s components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, factors such as the resources expended on product design and development, the extent and nature of post-assembly inspection and testing procedures, and worker skill required during the actual manufacturing process will be considered when determining whether a substantial transformation has occurred. No one factor is determinative.

The Court of International Trade more recently interpreted the meaning of “substantial transformation” in *Energizer Battery, Inc. v. United States*, 190 F. Supp. 3d 1308 (2016). *Energizer* involved the determination of the country of origin of a flashlight, referred to as the Generation II flashlight. All of the components of the flashlight were of Chinese origin, except for a white LED and a hydrogen getter. The components were imported into the United States and assembled into the finished Generation II flashlight. The *Energizer* court reviewed the “name, character and use” test utilized in determining whether a substantial transformation had occurred and noted, citing *Uniroyal, Inc. v. United States*, 3 C.I.T.220, 226 (1982), *aff’d*, 702 F.2d 1022 (Fed. Cir. 1983), that when “the post-importation processing consists of assembly, courts have been reluctant to find a change in character, particularly when the imported articles do not undergo a physical change.” *Energizer* at 1318. In addition, the court noted that “when the end-use was pre-determined at the time of importation, courts have generally not found a change in use.” *Energizer* at 1319, citing as an example, *National Hand Tool Corp. v. United States*, 16 C.I.T. 308, 312 (1992), *aff’d*, 989 F.2d 1201 (Fed. Cir. 1993).

In HQ 561392, dated June 21, 1999, CBP considered the country of origin marking requirements of an insulated electric conductor which involved an electrical cable with pin connectors at each end used to connect computers to printers and other peripheral devices. The cable and connectors were made in Taiwan. In China, the cable was cut to length and connectors were attached to the cable. CBP held that cutting the cable to length and assembling the cable to the connectors in China did not result in a substantial transformation.

In NY N336508, dated December 5, 2023, CBP addressed the country of origin of two types of hoses used to connect a variety of appliances (e.g., washing machines, dishwashers, and ice makers) to water sources. The first item consisted of a polyvinyl chloride (“PVC”) hose reinforced with braided stainless steel, with fittings, while the second item consisted of a PVC hose

reinforced with polymer, with fittings. The first manufacturing phase for these hoses took place in either Taiwan or Thailand, where the hoses were extruded from white PVC, braided with polyester reinforcement, and coated with clear PVC resin. The hoses were then spooled onto rolls for shipment to China for further processing. In China, the hoses underwent a second manufacturing phase, during which the hoses were reinforced by braiding with either AISI 304 stainless steel or a polymer material in lieu of stainless steel around the hoses. The hoses were also cut to length, fittings were attached, and they were packed for shipment. CBP held that the reinforcement with braided materials, cutting to length, and the addition of Chinese fittings in China did not substantially transform the hose. Accordingly, CBP held that the country of origin of the finished hose with fittings was either Taiwan or Thailand. In holding as such, CBP cited to NY N211518, dated April 25, 2012. There, CBP noted that in determining the country of origin marking requirements for rubber and plastic hoses, the imported hose is not substantially transformed as a result of cutting to length and attaching fittings.

In NY N335595, dated October 4, 2023, CBP also addressed the country of origin of hoses from Thailand that were used to connect a washing machine to a water source in the home. The hoses at issue in NY N335595 were composed of extruded PVC, reinforced with a braided stainless-steel sleeve and fitted on both ends with brass fittings. During the first manufacturing phase in Thailand, PVC resin was extruded to form a PVC hose, which was then spooled onto rolls for shipment and further processing. During the second manufacturing phases, the rolls of hose were shipped to China, where they were reinforced by braiding stainless steel around the hoses. The hoses were then cut to length, and brass fittings were attached. Finally, the finished hoses were packed for shipment. As in NY N336508, CBP held that the reinforcement with braided materials, cutting to length, and the addition of Chinese fittings in China did not substantially transform the hose, again citing to NY N211518 in support of its determination.

While HQ 561392 concerned the country of origin of an electrical conductor cable rather than hoses, we believe that the substantial transformation analysis for both commodities is analogous. Like the subject brake hoses, manufacture of electrical conductor cables involve cable that is produced in one country but cut to length with connectors attached in a second country. And with both electrical cable conductors and hoses, cutting the cable or hose to length and attaching fittings or connectors does not change the fundamental character of the final merchandise under the name, character and use test. Accordingly, CBP correctly applied the analysis in HQ 561392 and NY N211518—that cutting the cable or hose to length and attaching connectors or fittings to the cable or hose did not result in a substantial transformation—to the hoses in NY N336508 and NY N335595. Therefore, it is unclear why CBP departed from that analysis in NY N302378 and NY N331974, which involved hoses manufactured in a substantially similar manner as the hoses in NY N336508 and NY N335595, albeit with different commercial applications.

In NY N331974, bulk roll Japanese-origin hose, comprised of fluorine resin, SUS wire braiding, and a thermoplastic urethane outer cover, was imported into Thailand where it was cut to specific length, and fittings, bolts, and grommets were attached to the hose before it was packaged and shipped to the United States, where they will be used as brake hoses on Harley Davidson motorcycles. In NY N302378, the bulk rolls were first manufactured in

Spain by braiding steel wire around Teflon and Nylon hoses, followed by extrusion of the outer nylon cover on top of the hose, before it was repackaged in spools for shipment to China, where the hoses were cut to specific length and assembled with steel fittings or clamps for use as brake hoses. Unlike in NY N336508 and NY N335595, where steel wire was braided onto the hoses in the same country as where the hose was cut to length and fittings were attached, even more of the manufacturing of the subject brake hoses at issue happened during the first manufacturing phase before the hose was cut to length and fittings were attached in the final manufacturing phase. In particular, the brake hoses at issue underwent more extensive manufacturing during the first phase when steel wire was braided onto the hoses and the outer nylon cover was extruded on top of the hoses before they were shipped to China in NY N302378 and to Thailand in NY N331974, where they were cut to length and fittings were attached. By the time the brake hoses were shipped to China or Thailand for additional processing, they were no longer simply bulk spools of hose. The steel wire braided reinforcement and extruded plastic cover established the fundamental character of the merchandise as brake hoses. Moreover, based on CBP practice, cutting the brake hose to length and attaching fittings to the brake hose does not substantially transform the brake hoses. Accordingly, CBP should have continued to apply its long-standing position regarding the types of manufacturing operations that will substantially transform hoses and similar merchandise (e.g., the electrical cable in HQ 561392) for purposes of country of origin. Therefore, like the electrical cable in HQ 561392 and the hoses in NY N211518, NY N336508 and NY N335595, we find that cutting the brake hoses to length and attaching fittings to the brake hoses in China in NY N302378, and in Thailand in NY N331974, did not substantially transform the merchandise.

HOLDING:

Based on the facts provided, the brake hoses in NY N303378, consisting of Teflon and Nylon hoses with steel wire braided around it, followed by extrusion of the outer nylon cover on top of the hose in Spain, are not substantially transformed when they are cut to specific length and fittings are attached in China.

Based on the facts provided, the Japanese-origin brake hoses in NY N331974, consisting of fluorine resin, SUS wire braiding and a thermoplastic urethane outer cover, are not substantially transformed when they are cut to specific length and fittings are attached in Thailand.

EFFECT ON OTHER RULINGS:

NY N302378, dated February 15, 2019, and NY N331974, dated May 3, 2023, are hereby REVOKED.

This ruling will become effective 60 days from the date of publication in the Customs Bulletin.

Sincerely,

YULIYA A. GULIS,

Director

Commercial and Trade Facilitation Division

Cc: QingQing Zhuge
Kintetsu World Express
145-68 228th Street, Unit 1
Springfield Gardens, Queens, NY 11413

AGENCY INFORMATION COLLECTION ACTIVITIES:

Extension; Drawback Process Regulations (Form 7553)

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than August 12, 2025) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0075 in the subject line and the agency name. Please submit written comments and/or suggestions in English. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Drawback Process Regulations.

OMB Number: 1651-0075.

Form Number: 7553.

Current Actions: Extension without change to information collection.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: The collections of information related to the drawback process are required as per 19 CFR part 190 (Modernized Drawback), which provides for refunds of duties, taxes, and fees for certain merchandise that is imported into the United States where there is a subsequent related exportation or destruction. All claims for drawback, sometimes referred to as TFTEA-Drawback, must be filed electronically in the Automated Commercial Environment (ACE), in accordance with the Trade Facilitation Trade Enforcement Act of 2015 (TFTEA) (Pub. L. 114-125, 130 Stat. 122), and in compliance with the regulations in part 190, 181 (NAFTA Drawback) and 182 (USMCA Drawback). Specific information on completing a claim is available in the drawback CBP and Trade Automated Interface Requirement (CATAIR) document at: <https://www.cbp.gov/document/guidance/ace-drawback-catair-guidelines>.

CBP Form 7553, Notice of Intent to Export, Destroy or Return Merchandise for Purposes of Drawback (NOI), documents both the exportation and destruction of merchandise eligible for drawback. The NOI is the official notification to CBP that an exportation or destruction will occur for drawback eligible merchandise. The CBP Form 7553 has been updated to comply with TFTEA-Drawback requirements and is accessible at: <https://www.cbp.gov/newsroom/publications/forms>.

Relevant Regulations and Statutes:

Title 19, part 190—<https://ecfr.io/Title-19/Part-190>

19 U.S.C. 1313

<https://www.govinfo.gov/content/pkg/USCODE-2011-title19/pdf/USCODE-2011-title19-chap4-subtitleII-partI-sec1313.pdf>

19 U.S.C. 1313 authorizes the information collected on the CBP form 7553 as well as in the ACE system for the electronic drawback claim.

This collection of information applies to the individuals and companies in the trade community who are and are not familiar with drawback, importing and exporting procedures, and with the CBP regulations.

Please note that CBP Forms 7551 and 7552 are both abolished. From February 24, 2019, onward, TFTEA-Drawback, as provided for in part 190, is the only legal framework for filing drawback claims. No new drawback claims may be filed under the paper-based processes previously provided for in part 191 (Drawback). Sections 190.51, 190.52, and 190.53 provide the requirements to submit a drawback claim electronically. The provisions of part 190 are similar to the provisions in part 191, except where necessary to outline all the data elements for a complete claim (previously contained in CBP form 7551) and modify those requirements to comply with TFTEA-Drawback. CBP form 7552, Certificates of Delivery and Certificates of Manufacturing & Delivery will no longer be requested or accepted to demonstrate the transfer of merchandise. Sections 190.10 and 190.24 require that any transfers of merchandise must be evidenced by business records, as defined in § 190.2.

Type of Information Collection: Form 7553.

Estimated Number of Respondents: 150.

Estimated Number of Annual Responses per Respondent: 20.

Estimated Number of Total Annual Responses: 3,000.

Estimated Time per Response: 33 minutes.

Estimated Total Annual Burden Hours: 1,650.

Dated: June 10, 2025.

SETH D RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

AGENCY INFORMATION COLLECTION ACTIVITIES:**Reinstatement; Application for Allowance in Duties
(Form 4315)**

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than August 12, 2025) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0007 in the subject line and the agency name. Please submit written comments and/or suggestions in English. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at <https://www.cbp.gov/>.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the

agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Application for Allowance in Duties.

OMB Number: 1651-0007.

Form Number: 4315.

Current Actions: Reinstatement without a change in burden hours, information collected or method of collection.

Type of Review: Reinstatement (without change).

Affected Public: Businesses.

Abstract: CBP Form 4315, "*Application for Allowance in Duties*," is submitted to CBP in instances of claims of damaged or defective imported merchandise on which an allowance in duty is made in the liquidation of the entry. The information on this form is used to substantiate an importer's claim for such duty allowances. CBP Form 4315 is authorized by 19 U.S.C. 1506 and provided for by 19 CFR 158.11, 158.13, and 158.23. This form is accessible at: http://www.cbp.gov/sites/default/files/documents/CBP%20Form%204315_0.pdf

This collection of information applies to the importing and trade community who are familiar with import procedures and with the CBP regulations.

19 CFR 158.11—Merchandise completely worthless at time of importation. The allowance in duties may be made to nonperishable merchandise if found without commercial value at the time the importation by reason of damage or deterioration and complete worthless at the time of importation. For perishable merchandise an allowance in duties may be made if application filed within 96 hours after the unloading of the merchandise and before any of the shipment involved has been removed from the pier, merchandise involved shall thereafter be released upon presentation of an appropriate permit, and allowance in duty shall be made in the liquidation of the entry on

such of the merchandise covered by the application as is found to be entirely without commercial value by reason of damage or deterioration.

19 CFR 158.13—Allowance for moisture and impurities.

An application for allowance in duties under is made by the importer on Customs Form 4315, or its electronic equivalent for all detectable moisture and impurities present in or upon imported petroleum or petroleum products. For other products other than petroleum or petroleum products for excessive moisture or other impurities, an application for an allowance in duties shall be made by the importer on Customs Form 4315, or its electronic equivalent. If the port director is satisfied after any necessary investigation that the merchandise contains moisture or impurities, the Center director will make allowance for the amount thereof in the liquidation of the entry.

19 CFR 158.23—Filing of application and evidence by importer. Within 30 days from the date of his discovery of loss, theft, injury, or destruction, the importer shall file an application on Customs Form 4315, or its electronic equivalent and within 90 days from the date of discovery shall file any evidence required by § 158.26 or § 158.27.

Type of Information Collection: Form 4315.

Estimated Number of Respondents: 12,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 12,000.

Estimated Time per Response: 8 minutes.

Estimated Total Annual Burden Hours: 1,600.

Dated: June 10, 2025.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

AGENCY INFORMATION COLLECTION ACTIVITIES:

Extension; United States-Caribbean Basin Trade Partnership Act (CBTPA)

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than August 12, 2025) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0083 in the subject line and the agency name. Please submit written comments and/or suggestions in English. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the

agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: United States-Caribbean Basin Trade Partnership Act (CBTPA).

OMB Number: 1651-0083.

Form Number: 450.

Current Actions: Extension without change.

Type of Review: Extension (without change).

Affected Public: businesses.

Abstract: The provisions of the United States-Caribbean Basin Trade Partnership Act (CBTPA) were adopted by the U.S. with the enactment of the Trade and Development Act of 2000 (Pub. L. 106-200). The objective of CBTPA is to expand trade benefits to countries in the Caribbean Basin. For preferential duty treatment under CBTPA, importers are required to have a CBTPA Certificate of Origin (CBP Form 450) in their possession at the time of the preference claim, and to provide it to CBP upon request. CBP Form 450 collects data such as contact information for the exporter, importer, and producer, as well as information about the goods being claimed and provides instructions for its completion.

This collection of information is provided by 19 CFR 10.234, 10.236, part 134, 10.195, and 102.21. CBP Form 450 is accessible at: https://www.cbp.gov/newsroom/publications/forms?title_1=450.

This collection of information applies to the import and trade community, who are familiar with import procedures and with CBP regulations.

Type of Information Collection: CBTPA Certificate of Origin (Form 450).

Estimated Number of Respondents: 15.

Estimated Number of Annual Responses per Respondent:
286.

Estimated Number of Total Annual Responses: 4,290.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 8,580.

Dated: June 10, 2025.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

AGENCY INFORMATION COLLECTION ACTIVITIES:**Extension; Lien Notice (Form 3485)**

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than August 12, 2025) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0012 in the subject line and the agency name. Please submit written comments and/or suggestions in English. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Lien Notice.

OMB Number: 1651-0012.

Form Number: 3485.

Current Actions: Extension without change to the information collection.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: Section 564, Tariff Act of 19, as amended (19 U.S.C. 1564) provides that the claimant of a lien for freight can notify Customs and Border Protection (CBP) in writing of the existence of a lien, and CBP shall not permit delivery of the merchandise from a public store or a bonded warehouse until the lien is satisfied or discharged. The claimant shall file the notification of a lien on CBP Form 3485, *Lien Notice*. This form is usually prepared and submitted to CBP by carriers, cartmen and similar persons or firms. The data collected on this form is used by CBP to ensure that liens have been satisfied or discharged before delivery of the freight from public stores or bonded warehouses, and to ensure that proceeds from public auction sales are duly distributed to the lienholder. CBP Form 3485 is provided for by 19 CFR 141.112, and is accessible at: <https://www.cbp.gov/newsroom/publications/forms?title=3485&=Apply>.

Type of Information Collection: Lien Notice.

Estimated Number of Respondents: 112,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 112,000.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 28,000.

Dated: June 10, 2025.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U. S. Customs and Border Protection.

AGENCY INFORMATION COLLECTION ACTIVITIES:**Extension; NAFTA Regulations and Certificate of Origin**

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than August 12, 2025) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0098 in the subject line and the agency name. Please submit written comments and/or suggestions in English. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at <https://www.cbp.gov/>.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection.

Title: NAFTA Regulations and Certificate of Origin.

OMB Number: 1651-0098.

Form Number: 434, 446, 447.

Current Actions: Extension without change to the information collection.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: On December 17, 1992, the U.S., Mexico and Canada entered into an agreement, "The North American Free Trade Agreement" (NAFTA). The provisions of NAFTA were adopted by the U.S. with the enactment of the North American Free Trade Agreement Implementation Act of 1993 (Pub. L. 103-182).

CBP Form 434, *North American Free Trade Certificate of Origin*, is used to certify that a good being exported either from the United States into Canada or Mexico or from Canada or Mexico into the United States qualifies as an originating good for purposes of preferential tariff treatment under the NAFTA. This form is completed by exporters and/or producers and furnished to CBP upon request. CBP Form 434 is provided for by 19 CFR 181.11, 181.22, and is accessible at: <https://www.cbp.gov/newsroom/publications/forms>.

CBP Form 446, *NAFTA Verification of Origin Questionnaire*, is used by CBP personnel to gather sufficient information from exporters and/or producers to determine whether goods imported into the United States qualify as originating goods for the purposes of preferential tariff treatment under NAFTA. CBP Form 446 is provided for by 19 CFR 181.72 and is accessible at: <https://www.cbp.gov/newsroom/publications/forms>.

CBP Form 447, *North American Free Trade Agreement Motor Vehicle Averaging Election*, is used to gather information required by 19 CFR 181 Appendix, Section 11, (2) "Information Required When Pro-

ducer Chooses to Average for Motor Vehicles”. This form is provided to CBP when a manufacturer chooses to average motor vehicles for the purpose of obtaining NAFTA preference. CBP Form 447 is accessible at: <https://www.cbp.gov/newsroom/publications/forms>.

The NAFTA treaty terminated on June 30, 2020. However, CBP processing of post summary corrections and other processing of entries filed on or before June 30, 2020, is expected to continue through June 30, 2021. After that, CBP will discontinue this information collection.

This information is collected from members of the trade community who are familiar with the CBP regulations.

Type of Information Collection: Form 434.

Estimated Number of Respondents: 13,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 13,000.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 2,000.

Type of Information Collection: Form 446.

Estimated Number of Respondents: 400.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 400.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 800.

Type of Information Collection: Form 447.

Estimated Number of Respondents: 11.

Estimated Number of Annual Responses per Respondent: 11.

Estimated Number of Total Annual Responses: 1.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 11.

Dated: June 10, 2025.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

AGENCY INFORMATION COLLECTION ACTIVITIES:**Extension; Commercial Invoice**

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than August 12, 2025) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0090 in the subject line and the agency name. Please submit written comments and/or suggestions in English. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Commercial Invoice.

OMB Number: 1651-0090.

Form Number: N/A.

Current Actions: Extension with a change in burden hours, but no change to the information collected or method of collection.

Type of Review: Extension (with change).

Affected Public: Businesses.

Abstract: The collection of the commercial invoice is necessary for conducting adequate examination of merchandise and determination of the duties due on imported merchandise as required by 19 CFR 141.81, 141.82, 141.83, 141.84, 141.85, 141.86, 141.87, 141.88, 141.89 and 141.90 by 19 U.S.C. 1481 and 1484. The commercial invoice is provided to CBP by the importer. CBP Form 7501 (covered under OMB control number 1651-0022) is submitted as a supporting document for this collection. To facilitate trade, CBP did not develop a specific form for this information collection. Importers are allowed to use their existing invoices to comply with these regulations.

Type of Information Collection: Commercial Invoice.

Estimated Number of Respondents: 38,500.

Estimated Number of Annual Responses per Respondent: 1,208.

Estimated Number of Total Annual Responses: 46,508,000.

Estimated Time per Response: 4 minutes.

Estimated Total Annual Burden Hours: 3,100,533.

Dated: June 10, 2025.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

AGENCY INFORMATION COLLECTION ACTIVITIES:

Extension; Application To use Automated Commercial Environment (ACE)

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than August 12, 2025) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0105 in the subject line and the agency name. Please submit written comments and/or suggestions in English. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the

agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Application to use Automated Commercial Environment (ACE).

OMB Number: 1651-0105.

Form Number: N/A.

Current Actions: Extension with change.

Type of Review: Extension (with change).

Affected Public: Businesses.

Abstract: The Automated Commercial Environment (ACE) is a trade data processing system that replaced the Automated Commercial System (ACS), as the import system for U.S. Customs and Border Protection (CBP) operations. ACE is authorized by Executive Order 13659 which mandates implementation of a Single Window through which businesses will transmit data required by participating agencies for the importation or exportation of cargo. *See* 79 FR 10655 (February 25, 2014). ACE supports government agencies and the trade community with border-related missions with respect to moving goods across the border efficiently and securely. Once ACE is fully implemented, all related CBP trade functions and the trade community will be supported from a single common user interface.

To establish an ACE Portal account, participants submit information such as their name, their employer identification number (EIN) or social security number (SSN), and if applicable, a statement certifying their capability to connect to the internet. This information is submitted through the ACE Secure Data Portal which is accessible at: <http://www.cbp.gov/trade/automated>.

Please Note: A CBP-assigned number may be provided in lieu of your SSN. If you have an EIN, that number will automatically be used and no CBP number will be assigned. A CBP-assigned number is for CBP use only.

There is a standalone capability for electronically filing protests in ACE. This capability is available for participants who have not established ACE Portal Accounts for other trade activities, but desire to file protests electronically. A protest is a procedure whereby a private party may administratively challenge a CBP decision regarding imported merchandise and certain other CBP decisions. Trade members can establish a protest filer account in ACE through a separate application and the submission of specific data elements. *See* 81 FR 57928 (August 24, 2016).

The previously approved changes for this collection added a new ACE account type for Import Trade Carriers. This enabled users to file vessel entrance, clearance, and related data to CBP electronically through the new Vessel Entrance and Clearance System (VECS). The account application was changed to collect identifying information such as name, employer identification number (EIN), company address, and phone numbers, to be used to set up the Vessel Agency accounts. Users who create a Vessel Agency Account are automatically enrolled into the VECS public pilot. Additionally, unrelated to the Vessel Agency account type creation, CBP removed account types “Cartman” and “Lighterman” from the ACE Account Application. These account types were never used and are being removed due to that lack of use.

New Proposed Changes

Section four of the application entitled “Air Carrier/Rail Carrier/Sea Carrier/Truck Carrier/Driver/Crew” was updated on February 6, 2025, to change the word “gender” to “sex”. The change was made to comply with the Executive Order issued on January 20, 2025: “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government”.

Type of Information Collection: Application to ACE (Import).

Estimated Number of Respondents: 21,571.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 21,571.

Estimated Time per Response: 20 minutes.

Estimated Total Annual Burden Hours: 7,118.

Type of Information Collection: Application to ACE (Export).

Estimated Number of Respondents: 9,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 9,000.

Estimated Time per Response: 4 minutes.

Estimated Total Annual Burden Hours: 594.

Type of Information Collection: Application to Establish an ACE Protest Filer Account.

Estimated Number of Respondents: 3,750.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 3,750.

Estimated Time per Response: 4 minutes.

Estimated Total Annual Burden Hours: 248.

Dated: June 10, 2025.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

U.S. Court of Appeals for the Federal Circuit

AG DER DILLINGER HUTTENWERKE, FRIEDR. LOHMANN GMBH,
THYSSENKRUPP STEEL EUROPE AG, Plaintiffs ILSENBURGER GROBBLECH
GMBH, SALZGITTER FLACHSTAHL GMBH, SALZGITTER MANNESMANN
GROBBLECH GMBH, SALZGITTER MANNESMANN INTERNATIONAL GMBH,
Plaintiffs-Appellants v. UNITED STATES, SSAB ENTERPRISES LLC,
NUCOR CORPORATION, Defendants-Appellees

Appeal No. 2024–1219

Appeal from the United States Court of International Trade in Nos. 1:17-cv-00158-LMG, 1:17-cv-00160-LMG, 1:17-cv-00162-LMG, Senior Judge Leo M. Gordon.

Decided: June 17, 2025

RON KENDLER, White & Case LLP, Washington, DC, argued for plaintiffs-appellants. Also represented by DAVID EDWARD BOND, ALLISON KEPKAY.

KARA WESTERCAMP, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also represented by BRIAN M. BOYNTON, TARA K. HOGAN, PATRICIA M. MCCARTHY; AYAT MUJAIS, Office of the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, Washington, DC.

JEFFREY DAVID GERRISH, Schagrin Associates, Washington, DC, argued for defendant-appellee SSAB Enterprises LLC. Also represented by NICHOLAS J. BIRCH, SAAD YOUNUS CHALCHAL, CHRISTOPHER TODD CLOUTIER, ELIZABETH DRAKE, WILLIAM ALFRED FENNELL, LUKE A. MEISNER, ROGER BRIAN SCHAGRIN.

ALAN H. PRICE, Wiley Rein, LLP, Washington, DC, for defendant-appellee Nucor Corporation. Also represented by STEPHANIE MANAKER BELL, TESSA V. CAPELOTO, STEPHEN JOSEPH OBERMEIER, ADAM MILAN TESLIK, MAUREEN E. THORSON, ENBAR TOLEDANO, CHRISTOPHER B. WELD.

Before LOURIE, DYK, and REYNA, *Circuit Judges*.

DYK, *Circuit Judge*.

In this antidumping case, appellants Ilsenburger Grobbblech GmbH, Salzgitter Flachstahl GmbH, Salzgitter Mannesmann Grobbblech GmbH, and Salzgitter Mannesmann International GmbH (collectively, “Salzgitter”) appeal from a decision of the U.S. Court of International Trade (“Trade Court”) sustaining the Department of Commerce’s application of partial adverse facts available to impose a final dumping margin of 22.9 percent on Salzgitter’s steel plate products.

Commerce applied an adverse inference based on its determination that Salzgitter failed to cooperate to the best of its ability with one of Commerce’s requests for information. We hold that, although Commerce’s information request imposed an unreasonable burden on

Salzgitter, Commerce’s application of an adverse inference was permissible because Salzgitter failed to propose reasonable alternative forms of the missing information as required by statute. We reject Salzgitter’s other contentions and accordingly affirm.

BACKGROUND

I

In an antidumping duty proceeding, Commerce must determine whether a foreign exporter’s merchandise is being, or is likely to be, sold “in the United States at less than its fair value.” *Risen Energy Co. v. United States*, 122 F.4th 1348, 1351 (Fed. Cir. 2024) (quoting *Changzhou Trina Solar Energy Co. v. United States*, 975 F.3d 1318, 1321 (Fed. Cir. 2020)). When merchandise is sold at less than fair value, Commerce calculates a “dumping margin” for each entry of merchandise subject to Commerce’s review. 19 U.S.C. § 1675(a)(2). The dumping margin is “the amount by which the normal value” (typically the price at which a particular piece of merchandise is sold in an exporter’s home country) “exceeds the export price or constructed export price of the subject merchandise.” *Id.* § 1677(35)(A); *accord id.* § 1677b(a). If an exporter’s affiliated companies sell both the exporter’s products and other manufacturers’ products (as is the case here), Commerce must decide which home market sales are attributable to the exporter under review in order to calculate the dumping margin.

Exporters whose merchandise is subject to an antidumping investigation are obligated to provide information necessary for Commerce to reach its final antidumping determinations. *See Oman Fasteners, LLC v. United States*, 125 F.4th 1068, 1075 (Fed. Cir. 2025). Commerce gathers this information by issuing “questionnaires requesting factual information” about an exporter’s business. 19 C.F.R. § 351.221(b)(2); 19 U.S.C. § 1677b(b)(2)(A)(ii). If Commerce lacks information necessary to its determination after an exporter has responded to its questionnaires, it “must ‘fill in the gaps’ using information otherwise available to it.” *Oman Fasteners*, 125 F.4th at 1075 (quoting *BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1295 (Fed. Cir. 2019)). Where Commerce determines that an exporter “failed to cooperate by not acting to the best of its ability to comply with a request for information,” Commerce may apply an adverse inference to the information otherwise available in calculating the exporter’s antidumping duty margin. 19 U.S.C. § 1677e(b).

II

Commerce initiated this antidumping investigation in 2016 to determine if antidumping duties should be imposed on cut-to-length steel plate manufacturers from twelve countries, including Germany. *See Certain Carbon and Alloy Steel Cut-To-Length Plate from Austria, Belgium, Brazil, France, the Federal Republic of Germany, Italy, Japan, the Republic of Korea, the People's Republic of China, South Africa, Taiwan, and the Republic of Turkey: Initiation of Less-Than-Fair Value Investigations*, 81 Fed. Reg. 27,089, 27,089–90 (May 5, 2016). Salzgitter was chosen as a mandatory respondent, and in May 2016, received an initial questionnaire from Commerce. The initial questionnaire asked Salzgitter to report the sales of its merchandise in the United States and in its home market Germany, including the resales of its products by affiliated resellers. As part of this request, Commerce asked Salzgitter to identify the manufacturer of every plate sold by its resellers because the plates sold by those resellers included those produced by manufacturers other than Salzgitter, and Commerce needed to know which home market sales were attributable to Salzgitter.

In its initial response, Salzgitter submitted a database with the home-market sales of all its affiliated companies showing the manufacturers of the plate sold, except that it excluded some sales of one of its resellers because it was “unable to identify the manufacturer” of those plates, and identifying the manufacturer of those plates “could only be done manually.” J.A. 5742.

This set in motion a lengthy back-and-forth between Salzgitter and Commerce regarding the missing manufacturer information for the sales of Salzgitter’s reseller, which included five supplemental questionnaires from Commerce and corresponding responses from Salzgitter. In the end, Salzgitter was able to produce complete information for approximately 80 percent of the sales by its affiliated reseller. Salzgitter explained that it was unable to provide the manufacturer information for the remaining 20 percent of sales (28,000 sales) by its reseller because doing so would impose an unreasonable burden. Salzgitter estimated that production of the missing information, which would need to be done manually, “would take at least 4,667 hours, or more than two years for two people working full-time” to complete. Appellants’ Br. 12 (citing J.A. 8238–40).

At the verification stage, Commerce agreed with Salzgitter that the information could be gathered only through a manual process of reconciling information from two distinct sources and agreed with Salzgitter’s estimate that it would take about 5,000 hours to collect this information.

Following verification, Salzgitter acknowledged that the missing manufacturer information constituted an information gap in the record upon which Commerce was obligated to base its final determination and that Commerce would need to use information otherwise available. Salzgitter proposed three alternatives to make up for this gap. According to Salzgitter, Commerce could have: (1) attributed to Salzgitter all of the 28,000 sales missing manufacturer information; (2) attributed none of those sales to Salzgitter; or (3) attributed the percentage of those sales to Salzgitter that reflected “the actual and verified ratio of plate purchased from Salzgitter affiliates versus other mills during” the period of investigation, i.e., the percent calculated based on the sales where the manufacturer information was identified. Appellants’ Br. 14. All three approaches would have resulted in a zero percent dumping margin for Salzgitter.

On April 4, 2017, Commerce assigned Salzgitter a 22.9 percent margin. See *Certain Carbon Steel and Alloy Steel Cut-to-Length Plate from the Federal Republic of Germany: Final Determination of Sales at Less Than Fair Value*, 82 Fed. Reg. 16,360, 16,361 (Apr. 4, 2017). In its calculations, Commerce relied in part on its determination that the application of partial adverse facts available was warranted because Salzgitter failed to cooperate to the best of its ability by not supplying complete manufacturer information for its reseller’s sales. Commerce explained that this information “is the type of information that a respondent should have reasonably anticipated being required to provide to its customers for quality assurance and warranty claims,” and concluded that its verification demonstrated that “Salzgitter had relevant information available to it[] but determined not to invest the time in comprehensively examining its documentation in order to provide the requested information.” J.A. 44–45.

Commerce declined to use any of the three alternatives proposed by Salzgitter. Instead, Commerce attributed to Salzgitter all 28,000 sales, using “the highest non-aberrational net price among” those sales. J.A. 46. Commerce maintained the 22.9 percent antidumping duty for Salzgitter when it published the final results of its larger investigation. See *Certain Carbon and Alloy Steel Cut-To-Length Plate from Austria, Belgium, France, the Federal Republic of Germany, Italy, Japan, the Republic of Korea, and Taiwan: Amended Final Affirmative Antidumping Determinations for France, the Federal Republic of Germany, the Republic of Korea and Taiwan, and Antidumping Duty Orders*, 82 Fed. Reg. 24,096, 24,098 (May 25, 2017).

III

Salzgitter challenged Commerce’s final determination in the Trade Court. On the parties’ motions for judgment on the agency record, the Trade Court concluded that Commerce reasonably resorted to facts otherwise available because Commerce “could not determine whether to include or exclude the [disputed] plate transactions from . . . Salzgitter’s margin calculation[]” due to the missing information. *AG der Dillinger Hüttenwerke v. United States*, 399 F. Supp. 3d 1247, 1253 (Ct. Int’l Trade 2019) (*Salzgitter I*). The Trade Court then considered whether it was reasonable for Commerce to apply adverse facts available based on Salzgitter’s failure to cooperate.

The court sustained Commerce’s decision to apply adverse facts available, finding that the record reasonably supported Commerce’s determination that Salzgitter failed to cooperate to the best of its ability. *See id.* at 1254–56. Unconvinced that any of Salzgitter’s three proposals for allocating the 28,000 missing sales was a reasonable alternative, the Trade Court stated that it could not “understand why Salzgitter did not just simply conduct a statistical analysis of the [missing plate sales] . . . using a sufficient and randomized sample size that was then manually matched to the missing manufacturer information.” *Id.* at 1255. Such an approach, according to the Trade Court, would have better supported Salzgitter’s position under the statute. *Id.* at 1256.

After two additional remands,¹ the court sustained Commerce’s use of the highest non-aberrational net price among Salzgitter’s downstream market sales for which there was no manufacturer information. The court found reasonable Commerce’s explanation that its approach was warranted given the size of the information gap and the need to deter noncooperation. *See AG der Dillinger Hüttenwerke v. United States*, 648 F. Supp. 3d 1321, 1332–33 (Ct. Int’l Trade 2023) (*Salzgitter II*). Salzgitter appeals. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

¹ These remands were necessary because a nearly identical issue was raised in a separate case before the Trade Court, *Dillinger France S.A. v. United States*, 350 F. Supp. 3d 1349 (Ct. Int’l Trade 2018), where the Trade Court rejected Commerce’s use of the highest non-aberrational net price of an exporter’s sales to fill a gap caused by missing manufacturer information. *See id.* at 1364. In *Dillinger France*, Commerce eventually attributed to the exporter all the sales with missing manufacturer information at their reported sales prices (which was, in essence, the first of Salzgitter’s alternative proposals here). *See Dillinger Fr. S.A. v. United States*, 393 F. Supp. 3d 1225, 1228–29 (Ct. Int’l Trade 2019). During the remands here, Commerce explained that it did not adopt the *Dillinger France* approach for Salzgitter because the gap of missing information in Salzgitter’s case (28,000 sales), greatly exceeded the number of sales in *Dillinger France*, and thus had a material impact on Salzgitter’s margin, in contrast to *Dillinger France*, where it did not.

DISCUSSION

“We review Commerce’s determinations using the same standard as the Trade Court—that is, whether those determinations are ‘unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]’” *Risen Energy*, 122 F.4th at 1353 (alteration in original) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)).

I

Commerce may apply adverse facts available to fill in an information gap if it concludes that a respondent has “failed to cooperate by not acting to the best of its ability to comply with a request for information.” 19 U.S.C. § 1677e(b)(1). One purpose of applying adverse facts available is to incentivize cooperation because “Commerce lacks subpoena power” to ensure compliance. *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012). The central question presented in this case is whether Commerce may apply adverse facts available to a respondent based on its failure to cooperate after the respondent has demonstrated that full compliance with a request would pose an unreasonable burden.²

We have previously explained that “the ‘best of its ability’ standard is determined by assessing whether [a] respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation.” *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). This standard neither “require[s] perfection” nor “condone[s] inattentiveness, carelessness, or inadequate record keeping.” *Id.* Commerce may apply adverse facts “only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made.” *See id.* at 1383. This obligates Commerce to “examine [a] respondent’s actions and assess the extent of [a] respondent’s abilities, efforts, and cooperation” throughout the proceeding. *Id.* at 1382.

The statute itself recognizes that there are times where it may be impractical for a respondent to supply information. It provides:

If an interested party, promptly after receiving a request from [Commerce] for information, notifies [Commerce] that such party is *unable to submit the information requested in the requested form and manner*, together with a full explanation and

² We see no merit to Salzgitter’s argument that Commerce should not have applied facts available in the first instance. Appellants’ Br. 24–30. Salzgitter effectively concedes that the manufacturer information is “critical” for a margin analysis. Appellants’ Br. 29. Without this critical information, Commerce could not have fulfilled its duty to accurately calculate Salzgitter’s dumping margin, so Commerce’s resort to facts available was warranted under 19 U.S.C. § 1677e.

suggested alternative forms in which such party is able to submit the information, [Commerce] shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to *avoid imposing an unreasonable burden on that party*.

19 U.S.C. § 1677m(c)(1) (emphases added). Pertinent to this assessment is a respondent's "computer capabilities"—that is, the respondent's "ability to provide requested information in an automated format without incurring an unreasonable extra burden or expense." Statement of Administrative Action, Uruguay Round Agreements Act, H.R. Rep. No. 103–316, *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4195.

Although Commerce previously asserted that there is an absolute obligation for a respondent to supply all the information Commerce requests unless it is impossible to do so, Commerce acknowledged at oral argument that § 1677m(c)(1) makes clear that Commerce cannot demand information if the request would place an unreasonable burden on the respondent. Oral Arg. at 13:03–10. Consistent with the statute, Commerce has declined to impose adverse inferences in prior cases because of the administrative burdens those requests would impose on respondents. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon-Quality Steel Plate Products from Japan*, 64 Fed. Reg. 73,215, 73,218 (Dec. 29, 1999) (*CTL Japan*); *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Germany*, 67 Fed. Reg. 35,497, 35,498–99 (May 20, 2002).

Even if a request does constitute an unreasonable burden, the respondent must still provide "suggested alternative forms" for submitting the information requested. 19 U.S.C. § 1677m(c)(1).

The issues presented are therefore: (1) whether Commerce's request for the manufacturer information of the 28,000 sales made by Salzgitter's reseller constituted an unreasonable burden; and (2) whether Salzgitter proposed reasonable alternative forms of the missing data to satisfy § 1677m(c)(1).

A

We first consider whether the collection of the missing manufacturer information would have imposed an unreasonable burden on Salzgitter. Under the statute, a respondent is the party responsible for establishing that a request constitutes an unreasonable burden.

See 19 U.S.C. § 1677m(c)(1) (providing that a respondent must “promptly” notify Commerce of an inability to respond in order to avoid an unreasonable burden).

Commerce appears to contend that requiring Salzgitter to supply the manufacturer information for each of the 28,000 disputed sales was not an unreasonable burden because during verification, Salzgitter manually identified a manufacturer for a particular sale “within minutes.” Gov’t’s Br. 25. The ability to retrieve relevant information manually in a single instance says nothing about the over-all burden of the request, as Salzgitter has consistently argued. Commerce has not disputed Salzgitter’s calculation of the required burden, nor does Commerce seriously contest that the burden was substantial.

Commerce next defends its course of action on the ground that its treatment of Salzgitter was not inconsistent with prior determinations like *CTL Japan*, where Commerce acknowledged that a manual retrieval would have posed an unreasonable burden for the respondent. See J.A. 45. Commerce distinguishes from *CTL Japan* because “technological advances in electronic records management” since 1999 have “significantly reduce[d] the burden in obtaining the missing information.” J.A. 45; see also Gov’t’s Br. 29.

Commerce’s conclusion ignores the fact that here the missing information required manual assembly, and that technological enhancements in electronic records management could not be utilized to replace a manual effort. See, e.g., J.A. 8239–40 (explaining burden); J.A. 7107–11 (demonstrating technological obstacles). As Commerce itself found at verification, the problem was that Salzgitter’s reseller did not systematically track manufacturer information for each product sold, and collecting the missing information for the 28,000 disputed sales would require manual effort. See J.A. 11322–23. Commerce admitted that completing this manual process “would have required two people to work full-time for more than two years,” Appellants’ Br. 35 (citing J.A. 8239–40), noting that its “review was consistent with Salzgitter’s descriptions” of the estimated time needed to complete the task. J.A. 11313.

Finally, we are unpersuaded by Commerce’s argument that Salzgitter is responsible for any burden it may have experienced because manufacturer information “is the type of information that a respondent should have reasonably anticipated being required to provide to its customers for quality assurance and warranty claims.” Gov’t’s Br. 28 (quoting J.A. 45). There is no evidence to support this finding, and Commerce’s argument ignores the difference between responding to individual customer claims using a manual approach (which Salzgit-

ter could indisputably satisfy) and retrieving the same information in the aggregate (which may be unreasonably burdensome).

While Commerce appropriately assumes “that importers are familiar with the rules and regulations that apply to the[ir] import activities,” *Nippon Steel*, 337 F.3d at 1382, Commerce notably does not argue that Salzgitter should have collected the information in anticipation of a need to produce this information in an antidumping investigation. It appears that there was little reason for Salzgitter to anticipate this need because this was an original investigation, and Salzgitter had no prior notice that it would be named as a respondent.

We conclude that Commerce’s apparent finding of a lack of an unreasonable burden was not supported by substantial evidence.³

B

Although we conclude that Commerce’s request imposed an unreasonable burden on Salzgitter, we must also consider whether Salzgitter provided reasonable “alternative forms” for reporting the missing information as required by § 1677m(c)(1).⁴ In *Maverick Tube*, we recognized the obligation of an importer to provide alternative forms of missing information under the statute. 857 F.3d at 1361.

Salzgitter contends that its proposed alternatives would have allowed Commerce to fill the gap in the record for the missing manufacturer information and, therefore, Commerce should have accepted any of its three options to apply neutral, not adverse, facts available. *See* Appellants’ Br. 37–39. Those three proposals would have attributed (1) all, (2) none, or (3) a percent of the disputed sales at their reported and verified prices to Salzgitter based on the manufacturer data reported by Salzgitter’s resellers, resulting in a dumping margin of zero percent.

Commerce did not err in rejecting Salzgitter’s proposals. The first two did nothing to allocate the 28,000 sales between Salzgitter and other manufacturers. The third simply assumed that the proportion of Salzgitter’s sales among the 28,000 sales by its affiliated reseller was the same as the proportion of sales that were identified as

³ This is not a situation like that in *Maverick Tube Corp. v. United States*, 857 F.3d 1353 (Fed. Cir. 2017), where the respondent did not properly raise the issue of an unreasonable burden by asserting that it was unable to provide the requested information. In fact, in *Maverick Tube*, the respondent offered to supply the missing information. *See id.* at 1360–61. Here, Salzgitter did state that it was unable to provide the missing manufacturer information because of the unreasonable burden it would impose.

⁴ The parties further dispute whether Salzgitter “promptly” provided notice of its difficulties in collecting the information and its alternative proposals. *Compare* Gov’t’s Br. 28–30, with Appellants’ Br. 39. Because we conclude that the alternatives proposed by Salzgitter did not reasonably fill the information gap caused by failure to supply the missing manufacturer information, we do not reach the timeliness issue.

Salzgitter's in the dataset, without any evidence that these other sales were representative of the 28,000 sales missing manufacturer data.

Salzgitter's proposals were insufficient because they failed to address Commerce's concerns about selective reporting, which could have potentially rewarded Salzgitter by artificially distorting the margin by failing to reflect high-priced sales by Salzgitter. *See* J.A. 170–71 (“Commerce cannot rule out the possibility that the sales with the highest prices were entirely or primarily of CTL plate manufactured by Salzgitter, and Salzgitter's failure to report the manufacturer information was an attempt to obscure this fact, thereby distorting the margin.”). As the Trade Court recognized, randomized sampling would have been a reasonable “alternative form[]” of the missing information, *see* 399 F. Supp. 3d at 1255, but Salzgitter never proposed such an approach, and it was Salzgitter's obligation (not Commerce's) to do so under the statute. 19 U.S.C. § 1677m(c)(1).

We conclude that Commerce did not err in finding that Salzgitter did not provide reasonable “alternative forms” of information as required by § 1677m(c)(1), and that Commerce could properly apply adverse facts available.

II

We also reject Salzgitter's challenge to Commerce's application of the highest non-aberrational net price among the 28,000 sales to each of the 28,000 sales, while attributing all those sales to Salzgitter, as partial adverse facts available. Salzgitter contends that this selection was aberrational and not supported by substantial evidence.

In selecting an adverse inference, Commerce enjoys discretion to choose information on the record from which to draw an adverse inference to fill an information gap, *see* 19 U.S.C. § 1677e(b)(2), but may not draw inferences unsupported by the record or those that are merely punitive in nature, *see Oman Fasteners*, 125 F.4th at 1086–87. Commerce is not required “to select facts that reflect a certain amount of sales, yield a particular margin, fall within a continuum according to the application of particular statistical methods, or align with standards articulated in other statutes and regulations.” *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1347 (Fed. Cir. 2016). Commerce is not precluded from using the highest non-aberrational sales price under appropriate circumstances. *See BMW of N. Am.*, 926 F.3d at 1301–02.

Commerce's application of adverse facts available here was reasonable, if barely so, given the absence of evidence of misconduct.⁵ We have recognized that "the 'inference' that Commerce 'may use' in 'selecting from among the facts otherwise available' must 'be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.'" *Diamond Sawblades Mfrs.' Coal. v. United States*, 986 F.3d 1351, 1367 (Fed. Cir. 2021) (quoting *Flli de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)). Here, the size of the information gap—20 percent of the reseller's sales during the period of investigation—left Commerce unable to reasonably estimate Salzgitter's actual rate.

Under these circumstances, Commerce's substitution of the actual sales prices for the 28,000 sales missing manufacturer information with the highest non-aberrational net price among those 28,000 sales was a reasonable application of adverse facts available based on Salzgitter's failure to cooperate to the best of its ability because it did not supply reasonable alternatives under 19 U.S.C. § 1677m(c)(1). Such a selection furthers the purposes of the antidumping statutes by ensuring that intransigent respondents are not rewarded for refusing to cooperate, *see Essar Steel*, 678 F.3d at 1276, while ensuring that the "rate chosen ha[d] a relationship to the actual sales information available." *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1340 (Fed. Cir. 2002).

Salzgitter additionally argues that the margin Commerce calculated was aberrational because the transaction Commerce selected concerned a product "that was . . . dissimilar in physical characteristics to the products sold in the United States." Appellants' Br. 42. We see no error in the Trade Court's conclusion that, given the circumstances, Commerce's approach was reasonable, especially because Salzgitter failed "to suggest any alternative price from the record that Commerce could have selected as a reasonable application" of adverse facts available. 648 F. Supp. 3d at 1333.

We conclude that Commerce's choice of adverse inference in its application of adverse facts available was supported by substantial evidence and otherwise in accordance with law.

⁵ We note that the sale selected by Commerce did not identify Salzgitter as the manufacturer of the plate sold, raising questions as to the propriety of Commerce's use of that sale to fill the gap of missing manufacturer information. Salzgitter, however, did not object to Commerce's use of the sale on the ground that it should not be attributed to it as the manufacturer, so we do not decide the issue. Nor does Salzgitter object to attributing to it the 28,000 sales missing manufacturer information, an approach that Salzgitter itself suggested.

CONCLUSION

We have considered the remainder of Salzgitter's arguments and do not find them persuasive.

AFFIRMED COSTS

No costs.

U.S. Court of International Trade

Slip Op. 25–75

COZY COMFORT COMPANY, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Stephen Alexander Vaden, Judge
Court No. 1:22-cv-00173 (SAV)

[Resolving disputed facts about the subject merchandise, called The Comfy®, and concluding that The Comfy® is a pullover classifiable under Heading 6110 and Subheading 6110.30.30]

Dated: June 16, 2025

Christopher J. Duncan and *Elon A. Pollack* of Stein Shostak Shostak Pollack & O'Hara, of Los Angeles, CA, for Plaintiff Cozy Comfort Company, LLC. With them on the brief were *Gregory P. Sitrick*, *Isaac S. Crum*, and *Sharif S. Ahmed* of Messner Reeves LLP, of Phoenix, AZ, and *Robert H. Dunikoski II* of Castenda and Heidelman LLP, of Dallas, TX.

Brandon A. Kennedy, Trial Attorney, and *Beverly A. Farrell*, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant United States. With them on the brief were *Justin R. Miller*, Attorney-In-Charge, *Patricia M. McCarthy*, Director, and *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Michael A. Anderson*, General Attorney, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Vaden, Judge:

Cozy Comfort Company, LLC (Cozy Comfort) created a novel product called The Comfy®, which combines the features of an ordinary throw blanket with those of an oversized pullover. The Comfy® is made abroad so that it must be imported into the United States before it is sold to American consumers. Importing The Comfy® presented Cozy Comfort and the United States Government with a problem. All goods entering the United States must be classified according to the Harmonized Tariff Schedule of the United States (HTSUS) before import duties can be assessed. The HTSUS is not updated to account for every novel product on the market; it speaks in more general terms about broader categories of products. Importing The Comfy® thus demanded an answer to a classification question: Is The Comfy® a blanket, a pullover, or something else?

Cozy Comfort brought this lawsuit because it believes U.S. Customs and Border Protection (Customs) answered that question incorrectly. Customs classified The Comfy® under Subheading 6110.30.30, HTSUS, which covers sweaters, pullovers, sweatshirts, waistcoats

(vests) and similar articles. Cozy Comfort contends The Comfy® should be classified under a tariff heading for blankets instead, or in the alternative, under one of two other tariff headings. The Court conducted a five-day bench trial to resolve lingering factual disputes about The Comfy®. Based on the following findings of fact, the Court concludes that the Government is correct. The Comfy® is a pullover classifiable under 6110.30.30, HTSUS.

BACKGROUND

I. Procedural History

Cozy Comfort first imported The Comfy® in January 2018. *See* Trial Tr. vol. I at 72:17–20, ECF No. 108 (direct testimony of Mr. Speciale). The company listed the product as a blanket under Subheading 6301.40.00, HTSUS, on its customs forms and paid the associated duties. *See* Pre-Trial Order, Schedule C ¶ 32 (Jt. Uncontested Facts), ECF No. 107. On March 9, 2020, however, Customs reclassified The Comfy® as a pullover under Subheading 6110.30.30, HTSUS. *See id.* Cozy Comfort responded by filing its first protest with Customs on August 26, 2020. *See id.* ¶ 33. Customs issued Ruling H313594 on May 21, 2021, to resolve the protest. *See id.* ¶ 35. That ruling continued to find The Comfy® should be classified as a pullover under Subheading 6110.30.30, HTSUS. *See id.*

While Customs reviewed Cozy Comfort’s first protest, Cozy Comfort imported a new shipment of The Comfy® under Entry No. 442–9233932–0 on January 6, 2021. *See id.* ¶ 34. Cozy Comfort classified the products in that entry as pullovers under Subheading 6110.30.30, HTSUS, as Customs directed. *See id.* This January 2021 shipment is the shipment at issue in this case. *See id.* ¶¶ 34–35. On May 20, 2022, Cozy Comfort timely filed another protest contesting Custom’s liquidation of the January 2021 shipment at the higher tariff rate for pullovers. *See id.* ¶ 38. Customs denied that protest on May 31, 2022. *See* Compl. ¶ 24, ECF No. 6.

Cozy Comfort filed the present lawsuit challenging both the May 31, 2022 protest denial and the underlying Customs Ruling supporting it.¹ *See id.* ¶¶ 22–27. The Government moved for summary judgment after discovery concluded. *See* Def.’s Mot. for Summ. J., ECF No. 28. The Court denied the Motion, finding issues of material fact remained. *See* Order, ECF No. 47. The Court ordered a trial to determine the proper classification of The Comfy® and expressed it was

¹ Before this litigation, Cozy Comfort filed an earlier lawsuit in the Court of International Trade challenging Customs’ denial of its first protest; but it voluntarily dismissed that lawsuit without prejudice. *See Cozy Comfort Co. v. United States*, Ct. No. 1:21-cv-00404, ECF Nos. 17–18.

“particularly interested in hearing evidence about three matters: (1) whether The Comfy® protects against extreme cold, (2) how The Comfy® compares to [a similar product,] the Snuggie®, and (3) the use factors identified in [the Federal Circuit’s] *GRK Canada* [customs classification opinion] and applied [by the Court of International Trade] in *Allstar Marketing*.” See Order at 5, ECF No. 48.

The Court’s trial order noted that classifying The Comfy® would require applying the Federal Circuit’s legal framework from *Rubies Costume Co. v. United States (Rubies Costume II)*, 922 F.3d 1337 (Fed. Cir. 2019). See Order at 3–4, ECF No. 48. *Rubies Costume II* addressed whether a Santa Suit jacket fell under Heading 6110 and Subheading 6110.30.30, HTSUS. 922 F.3d at 1345–46. The Federal Circuit explained that items in Heading 6110 share certain characteristics: They “cover[] the upper body[,]” are worn “over either undergarments or other clothing[,]” “provide[] some warmth to the wearer[,]” but “do[] not protect against wind, rain, or extreme cold.” *Id.* These characteristics govern whether The Comfy® can be classified as a pullover under Heading 6110, as the Government requests. See Order at 3–4, ECF No. 48.

The parties filed a proposed pre-trial order listing key information, including uncontested facts, claims and defenses, damages and other relief requested, triable issues, proposed witnesses, and proposed exhibits. See Proposed Pre-Trial Order at 1–3, ECF No. 52. The Court then held a pre-trial conference to discuss this filing. See Tr. of Pre-Trial Conf., ECF No. 64. Both parties indicated that they had objections to the other side’s proposed exhibits and witnesses. See *id.* at 67:16–68:4. The Court set a schedule to hear motions *in limine* on those objections. See Order, ECF No. 58.

The parties filed four Motions. Cozy Comfort filed a motion *in limine* to exclude the testimony of Patricia Concannon, the Government’s fashion marketing expert. See Pl.’s First Mot. in Lim., ECF No. 54. It also filed a motion *in limine* to exclude the testimony of Renee Orsat, a national import specialist at Customs who helped classify The Comfy®. See Pl.’s Second Mot. in Lim., ECF No. 60. Cozy Comfort did not move to exclude testimony from Professor Mary Ann Ferro, the Government’s garment design expert. The Government filed a motion *in limine* to exclude the testimony of James Crumley, Plaintiff’s garment design expert. See Def.’s Second Mot. in Lim., ECF No. 62. It also filed a motion to exclude certain proposed exhibits. See Def.’s First Mot. in Lim., ECF No. 61. The Court held a hearing on these Motions on October 11, 2024. See ECF No. 80. It then issued an Order that granted in part Cozy Comfort’s two motions *in limine*,

denied the Government's motion *in limine* regarding Mr. James Crumley, and reserved ruling on the Government's exhibit-based motion until trial. *See Cozy Comfort Co., LLC v. United States*, 48 CIT ___, Court No. 1:22-cv-00173, 2024 Ct. Intl. Trade LEXIS 115 (Oct. 15, 2024).

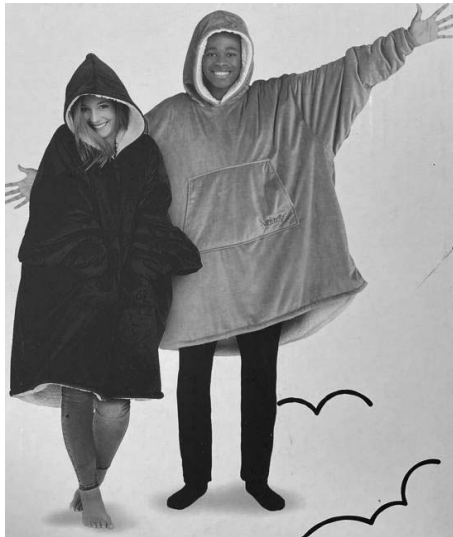
The Court held a bench trial from October 21 to October 25, 2024, to decide whether Customs properly classified The Comfy®. *See* Trial Tr. vols. I–V, ECF Nos. 108–112. The Court heard testimony from witnesses and considered objections from the parties. In some instances, the Court struck legally impermissible testimony and evidence from the record.² The parties submitted proposed findings of fact and conclusions of law after the trial ended. *See* Pl.'s Proposed Findings of Fact and Conclusions of Law (Pl.'s Br.), ECF No. 114; Def.'s Proposed Findings of Fact and Conclusions of Law (Def.'s Br.), ECF No. 116.

II. Stipulated Facts

The Court outlined the uncontested facts in its Pretrial Order. *See* Jt. Uncontested Facts, ECF No. 107. The parties stipulated to these facts in their pretrial filings. *See id.* These facts establish basic details about The Comfy®'s design, physical characteristics, use, and marketing. The following stipulated facts are relevant to the issues in this case.

In February 2017, two brothers, Michael Speciale and Brian Speciale, invented The Comfy®. *See id.* ¶ 19. A picture of The Comfy® from the box in which it is sold is depicted below. The product was “inspired by a men's [extra-large] hooded sweatshirt and a sherpa blanket.” *Id.* ¶ 3. To produce, market, and sell The Comfy®, the two brothers founded Cozy Comfort in April 2017. *See id.* ¶ 20. Cozy Comfort manufactures The Comfy®, also known as “The Comfy® Original,” in the People's Republic of China. *Id.* ¶¶ 1–2.

² In formulating this opinion, the Court gave no consideration to any testimony it struck from the record at trial because of that testimony's legally impermissibility. This included stricken testimony that (1) the Government erroneously introduced about settlement discussions and (2) the Government erroneously elicited from an expert witness that went beyond the scope of the witness's expert report. Even if the Court had not stricken and ignored this testimony on the specific evidentiary grounds noted, it would have disregarded the testimony as unduly prejudicial under Federal Rule of Evidence 403.



See Ex. P-1 (The Comfy® and its accompanying box).

The Comfy® is made “using two separate knitted fabrics: a micro-fiber fabric (microfleece) for the exterior and a sherpa fabric for the interior that provides extra warmth to the user.” *Jt. Uncontested Facts* ¶ 5, ECF No. 107; *see also id.* ¶ 4. These fabrics are “100% man-made fibers, specifically polyester.” *Id.* ¶ 4. The Comfy® has an “opening for the head, a hood, long sleeves, ribbed wrist cuffs, a wide, un-ribbed, hemmed bottom opening, and a frontal marsupial or kangaroo pocket.” *Id.* ¶ 6. It is intended to be worn over clothes or undergarments. *See id.* ¶ 11. It does not protect users from rain or wind. *See id.* ¶ 13.

The Comfy® is reversible and comes in one-size regardless of gender. *See id.* ¶¶ 8, 9, 14. The front panel of The Comfy® measures “approximately 36 inches wide and 33 inches long from the bottom of the neck hole to the bottom of the panel.” *Id.* ¶ 7. The back panel of The Comfy® measures “approximately 36 inches wide and 41 inches long from the bottom of the neck hole to the bottom of the panel.” *Id.*

Cozy Comfort has numerous design patents for The Comfy®. On September 19, 2019, the U.S. Patent and Trademark Office (USPTO) issued Design Patent No. D859,788 to Cozy Comfort for an “ENLARGED OVER-GARMENT WITH AN ELEVATED MARSUPIAL POCKET.” *Id.* ¶ 26. That patent refers to the product as an “enlarged over-garment” and does not describe the product as a blanket. *Id.* ¶ 27. On September 24, 2019, USPTO issued Patent No. 10,420,431 to Cozy Comfort for an “OVERGARMENT WITH AN ELEVATED MAR-

SUPIAL POCKET.” *Id.* ¶ 28. In that patent, Cozy Comfort described the invention as relating to blankets or large, wearable blankets, and the product was referred to as a “garment” or an “overgarment” throughout the patent. *Id.* ¶ 29. No patents for The Comfy® “include a description that it is for ‘protection against extreme cold.’” *Id.* ¶ 31. On November 15, 2022, after the start of the present tariff classification dispute, USPTO issued Design Patent No. D969,458 to Cozy Comfort for a “WHOLE BODY BLANKET.” *Id.* ¶ 40.

Cozy Comfort has marketed The Comfy® in different ways. It has been described as a “blanket that’s a sweatshirt,” “a giant blanket that’s really a giant sweatshirt,” and “The Blanket ... That’s A Sweatshirt.” *Id.* ¶ 15. Cozy Comfort has also marketed the product as a “wearable blanket,” noting that The Comfy® allows users who wear it to perform activities that an ordinary blanket would not allow. *Id.* ¶¶ 16–17.

Cozy Comfort designed a logo to help market the product. *See id.* ¶ 22. The logo featured “an image of a standing panda bear wearing a hooded sweatshirt to the left of the words ‘THE COMFY’ all of which is above the words ‘THE BLANKET ... THAT’S A SWEATSHIRT!’” *Id.* On February 19, 2019, USPTO registered Trademark No. 5,678,126 to Cozy Comfort for that logo, noting that it fell under “Class 24, ‘Blanket throws, namely whole body blankets,’” and “Class 35, ‘Online retail store services featuring blanket throws, namely whole body blankets[.]’” *Id.* ¶ 24. The logo is depicted below.



See Ex. P-4.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) because Cozy Comfort contests Customs’ denial of its protest against the tariff classification of its merchandise. 28 U.S.C. § 1581(a) (“The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part ...”). The Court reviews Customs’ denial of Cozy Comfort’s protest *de novo*. *See Rheem Metalurgica S/A v. United States*, 20 CIT 1450, 1456

(1996), *aff'd*, 160 F.3d 1357, 1358 (Fed. Cir. 1998). Although Customs' decision is presumed correct and "[t]he burden of proving otherwise shall rest upon the party challenging such decision," 28 U.S.C. § 2639(a)(1), the Court's "duty is to find the *correct* result." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) (Wisdom, J.). In a bench trial, the Court acts as the fact finder and weighs the evidence to reach a determination. *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 833 (Fed. Cir. 2010) ("As the fact finder in the bench trial, the judge is responsible for deciding what evidence to credit or reject and what result to reach.").

FINDINGS OF FACT

The Court makes the following findings of fact based on non-stricken testimony given during a five-day bench trial, a review of all the evidence entered pursuant to the Federal Rules of Evidence during that trial, and the Court's own *in camera* review of The Comfy®.

I. Overview of Witnesses and Their Testimony

Cozy Comfort presented the testimony of three people at trial. First, the Court heard testimony from Mr. Michael Speciale, the co-founder of Cozy Comfort and co-creator of The Comfy®. *See* Trial Tr. vol. I at 61:20–64:2, ECF No. 108. Second, the Court heard from Mr. James Crumley, an outdoorsman and garment designer who served as Cozy Comfort's expert witness. *See* Trial Tr. vol. II at 559:17–22, ECF No. 109; *id.* at 562:10–579:7. Third, the Court heard testimony from Customs employee Ms. Tatiana Matherne's Rule 30(b)(6) deposition on behalf of the United States, which Cozy Comfort read into the record. *See* Trial Tr. vol. III at 717:20–25, 724:11–725:25, ECF No. 110. A Rule 30(b)(6) witness offers testimony "on behalf" of a non-human party to the case. Fed. R. Civ. P. 30(b)(6) (Notes of Advisory Committee on Rules – 1970 Amendment).

The Government presented the testimony of four people at trial. First, the Court heard live testimony from Ms. Renee Orsat, a national import specialist at Customs who helped classify The Comfy®. *See* Trial Tr. vol. III at 747:18–749:9, ECF No. 110. Second, the Court heard live testimony from Ms. Patricia Concannon, an expert witness and experienced clothing marketing professional. *See id.* at 837:21–843:3. Third, the Court heard live testimony from Professor Mary Ann Ferro, an expert witness and an experienced garment designer. *See id.* at 914:7–925:2. Fourth, the Court heard testimony from Mr. Speciale's Rule 30(b)(6) deposition on behalf of Cozy Comfort, which the Government read into the record. *See* Trial Tr. vol. IV at 1164:20–1165:18, 1169:6–16, ECF No. 111.

Cozy Comfort's principal witness, Mr. Speciale, provided a detailed explanation of how he and his brother invented The Comfy®. *See* Trial Tr. vol. I at 61:20–65:6, ECF No. 108. Mr. Speciale testified that he invented The Comfy® while living with his brother Brian Speciale. *See id.* at 61:20–63:15. Mr. Speciale conceived of The Comfy® one morning when he saw his young “[seven]-year-old” nephew “wearing one of [Brian Speciale’s] old hoodies” while lying next to a sherpa-lined, microfleece throw blanket. *Id.* at 62:8–11; *see id.* at 61:20–63:15. Brian Speciale was “six [foot] one” and “about 200 pounds,” so that his sweatshirt was oversized on Michael Speciale’s nephew. *Id.* at 62:11–13. Inspired by this scene, Mr. Speciale decided to combine an oversized sweatshirt and a throw blanket to create a new product for adults. *Id.* at 63:21–22. To make the first prototype, he bought blankets and took them to a prototype design company to put together the first sample, which “was fairly close to what [they] wanted.” *Id.* at 64:7–22. Mr. Speciale also discussed various patent and trademark exhibits that the Court accepted into evidence. *See, e.g., id.* at 85:10–88:1 (describing Ex. P-4); Exs. P-3, P-4, P-5, P-6, P-8, P-9. These aspects of Mr. Speciale’s testimony were credible, persuasive, and undisputed by the Government.

Other aspects of Mr. Speciale’s testimony spoke to factual issues disputed by the parties. Mr. Speciale explained how he and his brother sought to market the product to consumers and how they sold The Comfy® in various stores and online retail sites. *See* Trial Tr. vol. I at 88:7–89:25, 151:18–166:17, ECF No. 108. This explanation sought to portray The Comfy® as being sold like a blanket. *See, e.g., id.* at 88:12–16 (MR. SPECIALE: “[I]t is always a blanket first[.]”). Mr. Speciale also testified about how Cozy Comfort launched The Comfy® on the TV show *Shark Tank*, and the Court accepted a video of that appearance into evidence. *See id.* at 71:21–72:20, 73:14–24; Ex. D-27. That video showed Cozy Comfort’s initial marketing strategy, which described The Comfy® as “the blanket that’s a sweatshirt” and sought to distinguish it from a well-known existing product, The Snuggie®. *See* Ex. D-27 at 0:43–46, 1:30–33, 6:32–49. The Court finds that Mr. Speciale’s characterization of The Comfy®’s marketing was undermined by other evidence in the record and was less persuasive than related testimony from Professor Ferro and Patricia Concannon.

Mr. Speciale also spoke about physical characteristics that he believed The Comfy® possessed. *See, e.g.,* Trial Tr. vol. I at 94:5–96:6, ECF No. 108; *id.* at 57:12–15. He repeatedly referred to The Comfy® as a “wearable blanket.” *See, e.g., id.* at 132:18. Mr. Speciale claimed the product was “designed ... so you can pull your knees in, pull your arms in and get into the full cocoon position[.]” which he demon-

strated in Court. *Id.* at 57:13–15, 94:5–96:6. Mr. Speciale and other witnesses referred to this position as “The Comfy® cocoon.” *Id.* at 57:15–16. Mr. Speciale also asserted that The Comfy® “will protect [a user] from extreme cold,” especially when used in the cocooning position. *Id.* at 130:6–12; *see id.* at 132:12–133:4. Mr. Speciale testified that Cozy Comfort’s customers used the product in the extreme cold, and the Court accepted various photographs of customers using The Comfy® into evidence. *See id.* at 134:8–145:17; Ex. P-13. The Court, however, found that these portions of Mr. Speciale’s testimony were contradicted by other evidence in the record and were less persuasive than testimony from Professor Mary Ann Ferro and Patricia Concannon.

Cozy Comfort’s expert witness, Mr. James Crumley, is an avid, lifelong outdoorsman who uses this expertise to help companies design hunting garments. *See* Trial Tr. vol. II at 559:20–22, 572:12–23, ECF No. 109. Mr. Crumley testified that he grew up “outdoors ... fishing, hunting[,] and [playing] sports” from a young age and that he began working as a hunting guide after college. *Id.* at 563:10–11, 565:3–25; *see also id.* at 563:14–20, 566:1–11. During his work as a hunting guide, Mr. Crumley decided to invent new “camo[u]flage] patterns that blend in with the surroundings in the United States[.]” *Id.* at 568:11–13. The pattern he invented, Trebark®, became a commercial success; and Mr. Crumley started helping companies design garments that used this pattern. *See id.* at 572:12–23. Mr. Crumley’s garment design work involved applying his “experience of being in the woods” to ensure products were suitable for hunters. *Id.* at 578:12.

Mr. Crumley’s testimony primarily focused on The Comfy®’s ability to protect against the extreme cold. *See, e.g., id.* at 582:24–583:2. His expert opinion on this topic was informed both by his experience hunting in extreme cold conditions and by his work designing and testing hunting garments. *See, e.g., id.* at 575:19–578:3 (describing his experience hunting in conditions as cold as “5 degrees air temperature blowing 25 miles an hour and gusting to 50”); *id.* at 578:6–579:7 (describing his professional experience designing and evaluating products that protect against the extreme cold). Mr. Crumley believes The Comfy® can protect against the extreme cold because of “the construction and the fabrics used in the construction and the way the patents show that it should be worn to maximize warmth.” *Id.* at 582:24–583:2. This testimony was disputed by later witnesses, and the Court found Mr. Crumley’s expert opinion to be less persuasive than the opinion of the other two expert witnesses, Professor Mary Ann Ferro and Patricia Concannon.

Professor Ferro was the Government's principal expert witness. She is a garment design expert who has spent her career designing outerwear for various major clothing companies including London Fog. *See* Trial Tr. vol. III at 914:7–925:2, ECF No. 110 (direct testimony of Prof. Ferro). Currently, she is an assistant professor at the Fashion Institute of Technology. *See id.* at 925:8–19. Professor Ferro's testimony primarily focused on the physical characteristics and design of The Comfy®. She testified that The Comfy® could not protect against the extreme cold because it cannot insulate the user and trap body heat. Her experience designing garments for cold weather informed her opinion. *See, e.g., id.* at 977:25–979:7. Professor Ferro supported her opinion with a detailed explanation about how The Comfy's interior fabric was “very porous” and allowed air to flow into and out of the item. *See id.* at 928:11–929:18. She explained how The Comfy's open bottom and open hood also allowed airflow into and out of it. *See id.* at 930:12–931:20. Professor Ferro's testimony about The Comfy's inability to protect against the extreme cold aligned with aspects of Ms. Concannon's testimony but differed from Mr. Speciale's and Mr. Crumley's testimonies. The Court found Professor Ferro's detailed analysis of the product to be more persuasive than the testimonies of Mr. Speciale and Mr. Crumley.

Professor Ferro also testified about the differences between a pull-over and a blanket, and she detailed how those differences impacted her assessment of The Comfy®. *See id.* at 915:13–14, 1034:4–1036:2 (direct testimony of Prof. Ferro). She explained that, in the fashion industry, pullovers are defined by certain common features: (1) they have an opening for the head, (2) they “pull[] over the head[,]” (3) they are “knitted[,]” (4) they “may ... have a hood[,]” (5) they usually have “some kind of rib at the wrist ... like ribbed cuffs,” (6) they “have sleeves[,]” (7) they have “[f]ront and back panels ... sewn together[,]” and (8) they can have a kangaroo pocket. *See id.* at 1034:4–1036:2. Based on her experience as a garment designer, she believed that The Comfy® is an “oversized garment,” *id.* at 928:16–17, and more specifically is “an oversized pullover with a hood.” *Id.* at 915:13–14. Professor Ferro's definition of the term pullover provided helpful context to determine the “common and commercial meaning[]” of the term pullover, a customs term at issue in this case. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). Her opinion that The Comfy® was a pullover — while informative — spoke to the ultimate issue in this case, which involves mixed questions of fact and

law that the Court must assess on its own. *See Wilton Indus., Inc. v. United States*, 741 F.3d 1263, 1265–66 (Fed. Cir. 2013) (noting that properly classifying an item is a “two-step process” involving questions of law and fact).

The Government’s other expert witness, Patricia Concannon, is a fashion marketing professional. She has spent her career helping companies sell clothing to retailers and advising these companies on how to “bring [clothing] product[s] to market.” Trial Tr. vol. III at 840:8, ECF No. 110 (direct testimony of Ms. Concannon); *see also id.* at 837:21–843:3. Ms. Concannon’s testimony focused on how The Comfy® was marketed and sold to consumers. She explained how products that protect against the extreme cold are typically marketed in ways that detail “the technical features that go into producing” the product and provide “a temperature range of what level [of cold] protection” the product affords. *Id.* at 845:1–3, 851:2–5. Ms. Concannon noted The Comfy® was not marketed in that manner. *See id.* at 856:14–858:2. It instead was marketed as a wearable indoor garment with some mention of outdoor activities like “walking the dog” and “going to a sporting event[.]” *See id.* at 856:14–857:2, 870:8–15. She based her opinion on her professional knowledge about how products “that protect[] against the extreme cold ... [are] marketed and sold.” *Id.* at 844:17–19. The Court found Ms. Concannon’s testimony on these topics to align with the testimony of Professor Ferro and to be more persuasive than the testimony of Mr. Speciale and Mr. Crumley.

The remaining witnesses and testimonies that the Court heard were less relevant for resolving factual issues in this case. The Government called Renee Orsat as a fact witness. *See id.* at 747:7–10. Ms. Orsat is a national import specialist who works for Customs and who helped classify The Comfy®. *See id.* at 747:18–749:9 (direct testimony of Ms. Orsat). Ms. Orsat’s testimony provided helpful context about the general Customs classification process and the agency’s interpretation of the relevant tariff headings, but it did not speak to any of the disputed facts at issue in the trial. *See, e.g., id.* at 777:2–6. Similarly, each party read deposition testimony from a Rule 30(b)(6) witness into the record. Mr. Speciale was deposed as the Rule 30(b)(6) witness representing Cozy Comfort, and the Government introduced portions of his testimony into evidence. *See* Trial Tr. vol. IV at 1164:20–1165:18, 1169:6–16, ECF No. 111. The Court found Mr. Speciale’s deposition testimony on behalf of Cozy Comfort generally duplicative of the live testimony Mr. Speciale offered as a fact witness. *See, e.g., id.* at 1173:15–1174:15. Tatiana Matherne was deposed as the Rule 30(b)(6) witness for the Government. *See* Trial Tr. vol. III at 717:20–25, 724:11–725:25, ECF No. 110. Cozy Comfort read portions

of her testimony into the record. *See id.* This testimony — much like Ms. Orsat’s testimony — provided helpful context about the Customs classification process and Customs’ interpretation of the relevant tariff provisions, but it did not speak to the facts in dispute in the trial. *See, e.g., id.* at 726:3–20.

II. The Comfy®’s Design, Intended Use, and Physical Characteristics

Cozy Comfort designed The Comfy® to combine the features of an oversized sweatshirt and a throw blanket, creating a new product for adults. *See* Trial Tr. vol. I at 62:6–65:6, ECF No. 108 (direct testimony of Mr. Speciale). To make the first prototype, Mr. Speciale bought blankets and took them to a prototype design company to put together the first sample, which “was fairly close to what [they] wanted.” *Id.* at 64:7–22 (direct testimony of Mr. Speciale). The design process eventually produced the product depicted below.

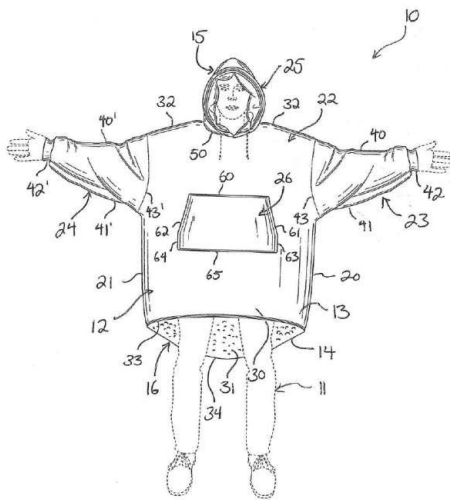


FIG. 1

See Ex. P-6, fig. 1.

The Comfy® solved what Cozy Comfort’s lawyers call the “left behind blanket problem.” *See* Trial Tr. vol. I at 28:4–7, ECF No. 108 (opening statement of Cozy Comfort). Pre-importation patents Cozy Comfort filed note that, although traditional “[t]hrow blankets are great at keeping a person warm and comfortable on the couch, ... sadly, eventually, one must get up from the couch ... [and] must leave

the warm blanket behind” Ex. P-6, col. 1, lines 19–27. The Comfy® aimed to be “[a]n improved, cozy, comfortable blanket” that was “practically portable” because it could be worn. *Id.*

The Comfy® was “mainly meant for lounging ... at home.” Trial Tr. vol. I at 67:18–19, ECF No. 108 (direct testimony of Mr. Speciale). The “background of the invention” section of Cozy Comfort’s patent describes indoor activities such as “get[ing] up from the couch ... to grab a hot chocolate, adjust the fire, or go to bed” as the context for why Cozy Comfort created The Comfy®. *See* Ex. P-6, col. 1, lines 23–25. Professor Ferro agreed The Comfy® was “designed primarily for indoors” in her expert opinion. *Compare* Trial Tr. vol. III at 915:4–8, ECF No. 110 (direct testimony of Prof. Ferro), *with* Trial Tr. vol. I at 67:16–25, ECF No. 108 (direct testimony of Mr. Speciale).

The Comfy® is designed so that users put it on by pulling it over their heads. Mr. Speciale demonstrated this process in Court during his testimony. He described the process of donning the product:

I’m holding The Original Comfy. I’m opening it up now from the very large bottom opening. I’m going to slide my arms into each of the two sleeves and pull the rib cuff to my wrists. I am now going to put my head through the hole for the — where the hood is. I now have The Comfy on.

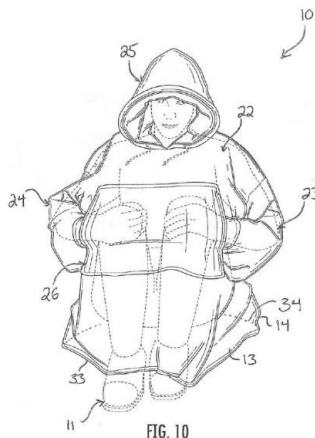
Trial Tr. vol. I at 108:23–109:6, ECF No. 108.

Once on, The Comfy® may be worn whether the wearer is standing or seated. The product’s patent begins its “DETAILED DESCRIPTION” of The Comfy® by explaining how The Comfy® is used “as worn by a person ... in a standing position.” Ex. P-6, col. 2, lines 43–46. Photographs of users wearing The Comfy® show customers wearing the product while standing. *See* Ex. P-13. When they are not standing in these photographs, users are typically wearing The Comfy® in a seated position. *See id.*

The Comfy® was designed to be oversized. Mr. Speciale’s first conception of The Comfy® was for it to be a “big oversized” item for adults. Trial Tr. vol. I at 63:21–22, ECF No. 108 (direct testimony of Mr. Speciale). The Comfy® extends to between the mid-thigh and knees of a wearer, depending on that wearer’s height. *See* Ex. P-13. Product patents predating The Comfy®’s first importation into the United States corroborate Mr. Speciale’s testimony regarding The Comfy®’s oversized design. *See, e.g.,* Ex. P-6, col. 6, lines 6–8 (describing the product as “approximately three to four times wider and approximately one-and-a-half times longer” than “a conventional item of clothing”). The Court confirmed The Comfy® was oversized when it donned The Comfy® in open court and allowed the parties to

point out aspects of the product they felt were relevant. *See* Trial Tr. vol. V. at 1389:11–1391:16, ECF No. 112 (THE COURT: “I was going to come down and put The Comfy on here in the courtroom ... and allow you to point out anything that you might want to point out....”). The in-court review demonstrated that the product fell to about the undersigned’s knees. *See id.* at 1396:17–21 (MR. SITRICK: “Your Honor, where does The Comfy come down to on your body while you’re standing?” THE COURT: “It looks like about my knees.”).

The Comfy® was not “primarily intended to be used in a cocooning position,” despite its size and Cozy Comfort’s arguments before the Court. Pl.’s Br. at 11, ECF No. 114. Mr. Speciale testified at trial that the product was “designed ... so you can pull your knees in, pull your arms in and get into the full cocoon position.” Trial Tr. vol. I at 57:12–15, ECF No. 108. Mr. Speciale and other witnesses at the trial referred to this position as “The Comfy cocoon.” *See, e.g., id.* at 57:15–16 (direct testimony of Mr. Speciale). Cozy Comfort and its patents describe the cocooning position as “a seated position with the user’s arms and legs pulled into the article with the knees and hands pulled into the chest area.” Pl.’s Br. at 8, ECF No. 114; *see also* Ex. P-6, fig. 10. That position is depicted below.



See Ex. P-6, fig. 10.

Persuasive evidence demonstrates that the cocooning position was not the product’s primary use. First, the Court’s *in camera* and in court review found that the cocooning position, as depicted above, was uncomfortable, constricting, and immobilizing. The Court had difficulty rising from the floor when assuming the cocoon position. The immobilizing nature of the cocooning position is in tension with how

Cozy Comfort's patents describe the product's intended uses. Those patents detail how The Comfy® is portable and suitable for indoor activities and primarily focus on how the product is used "as worn by a person ... in a standing position." Ex. P-6, col. 2, lines 43–46; *see also id.*, col. 1. Although a user might partially cocoon in The Comfy® by pulling his legs into the item while lying on his side in a fetal position, Cozy Comfort describes the "The Comfy® cocoon" as something different. *See* Pl.'s Br. at 8–9, ECF No. 114; Ex. P-6, fig. 10 (figure depicted above).

Second, customer photographs show only a handful of customers in a position resembling "The Comfy® cocoon." *See* Ex. P-13. Third, the box in which The Comfy® is sold does not mention or show the cocooning position. *See* Ex. P-1. All the pictures on the box instead show users wearing The Comfy® in a variety of standing positions. *See id.* For these reasons, the Court finds that the cocooning position is not the product's primary intended use. The cocooning position is a possible but uncomfortable and infrequent use of the product. It is not a position from which one can hunt or perform any other outdoor activity requiring movement. *See* Trial Tr. vol. II at 629:16–630:5, ECF No. 109 (cross-examination of Mr. Crumley) (describing the process for field testing hunting garments).

The Comfy® provides users with some warmth. That is primarily because The Comfy®'s interior is lined with a "sherpa-type ... curly pile fabric" modeled after "real ... shearling." Trial Tr. vol. III at 932:3–11, ECF No. 110 (direct testimony of Prof. Ferro). The Comfy®'s sherpa is an insulating fabric "made of ... synthetic fabric[.]" *Id.* at 933:7–12 (direct testimony of Prof. Ferro). Its addition helps trap some body heat in the product, keeping the user's body temperature higher in indoor environments. *See* Trial Tr. vol. II at 597:21–598:5, ECF No. 109 (direct testimony of Mr. Crumley). The Comfy®'s interior sherpa lining was created by threading synthetic sherpa fiber through a mesh fabric. *See* Trial Tr. vol. III at 928:19–929:18, ECF No. 110 (direct testimony of Prof. Ferro); *see also id.* at 933:2–18 (direct testimony of Prof. Ferro). Because of the visible holes in this mesh fabric, The Comfy®'s sherpa lining is "porous" and allows for some airflow into and out of the product. *Id.* at 929:16–930:3 (direct testimony of Prof. Ferro). Because of this open design, The Comfy® only keeps users warm in indoor or mild outdoor conditions, as detailed later in this opinion. *See id.* at 979:8–14 (MR. KENNEDY: "[W]ould you be able to estimate where you could wear The Comfy outdoors, at what temperature ranges?" PROF. FERRO: "I would say mild temperatures because of its open — especially because of its open design.").

Eighty-three percent of The Comfy®’s purchasers are females. *See* Ex. P-12 at 6; Trial Tr. vol. I at 83:14–18, ECF No. 108 (direct testimony of Mr. Speciale). Twenty-seven percent reside in the Midwest, twenty-eight percent in the Northeast, twenty-three percent in the South, and twenty-two percent in the West. *See* Ex. P-12 at 6. No testimony directly addressed whether The Comfy® is worn primarily during particular seasons, but testimony suggests the product is worn indoors year-round. *See* Trial Tr. vol. I at 120:8–121:21, ECF No. 108 (direct testimony of Mr. Speciale) (explaining how he wore The Comfy® indoors at a hockey rink “in the summer”). It can be worn outdoors in cool and mild conditions. *See* Trial Tr. vol. III at 979:8–14, ECF No. 110 (direct testimony of Prof. Ferro).

III. Marketing & Sales of The Comfy®

Cozy Comfort “knew from the beginning” that The Comfy® would “get compared with the Snuggie” by consumers. Trial Tr. vol. I at 66:24–67:1, ECF No. 108 (direct testimony of Mr. Speciale). The Snuggie® is a large, modified blanket “with two sleeves you put your arms through.” Trial Tr. vol. IV at 1193:16–18, ECF No. 111 (Rule 30(b)(6) deposition of Mr. Speciale); *see also Allstar Mktg. Grp., LLC v. United States*, 41 CIT __, 211 F. Supp. 3d 1319, 1324–26 (2017) (describing The Snuggie®). These sleeves allow a user to wear the Snuggie “on the front” of their body. Trial Tr. vol. IV at 1193:19–20, ECF No. 111 (Rule 30(b)(6) deposition of Mr. Speciale on behalf of Cozy Comfort). The Snuggie®’s box and a Snuggie® laid on a table are depicted below.



See Ex. D-50.

Mr. Speciale explained that comparisons between The Comfy® and The Snuggie® were “not necessarily a bad thing, especially in mar-

keting ...” because The Snuggie® is a well-known item. Trial Tr. vol. I at 67:1–3, ECF No. 108. Two major aspects of Cozy Comfort’s marketing relied on public knowledge of The Snuggie. First, Cozy Comfort sold The Comfy® exactly how The Snuggie® is sold: in a box. *Compare* Ex. P-1, with *Allstar Mktg.*, 41 CIT __, 211 F. Supp. 3d at 1325 (noting The Snuggie® is sold in “boxes”). Second, Cozy Comfort sold The Comfy® in the same store sections as The Snuggie®. *Compare* Trial Tr. vol. I at 152:12–154:13, ECF No. 108 (direct testimony of Mr. Speciale) (detailing how The Comfy® has been sold in the “bedding and blanket section,” the “bedding or lifestyle section,” and the “As Seen on TV section”), with *Allstar Mktg.*, 41 CIT __, 211 F. Supp. 3d at 1326 (“The Snuggie® is sold in the bedding, housewares, general merchandise, impulse buy, or as-seen-on-TV departments of retail stores, never in the wearing apparel department.”) (internal quotation marks and citations omitted).

Cozy Comfort still needed to distinguish The Comfy® from The Snuggie® to generate consumer interest, and it did so by emphasizing how The Comfy® was fully wearable and portable unlike The Snuggie®. *See* Trial Tr. vol. I at 67:8–25, ECF No. 108 (direct testimony of Mr. Speciale) (MR. SPECIALE: “But what’s great about [The Comfy®] is that you can get up and take your warmth with you. If you’re going to get something to drink, just day-to-day activities or going out to get the mail[.]”); Trial Tr. vol. IV at 1193:23–25, ECF No. 111 (Rule 30(b)(6) deposition of Mr. Speciale on behalf of Cozy Comfort) (MR. SPECIALE: “So [The Snuggie®] does have an opening, as opposed to The Comfy, where[as] The Comfy is closed around.”). Expert testimony confirmed that clothing-like wearability was the key difference between The Comfy® and The Snuggie®. Professor Ferro testified that, unlike The Snuggie®, “The Comfy is not a blanket, because you wear it. You wear it ... indoors. You wear it outdoors. It’s not just ... for the couch like the Snuggie” Trial Tr. vol. III at 945:23–946:2, ECF No. 110. She summarized the difference between the products by stating that “The Snuggie is like a blanket. But [The Comfy®] is a garment.” *Id.* at 946:4–5.

Focusing on The Comfy®’s distinct clothing-like wearability was an essential part of Cozy Comfort’s marketing strategy. This focus began from the moment Cozy Comfort launched The Comfy® on the TV show *Shark Tank* in December 2017. *See* Trial Tr. vol. I at 71:21–72:20, 73:14–24, ECF No. 108 (direct testimony of Mr. Speciale). Cozy Comfort introduced its product on *Shark Tank* as “the blanket that’s a sweatshirt” and explained that “it goes with you and keeps you warm wherever you are.” Ex. D-21 at 0:43–46, 1:30–33. One of the *Shark Tank* hosts, Lori Greiner, noted The Comfy® is “just

like” The Snuggie®. *Id.* at 6:03–05. Mr. Speciale responded that The Comfy® “is absolutely not The Snuggie®.” *Id.* at 6:09–10. Another *Shark Tank* host, Barbara Corcoran, then asked Mr. Speciale to “explain to me what the difference between your product is and The Snuggie®.” *Id.* at 6:32–37. Mr. Speciale explained, “If you’re on the couch with The Snuggie® and you wanted to get up to go do something, you have to take it off every time.” *Id.* at 6:37–43. His brother then emphasized that, unlike The Comfy®, The Snuggie® is “open in the back, it’s like having a robe on backwards.” *Id.* at 6:43–46. These differences made The Comfy® a “significant improvement” on The Snuggie® that customers would appreciate. *Id.* at 6:47–49 (according to Brian Speciale).

Early post-*Shark Tank* marketing played up this wearability while referencing known terms in the consumer goods market. *See* Trial Tr. vol. I at 88:5–16, ECF No. 108 (direct testimony of Mr. Speciale). Cozy Comfort identified the product as a hybrid of a blanket and a sweatshirt with slogans like “The Comfy, the Blanket... That’s A Sweatshirt!” Ex. P-4. Cozy Comfort also adopted a trademark for The Comfy®’s marketing logo, which depicts “a standing panda bear wearing a hooded sweatshirt” Ex. P-4. This slogan and logo emphasize to observers how The Comfy® can be worn like an article of clothing, unlike The Snuggie®.



See Ex. P-4.

Cozy Comfort changed this trademark in June 2021, but that change occurred after the present dispute with the Government began. *See* Trial Tr. vol. I at 91:23–92:1, ECF No. 108 (direct testimony of Mr. Speciale) (noting Cozy Comfort cancelled its original trademark on “June 17 of 2021”). Mr. Speciale admitted that the tariff dispute “may have accelerated” this marketing change. *Id.* at 93:19; *see also id.* at 93:14–23. That makes Cozy Comfort’s later trademarks and slogans less reliable evidence for the Court’s assessment of The Comfy®’s intended use and how it was marketed.

Cozy Comfort also switched to calling the product a “wearable blanket” alongside this marketing change. *See id.* at 89:6–25 (direct testimony of Mr. Speciale); Ex. P-1. Though it dropped the word “sweatshirt” from its slogan, the key marketing emphasis for The Comfy® remained its clothing-like wearability. *See* Ex. P-1 (The Comfy® and its accompanying box). To that end, the pictures of The Comfy® on the box in which it is sold still depict people wearing The Comfy® while standing, emphasizing its clothing-like wearability and portability. *See id.* Those pictures continued to contrast The Comfy® with the Snuggie®. *Compare Allstar Mktg.*, 41 CIT __, 211 F. Supp. 3d at 1325 (“The retail packaging shows users wearing the Snuggie® on their front with their arms through the sleeves while reclining or seated on an airplane, couch, bed, and floor[.]”), and Ex. D-50 (pictures of The Snuggie®), *with* Ex. P-1 (The Comfy® and its accompanying box).

Cozy Comfort makes a plurality of its sales on Amazon.com. *See* Trial Tr. vol. I at 151:18–152:11, ECF No. 108 (direct testimony of Mr. Speciale); Ex. P-16. Mr. Speciale testified that, early on, Amazon sold the product as a blanket. *See* Trial Tr. vol. I at 145:18–147:3, ECF No. 108. Today, Amazon sells The Comfy® in the “wearable blankets” category, which Amazon created for the product sometime in 2019. *See id.* at 145:18–146:23 (direct testimony of Mr. Speciale).

Other retailers sell The Comfy® in similar sections and categories as The Snuggie®. *Cf. Allstar Mktg.*, 41 CIT __, 211 F. Supp. 3d at 1326 (“The Snuggie® is sold in the bedding, housewares, general merchandise, impulse buy, or as-seen-on-TV departments of retail stores, never in the wearing apparel department.”) (internal quotation marks omitted). QVC sells The Comfy® in the “bedding and blanket section.” *See* Trial Tr. vol. I at 152:12–16, ECF No. 108 (direct testimony of Mr. Speciale). Costco sells it in the “bedding or lifestyle section.” *Id.* at 152:17–19 (direct testimony of Mr. Speciale). Target sells the product in the “As Seen on TV section,” because the product was featured on the TV show *Shark Tank*. *Id.* at 152:24–153:2 (direct testimony of Mr. Speciale). Bed Bath & Beyond sold the product in the “blanket and bedding section.” *Id.* at 153:3–5 (direct testimony of Mr. Speciale). Other stores sell the product in similar areas. *See id.* at 153:6–154:13 (direct testimony of Mr. Speciale). Exhibit P-10, a series of photographs that shows The Comfy® displayed for sale in retail locations, confirms Mr. Speciale’s testimony. *See* Ex. P-10; Trial Tr. vol. I at 154:21–155:2, ECF No. 108 (direct testimony of Mr. Speciale).

Licensing agreements with different major companies refer to The Comfy® in a variety of ways. *See* Trial Tr. vol. I at 165:12–166:17, ECF No. 108 (direct testimony of Mr. Speciale). Agreements with companies like Disney categorize the product as a “wearable throw[]... [or] blanket.” *Id.* at 165:12–17 (direct testimony of Mr. Speciale); *see also id.* at 165:22–166:17; Ex. P-11. Other agreements with companies such as Marvel call the product a “home furnishing[.]” Trial Tr. vol. I at 166:4–5, ECF No. 108 (direct testimony of Mr. Speciale); *see also* Ex. P-11 at 1.

The Comfy® was primarily marketed as a comfortable, wearable product to be used indoors. Ms. Concannon testified, “A lot of the imagery and a lot of the marketing looked like it was worn mostly indoors[.]” Trial Tr. vol. III at 856:16–18, ECF No. 110. The outdoor activities displayed in marketing materials focused on activities “like walking the dog” and “going to a sporting event.” *Id.* at 856:21–857:2 (direct testimony of Ms. Concannon); *see also* Jt. Uncontested Facts ¶ 18, ECF No. 107. All these activities are incompatible with the blanket-like Snuggie®. *See* Ex. D-21 at 6:37–43 (MR. SPECIALE: “If you’re on the couch with The Snuggie® and you wanted to get up to go do something, you have to take it off every time.”).

IV. Whether The Comfy® Protects Against the Extreme Cold

The remainder of the trial centered on whether The Comfy® protects against the extreme cold. Sweaters, pullovers, vests, and other similar articles do not provide protection against the “extreme cold.” *Rubies Costume II*, 922 F.3d at 1345–46. Customs’ classification of the product as a pullover would be incorrect if The Comfy® did provide such protection. *See id.*

A.

Various witnesses offered competing ideas about what “extreme cold” means. Mr. Speciale testified that what constitutes extreme cold “depends on the person and the individual.” Trial Tr. vol. I at 133:5–14, ECF No. 108. He believes, “Somebody that’s on the equator may consider 68 degrees extremely cold.” *Id.* at 133:15–16. Mr. Crumley, an experienced outdoorsman, noted that he “usually” had experienced extreme cold temperatures out West with “5 to 10 degrees air temperature and [wind] blowing 25 to 30 miles an hour.” *See* Trial Tr. vol. II at 576:20–577:5, ECF No. 109. *But see id.* at 593:13–16 (direct testimony of Mr. Crumley) (describing the extreme cold as a subjective term). Professor Ferro believed “extreme cold” constituted a range of temperatures that reasonable people consider to be extremely cold. *See* Trial Tr. vol. III at 955:12–24, ECF No. 110. The parties continued to dispute the meaning of “extreme cold” in their

post-trial briefs. Cozy Comfort argues that extreme cold has “inherent subjectivity” and varies based on the user. Pl.’s Br. at 36, ECF No. 114. The Government argues that extreme cold “is maximum, intense, frigid, bitter, or arctic cold, *i.e.*, well below zero degrees Fahrenheit.” Def.’s Br. at 6, ECF No. 116.

“Extreme cold” is relevant to this case because of the Federal Circuit’s opinion in *Rubies Costume II*. 922 F.3d at 1345–46. The meaning of the phrase is a question of law for this Court to assess on its own. *See YBM Magnex, Inc. v. Int’l Trade Comm’n*, 145 F.3d 1317, 1320 (Fed. Cir. 1998) (“The meaning or interpretation of precedent is a question of law[.]”) (citing *S. Park Indep. Sch. Dist. v. United States*, 453 U.S. 1301, 1304–05 (1981)), *rev’d on other grounds*, 285 F.3d 1046 (Fed. Cir. 2002). “[T]he language of [a judicial] opinion is not always to be parsed as though we were dealing with language of a statute.” *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). Courts interpreting the language of precedential opinions must remain cognizant that the words of a judicial opinion “appeared in a particular context and did particular work.” *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 374 (2023).

The Court declines to adopt the Government’s interpretation of “extreme cold.” The Government’s interpretation rests on a literalistic analysis of the word “extreme” and citations to general explanations about “extreme cold.” *See* Def.’s Br. at 6–7, ECF No. 116 (citing to dictionary definitions of “extreme”); *id.* at 7 (citing to National Weather Service definitions of “extreme cold”). That interpretation makes no sense in the context the Federal Circuit’s *Rubies Costume II* opinion. The Federal Circuit compared the jacket of a Santa Suit to a common sweater or sweatshirt when it wrote about the “extreme cold.” *See Rubies Costume II*, 922 F.3d at 1345–46. It said that “[l]ike a sweater or sweatshirt, the [Santa Suit] jacket covers the upper body and provides some warmth to the wearer but does not protect against wind, rain, or extreme cold.” *Id.* “Extreme cold” follows the terms “wind” and “rain,” two standard weather conditions. *Id.* This context implies that the “extreme cold” the Federal Circuit had in mind was a more common, serious but not severe, cold. *Cf. Fischer v. United States*, 603 U.S. 480, 487 (2024) (“[T]he canon of *noscitur a sociis* teaches that a word is given more precise content by the neighboring words with which it is associated.”) (internal citations and quotation marks omitted); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (“We rely upon [*noscitur a sociis*] to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words[.]”).

The Court also declines to accept Cozy Comfort’s subjective definition of the extreme cold. Nothing in the Federal Circuit’s opinion implies it was adopting a purely subjective, user-based standard for “some warmth,” “rain,” “wind,” or “extreme cold.” One cannot read the Federal Circuit as saying that the jacket in *Rubies Costume II* provides some warmth to the wearer but does not protect against wind, rain, or 68-degree weather. *Compare* Trial Tr. vol. I at 133:15–16, ECF No. 108 (direct testimony of Mr. Speciale) (suggesting someone at the equator “may consider 68 degrees extremely cold”), *with Rubies Costume II*, 922 F.3d at 1345–36.

The term “extreme cold” in *Rubies Costume II* instead refers to a range of temperatures at, near, or below freezing. No bright line separates the ordinary cold from the extreme cold, because, as the National Weather Service recognizes, “[w]hat constitutes extreme cold varies in different parts of the country.” Ex. D-30. Still, there are limits to what temperatures are extremely cold. The National Weather Service’s definition of “extreme cold” goes no higher than “near freezing temperatures” when experienced in the “southern U.S.” *Id.* Elsewhere, such as in the northern states, “extreme cold [only] means temperatures well below zero.” *Id.* The National Weather Service’s range — from “near freezing” down to “well below zero” — aligns with both common sense and the context of *Rubies Costume II*. 922 F.3d at 1345–46 (“Like a sweater or sweatshirt, the jacket ... provides some warmth to the wearer but does not protect against wind, rain, or extreme cold.”). Temperatures in this range present a similar degree of inclement weather as “wind” and “rain.” *Id.* They also involve the kind of weather against which an ordinary sweater, sweatshirt, or pullover cannot protect — the precise inquiry that motivated the Federal Circuit to write the phrase in question. *See id.* at 1345 (“Although the precise term for the type of jacket included with the Santa Suit does not appear in the list of items in heading 6110, the jacket shares the characteristics of the named articles in the heading.”).

Persuasive expert testimony at trial demonstrated that no single product protects against the extreme cold. The key to protecting against the extreme cold is proper layering, which, as Professor Ferro explained, “keep[s] in the [body’s] heat.” Trial Tr. vol. III at 934:13–14, ECF No. 110; *see also id.* at 944:11–17 (direct testimony of Prof. Ferro); Trial Tr. vol. II at 603:17–604:23, ECF No. 109 (direct testimony of Mr. Crumley). For an outer layer like The Comfy® to protect against the extreme cold, it must insulate, or trap, air within the garment and “prevent[] the outside ... cold from getting into the garment.” Trial Tr. vol. III at 935:24–936:1, ECF No. 110 (direct

testimony of Prof. Ferro); *see also* Trial Tr. vol. II at 657:21–25, ECF No. 109 (direct testimony of Mr. Crumley) (noting a garment protecting against “colder weather” needs material “to trap air, [and] body heat”). As Professor Ferro elaborated, “What the [outer] garment does is keep in the heat.... Most outerwear that’s made for extreme cold weather has to be more or less snugly fit.” Trial Tr. vol. III at 934:13–18, ECF No. 110. This insulating function keeps cold air out and body heat in, allowing the body to maintain its temperature. *See id.* at 983:1–984:18 (direct testimony of Prof. Ferro) (detailing the importance of trapping heat “at least around the body”); *see also id.* at 1018:4–12 (direct testimony of Prof. Ferro). Outer garments that protect against the extreme cold have certain common characteristics, according to the National Weather Service. *See* Ex. D-30. They are typically tightly woven to keep body heat in the garment. *See id.* They also often are water repellent and have a hood with a drawstring to pull the hood snug against the face. *See id.*; *see also* Trial Tr. vol. III at 997:5–1000:3, ECF No. 110 (direct testimony of Prof. Ferro).

B.

The Comfy® does not protect against the extreme cold.³ Aspects of The Comfy®’s physical design make it unsuited for extreme cold conditions, as Professor Ferro persuasively explained and the evidence confirmed. Three facts lead to this finding. First, The Comfy® lacks several important features products designed for the extreme cold typically possess. Second, The Comfy® is not marketed like products that protect against the extreme cold. Third, The Comfy® was designed primarily for indoor use.

The Comfy®’s porous interior fabric design renders it unable to protect users against the extreme cold. Professor Ferro credibly and persuasively testified that The Comfy®’s interior synthetic sherpa lining “wasn’t thick” because “it was knitted on” to a background material that was “very porous.” Trial Tr. vol. III at 928:19–929:18, ECF No. 110; *see also id.* at 933:2–18. That background material is mesh-like. *See id.* at 929:21–23 (direct testimony of Prof. Ferro). The Court confirmed these facts *in camera*. Cozy Comfort manufactures The Comfy®’s interior lining by looping sherpa fabric in and out of the mesh holes in the background material. *See id.* at 929:24–930:3 (direct testimony of Prof. Ferro). This leaves gaps in the lining where

³ The Government’s post-trial brief suggests that the relevant inquiry should be whether The Comfy® protects against the rain, wind, and extreme cold, not simply whether The Comfy® protects against the extreme cold. *See* Def.’s Br. at 32, ECF No. 116. The parties stipulated that The Comfy® does not protect against the rain or wind. *See* Jt. Uncontested Facts ¶ 13, ECF No. 107. Because The Comfy® does not protect against the extreme cold, the Court finds it unnecessary to address the Government’s suggestion that all three conditions should be evaluated together.

there is no sherpa material to block air from entering. *See id.* at 929:16–930:3 (direct testimony of Prof. Ferro); *see also* Trial Tr. vol. II at 436:23–467:2, ECF No. 109 (cross examination of Mr. Speciale) (MR. KENNEDY: “[The Comfy®] has hundreds of holes throughout the inside of the sherpa lining, correct?” MR. SPECIALE: “That’s how it’s manufactured, correct.”).

Similarly, The Comfy®’s open bottom and open hood make it unsuitable for the extreme cold. The Comfy® has an oversized bottom opening that allows cold air to enter the product, as Professor Ferro testified and the Court’s review confirmed. *See* Trial Tr. vol. III at 930:12–21, ECF No. 110. The product’s oversize hood also allows cold air to enter. *See id.* at 931:11–20 (direct testimony of Prof. Ferro). Indeed, The Comfy® lacks a drawstring that would permit the wearer to ensure a tight fit around the head to retain heat. *See id.* at 930:12–21, 931:11–20 (direct testimony of Prof. Ferro). The Comfy®’s porous material, open bottom, and open hood permit easy airflow into and out of the product. Summarizing her views, Professor Ferro persuasively testified, “You’re not going to be able to wear [The Comfy®] in the freezing cold because ... [i]t’s too open[.]” *Id.* at 943:22–24; *see also id.* at 1018:5–7 (PROF. FERRO: “The Comfy was too open to really — for the fabric to really do [its] job to keep the heat in.”).

Garments keep users warm in the extreme cold by insulating them with air trapped between layers. *See* Ex. D-30; Trial Tr. vol. III at 934:15–18, ECF No. 110 (PROF. FERRO: “What the garment does is keep in the heat.... Most outerwear that’s made for extreme cold weather has to be more or less snugly fit.”). The Comfy®’s oversized design and porous lining prevent it from effectively trapping air so that it cannot adequately insulate users. *Compare* Trial Tr. vol. III at 928:19–929:18, 930:12–931:21, ECF No. 110 (direct testimony of Prof. Ferro) (detailing how The Comfy® is porous and open), *with id.* at 930:15–21 (PROF. FERRO: “[I]f I’m thinking about ... staying warm, cold air can get into the garment very easily.... [i]t really needs to be cinched in, in order to keep the cold air from getting into the garment.”), *and* Trial Tr. vol. II at 657:21–25, ECF No. 109 (direct testimony of Mr. Crumley) (noting a garment protecting against “colder weather” needs material “to trap air, [and] body heat”). The Comfy® therefore is unsuitable for the extreme cold, and the Court finds that it does not protect from the extreme cold. *See* Trial Tr. vol. III at 935:24–936:1, ECF No. 110 (direct testimony of Prof. Ferro) (explaining for an outer layer to protect against the extreme cold it must “prevent[] the outside ... cold from getting into the garment”).

Cozy Comfort's post-trial brief attempts to discredit Professor Ferro's expert testimony.⁴ It argues Professor Ferro's opinion that The Comfy® did not protect against the extreme cold hinges on her belief that "extreme cold" only encompasses arctic-like temperatures. Pl.'s Br. at 45, ECF No. 114. Cozy Comfort claims that "Ms. Ferro applied an even more demanding standard for extreme cold ... [and] testified that extreme cold means 'minus 15 or below.'" *Id.* The Court disagrees.

Cozy Comfort's characterization of Professor Ferro's testimony hinges on a line from her cross examination. In that portion of her testimony, counsel for Cozy Comfort asked her about a time when she wore a down coat to protect against temperatures that she considered extremely cold. *See* Trial Tr. vol. IV at 1118:3–5, ECF No. 111 (cross examination of Prof. Ferro). Only once amid this line of questioning did Professor Ferro say, "According to the [National Weather Service], [extreme cold is] minus 15 and below." *Id.* at 1119:20–23. This was a brief statement where Professor Ferro, under cross-examination, quickly summarized how she believed the National Weather Service defined extreme cold. In contrast, Professor Ferro gave an extensive, detailed explanation of her view that the term "extreme cold" embodied a range of temperatures that a reasonable person may find "extremely cold." She explained that she believed the meaning of extreme cold:

[D]epends on — for a person, it depends on where they come from, what their constitution is, what their build is, what their health is like, what [their] age is. If you live in Arizona and it comes near freezing, you're very cold. But the person that lives in Wisconsin is fine.

Trial Tr. vol. III at 955:12–24, ECF No. 110 (direct testimony of Prof. Ferro). She based her opinion on outside sources like a National Weather Service webpage on the extreme cold. *See, e.g., id.* at 955:12–956:24, 957:12–958:4 (direct testimony of Prof. Ferro). When allowed to fully explain the National Weather Service's definition of extreme cold, Professor Ferro provided testimony demonstrating the

⁴ Cozy Comfort also argues that "Ms. Ferro ... was considering only the outermost layer and not the overall effect that a garment has in a series of layers." *See* Pl.'s Br. at 45, ECF No. 114. This too mischaracterizes Professor Ferro's testimony. Professor Ferro explained that no single garment protects against the extreme cold, and layering is essential. *See, e.g.,* Trial Tr. vol. IV at 1101:19–1102:1, ECF No. 111 (cross examination of Prof. Ferro) (explaining Prof. Ferro's belief that the Canada Goose protects against the extreme cold only when properly layered). The Court understands Professor Ferro's opinion on The Comfy® to be rooted in her analysis of The Comfy® as the outermost of multiple layers, not only as an analysis of The Comfy®'s ability to protect against the cold in isolation.

National Weather Service adopted a similar standard. *See, e.g., id.* at 957:18–958:1 (direct testimony of Prof. Ferro) (reading the National Weather Service webpage) (PROF. FERRO: “In the Southern United States, near freezing temperatures are considered extreme — extremely cold.”); *see also* Ex. D-30. Thus, when Professor Ferro said she believed The Comfy® could not protect against the extreme cold, the totality of her testimony clarifies that she meant The Comfy® could not protect against any temperature in the range considered to be extremely cold. This range included “near freezing” temperatures, *see* Trial Tr. vol. III at 955:20–21, ECF No. 110 (direct testimony of Prof. Ferro), of the type the Federal Circuit meant when it wrote “extreme cold” in *Rubies Costume II*. 922 F.3d at 1345–46.

That The Comfy® lacks the common characteristics of clothing that does protect against the extreme cold further supports the Court’s determination. Unlike most overgarments designed for the extreme cold, The Comfy® does not possess an elastic band or drawstring to keep its open bottom tight to the body and its hood close to the face. *See* Trial Tr. vol. III at 930:12–21, 931:11–20, ECF No. 110 (direct testimony of Prof. Ferro). It also does not use common insulating fabrics like Gore-Tex, Thinsulate, Primaloft, down, or fiber fill. *See* Trial Tr. vol. II at 435:21–436:10, ECF No. 109 (cross-examination of Mr. Speciale).

The Comfy® also lacks water resistance. The parties stipulated that The Comfy® does not protect against the rain. *See* Jt. Uncontested Facts at ¶ 13, ECF No. 107. But this understates The Comfy®’s deficiencies. As Professor Ferro testified, The Comfy® absorbs water on contact and stays wet for hours.⁵ *See* Trial Tr. vol. III at 935:10–938:9, ECF No. 110. Water resistance is not technically essential for a product to protect against the extreme cold, but products

⁵ In its post-trial brief, Cozy Comfort makes a conclusory argument that Professor Ferro’s water test was “irrelevant, undefined, and unscientific” Pl.’s Br. at 45–46, ECF No. 114. The Court disagrees. Expert witnesses must provide testimony that “is the product of reliable principles and methods[,]” and “reflects a reliable application of the principles and methods to the facts of the case.” Fed. R. Evid. 702 (c)–(d). Courts reviewing the reliability of an expert’s methodology focus on whether “[i]t was appropriate for [the expert] to rely on the test that he administered and upon the sources of information which he employed.” *Walker v. Soo Line R. R. Co.*, 208 F.3d 581, 587 (7th Cir. 2000). Here, Professor Ferro first assessed whether The Comfy® is water resistant. To do that, she poured “a couple of tablespoons of water on the fabric that comes in the box with The Comfy®.” *See* Trial Tr. vol. III at 936:5–8, ECF No. 110 (direct testimony of Prof. Ferro). Pouring a small quantity of water on an item is an appropriate method for determining if it is water resistant. After pouring this water on the material, Professor Ferro observed what happened to the material and waited to see how quickly the sample fabric dried. *See id.* at 936:18–937:22 (direct testimony of Prof. Ferro). That is an appropriate way to determine if a garment is capable of wicking water. The Court struggles to imagine another method to make that determination, and Cozy Comfort’s briefing provides no alternative test it considers more appropriate. *See* Pl.’s Br. at 46, ECF No. 114.

that do usually have this feature. *See id.* at 980:4–981:11 (direct testimony of Prof. Ferro). That is because water resistance prevents the wearer’s perspiration from soaking the garment and causing heat to leave the body. *See id.* at 934:4–8 (direct testimony of Prof. Ferro). Moisture is the enemy of heat preservation, and The Comfy® lacks any ability to wick moisture away from the body. *See id.* at 982:15–19 (MR. KENNEDY: “So then is [water] wicking important for the inside of the garment?” PROF. FERRO: “Yeah. That’s ... essential ... for [the] extreme cold[.]”).

The Comfy® is not marketed or sold like products that protect against the extreme cold. Ms. Concannon credibly explained that products which protect against the extreme cold are typically marketed with certain features.⁶ These products’ tags or websites tend to detail “the technical features that go into producing that garment” to demonstrate to consumers how and why the product can protect against the extreme cold. *Id.* at 845:1–3 (direct testimony of Ms. Concannon); *see also id.* at 844:20–846:24 (direct testimony of Ms. Concannon). This information often provides buyers with “a temperature range of what level [of cold] you’ll be protected up to[.]” *See id.* at 851:2–5 (direct testimony of Ms. Concannon). Garments that protect against the extreme cold are also typically advertised in ways that show the garment being worn in extremely cold conditions. *See id.* at 850:11–851:13 (direct testimony of Ms. Concannon).

By contrast, Cozy Comfort marketed The Comfy® primarily as an indoor product, with some mention of outdoor activities like “walking the dog” and “going to a sporting event.” *Id.* at 856:21–23 (direct testimony of Ms. Concannon); *see also id.* at 856:14–857:2 (direct testimony of Ms. Concannon). The box in which The Comfy® comes does not contain any indication the product offers protection from the

⁶ Cozy Comfort attempts to discredit Ms. Concannon’s testimony by arguing that she too relied on an incorrect definition of the term “extreme cold.” It claims that Ms. Concannon interpreted “extreme cold” to mean “temperatures like ‘negative 22 degrees Fahrenheit.’” Pl.’s Br. at 43, ECF No. 114 (citing Trial Tr. vol. III 847:11–19, 851:1–5, ECF No. 110 (direct testimony of Prof. Concannon)). Cozy Comfort’s characterization of Ms. Concannon’s testimony is inaccurate. When Ms. Concannon was discussing negative 22-degree weather, she was not explaining her definition of extreme cold. Instead, she was providing an example of the temperatures against which some products claim to protect. That is clear from the full context of her statement. She said, “A lot of times, some of the goods will give you a temperature range of what level you’ll be protected up to, say for example, negative 22 degrees Fahrenheit. You know, they’ll put these specs on there. Canada Goose is one example of that.” Trial Tr. vol. III at 851:2–8, ECF No. 110 (direct testimony of Ms. Concannon). The Court understands Ms. Concannon’s definition of extreme cold to embody a range of temperatures up to and including freezing cold. When discussing the concept of “extreme cold” in depth, Ms. Concannon cited to outdoor sports that typically take place in temperatures at, near, or slightly below freezing such as skiing and hiking. *See* Trial Tr. vol. II at 847:15–19 (direct testimony of Ms. Concannon); *see also id.* at 851:20–852:2 (direct testimony of Ms. Concannon). She did not discuss extreme arctic sports that typically take place at temperatures well below zero degrees Fahrenheit.

extreme cold. *See* Ex. P-1; Trial Tr. vol. III at 857:5–858:2, ECF No. 110 (direct testimony of Ms. Concannon). The Comfy® was marketed “as more of a loungewear product” rather than a product that protects against the elements. Trial Tr. vol. III at 870:13–14, ECF No. 110 (direct testimony of Ms. Concannon); *see also id.* at 870:8–15 (direct testimony of Ms. Concannon). Mr. Speciale confirmed this portion of Ms. Concannon’s testimony. He admitted Cozy Comfort had never marketed The Comfy® as protecting against the extreme cold. *See* Trial Tr. vol. II at 434:15–17, ECF No. 109 (cross examination of Mr. Speciale) (MR. KENNEDY: “The Comfy has never been marketed for protection from extreme cold, correct?” MR. SPECIALE: “Correct.”).

Finally, Cozy Comfort’s admission that it designed The Comfy® primarily for indoor use reinforces the Court’s finding. *See* Pl.’s Br. at 10, ECF No. 114. As The Comfy®’s co-creator Mr. Speciale testified on direct examination, The Comfy® is “mainly meant for lounging on the couch at home.” Trial Tr. vol. I at 67:16–19, ECF No. 108. Given the stark temperature differences between the typical indoor environment and any fair definition of extreme cold, it would be unlikely that the same product could be comfortably worn in both environments. *See* Ex. P-6, col. 1 (describing the indoor environment as the background for invention of The Comfy®). A product that protects against the extreme cold would keep in too much body heat, causing the user to become too hot for room temperature conditions. The opposite is true for a product designed for indoor use, like The Comfy®, which would be too loose and non-insulating to protect users from the extreme cold.

C.

Cozy Comfort makes four main arguments for why The Comfy® protects against the extreme cold. First, it offers expert opinion testimony from Mr. Crumley, an avid hunter and outdoorsman who believes the product protects against the extreme cold. Second, it argues that the product was designed to protect against the extreme cold. Third, it contends that customers use the product in the extreme cold. Fourth, it insists that customer reviews confirm the product is used in the extreme cold. The Court finds each of these arguments unsupported by the evidence admitted at trial.

Mr. Crumley’s opinion that The Comfy® protects against the extreme cold was unpersuasive. Mr. Crumley believes that The Comfy® protects against the extreme cold because of “the construction and the fabrics used in the construction and the way the patents show that it

should be worn to maximize warmth.” See Trial Tr. vol. II at 582:24–583:2, ECF No. 109. His opinion focused on the cocooning position as an aspect of The Comfy®’s protection against the extreme cold. See *id.* at 588:3–589:1. The cocooning position, in his view, allows users to protect their extremities from the cold. See *id.* at 588:3–19. Mr. Crumley stated he believes the The Comfy®’s sherpa lining traps body air to maximize warmth in the cocooning position. See *id.* at 588:20–589:1. Mr. Speciale advanced the same theory in his testimony. See, e.g., Trial Tr. vol. I at 71:7–14, ECF No. 108; *id.* at 132:24–133:4.

Both Mr. Crumley and Professor Ferro agree that a garment cannot protect against the extreme cold unless it traps air inside the garment to help the body retain heat. Compare Trial Tr. vol. III at 935:20–23, ECF No. 110 (direct testimony of Prof. Ferro), with Trial Tr. vol. II at 588:20–589:8, ECF No. 109 (direct testimony of Mr. Crumley), and *id.* at 597:21–25 (direct testimony of Mr. Crumley). Mr. Crumley rested his analysis on conclusory assertions that “the construction and the fabrics” of The Comfy® enable it to protect against the extreme cold. Trial Tr. vol. II at 582:24–583:2, ECF No. 109. He also suggested that, if users properly layer items beneath The Comfy®, then it would protect against the extreme cold. See *id.* at 603:17–605:7; Pl.’s Br. at 39, ECF No. 114.

But Professor Ferro undermined Mr. Crumley’s opinion. Unlike Mr. Crumley’s conclusory assertions, Professor Ferro’s testimony provided a detailed analysis of The Comfy®’s porous, open design and physical characteristics. See Trial Tr. vol. III at 928:19–931:20, ECF No. 110 (direct testimony of Prof. Ferro). An outer layer like The Comfy® must trap air to protect against the extreme cold. See Ex. D-30; Trial Tr. vol. III at 935:20–23, ECF No. 110 (direct testimony of Prof. Ferro); Trial Tr. vol. II at 588:20–589:8, ECF No. 109 (direct testimony of Mr. Crumley). Professor Ferro persuasively demonstrated how The Comfy®’s design made it unable to effectively trap air and keep the user warm in the extreme cold. See, e.g., Trial Tr. vol. III at 928:19–929:18, ECF No. 110 (PROF. FERRO: “[The background the sherpa was knitted on is] very porous.... The background is all ... it’s like a mesh type”); *id.* at 987:13–17 (MR. KENNEDY: “And what is the effect of the sherpa being porous?” PROF. FERRO: “Again, you know, it’s not doing its ... full job. The air is escaping. The air can get in even.”). As she testified, “[The Comfy® is] a very open, loose garment.... [I]f I’m thinking about it staying warm, cold air can get into the garment very easily.” *Id.* at 930:14–18. The Court finds Professor Ferro’s detailed analysis more persuasive and credible than that of Mr. Crumley.

The Court is also unpersuaded by Mr. Crumley's testimony about the protection provided by The Comfy® in the cocooning position. To be sure, Professor Ferro credibly testified that the cocooning position keeps the user warmer than when standing, because the bottom is no longer open. *See id.* at 986:19–22. However, she explained that, even as a cocoon, The Comfy® does not have the characteristics “that it needs to protect against the extreme cold.” *Id.* at 986:25–987:3. That is because “the fabrics ... are still not touching the body[;] ... [t]he hood is still open[;] ... the sherpa is porous[;] ... it's not water repellent[;] ... [and] [i]t doesn't have a finish.” *Id.* at 987:5–12 (direct testimony of Prof. Ferro). These features make it difficult for The Comfy® to trap air even when users cocoon. Cocooning also involves crouching down to the ground, which — in extreme cold conditions — may involve putting the non-water resistant Comfy® in contact with the wet ground or snow. In that case, The Comfy® would absorb rather than repel the moisture, ending its ability to provide warmth to the user. *See id.* at 937:23–938:9 (MR. KENNEDY: “Okay. And can you just explain why ... is it a good thing or bad thing that [The Comfy®] stays wet?” PROF. FERRO: “No. It's a bad thing.” MR. KENNEDY: “And why is that?” PROF. FERRO: “Heat moves very quickly through water. So you lose the heat from your body a lot faster. The whole idea of putting all these things on is to keep the heat in.”). Thus, even in the position most likely to provide protection, The Comfy®'s flaws prevent it from being able to protect in extreme cold conditions.

Cozy Comfort argues that The Comfy®'s ribbed knit and thick sherpa lining provide protection from the extreme cold, but the evidence does not support this contention. The Comfy® protects against mild to cool temperatures, like a sweater, pullover, or other similar article. *See id.* at 979:8–14 (MR. KENNEDY: “[W]ould you be able to estimate where you could wear The Comfy outdoors, at what temperature ranges?” PROF. FERRO: “I would say mild temperatures because of its open — especially because of its open design.”). As Professor Ferro testified, the ribbed knit at the bottom of the sleeves “keep[s] out the wind” and outside cold air. *Id.* at 929:7. The sherpa lining also traps some body heat in the product to “keep ... warmth in.” *Id.* at 1023:3–9 (direct testimony of Prof. Ferro). These are important features for providing warmth to users. But other deficiencies with the product make it unable to protect against the extreme cold, including the porous nature of the sherpa, the open hood, and the open bottom. *See id.* at 928:19–931:20 (direct testimony of Prof. Ferro). Thus, The Comfy® only provides warmth indoors at room temperature or outdoors in mild weather. *See id.* at 979:8–14 (MR. KENNEDY: “[W]ould you be able to estimate where you could wear

The Comfy outdoors, at what temperature ranges?” PROF. FERRO: “I would say mild temperatures because of its open — especially because of its open design.”)

Cozy Comfort also contends that the product was designed to protect from the extreme cold. *See* Trial Tr. vol. I at 94:5–8, ECF No. 108 (direct testimony of Mr. Speciale). The evidence did not support these assertions. Mr. Speciale testified that he drew inspiration from his nephew cocooned in a sweatshirt lying next to a blanket. *See id.* at 61:20–63:15. This occurred indoors. *See id.* When making the prototype, Mr. Speciale took basic throw blankets — like those he saw next to his nephew — and paid a company to turn them into “wearable blanket” that was almost identical to final version of The Comfy®. *See id.* at 64:7–22. No extra steps were taken to ensure The Comfy® could protect against the extreme cold. *See* Trial Tr. vol. II at 434:7–10, ECF No. 109 (cross-examination of Mr. Speciale) (MR. KENNEDY: “No testing has been performed by Cozy Comfort that shows The Comfy protects from extreme cold, correct?” MR. SPECIALE: “I believe that is correct, yes.”).

On direct examination, when asked to point to patent documents showing that The Comfy® could protect from the extreme cold, Mr. Speciale could only identify language that details how The Comfy® protects one indoors. *See* Trial Tr. vol. I at 95:4–96:6, 100:1–101:17, ECF No. 108 (citing Ex. P-6, col. 1). The cited patent describes how The Comfy® allows someone to “stay warm inside a cool building.” Ex. P-6, col. 1, line 29. The patent contains no mention of how The Comfy® is, can be, or should be used outdoors. *See id.* The cool room temperatures described in the patent do not approach near freezing. A product designed for these conditions is ill suited for any credible definition of extreme cold.

Cozy Comfort also entered photographs into evidence that purport to show customers using the product in the extreme cold. *See* Ex. P-13; Trial Tr. vol. I at 134:8–18, ECF No. 108 (direct testimony of Mr. Speciale). Cozy Comfort identified five photographs in Exhibit P-13. *See* Trial Tr. vol. I at 142:12–14, ECF No. 108. Through its witnesses, it argued these photographs showed customers wearing The Comfy® “in extremely cold conditions” based on the fact there was “snow on the ground.” *Id.* at 145:15–17 (direct testimony of Mr. Speciale). The Court has reviewed all the photographs admitted in Exhibit P-13. The Court finds that these photographs have little evidentiary value on whether The Comfy® can protect one in extreme cold conditions. The photographs provide little evidence of the weather conditions at the time they were taken. None of the photographs depict the temperature or wind speed. Snow can remain for a time once the tem-

perature rises above levels that could be described as extremely cold. The Court is cognizant of the Government's objection that the photographs could easily be cherry-picked by the Plaintiff. *See* Trial Tr. vol. I at 141:4–14, ECF No. 108 (raising objections to the admission of Ex. P-13); *cf.* Fed. R. Evid. 403 (“The Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of ... unfair prejudice[.]”); Fed. R. Evid. 1006(a) (“The court may admit as evidence a summary ... offered to prove the content of voluminous admissible ... photographs that cannot be conveniently examined in court[.]”). Mr. Speciale could not provide a precise estimate of the total number of customer photographs Cozy Comfort possesses, but he guessed that the number “would be in the thousands.” Trial Tr. vol. II at 504:6, ECF No. 109 (cross-examination of Mr. Speciale). Exhibit P-13, however, only contains around one hundred of these photographs; and Mr. Speciale “[didn’t] know exactly how they were selected.” *Id.* at 503:4–5 (cross-examination of Mr. Speciale); *see id.* at 502:13–16 (cross-examination of Mr. Speciale). It is impossible to gauge how frequently customers may wear the product outside as opposed to inside from Exhibit P-13. The customer reviews referenced by some witnesses in their testimony suffer from the same defects. *See, e.g.,* Trial Tr. vol. III at 885:3–25, ECF No. 110 (cross-examination of Ms. Concannon). When the photographs and reviews are compared with objective evidence such as the design of the product as well as Cozy Comfort's representations in its patent applications that the product is designed for use “inside a cool building,” the objective evidence bears greater weight. *See* Ex. P-6. For these reasons, the Court finds that The Comfy® does not protect against the extreme cold.

CONCLUSIONS OF LAW

The question of law in this case is under which HTSUS heading The Comfy® belongs. The parties propose Heading 6110 (sweaters, pull-overs, sweatshirts, waistcoats (vests), and similar articles); Heading 6301 (blankets and traveling rugs); Heading 6114 (other garments, knitted or crocheted); or Heading 6307 (other made-up articles, including dress patterns). For the following reasons, the Court finds that The Comfy® is properly classified as a pullover under Heading 6110, and — within that Heading — under Subheading 6110.30.30, HTSUS.

I. The Legal Framework for Tariff Classification

The Harmonized Tariff Schedule of the United States is organized into headings, each of which contains one or more subheadings.

Headings describe “general categories of merchandise.” *Wilton Indus.*, 741 F.3d at 1266. Subheadings “provide a more particularized segregation of the goods within each category.” *Id.*

The General Rules of Interpretation (GRIs) of the HTSUS set out a strict order of operations for courts to follow. First, “[a] classification analysis begins, as it must, with the language of the headings.” *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998) (citing GRI 1, HTSUS). Then, “[h]aving classified the product under the appropriate heading,” the Court “turn[s] to the subheadings” within the heading. *Id.* at 1442 (citing GRI 6, HTSUS).

Heading classification follows a two-step process whenever — as is the case here — litigants dispute material facts related to “the nature of the merchandise[.]”⁷ *Wilton Indus.*, 741 F.3d at 1266. First, courts interpret the language of the tariff headings at issue. *See Orlando Food*, 140 F.3d at 1439; *see also Wilton Indus.*, 741 F.3d at 1266. “Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same.” *Carl Zeiss*, 195 F.3d at 1379. The Court decides the common meaning of a tariff term as a question of law. *E.M. Chems. v. United States*, 920 F.2d 910, 912 (Fed. Cir. 1990) (citing *Stewart-Warner Corp. v. United States*, 748 F.2d 663, 664–65 (Fed. Cir. 1984)). The Court “may consult lexicographic and scientific authorities, dictionaries, and other reliable information” or may rely on its “own understanding of the terms used” when the tariff term lacks a clear definition. *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1337–38 (Fed. Cir. 1999). It may also consult the Explanatory Notes for the Harmonized Commodity Description and Coding System, which the World Customs Organization maintains. Although not legally binding, the Explanatory Notes “are generally indicative of the proper interpretation of a tariff provision.” *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007) (citing *Motorola Inc. v. United States*, 436 F.3d 1357, 1361 (Fed. Cir. 2006)).

Some HTSUS headings are *eo nomine* provisions, which “describe[] an article by a specific name.” *CamelBak Prods.*, 649 F.3d at 1364–65 (citing *Carl Zeiss*, 195 F.3d at 1379). *Eo nomine* provisions differ from use provisions, which describe merchandise by its use. *See Carl Zeiss*, 195 F.3d at 1379. An *eo nomine* provision “include[s] all forms of the named article[.]” *id.*, even improved forms, “as long as the improved article performs the same essential function as the named exemplar.” *Deckers Corp. v. United States*, 752 F.3d 949, 957 (Fed. Cir. 2014). An

⁷ This two-step process “collapses entirely into a question of law” whenever there is “no dispute as to the nature of the merchandise[.]” *Wilton Indus.*, 741 F.3d at 1266 (citing *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006)).

improved article stops performing the same essential function of a named exemplar when its improvements cause it to “possess[] features *substantially in excess* of those within the common meaning of the [named] term.” *R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1354 (Fed. Cir. 2014) (internal quotation marks omitted) (emphasis in original).

Second, after interpreting the tariff headings, courts apply the General Rules of Interpretation, starting with GRI 1, to determine the product’s proper heading. *See Orlando Food*, 140 F.3d at 1439. GRI 1 provides that “classification shall be determined according to the terms of the headings and any relative section or chapter notes.” GRI 1, HTSUS. The Federal Circuit has explained that GRI 1 determines a product’s classification if it “is described *in whole* by a single classification heading” of the HTSUS. *La Crosse Tech., Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013) (emphasis added). If no heading describes the product in whole, the Court then uses GRIs 2 through 5, in order — only using the next GRI if the previous GRI cannot classify the product. *See Mita Copystar Am. v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998); *Wilton Indus.*, 741 F.3d at 1266. But, “if the proper heading can be determined under GRI 1, the court is not to look to the subsequent GRIs.” *R.T. Foods*, 757 F.3d at 1353.

Once the Court determines the correct heading for the merchandise, it then analyzes the relevant subheadings. *See Orlando Food*, 140 F.3d at 1440. The Court uses the same process to determine the proper HTSUS subheading as it did the heading: first construing the subheadings’ meanings and then applying the General Rules of Interpretation in order. *See* GRI 6, HTSUS; *Orlando Food*, 140 F.3d at 1442.

II. Construction of the Relevant HTSUS Headings

The parties suggest four possible headings for The Comfy®. The Government maintains that the The Comfy® belongs in Heading 6110, as Customs originally determined. *See* Def.’s Br. at 31, ECF No. 116. Cozy Comfort suggests three alternative Headings — 6114, 6301, and 6307. *See* Pl.’s Br. at 2, 4, ECF No. 114. “All of the asserted classifications fall within Section XI of the HTSUS, which covers ‘textiles and textile articles’ and includes Chapters 50 to 63 of the HTSUS.” *Allstar Mktg.*, 41 CIT ___, 211 F. Supp. 3d at 1328. Chapter 61 and Chapter 63 apply only to “made up articles.” Note 1 to Ch. 61, HTSUS; Note 1 to Ch. 63, HTSUS. Note 7(e) to Section XI defines “made up” as an item “assembled by sewing, gumming or otherwise.” Note 7(e) to Section XI, HTSUS. Neither party disputes that The

Comfy® is “made up” within the meaning of the section. See Pl.’s Br., ECF No. 114; Def.’s Br., ECF No. 116. It is therefore appropriate to turn to these chapters to classify The Comfy®.

A.

Heading 6110 falls under Chapter 61 of the HTSUS. That chapter encompasses “articles of apparel and clothing accessories, knitted or crocheted.” Ch. 61, HTSUS. Headings 6101 to 6114 of Chapter 61 encompass various articles of apparel. For an item to be classifiable under these headings, it first must be “wearing apparel.” *Rubies Costume Co. v. United States (Rubies Costume I)*, 337 F.3d 1350, 1357 (Fed. Cir. 2003); see Statistical Note 2, Ch. 61, HTSUS (all items in Heading 6110 are “garments”); *Allstar Mktg.*, 41 CIT ___, 211 F. Supp. 3d at 1329–30 (deciding if an item is a “garment” by first considering if it is “wearing apparel”). The Federal Circuit clarified the meaning of “wearing apparel” in *Rubies Costume I*, where it determined that various Halloween costumes were not wearing apparel because they were “of a flimsy nature and construction” and were not “normal articles of apparel.” *Rubies Costume I*, 337 F.3d at 1358, 1360. As the Court explained, “Wearing apparel” is defined as “all articles which are ordinarily worn—dress in general.” *Id.* at 1357 (emphasis removed) (quoting *Arnold v. United States*, 147 U.S. 494, 496 (1893)).

Heading 6110 covers “[s]weaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted[.]” 6110, HTSUS. The Federal Circuit elaborated on the meaning of this heading in *Rubies Costume II*, where it determined a “well-made” and “durable” Santa Suit jacket was a “similar article” classifiable under Heading 6110. *Rubies Costume II*, 922 F.3d at 1345–46. The Federal Circuit explained that items under this heading share a few common traits: (1) they cover the upper body; (2) they provide “some warmth”; (3) they do not “protect against wind, rain, or extreme cold”; and (4) they can be worn over “undergarments or other clothing.” *Rubies Costume II*, 922 F.3d at 1345–46. Goods of Heading 6110 also have openings for the waist, head, and arms. See *BASF Corp. v. United States*, 35 CIT 1478, 1481 (2011) (“To assist it in ascertaining the common meaning of a tariff term, the court may rely on its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources.”) (citing *Baxter Healthcare*, 182 F.3d at 1337–38).

Heading 6110 is an *eo nomine* provision because the terms in Heading 6110 “describe[] ... article[s] by [their] specific name.” *R.T. Foods*, 757 F.3d at 1354; see *Rubies Costume II*, 922 F.3d at 1345–46 (treating

Heading 6110 as an *eo nomine* provision). “[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[.]’” *LeMans Corp. v. United States*, 34 CIT 156, 162–63 (2010) (alteration in original) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1840, 2308 (2002)); see also *Carl Zeiss, Inc.*, 195 F.3d at 1379. “[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.’” *LeMans Corp.*, 34 CIT at 162–63 (alteration in original) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1840, 2309 (2002)). A placket is “a finished slit” that provides an opening in the front of a garment. *Id.* at 163 n.11 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1728 (2002)). A sweatshirt is “a collarless long-sleeved pullover made of cotton jersey with a smooth-finished face and a heavily napped back.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2308 (1968). A waistcoat or vest is “an item of wearing apparel extending to the waist or below that is similar to a sleeveless jacket ... [u]sually worn over a blouse or shirt” *Victoria’s Secret Direct, LLC v. United States*, 37 CIT 573, 588–89 (2013) (citing THE FAIRCHILD DICTIONARY OF FASHION 477 (3rd ed. 2003)).

Though Heading 6110 is an *eo nomine* provision, the Court must still consider use when classifying goods under this heading. In general, courts “should not read a use limitation into an *eo nomine* provision.” *Kahrs Int’l v. United States*, 713 F.3d 640, 646 (Fed. Cir. 2013) (citing *Carl Zeiss*, 195 F.3d at 1379). But in certain “very limited circumstances,” the terms of an *eo nomine* provision “inherently suggest[] looking to intended use” and require a court to “consider use.” *Ford Motor Co. v. United States*, 926 F.3d 741, 753 (Fed. Cir. 2019); see also *Carl Zeiss*, 195 F.3d at 1375, 1379. To determine if these circumstances exist, courts look to “the language of the particular headings” to see whether it “impl[ies] that use or design is a defining characteristic.” *Irwin Indus. Tool Co. v. United States*, 920 F.3d 1356, 1361 (Fed. Cir. 2019).

Use is a relevant consideration when classifying an item under Heading 6110. In *Rubies Costume II*, the Federal Circuit’s classification of a Santa Suit jacket under Heading 6110 rested on its assessment that users can “wear the jacket over either undergarments or other clothing” and that the jacket “provides some warmth to the wearer but does not protect against the wind, rain, or extreme cold.” *Rubies Costume II*, 922 F.3d at 1346. These considerations relate to how the Santa Suit jacket is used. See *id.* The term pullover in

Heading 6110 also “suggests a type of use,” *Carl Zeiss*, 195 F.3d at 1379, because a pullover must be “put on by being pulled over the head[.]” *LeMans Corp.*, 34 CIT at 162–63 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1840, 2309 (2002)). The Court accordingly must consider use when classifying goods under Heading 6110. Doing so requires the Court to consider not only an article’s physical characteristics but also its design, intended use, and marketing. See *GRK Canada, Ltd. v. United States*, 761 F.3d 1354, 1358 (Fed. Cir. 2014).

B.

Heading 6301 covers “blankets and travelling rugs.”⁸ 6301, HT-SUS. Note 2(a) to Chapter 63 states that Headings 6301 to 6307 do not cover the “[g]oods of chapters 56–62.” If an article is properly classified under Heading 6110, it cannot be classified in Heading 6301. Cf. *Allstar Mktg.*, 41 CIT __, 211 F. Supp. 3d at 1328 (first examining if an article is classifiable under Heading 6114 before examining if it can be classified in Heading 6301 based on note 2(a) to Chapter 63).

The Court of International Trade analyzed the meaning of the term blanket in Heading 6301 in *Allstar Marketing*. See 41 CIT __, 211 F. Supp. 3d at 1335–36. The Court explained, “Blanket is not defined in the statute or legislative history; thus, the court considers its common commercial meaning.” *Id.* at 1335 (internal quotation marks omitted). The Court’s review of dictionary entries revealed that “first ... a blanket is a large (possibly oblong) piece of fabric, and second, that a blanket is used as a covering for warmth, often, but not always, as common knowledge dictates, on a bed.” *Id.* at 1336. The Court summarized its understanding of the term blanket by saying, “[T]he essential characteristics of a blanket ... [are] a large piece of fabric providing a warm covering.” *Id.* at 1337 (internal quotation marks omitted).

Heading 6301 is an *eo nomine* provision because it “describes an article by a specific name.” *R.T. Foods*, 757 F.3d at 1354. The term “traveling rug” in Heading 6301 “impl[ies] that use or design is a defining characteristic” for at least some items classifiable under the heading, *Irwin Indus. Tool Co.*, 920 F.3d at 1361, because “traveling rug[s]” are rugs used as a covering for passengers traveling in “automobiles ... [and] carriages” or other means of motorized transportation. *Riley & Co. v. United States*, 8 Ct. Cust. 116, 117–18 (1917).

⁸ Neither party suggests that The Comfy® is a travelling rug. A travelling rug is an article commonly used to cover the lower half of a person’s body while travelling by carriage, car, rail, ship, or other means of motorized transportation. See *Riley & Co. v. United States*, 8 Ct. Cust. 116, 117–18 (1917).

C.

Cozy Comfort offers two alternative headings, both basket provisions. Heading 6114 covers “Other garments, knitted or crocheted.” Heading 6307 covers “Other made up articles, including dress patterns[.]” “A basket provision is not a specific provision.” *R.T. Foods*, 757 F.3d at 1354 (quoting *Int’l Bus. Machs. Corp. v. United States*, 152 F.3d 1332, 1338 (Fed. Cir. 1998)). Imported merchandise only belongs in a basket provision “if there is no tariff category that covers the merchandise more specifically.” *Id.* (quoting *Rollerblade, Inc. v. United States*, 24 CIT 812, 815 (2000), *aff’d*, 282 F.3d 1349 (Fed. Cir. 2002)). The two basket headings do not apply if the Court finds that either of the more specific provisions covers The Comfy®. *Id.*

III. The Comfy® Is Classifiable Under Heading 6110

The Government correctly classified The Comfy® under Heading 6110 because The Comfy® is a pullover. Heading 6110 covers “[s]weaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted.” 6110, HTSUS. The parties agree that The Comfy® is “knitted,” so that it is classifiable under Heading 6110 if it (1) is wearing apparel; (2) shares the common characteristics of goods in Heading 6110; and (3) is a sweater, a pullover, a sweatshirt, a waistcoat, or a similar article. *See Rubies Costume II*, 922 F.3d at 1344–46 (determining if a Santa Suit jacket falls under Heading 6110); Jt. Uncontested Facts ¶ 4, ECF No. 107 (“The Comfy® is knitted.”). As the foregoing analysis shows, The Comfy® is wearing apparel. It shares the key characteristics common to “[s]weaters, pullovers, sweatshirts, waistcoats (vests) and similar articles” and is a “pullover[.]” 6110, HTSUS.

A.

The Comfy® must be a “garment,” or “wearing apparel,” to be classified in Heading 6110. *See Rubies Costume I*, 337 F.3d at 1357; *Allstar Mktg.*, 41 CIT ___, 211 F. Supp. 3d at 1330. Cozy Comfort argues that The Comfy® is not wearing apparel because it “is not ordinarily worn in a common place way like pants, a shirt, a jacket, or another article of clothing.” Pl.’s Br. at 21–22, ECF No. 114. Instead, “it is a brand new, novel patented product designed, marketed, and sold as an alternative to a household blanket ... not as clothing for general use in public.” *Id.* at 22. The Comfy® — in Cozy Comfort’s telling — possesses “non-clothing features that sharply and materially distinguish it from standard wearing apparel.” *Id.* at 23. The Court disagrees.

Federal courts have analyzed the meaning of the term “wearing apparel” for over a century. *See, e.g., Arnold v. United States*, 147 U.S. 494 (1893). Summarizing that case law, the Federal Circuit has explained:

An understanding of what is an article of [wearing] apparel begins with the Supreme Court’s decision in *Arnold v. United States* ... where the Court stated: “The term ‘wearing apparel’ is not an uncommon one in statutes, and is used in an inclusive sense as embracing all articles which are *ordinarily* worn” The Customs Court in *Antonio Pompeo v. United States*, 40 Cust. Ct. 362 (1958), further developed this definition [saying that]: “Wearing apparel refers to clothes or coverings for the human body worn for decency or comfort and common knowledge indicates that adornment is also an element of many articles of wearing apparel.”

Rubies Costume I, 337 F.3d at 1357 (emphasis in original) (indentations omitted). Certain features may indicate an item is wearing apparel “such as the extent of styling features, including ‘zippers, inset panels, darts or hoops, and whether the edges of the materials [are] left raw or finished.’” *Rubies Costume II*, 922 F.3d at 1343 (citing *Rubies Costume I*, 337 F.3d at 1357).

Whether merchandise is wearing apparel hinges on if it is “ordinarily worn.” *Rubies Costume I*, 337 F.3d at 1358 (citing *Arnold*, 147 U.S. at 496). The parties have stipulated that The Comfy® is “intended to be worn” Jt. Uncontested Facts ¶ 11, ECF No. 107. The remaining question is whether the merchandise is *ordinarily* worn. An item is “ordinarily” worn if it is worn like wearing apparel “in the ordinary course of events: usually” or “in a commonplace ... way[.]” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1589 (1968); *see also Allstar Mktg.*, 41 CIT __, 211 F. Supp. 3d at 1332.

No brightline rule governs when merchandise moves from being merely worn to being ordinarily worn. Courts examining the question conduct a fact intensive inquiry. In *Rubies Costume I*, the Federal Circuit held that a variety of Halloween costumes were not “ordinarily worn” because they were (1) worn once a year “for Halloween fun,” (2) “lacked cognitive association as wearing apparel,” and (3) were “of a flimsy nature” and not generally recognized as “normal articles of apparel.” 337 F.3d at 1358. In *Allstar Marketing*, the Court of International Trade applied *Rubies Costume I* and found that The Snuggie® was not ordinarily worn because (1) The Snuggie® lacked cognitive association as wearing apparel because of its long “dimensions

and lack of [a] rear closure” and (2) The Snuggie® was used like a blanket and thus was not “ordinarily worn in any commonplace way.” 41 CIT ___, 211 F. Supp. 3d at 1333–34. By contrast, in *Rubies Costume II*, the Federal Circuit found that a Santa Suit jacket was classifiable as “wearing apparel under HTSUS chapter 61” because the jacket’s “styling, construction, and finishing touch[es]” showed it was “well-made” and “of durable and nonflimsy construction....” 922 F.3d at 1345.

Extensive evidence shows that The Comfy® is ordinarily worn because users wear it in a variety of everyday, commonplace situations. These situations primarily include indoor activities like lounging on the couch, grabbing a drink, and adjusting the fire. *See* Jt. Uncontested Facts ¶ 18, ECF No. 107; Ex. P-6, col. 1. They also include outdoor activities like “walking the dog,” “getting the mail,” and “outside chores[.]” Jt. Uncontested Facts ¶ 18, ECF No. 107. When users don and wear The Comfy® in these situations, they do so by pulling it over their head in a manner identical to how users don and wear an ordinary pullover. *Cf.* Trial Tr. vol. I at 108:23–109:6, ECF No. 108 (direct testimony of Mr. Speciale) (describing how to put on The Comfy®). The Comfy®’s patents further explain that The Comfy® “is worn on the body of the person like an article of clothing[.]” Ex. P-6, col. 5, lines 65–66. The Comfy® is “made from a fleece outer-fabric and ... a thick, luxurious sherpa lining.” Trial Tr. vol. II at 595:4–6, ECF No. 109 (direct testimony of Mr. Crumley); *see also* Trial Tr. vol. I at 125:15–16, ECF No. 108 (direct testimony of Mr. Speciale) (noting The Comfy® has a “thick sherpa layer”). These materials impart The Comfy® with a “durable and nonflimsy construction.” *Rubies Costume II*, 922 F.3d at 1345.

The Comfy® is not worn once or twice during a specific week of the year, like the Halloween costumes in *Rubies Costume I*. Nor is its use limited by season. Testimony and evidence established that The Comfy® can keep users warm indoors and in cool or mild outdoor conditions. It is worn indoors year-round, even during the summer. *See* Trial Tr. vol. I at 120:8–121:16, ECF No. 108 (direct testimony of Mr. Speciale) (describing how he wore The Comfy® indoors at a hockey rink “in the summer” when “it was 110 [degrees] outside”). The Comfy® also is used for outdoor activities during cool and mild temperatures, which may occur during all four seasons depending on where a user lives. *See* Trial Tr. vol. III at 979:8–14, ECF No. 110 (MR. KENNEDY: “[W]ould you be able to estimate where you could wear The Comfy outdoors, at what temperature ranges?” PROF. FERRO: “I would say mild temperatures because of its open — especially be-

cause of its open design.”); Ex. P-12 at 6 (detailing the distribution of Comfy® customers in different regions of the United States).

The Comfy® also retains a cognitive association with wearing apparel, unlike a Halloween costume and The Snuggie®. The Federal Circuit in *Rubie’s Costume I* explained that Halloween costumes “lacked cognitive association as wearing apparel” because they “promote[] festive value rather than cognitive association as wearing apparel.” 337 F.3d at 1358. In other words, the costumes did not resemble items that people wear in ordinary circumstances. *See id.* That is not a concern here, as users wear The Comfy® in ordinary situations. *See* Jt. Uncontested Facts ¶ 18, ECF No. 107 (noting users wear The Comfy® while performing activities like “walking the dog,” “getting the mail,” and performing “outside chores”). In *Allstar Marketing*, The Snuggie®’s lack of cognitive association as wearing apparel hinged on the product’s long “dimensions and lack of [a] rear closure.” 211 F. Supp. 3d at 1333–34. Unlike The Snuggie® depicted below, The Comfy® has a closed back like typical wearing apparel. And it is not as long as The Snuggie®. *Compare id.* at 1333 (“[T]he Snuggie® consists of a 71-by-54 inch rectangular piece of ... fabric[.]”), with Jt. Uncontested Facts ¶ 7, ECF No. 107 (stipulating that The Comfy® is, at its longest, 36-by-41 inches). The Comfy® also has a “hood[,]” a “marsupial ... pocket[,]” and “ribbed wrist cuffs,” unlike The Snuggie®. *See* Jt. Uncontested Facts ¶ 6, ECF No. 107. These differences give The Comfy® a cognitive association as wearing apparel and make the item appear to be an oversized pullover.



See Ex. D-50.

The Comfy® is also used like commonplace apparel unlike The Snuggie®. Courts considering an item’s use give great weight to its

“primary design and use,” *CamelBak Prods.*, 649 F.3d at 1362, 1368–69, and assess if that “specific primary” or “obvious” purpose aligns with the purposes of items in the HTSUS headings at issue. *Otter Prods., LLC v. United States*, 834 F.3d 1369, 1376, 1381 (Fed. Cir. 2016). In *Allstar Marketing*, the Court focused on how “the Snuggie® was designed (and, thus, intended) to be loosely worn as an outer layer roughly covering the front of the user to provide warmth.” *Allstar Mktg.*, 41 CIT ___, 211 F. Supp. 3d at 1334. Additionally, evidence “showed people wearing [T]he Snuggie® in the types of situations one might use a blanket; for example, while seated or reclining on a couch or bed, or outside cheering a sports team.” *Id.* at 1337.

Cozy Comfort relies on *Allstar Marketing* and argues that The Comfy®’s “primary design and use” is as a “as a cozy, cocooning blanket[,]” not as wearing apparel. Pl.’s Br. at 24–25, ECF No. 114. But The Comfy® and The Snuggie® are different products with different physical characteristics. Unlike The Snuggie®, The Comfy® covers both sides of a user’s body, not just the wearer’s front; and users put on The Comfy® exactly like an ordinary pullover. *See* Trial Tr. vol. I at 108:23–109:6, ECF No. 108 (direct testimony of Mr. Speciale). Cozy Comfort called these differences a “significant improvement” on The Snuggie® when its founders tried persuading *Shark Tank*’s investors of The Comfy®’s viability, and Cozy Comfort’s marketing of The Comfy® emphasized these unique aspects of the product. *See* Ex. D-21 at 6:43–49 (according to Brian Speciale); Ex. P-1. Users do not primarily cocoon in The Comfy®, as Cozy Comfort argues. *See* Pl.’s Br. at 24–25, ECF No. 114; *supra* at 21–23. Instead, they primarily wear The Comfy® during indoor lounging activities like sitting or lying on the couch while watching television. True, these are “the types of situations one might use a blanket,” but they also are situations where one might use wearing apparel like a sweatshirt or pullover. *Cf. Allstar Mktg.*, 41 CIT ___, 211 F. Supp. 3d at 1337. And unlike blankets and The Snuggie®, users also wear The Comfy® during a variety of active tasks. Cozy Comfort stipulated that users wear the product during activities such as “ice skating; holiday activities at the park; tailgating; dinner party hosting; outside chores, like raking leaves; outside play, like jumping in the freshly raked leaves; pumpkin picking; pumpkin carving; hayrides; corn mazes; dancing; walking the dog; getting the mail; [and] cheering on the sidelines[.]” Jt. Uncontested Facts ¶ 18, ECF No. 107. The Comfy®’s co-creator, Mr. Speciale, testified that he wore The Comfy® in public at a hockey rink and while “explor[ing]” the area near Niagara Falls.

See Trial Tr. vol. I at 118:25–121:21, ECF No. 108. These activities are not possible while using a blanket.

The Court does not find Cozy Comfort’s remaining argument — that The Comfy® has “non-clothing features” that make it different from wearing apparel — persuasive. Pl.’s Br. at 23, ECF No. 114. Several features Cozy Comfort points to are simply features of oversized clothing. These include The Comfy®’s large hood opening, that its hood is “huge” and “can cover the user’s entire face,” the merchandise’s ability to “drape over a person,” its ability to “cover the [wearer] when in the fetal position,” and its ability to permit a user to “bring [his or her] arms in and out of the sleeves” *Id.* Cozy Comfort claims that The Comfy®’s “thick, blanket materials,” microfleece and sherpa, distinguish the item from clothing. *Id.*; see also Jt. Uncontested Facts ¶ 5, ECF No. 107. But these are fabrics that are in clothing as well. See Trial Tr. vol. III at 952:2–6, ECF No. 110 (MR. KENNEDY: “What types of fabrics can be used to make garments?” PROF. FERRO: “You can use ... anything to make a garment.”); *id.* at 952:17–21 (“MR. KENNEDY: “[H]ave you ever designed garments using sherpa?” PROF. FERRO: “Yes, I did.”); see also Pl.’s Br. at 23, ECF No. 114. For these reasons, the Court finds that The Comfy® is wearing apparel.

B.

The next question is whether The Comfy® shares the common characteristics of goods in Heading 6110. “Sweaters, pullovers, sweat-shirts, waistcoats (vests) and similar articles” all (1) cover the upper body, (2) provide “some warmth,” (3) do not “protect against wind, rain, or extreme cold,” and (4) can be worn over “undergarments or other clothing.” *Rubies Costume II*, 922 F.3d at 1345–46. The Comfy® possesses all four characteristics. The parties agree that The Comfy® does not provide protection against rain or wind. See Jt. Uncontested Facts ¶ 13, ECF No. 107. And they agree, “The Comfy® is intended to be worn over clothes or undergarments.” *Id.* ¶ 11. The Court resolved the parties’ remaining factual arguments over this issue in its findings of fact. The Comfy® covers the upper body of the user, see *supra* at 20–21, provides some warmth, see *supra* at 23–24, but does not protect against the extreme cold. See *supra* at 31–50.

Cozy Comfort’s remaining argument is that “The Comfy® ... cannot be classified in Heading 6110, HTSUS, because it extends to the knees or below of a typical user whereas Heading 6110 only applies to upper body garments.” Pl.’s Br. at 46, ECF No. 114. The Court found that The Comfy® falls between the thigh and the knees of a user, depending on the user’s height. Because the typical user is an adult female and the typical adult female is 5 feet 4 inches tall, The Comfy®

falls around a typical user's knees. *See* Trial Tr. vol. I at 77:23–78:11, ECF No. 108 (direct testimony of Mr. Speciale). Cozy Comfort designed the product to be oversized. *See id.* at 63:21–22 (direct testimony of Mr. Speciale); Ex. P-6, col. 6, lines 4–15. This gives rise to a colorable argument that The Comfy®'s oversized design takes it out of Heading 6110. Pl.'s Br. at 46, ECF No. 114.

Cozy Comfort, however, incorrectly assumes that “[H]eading 6110 only applies to upper body garments.” *Id.* (emphasis added). *But see Victoria's Secret Direct*, 37 CIT at 589 (noting that a waistcoat or vest is “an item of wearing apparel *extending to the waist or below*”) (emphasis added). To be sure, in *Rubies Costume II*, the Federal Circuit noted that the typical sweater, sweatshirt, or pullover “covers the upper body.” 922 F.3d at 1345–46. To Cozy Comfort, this implies that these goods may cover no more than the upper body. Modifications from a typical item, however, do not remove a product from an *eo nomine* heading unless the “difference” is “significant.” *R.T. Foods*, 757 F.3d at 1354 (citing *CamelBak Prods.*, 649 F.3d at 1365); *see also Deckers Corp.*, 752 F.3d at 957.

When determining if a “significant enough” difference exists, “[t]he criterion is whether the item possesses features *substantially in excess* of those within the common meaning of the [heading] term.” *Casio, Inc. v. United States*, 73 F.3d 1095, 1098 (Fed. Cir. 1996) (internal quotation marks omitted) (emphasis in original). An article that “has been improved or amplified but whose essential characteristic is preserved or only incidentally altered is not excluded from an unlimited *eo nomine* statutory designation.” *Id.* But an item does not belong in an *eo nomine* provision if it “is in character or function something other than as described ... and the difference is significant.” *Id.* at 1097 (citation omitted).

Courts apply this “substantial excess” test in a fact-specific inquiry. *See, e.g., id.* at 1098 (an electronic synthesizer does not possess characteristics in substantial excess of ordinary musical instruments because its “additional features are designed primarily to make it easier for a musician to create music or embellish the sound he or she would normally be able to produce”); *CamelBak Prods.*, 649 F.3d at 1368–69 (a bag with hydration and cargo components possessed features substantially in excess of a backpack because it was principally designed to afford “hands-free” hydration, not storage); *Allstar Mktg.*, 41 CIT ___, 211 F. Supp. 3d at 1336–37 (the addition of wearable sleeves to an ordinary blanket did not introduce features in substantial excess of a blanket because the sleeves amplified the product's ability serve as a covering). “Relevant factors include the subject import's design, use,

or function, how the article is regarded in commerce and described in sales and marketing literature, and whether the addition ‘is a substantial or incidental part of the whole product.’” *Allstar Mktg.*, 41 CIT __, 211 F. Supp. 3d at 1336–37 (quoting *CamelBak Prods.*, 649 F.3d at 1368).

Oversized sweaters, sweatshirts, and pullovers may be somewhat atypical, but they are still familiar items in the apparel market. Indeed, Mr. Speciale modeled The Comfy® off of a scene he witnessed where he saw his “[seven]-year-old” nephew cocooned in Mr. Speciale’s “six [foot] one ... 200 pound” brother’s “hood[y]” sweatshirt. Trial Tr. vol. I at 62:6–13, ECF No. 108 (direct testimony of Mr. Speciale). That sweatshirt was oversized on his nephew, but it was still a sweatshirt. *See id.* (describing what his nephew was wearing as “one of my brother’s old hoodies”). Its oversized nature did not transform it into something new.

Like the size of the sweatshirt his nephew wore, The Comfy®’s oversized nature is an “incidental part of the whole product.” *CamelBak Prods.*, 649 F.3d at 1368. Despite its size, the product is principally donned and worn like an ordinary pullover. *See* Trial Tr. vol. I at 108:23–109:6, ECF No. 108 (direct testimony of Mr. Speciale). The Comfy® possesses all the essential characteristics of a sweater, sweatshirt, or pullover: It covers the user’s upper body; it provides for some warmth without protecting from inclement weather; and users can wear it over other garments. *See supra* at 67. The Comfy®’s oversized features do not negate these essential characteristics. If anything, they amplify The Comfy®’s ability to be worn over other garments and provide for some warmth.

The Comfy’s marketing also leans in favor of concluding The Comfy®’s oversized nature does not remove it from Heading 6110. Marketing is relevant when deciding if a product’s improved features — here, being oversized — are in substantial excess of a heading term. *See GRK Canada*, 761 F.3d at 1358. It is true that The Comfy® was sold in a box and often was sold in stores’ bedding or blanket sections, but that reflects Cozy Comfort’s desire to take advantage of the public’s familiarity with The Snuggie® rather than The Comfy®’s true nature. *Compare* Ex. P-1 (showing The Comfy®’s box), and Trial Tr. vol. I at 152:12–154:13, ECF No. 108 (direct testimony of Mr. Speciale) (detailing where The Comfy® has been sold), with *Allstar Mktg.*, 41 CIT __, 211 F. Supp. 3d at 1325 (stating The Snuggie® is sold in a “box”), and *id.* at 1326 (detailing where The Snuggie® is sold). The Comfy®’s marketing strategy focused on how The Comfy® differs from The Snuggie® by emphasizing its sweatshirt-like wear-

ability. *See, e.g.*, Trial Tr. vol. IV at 1193:23–25, ECF No. 111 (Rule 30(b)(6) deposition of Mr. Speciale on behalf of Cozy Comfort) (MR. SPECIALE: “So [The Snuggie®] does have an opening, as opposed to The Comfy, where[as] The Comfy is closed around.”); Trial Tr. vol. III at 945:23–946:5, ECF No. 110 (PROF. FERRO: “The Snuggie is like a blanket. But [The Comfy®] is a garment.”); Ex. D-21 at 6:03–47 (Mr. Speciale describing the differences between The Snuggie® and The Comfy® on *Shark Tank*). This difference was the centerpiece of Cozy Comfort’s marketing strategy. *See* Trial Tr. vol. I at 67:1–7, ECF No. 108 (direct testimony of Mr. Speciale); Ex. P-4; Ex. D-21. That strategy involved calling the product “The Blanket ... *That’s A Sweatshirt*” and advertising the product using a trademark of a panda “wearing a hooded sweatshirt.” Ex. P-4 (emphasis added). The Comfy® is oversized, but that did not stop Cozy Comfort from emphasizing its sweatshirt-like characteristics when selling consumers on the product. In the words of the patent, The Comfy® solved the left-behind blanket problem by giving users something that was “practically portable when worn on the body,” Ex. P-6, col. 1., lines 40–41, and The Comfy® is “worn on the body of the person like an article of clothing[.]” *Id.* at col. 5, lines 65–66. The Comfy® thus meets the essential characteristics associated with items of Heading 6110.

C.

Finally, the Court assesses if The Comfy® falls under a particular term in Heading 6110. 6110, HTSUS. No party argues that The Comfy® is a waistcoat or vest, and the Court finds The Comfy® is not classifiable as such a garment. *Compare Victoria’s Secret Direct*, 37 CIT at 588 (defining vest as “[a]n item of wearing apparel ... that is similar to a sleeveless jacket”) (citing THE FAIRCHILD DICTIONARY OF FASHION 477 (3rd ed. 2003)), *with* Jt. Uncontested Facts ¶ 6, ECF No. 107 (noting The Comfy® has “long sleeves”). No party argues that The Comfy® is a sweater or a sweatshirt. Instead, they debate whether The Comfy® falls under the term “pullovers” or under the catch-all term “similar articles.” *See* Pl.’s Br. at 19–49, ECF No. 114; Def.’s Br. at 31–37, ECF No. 116.

“[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.’” *LeMans Corp.*, 34 CIT at 162–63 (alteration in original) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1840, 2308 (2002)). Professor Ferro testified that, in the garment industry, pullovers share key features: (1) they have an opening for the head; (2) they pull over the head; (3) they are knitted; (4) they have a hood; (5) they usually have some kind of rib at the

wrist like ribbed cuffs; (6) they have sleeves; (7) they have front and back panels sewn together; and (8) they can have a kangaroo pocket. *See* Trial Tr. vol. III at 1034:4–1036:2, ECF No. 110.

Users put on The Comfy® by pulling it “over the head,” in the same manner as users don an ordinary pullover. *Id.*; *see also* Jt. Uncontested Facts ¶ 10, ECF No. 107. The Comfy® also has all the other key features of a pullover: It has an opening for the head; it is knitted; it has a hood; it has ribbed cuffs; it has sleeves; its front and back panels are sewn together; and it has a kangaroo pocket. *See* Trial Tr. vol. III at 1034:4–1036:2, ECF No. 110 (direct testimony of Prof. Ferro); Jt. Uncontested Facts ¶¶ 4–6, ECF No. 107. It lacks a “placket or similar opening” in the front panel of the garment. *LeMans Corp.*, 34 CIT at 162–63. Its design was inspired in part by a pullover. *See* Trial Tr. vol. I at 61:20–63:15, ECF No. 108 (direct testimony of Mr. Speciale). And users wear it in the same situations they might wear a pullover. *See* Jt. Uncontested Facts ¶ 18, ECF No. 107 (list of activities during which The Comfy® can be worn). Cozy Comfort’s marketing of The Comfy® as an improvement on The Snuggie® that offers clothing-like wearability also leans in favor of this conclusion. *See* Ex. P-4 (depicting a “standing panda bear wearing a hooded sweatshirt” as a logo for The Comfy®); Ex. D-21 at 6:03–49; Trial Tr. vol. IV at 1193:23–25, ECF No. 111 (Rule 30(b)(6) deposition of Mr. Speciale on behalf of Cozy Comfort) (MR. SPECIALE: “So [The Snuggie®] does have an opening, as opposed to The Comfy, where[as] The Comfy is closed around.”). Indeed, the first association a consumer is likely to have on viewing the product for the first time is that it is an oversized pullover. It is an inescapable association.

IV. The Comfy® Cannot Be Classified Under Any Other Heading

Cozy Comfort makes three arguments for why The Comfy® should be classified as a blanket under Heading 6301. First, it argues that The Comfy® “is a large piece of fabric” like a blanket. *See* Pl.’s Br. at 50–51, ECF No. 114. Second, it asserts The Comfy® is “oblong, meaning that it is elongated and departs from an exact square with its rectangular shape.” *See id.* Third, it contends “the Comfy® is designed and primarily used as a covering for warmth and protection from the cold like a blanket.” *See id.* at 51 (emphasis removed). The Court is unpersuaded.

That The Comfy® is made of fabric does not render the product a blanket. Many items are made of fabric, including sweaters, sweatshirts, pullovers, blankets, tee shirts, pants, suit jackets, dresses, skirts, scarves, gloves, and ties. The HTSUS does not contain a

general “fabric” classification. Instead, it creates a system where fabric-made items are classified based on the physical characteristics that the manufacturing process imparts on them, *e.g.*, by sewing. *See, e.g.*, 6110, HTSUS (“Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted[.]”); 6301, HTSUS (“Blankets and traveling rugs[.]”).

The Comfy® is oblong, but — as with being made of fabric — that characteristic is not unique to blankets. Many items also have an elongated, non-square shape. These items include ties, dresses, and shirts. Oblongness, while perhaps a feature of blankets, is not sufficient to make an item a blanket.

The Comfy® is designed to provide for some warmth and protection from the cold, but it is not a “covering ... like a blanket.” Pl.’s Br. at 51, ECF No. 114. As *Allstar Marketing* noted, the “essential characteristic” of a blanket is that a blanket is “a large piece of fabric providing a warm covering.” 41 CIT ___, 211 F. Supp. 3d at 1337. *Allstar Marketing*’s reference to the term “covering” is linked to the fact that people drape a blanket over their front. *See id.* at 1333–34 (discussing how The Snuggie® is designed “to be loosely worn as an outer layer roughly covering the front of the user”). The Comfy® does not cover a person like a blanket. Rather than being draped over their front, users wear The Comfy® by pulling it over their head, sliding their arms into the item, and then pulling it down. The Comfy® not only covers a user’s front but also covers his back, arms, and — if he uses the hood — his head. This is not the kind of “covering” that the *Allstar Marketing* Court viewed as quintessentially blanket-like. 41 CIT ___, 211 F. Supp. 3d at 1337. That The Comfy® is sewn shut with a back panel undermines Cozy Comfort’s argument that the product is a blanket. Both the typical blanket and The Snuggie® are not sewn shut and do not have a back panel. *See Allstar Mktg.*, 41 CIT ___, 211 F. Supp. 3d at 1333 (discussing how The Snuggie® is “open in the back”). This difference is not esoteric; being sewn shut with a back panel is not an “incident[al] alter[ation]” to the ordinary blanket. *Cf. Casio*, 73 F.3d at 1098.

Sewing the panels together makes The Comfy® into something “in character [and] function” significantly different from a blanket in three important ways. *Id.* at 1097; *see also* Trial Tr. vol. III at 946:4–7, ECF No. 110 (PROF. FERRO: “The Snuggie is like a blanket. But [The Comfy®] is a garment. It has seams that pull it all together just like any garment. It’s sewn together.”). First, The Comfy® — by being sewn shut with a back panel — provides a 360-degree covering that, while oversized, tracks the shape of the human upper body. A blanket does not have this kind of human-body-based design and instead is a

flat piece of fabric. *See Allstar Mktg.*, 41 CIT ___, 211 F. Supp. 3d at 1336 (“Plaintiff offers as a common meaning that a blanket is a flat, rectangular textile covering Defendant contends the dictionary definitions suggest that a blanket is a single, continuous uninterrupted piece of fabric”) (internal quotation marks and modifications omitted). Second, customers don The Comfy® differently from how they use a blanket because The Comfy® is sewn shut with a back panel. Users do not wrap a blanket around their body by “opening it up ... from the very large bottom opening ... slid[ing] [their] arms into each of the two sleeves ... pull[ing] the rib cuff to [their wrists] ... [and] put[ing] [their] head through the hole for ... where the hood is.” Trial Tr. vol. I at 108:23–109:6, ECF No. 108 (direct testimony of Mr. Speciale). Third, because of its back panel, The Comfy® is designed to be worn like an article of clothing — including when the user is active. Those activities can include “ice skating; holiday activities at the park; tailgating; dinner party hosting; outside chores, like raking leaves; outside play, like jumping in the freshly raked leaves; pumpkin picking; pumpkin carving; hayrides; corn mazes; dancing; walking the dog; getting the mail; [and] cheering on the sidelines[.]” Jt. Uncontested Facts ¶ 18, ECF No. 107.

These three differences all touch on the core characteristics that define The Comfy®. They also make The Comfy® “in character [and] function something other than as described” by the term blanket. *Casio*, 73 F.3d at 1097. Fundamental differences like these mean that The Comfy® cannot be classified under Heading 6301. *See id.* (holding that an item cannot be classified in an *eo nomine* provision if it “is in character or function something other than as described ... and the difference is significant”). The Comfy® also cannot fit under the two other basket headings proffered by Cozy Comfort. Merchandise can only fit into a basket provision “if there is no tariff category that covers the merchandise more specifically.” *R.T. Foods*, 757 F.3d at 1354 (quoting *Rollerblade*, 24 CIT at 815). As Heading 6110 covers The Comfy®, the product cannot fit into a basket provision. *Id.*

V. The Comfy®’s Proper Subheading

Customs believes that, if The Comfy® is classifiable in Heading 6110, it belongs in Subheading 6110.30.30. Def.’s Br. at 58, ECF No. 116. Cozy Comfort argues over The Comfy®’s proper heading classification but does not address which subheading The Comfy® should fall under if the Court finds the good classifiable under Heading 6110. Pl.’s Br. at 56–57, ECF No. 114.

The subheadings under Heading 6110 classify products based on the kind of fabric used in the production process. *See, e.g.*, 6110.30.15, HTSUS (items “[c]ontaining 23 percent or more by weight of wool or fine animal hair”); 6110.10.10, HTSUS (items “[o]f wool or fine animal hair” that are “[w]holly of cashmere”); 6110.20.10, HTSUS (items “[o]f cotton” that contain “36 percent or more by weight of flax fibers.”). Subheading 6110.30.30 applies to items that are “[o]f man-made fibers” other than “23 percent or more ... of wool or fine animal hair,” “30 percent or more ... of silk or silk waste,” and “25 percent or more ... of leather.” *Compare* 6110.30.30, HTSUS, *with* 6110.30.10, 6110.30.15, *and* 6110.30.20, HTSUS. The parties agree that The Comfy® is “knitted and made from 100% man-made fibers, specifically polyester.” *See* Jt. Uncontested Facts ¶ 4, ECF No. 107. Therefore, The Comfy® is a pullover classifiable under Subheading 6110.30.30.

CONCLUSION

A wearable, oversized item covering the front and back with a hood, sleeves, ribbed cuffs, and a marsupial pocket is not a blanket. It is a pullover. Judgment must enter accordingly.

SO ORDERED.

Dated: June 16, 2025

New York, New York

Stephen Alexander Vaden

STEPHEN ALEXANDER VADEN,

JUDGE

Slip Op. 25–76

NANJING DONGSHENG SHELF MANUFACTURING CO., LTD., Plaintiff, v.
UNITED STATES, Defendant, and COALITION FOR FAIR RACK IMPORTS,
Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 24–00085

[Granting Plaintiff's Motion for Judgment on the Agency Record and remanding for Commerce to take further action in accordance with this Opinion.]

Dated: June 16, 2025

Gregory S. Menegaz, Alexandra H. Salzman, and Vivien J. Wang, The Inter-Global Trade Law Group PLLC, of Washington, D.C., for Plaintiff Nanjing Dongsheng Shelf Manufacturing Co., Ltd.

Tara K. Hogan, Assistant Director, and *Laurel D. Havens, III*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brett A. Shumate*, Acting Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Jesus N. Saenz*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Roger B. Schagrin, Luke A. Meisner, and Saad Y. Chalchal, Schagrin Associates, of Washington, D.C. for Defendant-Intervenor Coalition for Fair Rack Imports. *Alessandra A. Palazzolo, Christopher T. Cloutier, Elizabeth J. Drake, Jeffrey D. Gerrish, Justin M. Neuman, Maliha Khan, Nicholas J. Birch, Nicholas Phillips, and William A. Fennell* also appeared.

OPINION AND ORDER

Choe-Groves, Judge:

This action involves a challenge to mandatory respondent selection brought by Plaintiff Nanjing Dongsheng Shelf Manufacturing Co., Ltd. (“Plaintiff”) regarding the U.S. Department of Commerce’s (“Commerce”) final results in the agency’s administrative review of the antidumping duty order on certain steel racks from the People’s Republic of China (“China”) for the period of review of September 1, 2021 through August 31, 2022. Compl., ECF No. 10; *Certain Steel Racks and Parts Thereof from the People’s Republic of China* (“*Final Results*”), 89 Fed. Reg. 25,235 (Dep’t of Commerce Apr. 10, 2024) (final results of antidumping duty administrative review and final determination of no shipments; 2021–2022), and accompanying issues and decisions memorandum (“*Final IDM*”), ECF No. 20–5. Plaintiff contests Commerce’s rejection of its untimely Separate Rate Certification, decision to not select Plaintiff as a mandatory respondent, and use of adverse facts available in assigning Plaintiff the China-wide entity antidumping duty rate. Compl. ¶¶ 22–29. Before the Court is Plaintiff’s Motion for Judgment on the Agency Record (“Plaintiff’s

Motion”). Pl.’s Mot. J. Agency R. (“Pl.’s Mot.”), ECF No. 23. For the below discussed reasons, Plaintiff’s Motion is granted.

BACKGROUND

Commerce published on September 16, 2019 an antidumping duty order and countervailing duty order covering steel racks produced in China. *Certain Steel Racks and Parts Thereof from the People’s Republic of China* (“*Antidumping Duty Order*”), 84 Fed. Reg. 48,584 (Dep’t of Commerce Sept. 16, 2019) (amended final affirmative antidumping duty determination and antidumping duty order; and countervailing duty order). Plaintiff, a Chinese producer and exporter of goods covered by the *Antidumping Duty Order*, filed a request for an administrative review on September 29, 2022. Pl.’s Req. Admin. Rev., PR 6.¹ Commerce initiated an administrative review of the *Antidumping Duty Order* on November 3, 2022. *Initiation of Antidumping and Countervailing Duty Administrative Reviews* (“*Initiation Notice*”), 87 Fed. Reg. 66,275, 66,278–79 (Dep’t of Commerce Nov. 3, 2022), *corrected Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 88 Fed. Reg. 50 (Dep’t of Commerce Jan. 3, 2023). Plaintiff was identified as a respondent at the time Commerce initiated the administrative review. *Initiation Notice*, 87 Fed. Reg. at 66,278.

Commerce’s *Initiation Notice* provided the procedures through which a respondent could request a separate rate, rather than the China-wide entity rate. *Id.* at 66,276. Respondents requesting separate rate status were required to submit either a Separate Rate Application or Separate Rate Certification within 30 days of Commerce’s November 3, 2022 *Initiation Notice*.² *Id.* The *Initiation Notice* stated that “[e]xporters and producers must file a timely Separate Rate Application or Certification if they want to be considered for respondent selection.” *Id.*

In advance of the December 5, 2022 filing deadline for Separate Rate Applications and Separate Rate Certifications, Commerce received requests to extend the deadline from Nanjing Ironstone Storage Equipment Co., Ltd. (“Ironstone”), Xiamen Luckyroc Industry Co., Ltd. (“Luckyroc”), Ningbo Xinguang Rack Co., Ltd. (“Xinguang Rack”), Jiangsu JISE Intelligent Storage Equipment Co., Ltd. (“JISU”), Jiangsu Nova Intelligent Logistics Equipment Co., Ltd. (“Nova”), and Suntop Display System Inc. (“Suntop”). Ironstone,

¹ Citations to the administrative record reflect the public record (“PR”) document numbers filed in this case, ECF No. 37.

² Thirty days after November 3, 2022 was Saturday, December 3, 2022. Because the deadline fell on a weekend, submissions were due Monday, December 5, 2022. 19 C.F.R. § 351.303(b)(1).

Luckyroc, & Xinguang Rack Req. Extension Time File No Sales Certifications & Separate Rate Appl., PR 28; JISE & Nova Req. Extension Time File SRA/SRC, PR 29; Suntop Separate Rate Appl. Extension Req., PR 35. Commerce extended the deadline for these parties to file their Separate Rate Applications and Separate Rate Certifications to December 12, 2022. Commerce's Ironstone, Luckyroc, & Xinguang Rack No Sales Certification Separate Rate Appl. Extension Letter, PR 36; Commerce's JISE & Nova No Sales Certification Separate Rate Appl. Extension Letter, PR 37; Commerce's Suntop No Sales Certification Separate Rate Appl. Extension Letter, PR 38.

Prior to the extended December 12, 2022 deadline, Commerce received submissions from Nova, Nanjing Kingmore Logistics Equipment Manufacturing Co., Ltd, JISE, Xinguang Rack, and Suntop. Nova's Separate Rate Certifications, PR 40; Nanjing Kingmore Logistics Equip. Mfr. Co., Ltd Separate Rate Certification, PR 41; JISE Separate Rate Appl., PR 43; Xinguang Rack Separate Rate Appl., PR 44; Suntop Separate Rate Appl., PR 48.

Plaintiff also submitted its Separate Rate Certification on December 12, 2022. Pl.'s Separate Rate Certification, PR 45. Commerce rejected Plaintiff's Separate Rate Certification as untimely. Commerce's Rejection Pl.'s Separate Rate Certification, PR 62.

Commerce selected Xinguang Rack and Suntop as mandatory respondents on January 23, 2023. Commerce's Resp't Selection Mem., PR 64. Xinguang Rack and Suntop were selected because Commerce determined them to be "[t]he two exporters accounting for the largest value of the subject merchandise entered into the United States during the [period of review] who timely submitted [Separate Rate Applications] or [Separate Rate Certifications]." *Id.* at 6.

On January 25, 2023, Plaintiff filed a request for Commerce to accept its December 12, 2022 Separate Rate Certification and select Plaintiff as a mandatory respondent. Pl.'s Req. Accept Separate Rate Appl. & Select Mandatory Resp't ("Plaintiff's January 25, 2023 Request" or "Pl.'s Jan. 25, 2023 Req."), PR 74.

Commerce and Plaintiff's counsel held an ex parte video conference meeting on February 13, 2023, during which Plaintiff's counsel explained that they assumed that the extension granted to the other respondents also applied to Plaintiff. *See* Commerce's Mem. Meeting Counsel Pl., PR 93. Commerce determined that Plaintiff had not filed a timely extension request and had not identified "extraordinary circumstances" warranting the acceptance of the untimely filing under 19 C.F.R. § 351.302. Commerce's Mem. Decision Not Reconsider Rejection Pl.'s Separate Rate Certification Submission, PR 108.

Plaintiff filed a Section A Questionnaire Response on February 15, 2023, reiterating its request to be selected as a mandatory respondent or, in the alternative, a voluntary respondent. Pl.'s Sec. A Questionnaire Resp., PR 91. Commerce rejected Plaintiff's Section A Questionnaire Response on August 18, 2023. Commerce's Mem. Rejection Resp. Sec. A Antidumping Duty Order, PR 177.

Commerce's preliminary results were published on October 6, 2023, in which Plaintiff was assigned the China-wide entity rate. *Certain Steel Racks and Parts Thereof from the People's Republic of China* ("Preliminary Results"), 88 Fed. Reg. 69,612, 69,613 (Dep't of Commerce Oct. 6, 2023) (preliminary results and partial rescission of the antidumping duty administrative review, and preliminary determination of no shipments; 2021–2022). Following the *Preliminary Results*, Plaintiff filed an administrative case brief arguing that Commerce abused its discretion in rejecting Plaintiff's Separate Rate Certification and Section A Questionnaire Response and determining not to select Plaintiff as a mandatory respondent. Pl.'s Admin. Case Br., PR 245. Defendant-Intervenor filed a rebuttal administrative case brief arguing, in relevant part, that Commerce was correct to reject Plaintiff's filings as untimely. Def.-Interv.'s Rebuttal Br. at 11–14, PR 252. In the *Final Results*, Commerce continued to assign Plaintiff the China-wide entity rate. *Final Results*, 89 Fed. Reg. at 25,236–37; Final IDM at 24–31.

Plaintiff filed this case on May 7, 2024. Summons, ECF No. 1. Plaintiff subsequently filed its Motion for Judgment on the Agency Record on October 25, 2024. Pl.'s Mot. Defendant United States ("Defendant") and Defendant-Intervenor the Coalition for Fair Rack Imports ("Defendant-Intervenor") filed responses in opposition to Plaintiff's Motion. Def.'s Resp. Pl.'s Mot. J. Agency R. ("Def.'s Resp."), ECF No. 29; Def.-Interv.'s Opp'n Pl.'s Mot. J. Agency R. ("Def.-Interv.'s Resp."), ECF No. 30. Plaintiff filed a reply in support of its motion. Pl.'s Reply Br. ("Pl.'s Reply"), ECF No. 35.

JURISDICTION AND STANDARD OF REVIEW

The U.S. Court of International Trade has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final results in an administrative review of an antidumping duty order. The Court shall hold unlawful any determination 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).

DISCUSSION

Plaintiff raises three arguments in challenging Commerce's *Final Results*. First, Plaintiff argues that Commerce abused its discretion and acted contrary to law in rejecting Plaintiff's untimely Separate Rate Certification. Compl. ¶¶ 22–23; Pl.'s Br. at 8–18. Second, Plaintiff contends that Commerce acted contrary to its statutory obligations in declining to select Plaintiff as a mandatory respondent. Compl. ¶¶ 24–25; Pl.'s Br. at 18–21. Third, Plaintiff argues that Commerce improperly relied on adverse facts available in assigning it the China-wide entity rate. Compl. ¶¶ 26–29; Pl.'s Br. at 21–25. The Court begins by addressing whether Plaintiff was unlawfully denied mandatory respondent status.

Plaintiff argues that, regardless of whether its Separate Rate Certification was timely, Commerce was required to have selected Plaintiff as a mandatory respondent because Plaintiff was the largest exporter of subject merchandise. Pl.'s Br. at 18–21; Compl. ¶¶ 24–25. Plaintiff asserts that Commerce had a “longstanding practice to select among the largest exporters to capture as much of the export quantity as possible for specific review given its limited resources.” Pl.'s Br. at 19. Defendant and Defendant-Intervenor contend that Commerce properly excluded Plaintiff from consideration as a mandatory respondent due to Plaintiff's untimely filed Separate Rate Certification. Def.'s Resp. at 19–21; Def.-Interv.'s Resp. at 24–27.

In an administrative review of an antidumping duty order, the relevant statute mandates that Commerce “shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise.” 19 U.S.C. § 1677f-1(c)(1). The statute allows for an exception when:

If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, [Commerce] may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to –

- (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
- (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

Id. § 1677f-1(c)(2).

When Commerce’s administrative review involves subject goods from a non-market economy, it is Commerce’s policy that exporters and producers who do not demonstrate independence from government control are not entitled to a separate rate. *Transcom, Inc. v. United States*, 294 F.3d 1371, 1373 (Fed. Cir. 2002).

Commerce selected as mandatory respondents Xinguang Rack and Suntop, explaining that selection was limited to only those parties who timely submitted Separate Rate Applications and Separate Rate Certifications. Commerce’s Resp’t Selection Mem. at 6.

Commerce cannot impose a regulatory limitation on the selection of mandatory respondents that produces a result inconsistent with the express requirements of the statute. The statute’s exception provision directs Commerce to use either a “statistically valid” sample of exporters, or the exporters accounting for the largest volume of the subject merchandise. 19 U.S.C. § 1677f-1(c)(2). Here, Commerce explained that the 12 companies for which it initiated an administrative review was too large a number of exporters or producers for Commerce to review the whole group, and thus Commerce applied the exception provision. Commerce’s Resp’t Selection Mem. at 4. Commerce did not apply the sample of statistically valid exporters in the first section of the exception provision. *Id.*

Commerce explained that it did not examine the “largest volume” of exporters as directed by the second section of the exception provision in the statute, but instead decided to examine the “largest value” of subject merchandise, as follows:

In administrative reviews, Commerce will typically determine the exporters and producers that account for the largest volume of subject merchandise during the [period of review], based on the aggregated volume of entries of subject merchandise during the [period of review] attributed to that company in [U.S. Customs and Border Protection] entry data. However, because the quantities of steel racks imported into the United States from China are reported to [U.S. Customs and Border Protection] in multiple units of measure, here it would not be meaningful to aggregate the reported quantities of entered steel racks for exporters to determine which exporters account for the largest volume of subject merchandise entered during the [period of review]. Therefore, in this administrative review, we recommend selecting exporters that account for the largest value of subject merchandise that can be reasonably examined

Id. at 6.

In applying the exception under the statutory provision 19 U.S.C. § 1677f-1(c)(2), Commerce deviated from the statutory language. Rather than examining the “exporters and producers accounting for the *largest volume* of the subject merchandise” as required by statute, Commerce used the “largest value” instead. *See* 19 U.S.C. § 1677f-1(c)(2). The Court concludes that Commerce’s deviation from the statutory mandate of “largest volume” was not in accordance with law. The statute clearly requires Commerce to use the “largest volume” as the appropriate criteria to determine mandatory respondents under the exception provision in 19 U.S.C. § 1677f-1(c)(2).

In addition, the Court concludes that Commerce’s determination to reject consideration of Plaintiff as a mandatory respondent was not in accordance with law and was unsupported by substantial evidence because U.S. Customs and Border Protection data was reasonably available to Commerce showing that Plaintiff was the largest volume exporter of subject goods, accounting for more than double the combined exports of the firms selected as mandatory respondents. *See* Commerce’s Second Automated Commercial Sys. Shipment Query at Att. Furthermore, although Plaintiff’s Separate Rate Certification was untimely, it was filed only one week after the deadline and at the same time as those filed by other respondents considered for separate rate status who received filing extensions. The Court concludes that the data in the Separate Rate Certification filed one week late was reasonably available to Commerce, particularly since it was filed at the same time as other information considered by Commerce in conducting the mandatory respondent selection.

The Court understands that Commerce’s regulations allow it to establish deadlines “because Commerce clearly cannot complete its work unless it is able at some point to ‘freeze’ the record and make calculations and findings based on that fixed and certain body of information.” *Reiner Brach GmbH & Co.KG v. United States*, 26 CIT 549, 559, 206 F. Supp. 2d 1323, 1334 (2002); *Yantai Timken Co., Ltd. v. United States*, 31 CIT 1741, 1755, 521 F. Supp. 2d 1356, 1371 (2007) (“In order for Commerce to fulfill its mandate to administer the antidumping duty law, including its obligation to calculate accurate dumping margins, it must be permitted to enforce the time frame provided in its regulations.”). Under the specific facts of this case, however, the Court holds that Commerce’s failure to comply with the statutory requirements for the selection of mandatory respondents based on exporters of the “largest volume” of subject merchandise under 19 U.S.C. § 1677f-1(c)(2) is not justified or excused by Commerce’s regulations setting forth deadlines to file Separate Rate Applications or Certifications.

CONCLUSION

For the reasons set forth above, the Court holds that Commerce's determination to reject Plaintiff's request for selection as a mandatory respondent was not in accordance with law and was not supported by substantial evidence. The Court remands this matter to Commerce to reconsider the selection of mandatory respondents in accordance with this Opinion. Because remand will require Commerce to reconsider Plaintiff's Separate Rate Certification and potentially the rates assigned to all respondents, the Court defers consideration of Plaintiff's remaining arguments.

Accordingly, it is hereby

ORDERED that Plaintiff's Motion for Judgment on the Agency Record, ECF No. 23, is granted; and it is further

ORDERED that this case shall proceed according to the following schedule:

- (1) Commerce shall file its remand determination on or before December 16, 2025;
- (2) Commerce shall file the administrative record on or before December 30, 2025;
- (3) Comments in opposition to the remand determination shall be filed on or before January 27, 2026;
- (4) Comments in support of the remand determination shall be filed on or before February 24, 2026; and
- (5) The joint appendix shall be filed on or before February 24, 2026.

Dated: June 16, 2025
New York, New York

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

Slip Op. 25–77

TOYO KOHAN CO., LTD., Plaintiff, v. UNITED STATES, Defendant, THOMAS STEEL STRIP CORPORATION, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 24–00261

[Plaintiff's motion to amend complaint is granted.]

Dated: June 17, 2025

Daniel Lewis Porter, James Philip Durling, and William Charles Sjoberg, Pillsbury Winthrop Shaw Pittman LLP, of Washington, DC, and *William Gary Chandler*, Pillsbury Winthrop Shaw Pittman LLP, of New York, NY, for plaintiff Toyo Kohan Co., Ltd.

Emma E. Bond, Lead Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. Of counsel on the brief was *William Mitchell Purdy*, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

James R. Cannon, Jr., Nicole Brunda, and Ulrika Kristin Skitarelic Swanson, Cassidy Levy Kent (USA) LLP, of Washington, DC, for defendant-intervenor Thomas Steel Strip Corporation.

MEMORANDUM AND ORDER

Before the court is Plaintiff's ("Toyo Kohan") motion to file an amended complaint. Toyo Kohan Mot. to Amend Compl., ECF No. 27 (Apr. 30, 2025) ("Toyo Kohan Mot."). On December 23, 2024, Toyo Kohan filed its initial complaint to contest the Department of Commerce's ("Commerce") final results of its antidumping duty administrative review of diffusion-annealed nickel-plate flat-rolled steel from Japan, covering the period May 1, 2022, through April 30, 2023. Compl. at 1, ECF No. 6 (Dec. 23, 2024). On April 22, 2025, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") issued its opinion in *Marmen Inc. v. United States*, 134 F.4th 1334 (Fed. Cir. 2025) ("*Marmen*"). In *Marmen*, the court concluded that Commerce unreasonably relied on the Cohen's d test "to determine whether prices differ significantly when the underlying data is not normally distributed, equally variable, and equally and sufficiently numerous." *Id.* at 1348. Toyo Kohan then filed this motion, requesting to amend the complaint that is currently before this court to include an argument that Commerce unreasonably applied the Cohen's d test to groups of sales data that did not meet the assumptions of normality and equal variances on which the test is based. Toyo Kohan Mot. at 8.

It is uncontested that Toyo Kohan did not raise this argument at any point before the agency. *See* Toyo Kohan Mot. at 3; Gov. Resp. in Opp. to Mot. to Amend Compl. at 1, ECF No. 29 (May 21, 2025) ("Gov. Resp."). Toyo Kohan argues that the intervening legal authority exception to exhaustion ought to govern. Toyo Kohan Mot. at 3. Toyo

Kohan adds that the Federal Circuit's decisions in *Marmen* and *Stupp Corp. v. United States*, 2025 WL 1178392 (Fed. Cir. Apr. 23, 2025) ("*Stupp*") (vacating and remanding for Commerce to have an opportunity to re-perform a differential pricing analysis consistent with its opinion in *Marmen*) represent a fundamental shift in controlling law that directly forecloses Commerce's prior use of the Cohen's d methodology and that, accordingly, a pre-*Marmen* or *Stupp* challenge would have been futile. Toyo Kohan Mot. at 3–4. The government responds that, because the argument was not exhausted at the agency level, the court should deny this motion. Gov. Resp. at 1. The government adds that the proposed amendment would unduly delay proceedings and prejudice the United States. *Id.* Last, the government argues that the intervening case law exception applies to issues that present a pure question of law, whereas Toyo Kohan's proposed new claim presents factual and analytical issues that must be resolved by Commerce. *Id.* at 9.

The court will ordinarily allow amendment of a complaint "when justice so requires." USCIT Rule 15(a)(2). The government is correct that the intervening caselaw exception applies to issues that present a pure question of law, *see Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007) (noting that the Court of International Trade has developed a "pure legal question" exception to the exhaustion requirement in trade cases). Any efforts by Toyo Kohan to challenge Commerce's application of the Cohen's d methodology in the underlying proceedings would have been futile, however, because the Federal Circuit had not yet resolved the issue of how Cohen's d could be applied properly, while Commerce adhered to the methodology faithfully after several opportunities to reconsider it. As Toyo Kohan notes, the Federal Circuit's decision in *Marmen* fundamentally shifted the legal standard controlling Commerce's application of the Cohen's d test. Accordingly, justice requires that Toyo Kohan be allowed to address Commerce's application of Cohen's d under the standard articulated by the Federal Circuit in *Marmen*.¹

For the forgoing reasons, the court GRANTS the motion to amend.

Dated: June 17, 2025

New York, New York

/s/ Jane A. Restani

JANE A. RESTANI, JUDGE

¹ The government has not shown that Toyo Kohan's request would unduly delay resolution of the case or prejudice the other parties. While the government contends that Toyo Kohan should have raised the issue of the potential impact of *Marmen* and *Stupp* in the joint status report and proposed briefing schedule, it fails to cite to any support for this contention. *See* Gov. Resp. at 14–15.

Slip Op. 25–78

TENARIS BAY CITY, INC., MAVERICK TUBE CORPORATION, IPSCO TUBULARS INC., TENARIS GLOBAL SERVICES (U.S.A.) CORPORATION, AND SIDERCA S.A.I.C., Plaintiffs, and TMK GROUP AND TUBOS DE ACERO DE MEXICO, S.A., Consolidated Plaintiffs, and TENARIS BAY CITY, INC., MAVERICK TUBE CORPORATION, AND IPSCO TUBULARS INC., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, BORUSAN MANNESMANN PIPE U.S. INC., PTC LIBERTY TUBULARS LLC, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, AND WELDED TUBE USA INC., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 22–00344

[Sustaining the U.S. International Trade Commission’s affirmative material injury determination resulting from the investigation involving oil country tubular goods from Argentina, Mexico, Russia, and South Korea.]

Dated: June 20, 2025

Gregory J. Spak, Frank J. Schweitzer, Kristina Zissis, and Cristina M. Cornejo, White and Case, LLP, of Washington, D.C., for Plaintiffs Tenaris Bay City, Inc., Maverick Tube Corporation, IPSCO Tubulars Inc., Tenaris Global Services (U.S.A.) Corporation, and Siderca S.A.I.C., and Consolidated Plaintiff Tubos de Acero de Mexico, S.A. *Colin A. Dilley, Luca Bertazzo, Matthew W. Solomon, and Ron Kendler* also appeared.

Michael J. Chapman, Jeffrey M. Winton, and Amrietha Nellan, Winton & Chapman PLLC, of Washington, D.C., for Consolidated Plaintiff TMK Group. *Vi Mai, Ruby Rodriguez, and Jooyoun Jeong* also appeared.

Dominic L. Bianchi, General Counsel, *Andrea C. Casson*, Assistant General Counsel for Litigation, and *Madeline R. Heeran*, Attorney-Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., for Defendant United States.

Thomas M. Beline, Myles S. Getlan, James E. Ransdell, and Nicole Brunda, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor United States Steel Corporation.

Roger B. Schagrin, Jeffrey D. Gerrish, and Luke A. Meisner, Schagrin Associates, of Washington, D.C., argued for Defendant-Intervenors Borusan Mannesmann Pipe U.S. Inc., PTC Liberty Tubulars LLC, United Steel, Paper, and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, and Welded Tube USA Inc. *Christopher T. Cloutier, Elizabeth J. Drake, Justin M. Neuman, Nicholas J. Birch, Saad Y. Chalchal, and William A. Fennell* also appeared.

OPINION AND ORDER

Choe-Groves, Judge:

Before the Court is the remand determination from the final affirmative material injury investigation of oil country tubular goods (“OCTG”) from Argentina, Mexico, Russia, and South Korea by the

U.S. International Trade Commission (“Commission” or “ITC”). *Views of the Commission on Remand* (“*Remand Views*”), USITC Pub. 5381, Inv. Nos. 701-TA-671–72, 731-TA-1571–73 (Final) (Aug. 16, 2024), PR 181R; *see also Oil Country Tubular Goods from Argentina, Mexico, Russia, and South Korea*, 87 Fed. Reg. 69,331 (ITC Nov. 18, 2022) (“*Final Determination*”), PR 169; *see also Views of the Commission*, USITC Pub. 5381, Inv. Nos. 701-TA-671–72, 731-TA-1571–73 (Final) (Nov. 18, 2022), PR 165¹ (“*Views*”); Final Staff Report (Oct. 14, 2022), PR 161 (“*Staff Report*”).

Consolidated Plaintiff TMK Group, Plaintiffs Tenaris Bay City, Inc., Maverick Tube Corporation, IPSCO Tubulars Inc., Tenaris Global Services (U.S.A.) Corporation, and Siderca S.A.I.C., and Consolidated Plaintiff Tubos de Acero de Mexico, S.A. (collectively, “Plaintiffs”) challenge certain aspects of the final affirmative material injury determination, such as the Commission’s determinations of cumulation, volume, price effects, and impact, which were included in the Rule 56.2 motions for judgment on the agency record filed by TMK Group and Tenaris. Pl.’s Rule 56 Mot. J. Agency R. Pursuant USCIT Rule 56.2 (“*TMK Group’s Motion*”), ECF No. 42; Rule 56 Mot. J. Agency R. (“*Tenaris’ Motion*”), ECF No. 46; *see also* Mem. Supp. Pl.’s Rule 56.2 Mot. J. Agency R. (“*TMK Group’s Br.*”), ECF No. 42–1; Mem. Points Authorities Supp. Pls.’ Rule 56.2 Mot. J. Agency R. (“*Tenaris’ Br.*”), ECF No. 46. Defendant-Intervenors Borusan Mannesmann Pipe U.S. Inc., PTC Liberty Tubulars LLC, United States Steel Corporation, United Steel, Paper, and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, and Welded Tube USA Inc. (collectively, “*Defendant-Intervenors*”) filed their response. Def.-Intervs.’ Rule 56.2 Resp. Br. (“*Def.-Intervs.’ Resp.*”), ECF No. 50. Defendant United States (“*Defendant*” or “*the Government*”) filed its Memorandum in Opposition to Plaintiff’s Rule 56. 2 Motion for Judgment on the Agency Record. Def.’s Mem. Opp’n Pl.’s Rule 56.2 Mot. J. Agency R. (“*Def.’s Resp.*”), ECF No. 52. TMK Group and Tenaris filed their reply briefs. Reply Supp. Pls.’ Rule 56.2 Mot. J. Agency R. (“*Tenaris’ Reply*”), ECF No. 56; Reply Br. TMK Group (“*TMK Group’s Reply*”), ECF No. 57.

The Court remanded the *Final Determination* and deferred its review of the ITC’s determinations on volume, price effects, and impact in the material injury determination. *See Tenaris Bay City, Inc. v. United States* (“*Tenaris I*”), 48 CIT ___, 698 F. Supp. 3d 1287

¹ Citations to the administrative record reflect the public administrative record (“PR”) and the confidential administrative record (“CR”). ECF Nos. 59, 92.

(2024). On remand, the Commission continued to adopt its determinations on the conditions of competition, volume, price effects, and impact from the original *Views*. *Remand Views* at 3. The *Remand Views* solely addressed the cumulation issue.

TMK Group and Tenaris filed their comments in opposition to the *Remand Views*. Pls.' Cmts. USITC's Remand Redetermination ("Tenaris' Remand Cmts."), ECF Nos. 80, 81; Cmts. TMK Group Opp'n [ITC]'s Remand Redetermination ("TMK Group's Remand Cmts."), ECF Nos. 82, 83. Defendant and Defendant-Intervenors filed their comments in support. Def. [USITC]'s Cmts. Remand Redetermination ("Def.'s Remand Cmts."), ECF Nos. 86, 87; Def.-Intervs.' Cmts. Supp. Remand Results ("Def.-Intervs.' Remand Cmts."), ECF Nos. 89, 90.

For the following reasons, the Court sustains the Commission's *Final Determination*.

BACKGROUND

The Court presumes familiarity with the underlying facts and procedural history of this case and recites the facts relevant to the Court's review of the *Remand Views*. *See Tenaris I*, 48 CIT at __, 698 F. Supp. 3d at 1292.

Petitions requesting investigations were filed with the U.S. Department of Commerce ("Commerce") and the ITC on October 6, 2021 by Borusan Mannesmann Pipe U.S., Inc., PTC Liberty Tubulars LLC, U.S. Steel Tubular Products, Inc., the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, and Welded Tube USA, Inc. Petitions, PR 1.

The Commission initiated an investigation and determined preliminarily that there was a reasonable indication that the domestic industry was materially injured or threatened with material injury by reason of subject imports. *Views of the Commission (Preliminary) ("Preliminary Views")*, PR 74.

The Commission published its *Final Determination* on November 18, 2022, determining that an industry in the United States was materially injured by reason of imports of OCTG from Argentina, Mexico, Russia, and South Korea. *See Final Determination*, 87 Fed. Reg. at 69,331.

The Court sustained in part and remanded in part the *Final Determination*. The Court sustained the ITC's determination to cumulate subject imports from Argentina and Mexico as supported by

substantial evidence, but remanded the ITC's determination to cumulate subject imports from Russia and subject and non-subject imports from South Korea as unsupported by substantial evidence. *Tenaris I*, 48 CIT __, 698 F. Supp. 3d at 1309. The Court remanded for the Commission to reconsider its cumulation determinations for subject imports from Russia and non-subject imports from South Korea, and deferred its analysis of the challenges to the ITC's additional determinations regarding volume, price effects, and impact in the material injury determination. *Id.*, at __, 698 F. Supp. 3d at 1301, 1307, 1309.

The Commission published a notice of remand proceedings on May 29, 2024, and issued supplemental tables concerning imports from South Korea on June 7, 2024. *Oil Country Tubular Goods from Argentina, Mexico, and Russia*, 85 Fed. Reg. 46,419 (May 29, 2024) (notice of remand proceedings); USITC Suppl. Mem. (June 7, 2024), PR 174R, CR 440R. The Parties filed comments in response to the notice of remand proceedings. TMK Group's Remand Cmts., PR 176R; Tenaris' Remand Cmts., PR 177R, CR 442R.

The Commission issued its *Remand Views* on August 16, 2024. *See Remand Views*. Oral argument was held on March 17, 2025. Oral Arg. (Mar. 17, 2025), ECF No. 100.

ISSUES PRESENTED

The Court reviews whether the Commission's determinations of cumulation of subject imports, volume, price effects, and impact are supported by substantial evidence and in accordance with law.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i), which grant the Court authority to review actions contesting the ITC's final injury determinations following an antidumping or countervailing duty investigation. The Court will hold unlawful any determination found to be unsupported by substantial record evidence or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i); *see also Siemens Energy, Inc. v. United States*, 806 F.3d 1367, 1369 (Fed. Cir. 2015).

DISCUSSION

Tenaris and TMK Group challenge certain aspects of the Commission's final affirmative material injury determination. TMK Group challenges only the Commission's cumulation analysis as unsupported by substantial evidence and not in accordance with law,

whereas Tenaris challenges the Commission's cumulation, volume, price effects, and impact determinations as unsupported by substantial evidence and not in accordance with law. *See* TMK Group's Br.; Tenaris' Br. The Government and Defendant-Intervenors contend that the Commission's material injury determination is supported by substantial evidence and in accordance with law in all aspects of the affirmative determination. *See* Def.'s Resp.; Def.-Intervs.' Br.

To make an affirmative material injury determination, the ITC must find that: (1) material injury existed; and (2) the material injury was caused by reason of the subject imports. *See Swiff-Train Co. v. United States*, 793 F.3d 1355, 1359 (Fed. Cir. 2015) (quoting *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 719 (Fed. Cir. 1997)). Material injury is defined by statute as harm that is not inconsequential, immaterial, or unimportant. 19 U.S.C. § 1677(7)(A). To determine whether a domestic industry has been materially injured or threatened with material injury by reason of unfairly subsidized or less than fair value imports, the Commission considers:

- (I) the volume of imports of the subject merchandise,
- (II) the effect of imports of that merchandise on prices in the United States for domestic like products, and
- (III) the impact of imports of such merchandise on domestic producers of domestic like products, but only in the context of production operations within the United States.

Id. § 1677(7)(B)(i). The Commission may consider other economic factors that are relevant to determining whether there is material injury by reason of imports. *Id.* § 1677(7)(B)(ii). No single factor is dispositive and the significance to be assigned to a particular factor is for the ITC to decide. *See* S. Rep. No. 96-249, at 88 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 474. The statute neither defines the phrase "by reason of," nor provides the ITC with guidance, on how to determine whether the material injury is by reason of subject imports. The U.S. Court of Appeals for the Federal Circuit ("CAFC") has interpreted the statutory language "by reason of" to require the Commission to consider the volume of subject imports, their price effects, their impact on the domestic industry, and to establish whether there is a causal connection between the imported goods and the material injury to the domestic industry. *See Swiff-Train Co.*, 793 F.3d at 1361; *see also* S. Rep. No. 96-249, at 57-58, 74-75 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 443-44, 460-61.

I. The Commission's Cumulation of Subject Imports

The Commission cumulated subject imports from Argentina, Mexico, Russia, and South Korea, determining that the cumulation factors of fungibility, channels of distribution, geographic overlap, and simultaneous presence in the market showed a “reasonable overlap of competition” among subject imports and the domestic like product. *Views* at 16–23. On remand, the Commission continued to adopt its determinations on the conditions of competition, volume, price effects, and impact from the original *Views*. *Remand Views* at 3.

A. Legal Standard

In evaluating material injury, the Commission must “cumulatively assess the volume and effect of imports of the subject merchandise from all countries,” if such imports compete with each other and with domestic like products. 19 U.S.C. § 1677(7)(G)(i)(I), (II). The ITC refers to this requirement as “cumulation.” The Statement of Administrative Action to the Uruguay Round Agreements Act (“SAA”) states that the statutory requirement is satisfied if there is a reasonable overlap of competition. *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 848 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4190. Because the Commission need only find that a “reasonable overlap” of competition exists, a finding of “‘complete overlap’ of competition” is not required to support a cumulation decision. *Mukand Ltd. v. United States*, 20 CIT 903, 909, 937 F. Supp. 910, 916 (1996) (quoting *Wieland Werke, AG v. United States*, 13 CIT 561, 563, 718 F. Supp. 50, 52 (1989)); *see also Goss Graphics Sys., Inc. v. United States*, 216 F.3d 1357, 1362 (Fed. Cir. 2000) (stating that the ITC’s inquiry is “whether ‘reasonable overlap’ of competition exists”).

To determine whether imports compete with each other and with the domestic like product, or if there is a “reasonable overlap” of competition, the Commission analyzes four factors:

- (1) the degree of fungibility between subject imports from different countries and between subject imports and the domestic like product, including consideration of specific customer requirements and other quality related questions;
- (2) the presence of sales or offers to sell in the same geographic markets of subject imports from different countries and the domestic like product;

- (3) the existence of common or similar channels of distribution for subject imports from different countries and the domestic like product; and
- (4) whether the subject imports are simultaneously present in the market

Int'l Indus., Ltd. v. United States, 42 CIT __, __, 311 F. Supp. 3d 1325, 1329–30 (2018) (citation omitted).

The Commission's use of these criteria for determining whether competition exists between and among subject imports and the domestic like product have been approved by the U.S. Court of International Trade ("CIT") and the CAFC. See *Goss Graphics Sys., Inc. v. United States*, 22 CIT 983, 985, 33 F. Supp. 2d 1082, 1085 (1998), *aff'd sub nom.*, 216 F.3d 1357 (Fed. Cir. 2000); see also *Fundicao Tupy S.A. v. United States*, 12 CIT 6, 10–11, 678 F. Supp. 898, 902 (1988) (summarizing the factors as "the fungibility and similar quality of the imports, the similar channels of distribution, the similar time period involved, and the geographic overlap of the markets"), *aff'd*, 859 F.2d 915 (Fed. Cir. 1988). No one factor in the Commission's analysis is dispositive. *Noviant OY v. United States*, 30 CIT 1447, 1461, 451 F. Supp. 2d 1367, 1379 (2006).

The Commission must "evaluate all relevant economic factors . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry" when considering the impact of subject imports on the domestic industry. 19 U.S.C. § 1677(7)(C)(iii). The ITC's determinations regarding competition and market conditions must be supported by substantial record evidence. See 19 U.S.C. § 1615a(b)(1)(B)(i); see also *Siemens Energy, Inc.*, 806 F.3d at 1369. When the Commission makes a determination on volume, price, or impact that is premised on speculation about industry conditions, that determination has not been "evaluate[d] . . . within the context of the business cycle and the conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii); see also *Catfish Farmers of Am. v. United States*, 37 CIT 717, 733 (2013) ("[S]peculation does not amount to reasonable inference, as it provides no factually-grounded basis for sustaining an agency's determination.").

B. OCTG from Russia

In *Tenaris I*, the Court remanded the ITC's determination to cumulate subject imports from Russia as not supported by substantial evidence or in accordance with law due to: (1) the ITC's timeframe for evaluating cumulation; (2) the ITC's failure to consider potentially

contrary evidence on the record for its cumulation determination; and (3) the ITC's failure to file the Responses to Commission Questions with the Court. *Tenaris I*, 48 CIT at ___, 698 F. Supp. 3d at 1298.

1. Timing of Assessment

In their Rule 56.2 motions, Tenaris and TMK Group challenged the ITC's cumulation of subject imports from Russia, arguing that the ITC's determination was not in accordance with law because the timeframe for evaluating cumulation of Russian OCTG was improper and vote day should have been the appropriate timeframe to assess conditions of competition. See TMK Group's Br. at 5–25; Tenaris' Br. at 8–23.

In both the *Views* and *Remand Views*, the ITC cumulated Russian OCTG based on the period of investigation, explaining on remand that the assessment of competitive overlap for cumulation purposes should not be made at the time of the Commission's vote. *Remand Views* at 11–17. The Commission clarified that Commerce, rather than the Commission itself, determined that subject imports from the four countries at issue were unfairly traded before the time of the Commission's vote on October 26, 2022, and contended that *Chaparral Steel Co. v. United States* (“*Chaparral Steel*”), 901 F.2d 1097 (Fed. Cir. 1990), was distinguishable from this case, and relied on *Steel Auth. of India, Ltd. v. United States* (“*Steel Authority of India*” or “*SAIL*”), 25 CIT 472, 478, 146 F. Supp. 2d 900, 906–07 (2001) in its cumulation determination. *Id.*

Tenaris contests the ITC's reliance on *Steel Authority of India* because the case was dependent on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and argues that the Court must instead independently interpret the term “compete with” in 19 U.S.C. § 1677(7)(G)(i) under *Loper Bright Enters. v. Raimondo* (“*Loper Bright*”), 603 U.S. 369, 144 S. Ct. 2244 (2024). Tenaris' Remand Cmts. at 11–15.² Tenaris contends that the ITC's interpretation of the statute and its cumulation analysis continue to be inconsistent with the plain meaning of

² Defendant contends that the Parties' argument regarding *Loper Bright* is waived under the doctrine of administrative exhaustion because Tenaris did not raise this argument in its administrative remand comments filed prior to the issuance of *Loper Bright*. See Tenaris' Remand Cmts. Parties are excused from the exhaustion requirement when an intervening judicial decision materially affects an issue before the Court. See *Siemens Gamesa Renewable Energy v. United States*, 621 F. Supp. 3d 1337, 1348 (2023) (citing *Hormel v. Helvering*, 312 U.S. 552, 558–59 (1941)); *Gerber Food (Yunnan) Co. v. United States*, 33 CIT 186, 196, 601 F. Supp. 2d 1370, 1380 (2009); cf. *Papierfabrik Aug. Koehler AG v. United States*, 36 CIT 1632, 1635 (2012) (“the intervening judicial decision exception applies because there was a change in the controlling law on the use of zeroing”). Tenaris' argument is not waived because *Loper Bright* is an intervening judicial decision that would “materially alter the result” of the case. See *Gerber Food (Yunnan) Co.*, 33 CIT at 196, 601 F. Supp. 2d at 1380.

the statutory phrase “compete with,” which uses the present tense and thus denotes that the subject imports should be evaluated during the months leading up to and including vote day. *Id.* at 7.

During oral argument, however, Plaintiffs apparently abandoned their argument that vote day should be the proper timeframe of assessment, framing the issue instead as greater weight that the ITC should have accorded to the last few months of the period of investigation when sanctions were imposed against Russian imports and prevented reasonable competition with other subject imports. Oral Arg. at 2:00:00–2:00:31 (“Just to be clear, we are not asking to change the [period of investigation]. We are asking the Court to consider whether the Commission reasonably determined present material injury during the [period of investigation].”). Because Plaintiffs no longer assert that vote day is the appropriate time for assessing competition of imports, the Court focuses here on the assessment of competition through the end of the period of investigation rather than vote day.

Under *Loper Bright*, courts exercise their “independent judgment” about the correctness of an agency’s statutory interpretation. *See Lashify, Inc. v. Int’l Trade Comm’n*, 130 F.4th 948, 957 (Fed. Cir. 2025) (citing *Loper Bright*, 603 U.S. at 412). Previously, under *Chevron* deference, “ambiguous” statutes were treated as “implicit” delegations of authority to agencies, which had authority to “fill any gap[s]” in the statute with “reasonable” interpretations. *Chevron*, 467 U.S. at 843–44 (quotation omitted). However, *Loper Bright* held that statutory ambiguity “is not a delegation to anybody,” and courts should not “defer” to an agency’s interpretation when faced with an unclear statute. *Loper Bright*, 603 U.S. at 400.

The statutory language is the starting point for analysis and typically controls the outcome. *See, e.g., Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). At issue is the “compete with” provision in section 1677(7)(G)(i). *See* 19 U.S.C. § 1677(7)(G)(i) (stating that the ITC may cumulate subject imports to determine material injury “if such imports compete with each other and with domestic like products in the United States market”).

The Court must “use[] every tool at their disposal to determine the best reading of the statute and resolve the ambiguity [in the statute].” *Loper Bright*, 603 U.S. at 373. The Court must apply “all relevant interpretative tools” to determine which meaning is best—“the reading the court would have reached’ if no agency were involved.” *Id.*

Section 1677(7)(G)(i) states:

For purposes of clauses (i) and (ii) of subparagraph (C), and subject to clause (ii), the Commission shall cumulatively assess

the volume and effect of imports of the subject merchandise from all countries with respect to which—

- (I) petitions were filed under section 1671a(b) or 1673a(b) of this title on the same day,
- (II) investigations were initiated under section 1671a(a) or 1673a(a) of this title on the same day, or
- (III) petitions were filed under section 1671a(b) or 1673a(b) of this title and investigations were initiated under section 1671a(a) or 1673a(a) of this title on the same day,

if such imports compete with each other and with domestic like products in the United States market.

19 U.S.C. § 1677(7)(G)(i).

Section 1677(7)(G)(i) is silent as to the precise time period that the Commission must consider in making its cumulation determination. The phrase “compete with” is not defined, with the only statutory mandate to cumulate subject imports in cases when “imports compete with each other and with domestic like products” in the United States market. 19 U.S.C. § 1677(7)(G)(i). What Congress intended by the phrase “compete with,” or the timeframe that the Commission may use to assess competition, is also not immediately clear from the legislative history of section 1677(G)(i), which was first added to the law in the Trade and Tariff Act of 1984, Pub.L. No. 98–573, § 612, 98 Stat. 2948, 3033.³ Cumulation was mandated “for purposes of assessing injury if such imports compete with each other and with like products of domestic industry in the U.S. market.” House Comm. on Ways and Means, Trade Remedies Reform Act of 1984, H.R. REP. No. 98–725, at 37 (1984), reprinted in 1984 U.S.C.C.A.N. 5127, 5134.

Congress did not include statutory language regarding the timeframe that the Commission should use for its cumulation analysis in the Customs and Trade Act of 1990. See Customs and Trade Act of 1990, Pub. L. No. 101–382, § 224(a); Uruguay Round Agreements Act, Pub. L. No. 103–465, § 222(b)(2) & (e)(2). The legislative history only includes guidance that cumulation is designed to take into account “simultaneous unfair imports.” Neither the statutory language nor the legislative history conclusively establishes the intended time frame in which imports are to be considered for competition in the cumulation analysis.

³ This provision was added as clause (i) to Paragraph (7)(C). Trade and Tariff Act of 1984, Pub. L. No. 98–573, § 612(a)(2)(A).

As noted in *Tenaris I*, the statutory language is written in the present tense: if “such imports compete with each other and with domestic like products in the United States market.” 19 U.S.C. § 1677(7)(G)(i). The Court reiterates that conditions of competition must exist in the present tense at the end of the investigation. It is not enough for the conditions of competition to have existed at some point during the period of investigation. The Court also concludes that the statutory language does not support Plaintiffs’ contention that the ITC should accord greater weight to the conditions of competition at the end of the period of investigation. The Court also considers the present tense of the word “compete with.” “Compete” in the context of firms is defined as each firm “tr[ying] to get people to buy its own goods in preference to those of the other firm or country.” *Collins Dictionary*, Merriam-Webster Dictionary, available at <https://www.collinsdictionary.com/us/dictionary/english/compete> (last visited June 20, 2025). For there to be competition, subject imports from competing countries must be evaluated under similar circumstances and in the present tense at the end of the investigation.

On remand, the Commission explained that it made its determination based on the entire period of investigation. In light of Plaintiffs’ abandonment of the argument that the conditions of competition should exist on vote day, and the lack of statutory support for the argument that the ITC was required to weigh the conditions of competition more heavily at the end of the period of investigation due to the sanctions imposed against Russia, the Court concludes that the ITC’s assessment of competition throughout the 42-month period of investigation was in accordance with law.

The Commission’s determination that imports from Russia “compete with each other and with domestic like products” within the meaning of Section 771 of the Tariff Act of 1930, as amended, and its review of Russian OCTG in the United States market for its material injury determination is reasonable.

Therefore, the Court sustains the ITC’s determination on the issue of imports from Russia competing with each other and with domestic like products.

2. Cumulation Factors

TMK Group challenged the ITC’s cumulation determination as not supported by substantial evidence, arguing that all four cumulation factors were not met because: (1) the loss of American Petroleum Institute (“API”) certification for Russian subject imports rendered subject imports not fungible with other subject imports; and (2) the sanctions imposed on Russia (aside from the loss of API certification)

and Section 232 duties affected subject Russian OCTG from sharing simultaneous presence, channels of distribution, and geographic overlap with other subject imports. *See* TMK Group's Br. at 6–24.

Regarding the fungibility of Russian OCTG, the ITC first acknowledged that the impact of loss of API-certification “is not yet clear, particularly in light of continued subject imports from Russia after March 2022.” *Views* at 23. The Court noted that this statement seemed contradictory because it showed that the ITC was not clear about the impact from such a loss, but proceeded to predict and discuss the effect of this sanction. *Tenaris I*, 48 CIT at __, 698 F. Supp. 3d at 1298.

The Court remanded for the ITC to further explain “the lag of the sanction measures taking place or the impact of the loss of API-certification services on Russian OCTG’s competitiveness” and “the potential contrary evidence regarding the competitiveness of imports from Russian OCTG relative to the other subject imports from Argentina, Mexico, and South Korea.” *Id.* at 1301.

On remand, the ITC clarified that the suspension of API-certification did not render Russian OCTG non-fungible with domestic and imported OCTG, as the loss of API-certification did not prevent Russian green tube from being fungible and competing with domestic or imported green tube, either in limited-service environments or after being processed in the United States, because the quality of Russian OCTG remained competitive despite lacking certification. *Remand Views* at 28–35.

The ITC addressed the “potentially contrary evidence” previously cited by TMK Group in its Rule 56.2 brief regarding the competitiveness of Russian OCTG, such as the hearing testimony of Luca Zanotti, President of Tenaris USA, and a letter from the API. *See Tenaris I*, 48 CIT at __, 698 F. Supp. 3d at 1299; *Remand Views* at 30–35. The ITC explained on remand that Zanotti’s testimony that the suspension of API-certification services would be a “major setback for Russia” did not reflect the actual views of domestic and global purchasers on this issue as it was Zanotti’s own personal assumptions, and the API letter in its entirety demonstrated that Russian OCTG would still be competitive when sold in the United States because the products’ quality would not decline despite the lack of certification. *See Remand Views* at 30–35. The ITC also addressed the testimony of Adam Lange, Vice President of Drilling for Tap Rock Operating, which the ITC explained was evidence showing that the quality of Russian OCTG would not be affected by the loss of certification and would continue to remain competitive in the United States market. *See Tenaris’ Remand Cmts.* at 12; *TMK Group’s Remand Cmts.* at 8;

Remand Views at 32–33 (citing USITC Hearing Tr. at 249–50, PR 136).

The ITC cited to additional evidence on remand demonstrating that API-certification was not the sole consideration for purchasers when qualifying suppliers or assessing the quality of OCTG, especially when Russian OCTG was produced to API specification. *Remand Views* at 30–35 (citing Staff Report at Table II-12; Blank U.S. Importer Questionnaire (June 14, 2022) at III-22, III-25, PR 92)). For example, the ITC cited Table II-12, which showed the number of purchasers’ responses regarding the ability of suppliers to meet minimum quality specifications and indicated that a majority of responding purchasers reported that Russian OCTG “always” or “usually” met minimum quality specifications. *Id.* at 30–35 (citing Staff Report at II-30). The Court agrees that this evidence demonstrates that purchasers believed that Russian OCTG were able to meet minimum qualification specifications, with or without API-certification.

Regarding the simultaneous presence of Russian OCTG in the United States market due to the imposition of sanctions, the ITC addressed the Court’s concern that the *Views* did not accurately reflect the effects of sanctions, given the alleged lag of the sanctions taking effect from March 2022 to May 2022 on Russian subject imports. *Tenaris I*, 48 CIT at __, 698 F. Supp. 3d at 1299. On remand, the Commission explained that the sanctions did not prevent subject Russian OCTG from being simultaneously present in the United States market during the period of investigation, including the post-invasion months. *Remand Views* at 26–39 (citing Staff Report at Tables IV-18, C-1, C-2, and G-4).

The ITC cited Tables IV-18, C-1, C-2, and G-4 to demonstrate that subject imports entered the United States market in the second quarter of 2022 in relatively high volumes, were shipped into the United States market in interim 2022, and were held in importers’ inventory at the end of interim 2022. *Id.* (citing Staff Report at Tables IV-18, C-1, C-2, and G-4). The ITC cited Table IV-18 to show monthly United States import data during the entire period of investigation, January 2019 through June 2022. *Id.* (citing Staff Report at IV-34–IV-37). The ITC cited Table IV-18 to support its determination that OCTG from Russia were imported in February 2022, March 2022, and May 2022. *Id.* (citing Staff Report at IV-35). There is no import data for April 2022 and June 2022. *Id.* The ITC cited Table C-1 to show summary data concerning the United States market, by item and period, and Table C-2 to show summary data concerning the United States market, excluding one United States producer, by item

and period. *Id.* (citing Staff Report at App'x C). The ITC cited Table G-4 to show the domestic importers' shipments of imports from Russia into the United States, by end-finish and grade, with quantity in short tons. *Id.* (citing Staff Report at G-12). The Court agrees with the ITC that this evidence shows that subject Russian imports entered the United States market in the second quarter of 2022 in higher volumes than they did in the first half of 2021. *Id.*

Referring to the specific sanctions on Russian OCTG, the ITC explained that: (1) the Section 232 duties were in place since 2018; (2) the combination of the Section 232 duties and the suspension of the API-certification (as of March 17, 2022) did not prevent Russian OCTG from entering into the United States in March 2022 in volumes that were 69% higher than in March 2021; and (3) these sanctions, together with the revocation of Russia's MFN status (as of April 18, 2022) and ban on Russian ships from entering United States ports (as of April 2022) did not prevent Russian OCTG from entering the domestic market in May 2022 in volumes 25% higher than in May 2021. *Id.* at 37–38. The ITC explained that the combined volume of subject imports from Russia was 47.5% higher in March and May 2022, after the imposition of these sanctions, than in March and May 2021. *Id.*

The Court concludes that the Commission adequately explained on remand the impact of the sanctions on Russian OCTG with respect to the cumulation analysis. The Court also concludes that record evidence cited by the ITC on remand supports its determination that subject Russian imports remained in the United States market and in the final four months of the period of investigation and did not affect these imports from sharing simultaneous presence, channels of distribution, and geographic overlap with other subject imports.

The ITC complied with the remand instructions for this issue.⁴ The Commission's determination to cumulate Russian OCTG is sustained as in accordance with law and supported by substantial evidence.

⁴ On remand, the ITC filed the Responses to Commission Questions, which previously was not placed in its entirety on the record with the Court, only including three pages of the document, pages II-29–II-32, which did not pertain to any information about the loss of API-certification or green tubes. The ITC cited to the Responses to Commission Questions, stating that the loss of API-certification to Russian OCTG producers would not prevent Russian-produced OCTG from being sold in the United States market with the certification because Russian producers could still send green tubes to API-certified processors and then sell the processed tubes in the United States market. *Id.* (citing Petitioners' Post-Hearing Br. (Sept. 29, 2022) at Ex. 1 ("Responses to Commission Questions") at II-55–II-56, PR 143, CR 419). The Court now observes that pages II-55–II-56 of the document has been filed with the Court. Resps. Commission Questions at II-55–II-56.

C. OCTG from South Korea

Plaintiffs challenged the Commission's determination to cumulate OCTG from South Korea as not in accordance with law and not supported by substantial evidence because the ITC included: (1) non-subject imports from South Korea; and (2) subject imports from South Korea that were under an antidumping order and not fungible with subject imports from Argentina and Mexico. *See* TMK Group's Br. at 25–26; Tenaris' Br. at 23–24.

1. Exclusion of Non-Subject Imports from South Korea

In their Rule 56.2 motions, Plaintiffs asserted that the Commission's cumulation determination was not in accordance with law because the ITC's inclusion of non-subject imports violated 19 U.S.C. § 1677(7)(G)(i) through its reliance on Tables II-16, II-19, and IV-7 of the Staff Report. *See* TMK Group's Br. at 25–26; Tenaris' Br. at 23–24.

In the original *Views*, the ITC relied on Staff Report tables that contained non-subject imports from South Korea and tables for its cumulation determination for findings of fungibility, geographic overlap, and simultaneous presence in the market. The ITC determined that there was a sufficient degree of fungibility between the subject imports from South Korea and those from Argentina and Mexico, even though there were differences in the average unit values between these countries, based on data that showed interchangeability between all subject imports. *See Views* at 27 (citing Staff Report at Tables II-15–II-17). In addition to citing Tables II-16, II-19, and IV-17, the ITC cited to Tables II-1, II-15, II-18, and II-20 to support its cumulation determination. *Id.*

Previously, the Court concluded that the ITC's determination to cumulate both subject and non-subject South Korean imports was neither supported by substantial evidence nor in accordance with law. *Tenaris I*, 48 CIT at ___, 698 F. Supp. 3d at 1307. The Court remanded the ITC's determination on South Korean OCTG because non-subject imports may not be included in the ITC's cumulation determination. *Id.*

On remand, the ITC revised the tables that it had relied on in the Staff Report, issuing a supplemental memorandum with 11 corresponding tables. Suppl. Mem. The ITC stated on remand that “nothing in this record indicated that there were meaningful producer-specific differences among imports of OCTG from South Korea,” but retabulated data to ensure that it was not including non-subject Hyundai OCTG in its analysis of competitive overlap, which are contained in the Supplemental Tables 1 to 11. *Remand Views* at 44.

In its remand brief, Tenaris argues that the original and new tables used by the ITC failed to reliably exclude non-subject imports from South Korea and that reliance on these tables for the ITC's fungibility determination violates the statute and does not comply with the remand order. Tenaris' Remand Cmts. at 23–32. Tenaris argues that the ITC could have issued new questionnaires to the purchasers and importers to confirm that they only considered subject imports when responding to the questions. *Id.* at 29.

The Government contends that the ITC's remand redetermination with respect to non-Hyundai imports⁵ from South Korea was supported by substantial evidence and in accordance with law because the ITC stated that the record evidence did not indicate “meaningful producer-specific differences among imports of OCTG from South Korea” and respondents had continuously referred to South Korean imports as a whole, without making a distinction between subject and Hyundai imports. Def.'s Remand Cmts. at 24–26.

Defendant-Intervenor asserts that the ITC excluded any data with an evidentiary basis for suspecting connection to non-subject South Korean OCTG and the Court should sustain the remand redetermination based on the revised tables. Def.-Intervs.' Remand Cmts. at 30–33.

The ITC described the supplemental tables as follows:

Tables 1 and 2 present geographic and monthly official import statistics adjusted using proprietary, Census edited Customs records to reclassify imports from Hyundai as “nonsubject imports” (corresponding to CR Tables II-17 and II-18). Tables 3 and 5 present importer questionnaire responses regarding interchangeability and the significance of differences other than price, and separate and exclude responses by importer Hyundai (corresponding to CR Tables II-16 and II-19). Tables 4 and 6 present purchaser questionnaire responses regarding interchangeability and the significance of differences other than price, and separate and exclude responses by firms that purchased, or might have purchased, OCTG imported by Hyundai Steel USA (corresponding to CR Tables II-17 and II-20). Tables 7 through 11 present purchaser questionnaire responses comparing 15 characteristics of OCTG from South Korea and other sources, and separate and exclude responses by firms that purchased, or might have purchased, OCTG imported by Hyundai (corresponding to CR Table II-14).

Remand Views at 44 n.191.

⁵ The non-subject South Korean imports were from Hyundai's imports. *See Views*.

The ITC stated that each table in the supplemental memorandum, from the least stringent exclusion 1 to the most stringent exclusion 3, continued to support the Commission's original fungibility, geographic overlap, and simultaneous presence determinations. *Id.* at 46. The ITC explained that the adjustment of data in the supplemental document "eliminate[d] from the pool of responses impressions of purchasers who may have had Hyundai's OCTG in mind when furnishing responses on interchangeability, comparability, and the importance of non-price factors," and the ITC adjusted geographic and monthly official import statistics to distinguish between subject imports from South Korea and non-subject imports from South Korea for its geographic overlap and simultaneous presence analyses. *Id.* at 45 (citing Suppl. Mem., cover note). The ITC explained that each exclusion removed from the dataset the responses of domestic purchasers who reported purchasing South Korean OCTG from Hyundai Steel or a customer of Hyundai Steel. *Id.* at 45 n.193. For example, Exclusion 1 excluded from the data set the response of a domestic producer who reported purchasing specifically from Hyundai Steel in its list of top suppliers in the domestic purchasers' questionnaire response. *Id.* at 45.

The ITC explained that "the data for interchangeability, comparability, and the significance of differences other than price show three different permutations, removing to varying degrees responses from U.S. purchasers that reported purchasing from Hyundai, U.S. purchasers that Hyundai reported selling to, or U.S. purchasers that reported purchasing from a distributor who purchased from Hyundai." *Id.*

The Court concludes that the ITC reasonably excluded non-subject South Korean imports from its cumulation analysis, based on its further explanations on remand and the record documents that support the ITC's determination. Therefore, the Court sustains the ITC's cumulation determination with respect to South Korean imports as in accordance with law and supported by substantial evidence.

2. Impact of the Existing Antidumping Order on Subject Imports from South Korea

In their Rule 56.2 motions, Plaintiffs contested the ITC's inclusion of subject merchandise from South Korea that had already been used to support a finding of material injury to the domestic OCTG industry in 2014 in a different proceeding and was subject to an existing antidumping order, which Plaintiffs contended artificially inflated the cumulated volume of imports while adding little or no impact to the potential harm suffered by the domestic industry. TMK Group's Br. at 4–5; Tenaris' Br. at 23–24.

The Court remanded the *Final Determination* as to the cumulation of South Korean imports because the ITC did not address the possible effect resulting from the subject imports from South Korea that were under an antidumping order in its final determination. *Tenaris I*, 48 CIT at __, 698 F. Supp. 3d at 1307.

In its remand brief, Tenaris argues that the ITC failed to address the impact of the existing antidumping order as a condition of competition affecting subject imports from South Korea. Tenaris' Remand Cmts. at 23–32. Tenaris argues that the ITC did not meaningfully address the disciplining impact of the existing antidumping order as a condition of competition affecting subject imports from South Korea and the ITC's failure to consider the commercial and competitive impact of such an antidumping order arguably rendered the ITC's cumulation determination unsupported by substantial evidence. *Id.* at 31–32.

The Government contends that the ITC addressed the effects of the existing antidumping order on subject imports and the Court did not instruct the ITC to consider the impact of the antidumping order. Def.'s Remand Cmts. at 26.

Defendant-Intervenors assert that the ITC complied with the Court's remand order and the SAA undermines Tenaris' theory regarding the impact of the antidumping order on the subject imports from South Korea. Def.-Intervs.' Remand Cmts. at 33–34.

The Court observes that the ITC addressed on remand the potential impact of the existing antidumping order on subject imports and explained that its analysis of the four factors would support its cumulation analysis notwithstanding the antidumping order.

In the *Remand Views*, the Commission stated:

As an initial matter we note that, notwithstanding an order remedying the dumping of OCTG imports from South Korea, Commerce found the non-Hyundai imports from South Korea to still be unfairly traded through subsidization at above de minimis levels. The dumping order would not address injury resulting from the subsidization of these imports, and the dumping order is only capable of disciplining the level of dumping not the level of subsidization. In addition, the existence of the [antidumping] order did not result in differences in the way these imports competed in the U.S. market to render cumulation inappropriate based on the Commission's four cumulation factors. As reviewed below, analysis of the four factors used in the Commission cumulation analysis show that subject imports from South Korea were fungible with imports from other subject countries, sold in overlapping channels of distribution and in

overlapping geographic markets, and simultaneously present in the U.S. market. Furthermore, the record shows that, even while under the discipline of the [antidumping] order, subject imports from South Korea *** the domestic like product in the *** of quarterly price comparisons and Respondents put forward no evidence in support of their assertion to the contrary.

Remand Views at 52. Because the ITC adequately discussed the antidumping order and its effect on the cumulation analysis, it complied with the remand instructions for this issue.

Accordingly, the ITC's cumulation of OCTG from Russia, South Korea, Mexico, and Argentina is in accordance with law and supported by substantial evidence.⁶

II. The Commission's Determinations of Volume, Price Effects, and Impact

To determine whether subject imports caused material injury to a domestic industry in the United States, the Commission considers three statutory factors—the volume of subject imports, the effect of such imports on prices, and the economic impact of subject imports on the domestic industry. *See* 19 U.S.C. § 1677(7)(C)(i)–(iii). Because the Court holds that the Commission's cumulation determination is supported by substantial evidence and in accordance with law, the Court now addresses the additional determinations regarding volume, price effects, and impact in the material injury determination that were not addressed in *Tenaris I*. On remand, the Commission continued to make an affirmative material injury determination and adopt its previous determinations on the conditions of competition, volume, price effects, and impact from the original *Views*.⁷ *See Remand Views* at 3.

Tenaris contends that the Commission failed to conduct its injury analysis within the context of unprecedented conditions of competition prevailing during the period of investigation, which led to erroneous volume, price, and impact determinations. Tenaris' Br. at 9–17. Tenaris articulated these conditions of competition as including: (1) severely reduced demand for petroleum (and therefore OCTG) resulting from both the Russia/Saudi oil price/supply war and the global pandemic; (2) market factors suppressing domestic production, including high inventory levels held by United States distributors,

⁶ Previously, the Court held the ITC's determination to cumulate subject imports from Argentina and Mexico was supported by substantial evidence. *Tenaris I*, 48 CIT at ___, 698 F. Supp. 3d at 1307–09.

⁷ The *Remand Views* solely addressed the cumulation issue on remand, and did not address the Commission's determinations of volume, price effects, and impact.

de-stocking of those inventories, a meteoric rise in prices for hot-rolled coil (“HRC”) (the major input for welded OCTG production), and labor shortages; (3) Tenaris’ emergence as the largest domestic OCTG producer after investment of more than \$10 billion in United States production facilities, including its acquisition of IPSCO during the period of investigation, that coincided with the period of investigation demand and supply shocks; (4) Tenaris’ innovative approach to domestic supply through its Rig Direct program, featuring long-term contracts with sales at “one price” bidding in the United States market, regardless of whether the OCTG was produced at Tenaris’ domestic mills or imported; and (5) twenty-four consecutive months of increasing OCTG prices (including for over a year in advance of the filing of the petition). *See id.*

A. The Commission’s Volume Determination

Tenaris challenges as not in accordance with law the Commission’s determination that the volume of subject imports was “significant in absolute terms and relative to the consumption in the United States,” arguing that the volume of such imports was not considered significant under the conditions of competition, which showed that after a historic demand collapse, United States producers could not supply the surging demand in 2021 and imports were needed. Tenaris’ Br. at 25–30. Tenaris also contends that the Commission also failed to consider the post-petition increase in the volume of subject imports (improperly accorded less weight to post-petition data). Tenaris’ Reply at 6–8.

1. Conditions of Competition

19 U.S.C. § 1677(7)(C)(iii) states that:

In examining the impact required to be considered under subparagraph (B)(i)(III), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to—

- (I) actual and potential decline in output, sales, market share, gross profits, operating profits, net profits, ability to service debt, productivity, return on investments, return on assets, and utilization of capacity,
- (II) factors affecting domestic prices,
- (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,

- (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
- (V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping.

The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

19 U.S.C. § 1677(7)(C)(iii).

Tenaris contends that the Commission's volume analysis must consider conditions of competition in finding subject imports to be "significant," citing to several cases in support of its proposition. Tenaris' Br. at 25–26 (citing *Altix, Inc. v. United States*, 26 CIT 709 (2002), *aff'd*, 370 F.3d 1108 (Fed. Cir. 2004); *Angus Chem. Co. v. United States*, 944 F. Supp. 943 (1996), *aff'd*, 140 F.3d 1478 (Fed. Cir. 1998); *Arlanxeo USA LLC v. United States*, 389 F. Supp. 3d 1330 (2019), *aff'd*, 819 Fed. App'x 925 (Fed. Cir. 2020)); Tenaris' Reply at 5–6 (citing *OCP S.A. v. United States*, 658 F. Supp. 3d 1297 (2023); *OCTAL Inc. v. United States*, 539 F. Supp. 3d 1291 (2021)).

Defendant-Intervenors argue that the Commission is not statutorily required to consider the conditions of competition and Tenaris' cited cases are inapplicable for the volume determination analysis. Def.-Intervs.' Resp. at 24–25.

Defendant interprets Tenaris' argument as requiring the Commission to consider whether subject imports were "needed" and asserts that the Commission can make significance of volume determinations based on the volume data alone. Def.'s Resp. at 26–27.

The Commission determined that "the volume of cumulated subject imports, and the increase in that volume, are significant in absolute terms and relative to consumption in the United States," and did not address the conditions of competition that were raised by Plaintiffs in its analysis of the volume of subject imports. *See Views* at 32–33.

Defendant-Intervenors distinguish between 19 U.S.C. § 1677(7)(C) and 19 U.S.C. § 1677(7)(C)(iii) to argue that conditions of competition are only relevant to the impact analysis, rather than the volume analysis.

Section 1677(7)(C)(iii) elucidates the economic factors pertaining to the Commission's assessment of the impact on the affected domestic industry and mandates consideration of "conditions of

competition” for economic factors within “this clause” (*i.e.*, 1677(7)(C)(iii)), as opposed to “this subparagraph” (*i.e.*, 1677(7)(C)). This provision was added by the Omnibus Trade and Competitiveness Act of 1988, Pub.L. 100–418, § 1328(2)(C) (1988), and like the statute itself, the conference report makes clear that the “conditions of competition” mandate applied only to the Commission’s evaluation of impact. *See* H. Conf. Rep. 100–576 (1988) at 617 (subsection c); *see also* S. Rep. 100–71 (1987) at 117 (describing the “third change” as relating to “examin[ation of] the impact of imports on domestic producers”).

Def.-Intervs.’ Resp. at 24.

The Court agrees that the last section of 19 U.S.C. § 1677(7)(C)(iii) regarding “conditions of competition” should be read to apply only to the “impact on affected domestic industry” section of the statute. The legislative history expresses Congressional intent that the conditions of competition requirement should apply only to the ITC’s evaluation of impact, and the statutory language “relevant economic factors” appears in both the “impact” section and the “conditions of competition” section, supporting the interpretation that these clauses should be read together. The “volume” language in section 1677(7)(C)(i) does not mention “relevant economic factors,” supporting the interpretation that the “conditions of competition” requirement was intended to apply only to “impact” and not to “volume.”

When the Commission evaluates the volume of imports of merchandise, it must consider “whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.” 19 U.S.C. § 1677(7)(C)(i). Under subsection (iii), which pertains to the impact on the affected domestic industry, the Commission must consider “all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.” *Id.* § 1677(7)(C)(iii)(V).

Here, the ITC examined whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, was significant, in compliance with 19 U.S.C. § 1677(7)(C)(i). *Views* at 43. The Court concludes that the ITC’s volume determination followed the statutory requirements and was in accordance with law.

The ITC cited record evidence in support of its volume determination, including Tables IV-19 and C-1, showing that cumulated subject import volume in absolute terms increased overall. *Id.* at 42 (citing Staff Report at Tables IV-19 and C-1). The ITC cited record evidence

demonstrating that the volume and the increase in volume of cumulated subject imports were significant relative to United States consumption. *Id.* at 42–43 (citing Staff Report at Tables IV-19 and C-1). Thus, the Court sustains the ITC’s volume determination because it is in accordance with law and supported by substantial evidence.

2. Post-Petition Data

Tenaris argues that the post-petition data provision, 19 U.S.C. § 1677(7)(I), only allows for the Commission to discount data based on post-petition changes in import volumes in absolute terms, rather than volume relative to consumption, such as market share. Tenaris’ Br. at 27. Tenaris asserts that the Commission’s focus on market share, rather than import volume, led to the discounting of favorable domestic industry performance data in interim 2022, which was data that coincided with rising import volumes and changing market conditions to demonstrate that subject imports were not the cause of harm to the domestic injury. *Id.* at 29.

Defendant and Defendant-Intervenors contend that legislative history does not support such a strict interpretation of the term “volume” under the post-petition data provision. Def.’s Resp. at 27–30; Def.-Intervs.’ Resp. at 27–28. Defendant-Intervenors contend that the Commission’s determination to give less weight to post-petition market share data was reasonable and comports with 19 U.S.C. § 1677(7)(C)(i) and its discretion pursuant to 19 U.S.C. § 1677(7)(I). Def.-Intervs.’ Resp. at 27.

The post-petition data provision states:

The Commission shall consider whether any change in the volume, price effects, or impact of imports of the subject merchandise since the filing of the petition in an investigation under part I or II of this subtitle is related to the pendency of the investigation and, if so, the Commission may reduce the weight accorded to the data for the period after the filing of the petition in making its determination of material injury, threat of material injury, or material retardation of the establishment of an industry in the United States.

19 U.S.C. § 1677(7)(I) (emphasis added).

Legislative history, specifically the SAA, provides guidance as to the legislative intent behind 19 U.S.C. § 1677(7)(I):

Section 222(f) of the bill amends section 771(7) to address the probative value of post-petition data by adding section 771(7)(I). The new statutory provision emphasizes that the Commission should consider whether changes in the volume of imports, their

price effects, and their impact on the domestic industry occurring since the filing of the petition are related to the pendency of the investigation. Courts have repeatedly recognized that the initiation of antidumping and countervailing duty proceedings can create an artificially low demand for subject imports, thereby distorting post-petition data compiled by the Commission. See *Metallwerken Nederland, B.V. v. United States*, 744 F. Supp. 281, 284 (Ct. Int'l Trade 1987); *USX Corp. v. United States*, 655 F. Supp 487, 492 (Ct. Int'l Trade 1987). The imposition of provisional duties, in particular, can cause a reduction in import volumes and an increase in prices of both the subject imports and the domestic like product. Similarly, improvements in the domestic industry's condition during an investigation can be related to the pendency of the investigation.

The provision also is intended to make clear that, when the Commission finds evidence on the record of a significant change in data concerning the imports or their effects subsequent to the filing of the petition or the imposition of provisional duties, the Commission may presume that such change is related to the pendency of the investigation. In the absence of sufficient evidence rebutting that presumption and establishing that such change is related to factors other than the pendency of the investigation, the Commission may reduce the weight to be accorded to the affected data. To the extent that the decision of the Court of International Trade in *Chr. Bjelland Seafood/A/S v. United States*, slip op. 92–196 (Ct. Int'l Trade Oct. 23, 1992), could be interpreted as requiring the Commission to demonstrate that the change is not related to other factors, it is disapproved.

Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 843 (1994), reprinted in 1994 U.S.C.A.N. 4040, 4186.

Considering the language of the SAA, the Court agrees that if the Commission cannot consider if market share changes are related to the pendency of antidumping and countervailing duty investigations, then the Commission's ability to identify and discount data that have been "distorted" by such investigation would be hindered. See Def.'s Resp. at 29.

Further, the definition of "volume" under 19 U.S.C. § 1677(7)(C)(i) does not support Plaintiff's interpretation of the statutory intent to restrict the Commission's consideration to absolute volume. As mentioned above, the Commission evaluates the volume of imports of

merchandise and “shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.” 19 U.S.C. § 1677(7)(C)(i). The post-petition data provision of 19 U.S.C. § 1677(7)(I) only mentions “volume” and does not have any restrictions or limitations, and thus it is reasonable to conclude that the post-petition data statutory provision applies to volume of imports in absolute terms or relative to production or consumption in the United States. 19 U.S.C. § 1677(7)(C)(i); 19 U.S.C. § 1677(7)(I).

Accordingly, the Commission’s volume determination followed the statutory requirements in 19 U.S.C. § 1677(7)(C)(i) and 19 U.S.C. § 1677(7)(I) and is in accordance with law.

B. The Commission’s Price Effects Determination

Tenaris asserts that the Commission’s determination that subject imports had significant adverse effects was unsupported by substantial evidence and otherwise not in accordance with law because the Commission did not make a finding regarding price suppression, failed to consider record evidence concerning Petitioners’ lost sales and lost revenue claims; and failed to account for price lags resulting from Tenaris’ long-term contracts. Tenaris’ Br. at 30–37.

The Government and Defendant-Intervenor argue that the Commission’s price effects determination was supported by substantial evidence and in accordance with law. Def.’s Resp. at 31–38; Def.-Intervs.’ Resp. at 28–36.

1. Legal Standard

In evaluating the effect of imports on prices, the statute directs the Commission to consider whether:

(I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii).

2. The Commission’s Determination

The ITC stated that there is a moderate-to-high degree of substitutability between the domestic like product and cumulated subject

imports, *Views* at 29 (citing Staff Report at Table II-12), and that price is an important factor in OCTG purchasing decisions, among other important factors. *Id.* at 33. The ITC had collected quarterly pricing data from U.S. producers and importers for nine pricing products. *Id.* at 34 (citing Staff Report at V-12–V-13). The Commission determined that “[g]iven the significant underselling and the market share shift, we do not reach a conclusion as to whether the domestic producers would have been able to further increase prices to a significant degree than they did for subject imports.” *Id.* at 39.

3. Alternative Price Comparison Methodology

In the *Views*, the ITC addressed Tenaris’ argument regarding the possible price lags resulting from Tenaris’ long-term contracts. The ITC rejected Tenaris’ argument to adopt an alternative price comparison methodology, which asked the ITC to depart from its normal price comparison and “lag by one quarter” its comparisons of subject import prices to domestic prices, comparing domestic prices in a given quarter to subject imports in the following quarter. *Id.* The record evidence supports the ITC’s determination to not apply an alternative methodology.

First, the ITC reasoned that the basis for Tenaris’ proposed adjustments to the Commission’s quarterly price comparisons would largely be limited to subject imports from Argentina and Mexico, and although these limited subject imports accounted for the vast majority of Tenaris’ U.S. shipments of subject imports during the POI, the ITC stated that it must consider the significance of underselling by cumulated subject imports. *Id.* at 35 (citing Staff Report at Table III-24). Table III-24 shows U.S. producers’ purchases of imports from subject sources as being mainly Russian OCTG. Staff Report at III-31.

Second, the ITC asserted that the percentage of Tenaris’ U.S. shipments subject to contracts containing a time lag is unclear, even as to subject imports from Argentina and Mexico. *Id.* (citing Tenaris’ Pre-Hearing Br. at Exh. 63 (“Prusa Analysis”), CR 405, PR 128). The Prusa Analysis supports the ITC’s assertion. *See* Prusa Analysis.

Third, the ITC stated that Tenaris’ argument wrongly assumes that domestic OCTG is generally sold at spot market prices, allegedly creating the appearance of underselling, when these market prices rose while subject import contract prices remain unchanged for another quarter. *Views* at 35 (citing Staff Report at Table V-5). Table V-5 demonstrates that U.S. producers sold a plurality of their OCTG under short-term contracts, with most of the rest of their sales under long-term contracts or spot sales, and importers sold mostly under long-term contracts, followed by spot sales, and then short-term con-

tracts. Staff Report at V-10. The ITC stated that a high percentage of the domestic industry's sales were made pursuant to contracts in 2021, with some including pricing mechanisms similar to those in Tenaris' contracts. *Views* at 35 (citing Petitioners' Post-Hearing Br. at Exh. 3 ("Declaration of Robert J. Beltz") & Exh. 4 ("Declaration of Brett Mendenhall")).⁸ Both declarations indicate that there were contracts made in 2021 in the domestic industry. Decl. Robert J. Beltz; Decl. Brett Mendenhall.

Fourth, the ITC reasoned that Tenaris' time lag argument is inconsistent with other record evidence.

Under Tenaris'[] time lag argument, underselling by cumulated subject imports should have decreased earlier in the period, when spot market prices fell, and significantly increased later in the period, when market prices increased dramatically. Instead, the record shows that the rate of cumulated subject import underselling was fairly consistent from 2019 to 2021, rising only slightly from 55.9[%] of quarterly comparisons in 2019 to 57.1[%] of quarterly comparisons in 2020 and to 60.4[%] of quarterly comparisons in 2021. For all these reasons we do not view Tenaris' time lag methodology as a reliable means of analyzing price competition by cumulated subject imports in the U.S. market.

Views at 35 (citing Prusa Analysis; Staff Report at Tables V-6–V-14). Tables V-6 to V-14 provide price data for products 1 to 9 and demonstrate that for most products, prices for OCTG fell in early 2020 when oil and gas prices fell, and then rose in 2021 and 2022 as oil and gas prices rose. Staff Report at Tables V-6–V-14.

4. Lost Sales

Tenaris argues that the Commission ignored contrary record evidence that detracted from the probative value of the market share table on which it relied when the ITC stated that it found "some evidence that domestic producers lost sales to subject imports on the basis of price." Tenaris' Br. at 32.

The ITC stated:

We also find some evidence that domestic producers lost sales to subject imports on the basis of price. Twenty of 28 responding purchasers reported that they had purchased subject imports

⁸ The declarations state that Robert J. Beltz is employed by the United States Steel Corporation, a domestic producer of OCTG products, and Brett Mendenhall serves as the President and CEO of P2 Energy Services, a domestic OCTG distributor. Decl. Robert J. Beltz; Decl. Brett Mendenhall.

instead of the domestic like product during the [period of investigation]. Eight of those 20 reported that subject imports were priced lower than the domestic like product, and five of those eight reported that price was a primary reason for purchasing of *** short tons of subject OCTG over the domestic like product.

Views at 48; *see also id.* at 48 n.203, 204 (citing Staff Report at Table V-19).

Tenaris argues that the Government attempts to “cure” the ITC’s failure to consider lost sales arguments and evidence with post hoc rationalizations, arguing that the Government is now claiming to only have relied on Table V-19, rather than both Table V-18 and Table V-19. Tenaris’ Reply at 11–12.

The ITC’s discussion of the evidence regarding lost sales cited to both footnote 203 and footnote 204 of the *Views*. Footnote 203 addressed Tenaris’ concerns regarding the market share table, or Table V-19:

Tenaris argues that two of the five purchasers reporting that they purchased subject imports instead of the domestic like product due to price . . . have contradicted this reporting elsewhere in their questionnaire responses. . . . However, their questionnaire responses generally corroborate their lost sales reporting. *See* *** purchaser questionnaire responses at III-23 and III-24 (showing that this firm listed price as among its top three purchasing factors, and that it characterized price as very important in its purchasing decisions); and *** purchaser questionnaire response at III-23 (showing that this firm listed “cost” as a factor that is very important in its purchasing decisions).

Id. at 48 n.203. Footnote 204 discussed Table V-18, noting that responding purchasers reported that between January 2019 and June 2022, the domestic industry’s share of their purchases declined, while the subject import share of their purchases increased, reflecting a shift in purchases from the domestic industry to subject imports. *Id.* at 48 n.204.

The Government did not address Table V-19 in its brief, and asserts that the ITC did not focus on the “warning note” in footnote 203 in its lost sales analysis, but rather on the data in Table V-19, to which no equivalent note was attached. Def.’s Resp. at 35. The Government also states that “to the extent that this footnote reference could be said to render the Commission’s lost sales analysis partially based on a table potentially containing double counting, the Commission’s lost sales finding was tempered appropriately” because of the inclusion of

the word “some” evidence. *Id.*

The Court agrees with the Government that the ITC considered the evidence of lost sales and reasonably determined the adverse price effect of the subject OCTG. Table V-18 shows U.S. purchasers’ reported purchases and imports, by firm and source, from January 2019 to June 2022. Staff Report at V-39. Table V-19 shows purchasers’ responses to purchasing subject imports instead of domestic product, by firm, and demonstrates that five purchasers had confirmed buying a certain amount of short tons of subject OCTG over the domestic like product based on their lower prices. Despite the potential double counting, the data relied on by the Commission in both tables support the ITC’s determination.

5. Price Suppression Finding

Tenaris argues that the ITC failed to make a price suppression finding under 19 U.S.C. § 1677(C)(ii), so its price effects analysis is contrary to law and unsupported by substantial evidence, and should be remanded with instructions for the Commission to make a price suppression finding. Tenaris’ Br. at 30–31.

The Government contends that the CAFC has held that the Commission’s “consideration” of a statutory factor does not encompass an obligation to make any ultimate finding regarding that factor. Def.’s Resp. at 36.

Defendant-Intervenors also assert that there is no statutory requirement to make a price suppression finding. Def.-Intervs.’ Resp. at 33.

Regarding the evaluation of price, 19 U.S.C. § 1677(C)(ii) states that:

In evaluating the effect of imports of such merchandise on prices, the Commission shall *consider* whether—

(I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(C)(ii) (emphasis added).

The Court concludes that the statute does not require the ITC to make a price suppression finding for its price effects determination.

See, e.g., OCTAL Inc. v. United States, 45 CIT at ___, 539 F. Supp. 3d 1291, 1301–16 (2021) (affirming the Commission’s finding of significant adverse price effects due to underselling, without a finding that there was significant price depression or suppression); *Nucor Corp. v. United States*, 414 F.3d 1331, 1339 (Fed. Cir. 2005) (affirming that the Commission complied with statutory requirements of 19 U.S.C. § 1677(C)(ii) even though the Commission did not make a price suppression finding).

The Court agrees with Defendant-Intervenors that *Swift-Train Co. v. United States*, 904 F. Supp. 2d 1336 (2013), is distinguishable from this case. In *Swift-Train*, the Commission did not make an explicit finding of significant price depression and no finding at all regarding price suppression. *Swift-Train*, 904 F. Supp. 2d at 1344. The Court directed the Commission to “make explicit findings on the effect of the subject imports on the price suppression and depression factors, discussing not only the factors cited in the Commission’s Views,” but did not specifically ask the Commission to make a price suppression finding. *Id.*

Further, in the *Views*, the Commission considered whether subject imports had significantly suppressed prices for the domestic like product by analyzing the industry’s [cost of goods sold]-to-net-sales. *See Views* at 38–39. Because the Commission properly considered whether subject imports had significantly suppressed prices for the domestic like product pursuant to the relevant statutory authority, the Commission’s determination was in accordance with law.

Accordingly, the Court sustains the Commission’s price effects determination as in accordance with law and supported by substantial evidence. Based on the record evidence, it was reasonable for the Commission to conclude that the significant volume of subject imports undersold the domestic like product causing significant adverse price effects and to not view Tenaris’ time lag methodology as a reliable means of analyzing price competition by cumulated subject imports in the U.S. market.

C. The Commission’s Impact Determination

Tenaris asserts that the Commission’s determination that the domestic industry was injured by reason of subject imports was unsupported by substantial evidence and not in accordance with law because the Commission failed to evaluate impact within the context of conditions of competition distinctive to the U.S. OCTG industry, the domestic industry began to recover before the petitions were filed, and the Commission relied on qualitative information that included non-subject imports from South Korea. Tenaris’ Br. at 37–48.

The Government and Defendant-Intervenors argue that the Commission's impact determination was supported by substantial evidence and in accordance with law. Def.'s Resp. at 25–31; Def.-Intervs.' Resp. at 36–48.

1. Legal Standard

The statute directs the Commission to consider several enumerated factors, “among other relevant economic factors,” when determining whether an industry in the United States is threatened with material injury by reason of imports of subject merchandise. *See* 19 U.S.C. § 1677(F)(i). Those factors are:

- i. if a countervailable subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement), and whether imports of the subject merchandise are likely to increase,
- ii. any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,
- iii. a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,
- iv. whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports,
- v. inventories of the subject merchandise,
- vi. the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products,
- vii. in any investigation under this subtitle which involves imports of both a raw agricultural product (within the meaning of paragraph (4)(E)(iv)) and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shift-

ing, if there is an affirmative determination by the Commission under section 1671d(b)(1) or 1673d(b)(1) of this title with respect to either the raw agricultural product or the processed agricultural product (but not both),

- viii. the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
- ix. any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).

Id. The Commission shall consider the factors as a whole when making its determination, and the “presence or absence of any factor . . . shall not necessarily give decisive guidance with respect to the determination.” *Id.* at § 1677(F)(ii).

2. Conditions of Competition

Tenaris argues that the Commission: (1) failed to evaluate the impact of subject imports within the context of conditions distinctive to the U.S. OCTG industry, as required by statute; and (2) erroneously attributed the positive health of the industry in interim 2021 to post-petition effects and placed less weight on the interim period data that showed the domestic industry had recovered and was performing well consistent with the changing market conditions. Tenaris’ Br. at 37. Tenaris contends that the Commission found a “causal nexus between cumulated subject imports and the domestic industry’s weak performance relative to the strong growth in apparent U.S. consumption from 2020 to 2021,” and failed to account for conditions of competition during the period of investigation in assessing the cause of any harm to the domestic industry and its improvement in interim 2022. *Id.* at 38. Tenaris argues that the record evidence does not support a causal nexus between the subject imports and the domestic industry’s performance because of: (1) the impact of the Russia/Saudi oil supply war and COVID-19 pandemic; (2) supply constraints, such as inventory overhead, HRC prices, and labor shortages; and (3) Tenaris’ role in the U.S. OCTG market and intra-industry competition. *Id.* at 38–44.

The Government states that substantial evidence supports the Commission's determination that cumulated subject imports had a significant impact on the domestic industry. Def.'s Resp. at 38–47. Defendant-Intervenors assert that the Commission's *Views* reasonably addressed and rejected all three arguments. Def.-Intervs.' Resp. at 36.

a. Supply and Demand

Tenaris contends that the Commission failed to address the Russia/Saudi oil supply war and de-emphasized COVID-19 in assessing the impact of subject imports, dismissed evidence of supply constraints, and erroneously considered only inventories, rather than the combination of inventories, high HRC prices, and labor shortages, in supply constraint. Tenaris' Br. at 38–39.

The Government argues that the Commission comprehensively addressed the effects of all factors, including the Russia/Saudi price war on U.S. OCTG demand during the period of investigation, by evaluating the trends throughout the period of investigation in each of the following OCTG demand indicators: (1) apparent U.S. consumption, (2) active U.S. rig count, and (3) U.S. oil and gas prices. Def.'s Resp. at 39.

The ITC discussed the conditions of competition to inform its analysis of whether there was material injury of subject imports, such as supply and demand considerations. *Views* at 27–29.

Regarding demand considerations, the ITC stated that “demand for OCTG is driven by oil and gas prices as well as exploration and production” and “[t]he active U.S. rig count, an indicator of oil and gas production in the United States, decreased from January 2019 to an historic low in August 2020.” *Id.* at 27 (citing Staff Report at II-19, Table II-5 and Figure II-2). On Page II-19 of the Staff Report, the Commission recognized the dispute over oil prices and production between Saudia Arabia and Russia, as well as the COVID-19 pandemic, as demand determinants. Staff Report at II-19.

Over the course of 2019, OCTG demand declined due to a dispute over oil prices and production between Saudi Arabia and Russia. Then, at the onset of the COVID-19 pandemic in early 2020, oil and gas production plummeted as oil prices even briefly turned negative. . . . However, multiple factors (including rising inflation and U.S. sanctions due to the Russian-Ukraine war) led to rising oil and natural gas prices in late 2021 and early 2022, in turn leading to more oil and gas exploration and production.

Id. The Commission also discussed that the active oil and gas rig count generally decreased from January 2019 to August 2020, when it reached historic lows, and then began to recover through the summer of 2022 while remaining more than 25% below early 2019 levels. *Id.*

Regarding inventory overhang, Tenaris argues that record evidence confirmed that the significant inventory held by U.S. distributors prevented them from placing orders with U.S. producers and impeded the domestic industry's ability to recover. Tenaris' Br. at 39. The ITC addressed this argument and was unpersuaded by Tenaris' argument that the market share shift was caused as distributors drew down their "inventory overhangs" in lieu of placing orders with domestic mills during the period of investigation and thus delayed the "reactivation of domestic OCTG production." *Views* at 45. Further, the ITC explained that:

[A]ny such inventory overhang would not explain why the 32.2 percent increase in apparent consumption from 2020 to 2021, unmet by existing inventories, was satisfied by increased subject imports rather than domestic producers. Second, inventory data . . . indicates that monthly inventory levels of OCTG—which include sourcing from both domestic producers and importers—were relatively constant between January 2019 and March 2021, with small fluctuations above and below a level of about *** net tons. Thus, these data suggest no "massive" draw down of inventories in 2020, as Tenaris describes.

Id.

Regarding HRC prices, Tenaris contends that the Commission ignored the effect of high HRC prices on welded producers. Tenaris' Br. at 41. The ITC acknowledged Tenaris' argument that the rising domestic HRC prices and labor shortages constrained domestic supply and necessitated increased subject imports in 2021. *Views* at 46. The ITC explained that:

Tenaris has also argued that rising domestic HRC prices and labor shortages constrained domestic supply and necessitated increased subject imports in 2021. Yet, even if increasing HRC prices helped reduce domestic production of welded OCTG, domestic producers of seamless OCTG, which utilize steel billets as their raw material input, were unaffected by changes in HRC prices. Domestic producers of seamless OCTG were fully capable of serving the increase in OCTG demand from 2020 to 2021 in light of their low rate of capacity utilization

Id.

Regarding labor shortages, Tenaris asserts that the Commission dismissed Tenaris' evidence regarding its struggles to hire workers during the period of investigation and instead relied on Petitioner's self-serving statements regarding their ability to hire employees. Tenaris' Br. at 41. The Court observes that the ITC reasonably relied on witness testimony, rather than "self-serving" statements to make its determination. In the *Views*, the ITC stated that:

Contrary to Tenaris' argument that labor shortages significantly constrained domestic production, responding domestic producers and domestic industry witnesses at hearing indicated that they were capable of hiring as warranted by increased demand for domestic OCTG, and the domestic industry sharply expanded employment in interim 2022, after the filing of the petitions caused subject imports to compete less aggressively in the U.S. market.

Views at 46–47 (citing Staff Report at II-13; USITC Hearing Tr. at 67–68).

b. Investment and Intra-Industry Competition

Tenaris argues that the Commission failed to consider Tenaris' role in the U.S. OCTG market and intra-industry competition, such as its Rig Direct program, and failed to address record evidence when discussing intra-industry competition. Tenaris' Br. at 43–44.

The ITC did not fail to consider Tenaris' role in the U.S. market and sufficiently addressed record evidence. In the *Views*, the ITC was unpersuaded by Tenaris' argument that intra-industry competition explains any injury to the domestic industry and stated that intra-industry competition could not explain the domestic industry's loss of market share to subject imports from 2020 to 2021. *Views* at 47. Further, in *Tenaris I*, this Court addressed Tenaris' "Rig Direct" program, which Tenaris argued as the reason for the shift in market share and the increase in Tenaris' market share. *Tenaris I*, 48 CIT at ___, 698 F. Supp. 3d at 1308; see Tenaris' Br. at 22–23. The Court held that, based on the record evidence, the ITC considered Tenaris' "Rig Direct" program in assessing possible factors that attributed to the shift in market share toward cumulated subject imports and that the ITC's determination that the "Rig Direct" program was not a cause of the loss of domestic market share was supported by substantial evidence.

3. Domestic Industry's Recovery

Tenaris also argues that the Commission should have given full weight to the evidence of the domestic industry's recovery, rather than ignoring record evidence that improvements in the domestic industry's condition occurred before the filing of the petition. Tenaris' Br. at 44–47.

The Commission did not fail to fully consider the evidence of the domestic industry's recovery. In the *Views*, the ITC stated that:

We find it instructive that the domestic industry was able to improve its performance markedly in interim 2022 compared to interim 2021 after the filing of the petitions in October 2021. As discussed above, subject imports competed less aggressively in the U.S. market after the filing of the petitions, losing *** percentage points of market share as the domestic industry gained 0.6 percentage points of market share in interim 2022 compared to interim 2021. Consequently, the domestic industry was able to more fully capitalize on the 70.6 percent increase in apparent U.S. consumption in interim 2022 compared to interim 2021 and improved its performance by nearly every measure between the interim periods.

Views at 43. Further, the ITC considered 2021 trends and observed that “the industry’s production, employment, and financial performance remained weaker in 2021 than would have been expected in light of the strong increase in demand.” *Id.* The Court also does not find Tenaris’ prior determinations for the proposition that improvements in industry performance across interim periods support a finding of no adverse impact to be persuasive. *See* Tenaris’ Br. at 47 (citing *Silicomanganese from Australia*, USITC Pub. 4600, Inv. No. 731-TA-1269 (Final) (Apr. 1, 2016); *Greenhouse Tomatoes From Canada*, US-ITC Pub. 3499, Inv. No. 731-TA-925 (Final) (Apr. 1, 2002)). These prior determinations do not provide that the Commission has an established practice to always treat interim period improvements as evidence of adverse impact.

Therefore, the Commission’s impact determination was in accordance with law and supported by substantial evidence.

CONCLUSION

For the foregoing reasons, the Court concludes that the ITC’s determinations regarding the cumulation of subject imports, volume,

price effects, and impact are in accordance with law and supported by substantial evidence. Therefore, the Commission's *Final Determination* is sustained.

Judgment will be entered accordingly.

Dated: June 20, 2025

New York, New York

/s/ *Jennifer Choe-Groves*

JENNIFER CHOE-GROVES, JUDGE

Index

Customs Bulletin and Decisions
Vol. 59, No. 27, July 2, 2025

U.S. Customs and Border Protection

General Notices

	<i>Page</i>
Proposed Revocation of Two Ruling Letters, Modification of One Ruling Letter, and Proposed Revocation of Treatment Relating to the Tariff Classification of Certain Wireless Headphones and Earphones	1
Proposed Revocation of Two Ruling Letters and Proposed Revocation of Treatment Relating to the Country of Origin of a Brake Hose	29
Agency Information Collection Activities:	
Extension; Drawback Process Regulations (Form 7553)	43
Reinstatement; Application for Allowance in Duties (Form 4315)	46
Extension; United States-Caribbean Basin Trade Partnership Act (CBTPA)	49
Extension; Lien Notice (Form 3485)	52
Extension; NAFTA Regulations and Certificate of Origin	55
Extension; Commercial Invoice	58
Extension; Application To use Automated Commercial Environment (ACE)	61

U.S. Court of Appeals for the Federal Circuit

	<i>Appeal No.</i>	<i>Page</i>
AG der Dillinger Huttenwerke, Friedr. Lohmann GmbH, Thyssenkrupp Steel Europe AG, Plaintiffs Ilsenburger Grobblech GmbH, Salzgitter Flachstahl GmbH, Salzgitter Mannesmann Grobblech GmbH, Salzgitter Mannesmann International GmbH, Plaintiffs-Appellants v. United States, SSAB Enterprises LLC, Nucor Corporation, Defendants-Appellees	2024-1219	65

U.S. Court of International Trade *Slip Opinions*

	<i>Slip Op. No.</i>	<i>Page</i>
Cozy Comfort Company, LLC, Plaintiff, v. United States, Defendant.	25-75	79
Nanjing Dongsheng Shelf Manufacturing Co., Ltd., Plaintiff, v. United States, Defendant, and Coalition for Fair Rack Imports, Defendant-Intervenor.	25-76	129

Toyo Kohan Co., Ltd., Plaintiff, v. United States, Defendant, Thomas Steel Strip Corporation, Defendant-Intervenor. . . .	25–77	137
Tenaris Bay City, Inc., Maverick Tube Corporation, Ipsco Tubulars Inc., Tenaris Global Services (U.S.A.) Corporation, and Siderca S.A.I.C., Plaintiffs, and TMK Group and Tubos de Acero de Mexico, S.A., Consolidated Plaintiffs, and Tenaris Bay City, Inc., Maverick Tube Corporation, and Ipsco Tubulars Inc., Plaintiff-Intervenors, v. United States, Defendant, and United States Steel Corporation, Borusan Mannesmann Pipe U.S. Inc., PTC Liberty Tubulars LLC, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, and Welded Tube USA Inc., Defendant-Intervenors.	25–78	139