

# U.S. Court of International Trade

Slip Op. 17–146

MAVERICK TUBE CORPORATION, Plaintiff, v. UNITED STATES, Defendant,  
and SEAH STEEL CORPORATION, Defendant-Intervenor.

Before: Richard K. Eaton, Judge  
Court No. 15–00303

[Plaintiff Maverick Tube Corporation’s motion for judgment on the agency record is denied, and the United States Department of Commerce’s final negative countervailing duty determination is sustained.]

Dated: October 27, 2017

*Robert E. DeFrancesco* and *Brett A. Shumate*, Wiley Rein, LLP, of Washington, DC, for plaintiff. With them on the brief were *Alan H. Price*, *Tessa V. Capeloto*, *Adam M. Teslik*.

*Loren M. Preheim*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director, and *Ryan M. Majerus*, Trial Attorney. Of counsel on the brief was *Khalil Gharbieh*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

*Daniel E. Parga*, Law Office of Jeffrey M. Winton PLLC, of Washington, DC, for defendant-intervenor. With him on the brief was *Jeffrey M. Winton*.

## OPINION

### Eaton, Judge:

Before the court is Maverick Tube Corporation’s (“Maverick” or “plaintiff”) motion for judgment on the agency record challenging the final determination of the United States Department of Commerce (“Commerce” or the “Department”) in *Welded Line Pipe From the Republic of Korea: Final Negative Countervailing Duty Determination*, 80 Fed. Reg. 61,365 (Dep’t Commerce Oct. 13, 2015), P.R. 457 and accompanying Issues and Decision Memorandum, P.R. 450 (“Final Determination”).

Plaintiff objects to the Final Determination on three grounds, claiming that (1) Commerce acted contrary to law by concluding that the Government of the Republic of Korea’s (“Korean Government”) provision of electricity to defendant-intervenor SeAH Steel Corporation (“SeAH”) did not benefit the company; (2) Commerce’s conclusion

that the Korean Government’s provision of electricity did not benefit SeAH was unsupported by substantial evidence; and (3) Commerce’s determination not to apply adverse facts available<sup>1</sup> (“AFA”) to the Korean Government was unsupported by substantial evidence. Pl.’s Mem. Supp. Mot. J. Agency R., ECF No. 32 (“Pl.’s Br.”) 3. Additionally, plaintiff asks the court to “remand the issue of specificity<sup>[2]</sup> to the agency” because Commerce’s failure to reach a final determination on specificity “was contingent on its unlawful and unreasonable finding of no benefit.” Pl.’s Br. 4.

Defendant the United States (the “Government” or “defendant”), on behalf of Commerce, argues that Commerce’s determination that the Korean Government’s provision of electricity “provides no benefit to [respondent] SeAH . . . because the prices charged to [SeAH] . . . were consistent with [the Korea Electricity Power Corporation’s (“KEPCO”)] standard pricing mechanism,” is both in accordance with law and supported by substantial evidence. Final Determination at 18; *see* Def.’s Resp. Pl.’s Mot. J. Agency R., ECF No. 39 (“Def.’s Br.”) 10. Specifically, defendant maintains that, under the regulatory framework, Commerce properly determined that KEPCO’s electricity prices “were set in accordance with . . . market principles” based on Commerce’s “analysis of the [KEPCO’s] price-setting philosophy [*i.e.*, standard pricing mechanism].” Def.’s Br. 10. In addition, the Government maintains that Commerce did not apply AFA lawfully because the Korean Government “was fully cooperative” by “respond[ing] to Commerce’s multiple, detailed questionnaires. . . .” Def.’s Br. 23. Defendant’s papers do not address the issue of specificity. Because the Government argues that Commerce properly determined that a benefit was not conferred, however, the Government presumably believes the issue of specificity need not be addressed. This court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012); 19 U.S.C. § 1516a (a)(1)(A).

Defendant-Intervenor SeAH states that defendant “has provided sufficient justification for denying Maverick’s motion,” and therefore, determined “it [was] not necessary . . . to explain its own views of the

<sup>1</sup> If Commerce determines that the use of facts available is warranted under 19 U.S.C. § 1677e(a), and makes the additional finding that a party has “failed to cooperate by not acting to the best of its ability to comply with a request for information,” it may use an adverse inference “in selecting from among the facts otherwise available.” 19 U.S.C. § 1677e(b) (2012); *Artisan Mfg. Corp. v. United States*, 38 CIT \_\_\_, \_\_\_, 978 F. Supp. 2d 1334, 1342 (2014). This is generally referred to as “adverse facts available.”

<sup>2</sup> Pursuant to the statute, a subsidy must be “specific” to be countervailable. *See* 19 U.S.C. § 1677(5)(A). “Specificity” may be established in several ways, one of which is by showing that a particular industry is favored over others. *See* 19 U.S.C. § 1677(5A)(D)(iii)(IV) (providing that a subsidy is specific “as a matter of fact” if “[t]he manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others”).

issues . . . or the reasons that Maverick’s motion should be denied.” Def.-Int.’s Resp. Pl.’s Mot. J. Agency R., ECF No. 40, 1.

Because the court finds that Commerce’s Final Determination was supported by substantial evidence and in accordance with law, plaintiff’s motion for judgment on the agency record is denied.

### LEGAL FRAMEWORK

A countervailable subsidy exists where “an authority [*i.e.* a government or governmental actor] . . . provides a financial contribution . . . to a person and a benefit is thereby conferred.” 19 U.S.C. § 1677(5)(B). When the financial contribution consists of a provision of goods or services, a benefit is found when “such goods or services are provided for less than adequate remuneration,” with the adequacy of remuneration determined “in relation to prevailing market conditions for the good or service being provided . . . in the country which is subject to the investigation or review.” 19 U.S.C. § 1677(5)(E)(iv). Examples of prevailing market conditions include “price, quality, availability, marketability, transportation, and other conditions of purchase or sale.” 19 U.S.C. § 1677(5)(E).

Importantly for plaintiff, § 1677(5)(E)(iv) reflects a change in definition of what amounts to a “benefit” following the passage of the Uruguay Round Agreements Act (“URAA”).<sup>3</sup> *See Certain Softwood Lumber Prods. From Canada*, 66 Fed. Reg. 43,186, 43,196 (Dep’t Commerce Aug. 17, 2001) (preliminary affirmative countervailing duty determination). Prior to the URAA, a subsidy would have been found present when goods or services were provided “at preferential rates.” 19 U.S.C. § 1677(5)(A)(ii)(II) (1988). Under the former preferentiality standard, “preferential” meant “more favorable treatment to some within the relevant jurisdiction than to others within that jurisdiction,” but not that preferential treatment was necessarily “inconsistent with commercial considerations.” *Countervailing Duties*, 54 Fed. Reg. 23,366, 23,372 (Dep’t Commerce May 31, 1989) (notice of proposed rulemaking and request for public comments) (“1989 Proposed Rule”)<sup>4</sup>; *see also Final Negative Countervailing Duty Determinations; Certain Softwood Prods. From Canada*, 48 Fed. Reg. 24,159, 24,167 (Dep’t Commerce May 31, 1983).

Following the passage of the URAA and the adoption of the “adequate remuneration” language, Commerce concluded that it wished

<sup>3</sup> Uruguay Round Agreements Act, Pub. L. No. 103–465, § 101, 108 Stat. 4814 (codified as 19 U.S.C. § 3511 (1994)).

<sup>4</sup> Although not adopted, the 1989 Proposed Rule “codif[ie]d] much of the Department’s existing practice with respect to the identification and measurement of subsidies under the countervailing duty law.” *Countervailing Duties*, 54 Fed. Reg. at 23,366.

to “acquire some experience with the new statutory provision before codifying [its] methodology [for determining the adequacy of remuneration] in the form of a regulation.” *Countervailing Duties: Final Rule*, 63 Fed. Reg. 65,348, 65,377 (Dep’t Commerce Nov. 25, 1998) (“Preamble”). In 1997, Commerce sought guidance as to how to conform its regulations with the language of the URAA. *See Countervailing Duties: Proposed Rule*, 62 Fed. Reg. 8818 (Dep’t Commerce Feb. 26, 1997) (notice of proposed rulemaking and request for public comments) (“1997 Proposed Rule”). In response to the 1997 request, Commerce received comments emphasizing the importance of basing the adequate remuneration benchmark on market prices that have not been distorted by a government’s involvement in the market. Commerce also received comments regarding its stated intention to continue employing a preferentiality analysis when the government is the sole provider of goods or services (e.g., for provisions of electricity, water, or natural gas).<sup>5</sup> One commenter urged Commerce to codify a preferentiality-type analysis for such situations; others argued that this approach would not “adequately measure the differential between the price paid for the input and the full market value of the input.” Preamble, 63 Fed. Reg. at 65,377.

Thereafter, based on its experience and the comments it received, Commerce noted that “[p]articular problems can arise in applying [the adequate remuneration] standard when the government is the sole supplier of the good or service in the country or within the area where the respondent is located.” *Steel Wire Rod From Trinidad and Tobago*, 62 Fed. Reg. 55,003, 55,006 (Dep’t Commerce Oct. 22, 1997) (final affirmative countervailing duty determination). Commerce reached this conclusion because, when the government is the sole supplier of the good or service, “there may be no alternative market prices available” to use as a benchmark against which to measure the supplier’s price. *Steel Wire Rod From Trinidad and Tobago*, 62 Fed. Reg. at 55,006; *see also Steel Wire Rod From Germany*, 62 Fed. Reg. 54,990, 54,994 (Dep’t Commerce Oct. 22, 1997) (final affirmative countervailing duty determination). Thus, when there is no market-

<sup>5</sup> In particular, as to the anticipated inclusion of a preferentiality-based analysis in the regulations, Commerce stated:

We should note, however, that while “adequate remuneration” has replaced “preferential” as the standard, we do not believe this precludes us from continuing to apply certain preferentiality-based analyses we have used in the past. *See Pure Magnesium and Alloy Magnesium from Canada*, 57 FR 30946, 30949 (1992); and *Certain Fresh Cut Flowers from the Netherlands*, 52 FR 3301, 3302 (1987). There is no indication that Congress intended to change our practice with respect to government-provided goods and services such as electricity, water, or natural gas; i.e., goods and services provided to a wide variety of users by a government-owned company that is usually the sole provider of the good or service.

1997 Proposed Rule, 62 Fed. Reg. at 8836.

based benchmark to compare the government price to, Commerce found that it was necessary to “examine other options” for determining whether the goods or services were provided for adequate remuneration. *Steel Wire Rod From Germany*, 62 Fed. Reg. at 54,994.

In early investigations under the new statute, Commerce’s “other options” included an examination of such factors as “whether the government has followed a consistent rate making policy, whether it has covered its costs, whether it has earned a reasonable rate of return in setting its rates, and/or whether it applied market principles in determining its rates.” *Steel Wire Rod From Trinidad and Tobago*, 62 Fed. Reg. at 55,007; see also *Steel Wire Rod From Germany*, 62 Fed. Reg. 54,994. Commerce made it clear, however, that such considerations “in no way indicate[d] a departure from [its] preference for relying on market conditions in the relevant country . . . .” *Steel Wire Rod from Trinidad and Tobago*, 62 Fed. Reg. at 55,007.

After gaining some further experience with the adequate remuneration standard, Commerce codified its methodology. See 19 C.F.R. § 351.511 (1999). To conform to the URAA, and its preference for market-based benchmark prices, Commerce adopted a three-tiered, hierarchical approach for determining the adequacy of remuneration of an investigated good or service. See 19 C.F.R. § 351.511.

Under this methodology, Commerce generally begins by identifying a proper benchmark price, which is “the price that could have constituted adequate remuneration,” and then compares that price with the government-determined price paid by respondents. *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1368 (Fed. Cir. 2014); see 19 C.F.R. § 351.511. The preferred method is to “compar[e] the government price to a market-determined price for the good or service resulting from actual transactions in the country in question” (a “tier one” benchmark analysis). See 19 C.F.R. § 351.511(a)(2)(i). If no useable market-determined price can be traced to actual transactions within the country, Commerce will then compare “the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question” (a “tier two” benchmark analysis). 19 C.F.R. § 351.511(a)(2)(ii). If no world market price is available to in-country purchasers, however, Commerce will then determine the adequacy of remuneration by “assessing whether the government price is consistent with market principles” (thus, Commerce’s regulations provide for a “tier three” benchmark analysis). 19 C.F.R. § 351.511(a)(2)(iii).

The preamble to § 351.511 states that a tier three benchmark analysis will involve an examination of “such factors as the govern-

ment's price-setting philosophy [(i.e., standard pricing mechanism)<sup>6</sup>], costs (including rates of return sufficient to ensure future operations), or possible price discrimination." Preamble, 63 Fed. Reg. at 65,378. Notably, however, Commerce stated that it need not "put[] these factors in any hierarchy, and [it] may rely on one or more of these factors in any particular case." Preamble, 63 Fed. Reg. at 65,378. The Preamble then cites *Pure Magnesium and Alloy Magnesium From Canada* ("*Magnesium from Canada*") as an example of a useful tier three benchmark analysis for measuring the adequacy of remuneration with respect to government-provided goods or services when the government entity is the sole provider of the good or service. Preamble, 63 Fed. Reg. at 65,378 (citing *Magnesium from Canada*, 57 Fed. Reg. 30,946 (Dep't Commerce July 13, 1992) (final affirmative countervailing duty determination)); see also 1997 Proposed Rule, 62 Fed. Reg. at 8836 ("There is no indication that Congress intended to change our practice [i.e., of using the *Magnesium from Canada* analysis,] with respect to government-provided goods and services such as electricity . . . .").

In *Magnesium from Canada*, the Department found that

the first step the Department takes in analyzing the potential preferential provision of electricity—assuming a finding of specificity<sup>7</sup>—is to compare the price charged with the applicable rate on the power company's non-specific rate schedule . . . . If the rate charged is consistent with the standard pricing mechanism and the company under investigation is, in all other respects, essentially treated no differently than other industries which purchase comparable amounts of electricity, we would probably not find a countervailable subsidy.

*Magnesium from Canada*, 57 Fed. Reg. at 30,949. In other words, under the *Magnesium from Canada* analysis, the Department first examines how the government-owned utility company sets its rates and then determines whether a respondent receives a price that is better than that afforded other companies or industries purchasing comparable amounts of electricity.

<sup>6</sup> As Commerce did in its Final Determination, the court uses the terms "price-setting philosophy" and "standard pricing mechanism" interchangeably. See Final Determination at 26. ("[T]he Department may rely on either the use of a standard pricing mechanism ('price-setting philosophy') or a utility company's costs . . . .").

<sup>7</sup> It can be presumed that specificity, in this context, means "domestic subsidies . . . provided or required by government action to a specific enterprise or industry, or group of enterprises or industries." 19 U.S.C. § 1677(5)(A)(ii) (1988).

## BACKGROUND

On October 16, 2014, Maverick filed a countervailing duty petition covering imports of welded line pipe from the Republic of Korea (“Korea”) and on November 5, 2014, Commerce initiated a countervailing duty investigation.<sup>8</sup> *Welded Line Pipe From the Rep. of Korea and the Rep. of Turkey*, 79 Fed. Reg. 67,419 (Dep’t Commerce Nov. 13, 2014) (initiation of countervailing duty investigations). Commerce selected SeAH and NEXTEEL Co., Ltd. (“NEXTEEL”) as mandatory respondents for individual examination. The period of investigation (“POI”) was from January 1, 2013, through December 31, 2013. Commerce investigated, among other things, whether KEPCO, a state-owned and controlled entity that supplied “substantially all of the electricity in Korea,” provided respondents with a countervailable subsidy in the form of the provision of electricity for less than adequate remuneration. Final Determination at 13, 14–17.

On March 20, 2015, Commerce issued a negative preliminary determination, finding that the Korean Government and KEPCO provided producers and exporters of welded line pipe from Korea only *de minimis* countervailable subsidies.<sup>9</sup> *See Welded Line Pipe From the Rep. of Korea*, 80 Fed. Reg. 14,907, 14,908 (Dep’t Commerce Mar. 20, 2015) (“Preliminary Determination”).

Following the Preliminary Determination, the Department issued supplemental questionnaires to the Korean Government. *See* Letter from Yoon & Yang LLC to Sec’y Commerce: Resp. to the Suppl. Questionnaire, C.R. 316–322, P.R. 380–386, ECF Nos. 35–2, 3410 (April 14, 2015) (“Suppl. Questionnaire Resp.”). In order to determine how the electricity rates were set, the Department asked for copies of the applications KEPCO actually filed with the Ministry of Trade, Industry and Energy (“Trade Ministry”) for the electricity tariffs in effect from January 1 through January 13 and January 14 through November 20, 2013, which the Korean Government had not provided

<sup>8</sup> The scope of this investigation covered

circular welded carbon and alloy steel (other than stainless steel) pipe of a kind used for oil or gas pipelines (welded line pipe), not more than 24 inches in nominal outside diameter, regardless of wall thickness, length, surface finish, end finish, or stenciling. Welded line pipe is normally produced to the American Petroleum Institute (API) specification 5L, but can be produced to comparable foreign specifications, to proprietary grades, or can be non-graded material.

*Welded Line Pipe From the Rep. of Korea and the Rep. of Turkey*, 79 Fed. Reg. 67,419, 67,423, App. 1.

<sup>9</sup> Under 19 U.S.C. § 1671b(b)(4)(A), if the “aggregate of the net countervailable subsidies is less than 1 percent ad valorem,” then Commerce will disregard such *de minimis* countervailable subsidies.

during the Preliminary Determination.<sup>10</sup> Suppl. Questionnaire Resp. at 6–12. In response, the Korean Government submitted copies of the appropriate applications as well as data summaries supporting the relevant tariff increases. *See* Suppl. Questionnaire Resp. at 6–12; *see also* Suppl. Questionnaire Resp., Exs. GSQ4RE-2, GSQ4RE-4, GSQ4RE-5, GSQ4RE-9, GSQ4RE-10. In June, Commerce conducted a verification of the questionnaire responses. Verification Questionnaire Resp., ECF Nos. 35–2, 42, C.R. 385, P.R. 430 (Aug. 17, 2015) (summary of verification responses). Although Commerce ultimately found that the Korean Government had “adequately responded to all of the Department’s detailed questions” involving its provision of electricity to the respondents, plaintiff raised several concerns involving the information the Korean Government submitted to Commerce regarding KEPCO’s price-setting procedures. Final Determination at 24–26.

On October 13, 2015, Commerce issued its final negative countervailing determination. *See* Final Determination. As it had in the Preliminary Determination, the Department began its analysis by determining the proper tier under 19 C.F.R. § 351.511(a)(2) (2014). Commerce found a tier one benchmark analysis was inappropriate because KEPCO “is the primary utility company in Korea providing electricity to Korean consumers, and the [Korean Government] regulates the rates that KEPCO charges for electricity.” Final Determination at 15. In other words, there was no competitive-market determined price that could provide an adequate benchmark. In addition, Commerce declined to use a tier two benchmark analysis because “[t]he [Korean Government] has stated that there is no cross-border transmission or distribution of electricity in Korea,” and “the Department will only use world market prices if the good or service is actually available to the purchaser in the country under investigation.” Final Determination at 16. Therefore, Commerce elected to use its “final alternative,” a tier three benchmark analysis, in which “the Department will assess whether the prices charged by KEPCO are set in accordance with market principles through an analysis of such factors as KEPCO’s [standard pricing mechanism], costs . . . , or possible price discrimination.” Final Determination at 16.

Based on the information used by KEPCO “to develop the tariff schedules that were applicable during the POI,” Commerce found

---

<sup>10</sup> According to answers submitted by the Korean Government in response to Commerce’s supplemental questionnaires “[t]he calculation of costs provided [to Commerce during earlier responses] are KEPCO cost[s] . . . for the entire POI [*i.e.*, the entirety of 2013].” Suppl. Questionnaire Resp. at 12. Nevertheless, Commerce found that the Korean Government’s supplemental questionnaire responses “provided the necessary information to be used in [Commerce’s] analysis as to whether the prices are in accord with a standard pricing mechanism.” Final Determination at 30.

that the company's prices were consistent with market principles solely through an analysis of KEPCO's standard pricing mechanism. Final Determination at 17–18. In other words, Commerce did not depend on facts otherwise available,<sup>11</sup> as it had in the Preliminary Determination, to determine how KEPCO set its rates, but rather it relied on questionnaire responses. Specifically, Commerce first determined how KEPCO set its rates and if they were consistent with a standard pricing mechanism. Next, the Department “examine[d] the electricity rates charged to [the] investigated respondents to determine whether the price charged is consistent with the power company's standard pricing mechanism.” Final Determination at 17. Using the analysis found in *Magnesium from Canada*, Commerce found that because the rates charged to respondents were consistent with KEPCO's standard pricing mechanism, and the companies were “in all other respects essentially treated no differently than other companies and industries which purchase[d] comparable amounts of electricity,” respondents received no benefit. Final Determination at 17–18 (citing *Magnesium from Canada*, 57 Fed. Reg. at 30,946). That is, Commerce first determined if KEPCO had a standard pricing mechanism and how it worked, and then examined whether this same method was employed to set the rates for respondents and other companies and industries purchasing similar amounts of electricity.

With respect to KEPCO's standard pricing mechanism, Commerce verified that the utility company developed its electricity rates based on annual cost data obtained from an independent accounting firm that audited KEPCO's costs and calculated its annual cost of electricity. Final Determination at 17. Those figures were later used to calculate the tariff for each customer classification. Final Determination at 17. Thus, the Department found:

To develop the electricity tariff schedules that were applicable during the POI, KEPCO first calculated its overall cost including an amount for investment return. This cost includes the operational cost for generating and supplying electricity to the consumers as well as taxes. The cost for each electricity classification was calculated by (1) distributing the overall cost according to the stages of providing electricity (generation, transmission, distribution, and sales); (2) dividing each cost into fixed cost, variable cost, and the consumer management fee; and (3) then calculating the cost by applying the electricity load level,

<sup>11</sup> Under 19 U.S.C. § 1677e(a), if “necessary information is not available on the record” or “an interested party or any other person . . . withholds information that has been requested by the administering authority . . . or . . . provides such information but the information cannot be verified,” then Commerce shall use “the facts otherwise available” in making its determination.

peak level, and the patterns of consuming electricity. Each cost was then distributed into the fixed charge and the variable charge. KEPCO then divided each cost taking into consideration the electricity load level, the usage pattern of electricity,<sup>12</sup> and the volume of the electricity consumed. Costs were then distributed according to the number of consumers for each classification of electricity.

Final Determination at 17. Commerce “verified that KEPCO applied this same . . . standard pricing mechanism to determine the electricity tariffs for each tariff classification including the industrial tariff that was paid by the respondents during the POI” and thus found that “the [Korean Government] provided the necessary information to be used in [the Department’s] analysis as to whether the prices are in accord with a standard pricing mechanism” pursuant to § 351.511(a)(2)(iii). Final Determination at 17–18, 30. Commerce also found that there was “no information on the record that SeAH . . . [was] treated differently from other industrial users of electricity that purchase comparable amounts of electricity.” Final Determination at 18. Next, the Department rejected plaintiff’s arguments that the Korean Government did not cooperate with Commerce and that AFA should therefore be applied because Commerce found that the Korean Government had not failed to cooperate to the best of its ability in the proceeding. Final Determination at 29 (“The [Korean Government] adequately responded to all of the Department’s extensive and detailed questions in its responses . . . . Our detailed supplemental questions on electricity were not the general result of the [Korean Government’s] unwillingness to respond to our questions but rather, were due to the complicated nature of an analysis of market principles required under the 19 CFR 351.[5]11(a)(2)(iii). Therefore, we disagree with the petitioner’s argument that the [Korean Government] has prevented or forestalled the Department’s attempt to collect the appropriate information to conduct an analysis under 19 CFR 351.[5]11(a)(2)(iii).”).

As a result, Commerce found that “consistent with 19 CFR 351.511 and *Magnesium from Canada* . . . [KEPCO’s] program provides no benefit to SeAH . . . because the prices charged to [SeAH] under the applicable industrial tariff were consistent with KEPCO’s standard

<sup>12</sup> For instance, if a classification consumed most of its electricity at night when demand was low, it would be charged less. See *Detailed Approval Standards for Power Generation Business, Standards for Calculation of Electricity Charges, Tolerance of Electricity Meters and Electric Power System Operation* (Apr. 1, 2012), ECF No. 42, Art. 9(2) (“In principle, the electricity charges consist of basic charges, electricity volume charges and fuel cost adjustment charges.”).

pricing mechanism” and thus, that the Korean Government provided no countervailable subsidy. Final Determination at 18.

This action followed.

## STANDARD OF REVIEW

“The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). “Substantial evidence is defined as ‘more than a mere scintilla,’ as well as evidence that a ‘reasonable mind might accept as adequate to support a conclusion.’” *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1306 (Fed. Cir. 2014) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)).

## DISCUSSION

### **I. Commerce’s Determination that the Korean Government’s Provision of Electricity did not Benefit Respondents is in Accordance with Law and Supported by Substantial Evidence**

#### **A. Commerce’s Use of the Standard Pricing Mechanism Analysis was in Accordance with Law**

Plaintiff’s primary argument is that Commerce, in reaching its determination, unlawfully relied on a factor “‘which Congress has not intended it to consider.’” Pl.’s Br. 24 (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Specifically, plaintiff argues that Commerce’s use of the standard pricing mechanism analysis found in *Magnesium from Canada* merely “measured price discrimination,” and thus, only demonstrated that the Korean Government did not “provide electricity at ‘preferential’ rates.” Pl.’s Br. 23. According to plaintiff, by “limit[ing] its examination to whether prices were consistent with KEPCO’s standard pricing mechanism . . . Commerce failed to meaningfully consider the question posed by the statute,” (*i.e.*, whether the Korean Government received adequate remuneration for its electricity) and therefore unlawfully “equated the lack of preferentiality with adequate remuneration.” Reply Br. Pl.’s (“Pl.’s Reply Br.”) 2, 4.

Plaintiff maintains that Commerce was required by the statute to do more. It insists that although “Congress had amended the [Tariff] Act to replace the former ‘preferential’ standard with the current ‘adequate remuneration’ standard,” the *Magnesium from Canada* determination, which Commerce relied upon, is bad precedent because it was decided prior to the statutory amendment. Pl.’s Br. 24.

“When Commerce issued its determination in *Magnesium from Canada*, the Act provided that subsidies include ‘[t]he provision of goods or services at preferential rates.’” (citing 19 U.S.C. § 1677(5)(A)(ii)(II) (1988)). For Maverick, the statutory amendment providing for “adequate remuneration” requires Commerce to analyze whether government prices are “marketbased”—a determination plaintiff asserts cannot be made solely by examining whether respondents received a rate outside of what it would have received if the rate were set by the standard pricing mechanism. *See* Pl.’s Reply Br. 3, 6 (“[A] lack of preferential pricing in and of itself does not show that prices are market based.”). Thus, according to Maverick, Commerce’s use of the standard pricing mechanism analysis “elevates a single citation in the [Preamble] above what is required by the statute” and “eliminates the distinction between the preferentiality standard and the adequacy of remuneration standard.” Pl.’s Reply Br. 3, 6.

For Commerce, however, “[d]etermining whether a government-set price for electricity is in accordance with market principles by examining whether the electricity prices are set using the utility company’s standard pricing [mechanism] is consistent with [its] regulations and precedent.” Final Determination at 23 (citing Preamble, 63 Fed. Reg. at 65,378). As for the URAA’s change to the adequate remuneration standard, defendant maintains Commerce’s regulations found at 19 C.F.R. § 351.511 complied with the statute because the regulation “flipped the regulatory hierarchy, with market prices from the country under investigation and world market prices moving up the hierarchy, and other considerations, including price discrimination, remaining potentially relevant only if the preferred data are unavailable.” Def.’s Br. 20. In other words, for Commerce, what constitutes adequate remuneration depends on the nature of the marketplace, and where the marketplace is a government-controlled monopoly, there is a role for a preferentiality-based test.

Defendant then contends that, contrary to plaintiff’s characterization, the concept developed in *Magnesium from Canada* was “an analytical methodology distinct from simple price discrimination.” Def.’s Br. 21; *see also* Final Determination at 23 (“The petitioner misinterprets 19 CFR 351.511 regarding the benefit analysis of the government provision of a good or service.”). Defendant argues that the standard pricing mechanism analysis was created “to account for the commercial market conditions by which electricity is provided to consumers,” by implicitly recognizing that “electricity tariffs are generally based upon the type and amount of consumption of electricity and that utility rates vary depending on the size and classification of

the electricity consumer.” Def.’s Br. 22; *see also* Final Determination at 17 n.79 (“The principle of the standard pricing mechanism recognizes the commercial and market practices and conditions for the provision of electricity.”). Thus, factors such as amount of electricity consumed and the time of day that it is consumed can affect the price of electricity where a government monopoly controls the supply.

The Department also insists that it took into account acquisition costs, specifically finding that

[t]he petitioner is correct that we did not request the cost information from KEPCO’s generating subsidiaries. This information was not requested because the information from the generating subsidiaries was not relevant to our analysis. Electricity generators, including subsidiaries of KEPCO, sell electricity to the Korea Power Exchange [(“KPX”)] and KEPCO purchases the electricity that it distributes to all of its customers from KPX . . . . Therefore, the cost of this electricity is identical for all the tariff classes (residential, general, industry, etc.) within Korea. The cost of electricity is based upon the purchase price of electricity from the KPX; therefore, this is the cost that is relevant for determining whether KEPCO’s industrial tariff schedule is developed using a standard pricing mechanism. We also note that the cost data underlying the tariff rate calculations were prepared by an independent accounting firm.

Final Determination at 23–24; *see also* Def.’s Br. 18 (“KEPCO’s costs for electricity are based upon the purchase price from the Korea Power Exchange, which is the cost that was relevant to Commerce’s evaluation of whether the power company’s rates were developed using a standard pricing mechanism.”).

In addition, Commerce claims that the standard pricing mechanism analysis is in accord with the adequate remuneration standard found in the statute. According to defendant, its *Magnesium from Canada* analysis works as follows: first, the Department determines whether the government’s standard pricing mechanism is in accordance with market-principles, and second, it considers whether the respondents are treated any differently from other consumers. *See* Transcript of Oral Argument at 13–14, *Maverick Tube Corp. v. United States* (No. 15–00303). Therefore, defendant argues that it is wrong to simply call Commerce’s approach a preferentiality test. *See* Def.’s Br. 21.

The court finds that (1) Commerce’s regulation is a reasonable interpretation of the statute and (2) the Department lawfully interpreted its regulation to determine the adequacy of remuneration for the electricity provided to respondents during the POI.

“When reviewing Commerce’s construction of the trade statute, this Court is directed by the two-step framework set forth by *Chevron*.” *Xiping Opeck Food Co. v. United States*, 38 CIT \_\_, \_\_, 34 F. Supp. 3d 1331, 1342 (2014) (citing *Fine Furniture*, 748 F.3d at 1369); see also *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1983). The first step requires the court to determine whether Congress’ intent under the statute is clear. *Chevron*, 467 U.S. at 842–43; see also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”). If Congress’ intent is clear, the court “must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842–43. Should the court determine that Congress has not directly addressed the question at issue, that is, if “the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* (footnote omitted). Under this second step, provided that Commerce’s construction of the statute is reasonable, it will be found to be in accordance with law. See *United States v. Eurodif S.A.*, 555 U.S. 305, 317 (2009).

Here, the court finds Commerce’s interpretation of the statute—namely, that when a government is the sole, or nearly sole, provider of a good or service, Commerce may determine the adequacy of remuneration through its standard pricing mechanism analysis (including use of a preferentiality-based test)—to be a reasonable construction of the statute.

As an initial matter, despite plaintiff’s arguments to the contrary, Congress’ intent in adopting the URAA amendment is unclear as to the proper method for determining the adequacy of remuneration. Section 1677(5)(E) simply states that the adequacy of remuneration “shall be determined in relation to prevailing market conditions for the good or service being provided . . . in the country which is subject to the investigation or review.” 19 U.S.C. § 1677(5)(E). The statute then gives a non-exhaustive list of “prevailing market conditions,” which include “price, quality, availability, marketability, transportation, and other conditions of purchase or sale.” *Id.* Aside from this list of conditions, the statute gives no guidance as to how the Department should interpret the adequacy of remuneration language. It is worth noting, however, that cost of production is absent from the list.

An examination of the Statement of Administrative Action (“SAA”)<sup>13</sup> accompanying the URAA reveals that 19 U.S.C. § 1677(5)(E)’s language comes almost verbatim from the guidelines set out in Article 14 of the Subsidies Agreement, a part of the Uruguay Round Agreement. *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, at 912–13 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4239. Therefore, while the source of the adequacy of remuneration language is known, neither the statute, nor the SAA gives guidance as to Congress’ intent when the words were enacted. Nor does there appear to be any legislative history that provides guidance.

Once it has been established that the definition of “adequate remuneration” is unclear, step two of *Chevron* comes into play. Under step two, the court must determine whether Commerce’s construction of the statute is reasonable. *See Chevron*, 467 U.S. at 843.

The court finds that Commerce’s construction of the statute is reasonable. In a state-controlled monopolistic market, it is reasonable to determine the adequacy of remuneration by first examining how the state sets its rates, as the state (and not necessarily supply-and-demand)<sup>14</sup> controls price and availability. If the state does use a standard pricing mechanism to set its rates (*i.e.*, if its prices are set by a consistent discernable method), it is also reasonable for Commerce to determine the adequacy of remuneration by examining whether respondents received a preferential rate when compared to those entities receiving a rate set by the standard pricing mechanism.

As noted, the statute directs Commerce to determine if a benefit is present by determining whether a good or service is provided “for less than adequate remuneration.” Adequate remuneration is to be measured by “prevailing market conditions . . . in the country which is subject to the investigation or review.” 19 U.S.C. § 1677(5)(E). The statute does not direct Commerce to create a fictional model market or (as shall be seen) to audit KEPCO’s books to determine if it covers its costs. The statute directs Commerce to judge the adequacy of

<sup>13</sup> The SAA, which “shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the [URAA],” 19 U.S.C. § 3512(d), states:

Article 14 of the Agreement sets guidelines for methods used to calculate benefit. . . . The guidelines set out in Article 14 are that: . . . the provision of goods or services . . . by a government confers a benefit where the provision is made for less than adequate remuneration . . . with the adequacy of remuneration determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation, and other conditions of purchase or sale).

SAA, at 912–13.

<sup>14</sup> The provision of electricity, in particular, is often subject to state control. *See, e.g.*, N.Y. POWER AUTH., ANNUAL REPORT 53 (2015).

remuneration based on market conditions that actually exist in Korea. That the Korean electricity market is controlled by a state run monopoly does not change the statute.

The court, moreover, is unconvinced that simply because *Magnesium from Canada* was guided by a different statutory standard, its standard pricing mechanism analysis cannot be used to determine the adequacy of remuneration under a tier three benchmark analysis. Although the statutory change marked a departure from defining a benefit in terms of preferentiality, that does not mean that *Magnesium from Canada*'s standard pricing mechanism analysis is not relevant to determine the adequacy of remuneration when market-based prices are unavailable. There is no evidence in the legislative history that Congress intended the dramatic change in law plaintiff suggests. In fact, the legislative history seems to indicate that Congress simply chose to enact the language contained in the Uruguay Round Agreement.

Commerce's past experience shows that, in certain situations, preferentiality-like tests may be useful when determining the adequacy of remuneration. See, e.g., *Steel Wire Rod From Germany*, 62 Fed. Reg. at 54,994.<sup>15</sup> Indeed, in a monopolistic situation, such as the electricity market in Korea, the state-controlled market provides the only source from which Commerce can obtain a price. That is, in situations involving the state-controlled provision of electricity, finding that electricity rates are based on a standard pricing mechanism and then examining if a company or industry receives a preferential rate is a reasonable way to determine whether a state-controlled supplier received adequate remuneration.

Plaintiff spends a great deal of time in its papers claiming that Commerce unlawfully applied a preferential analysis in reaching its determination. In doing so, plaintiff appears to argue that Commerce was somehow prohibited from assembling information as to whether the respondents were charged less for their electricity than other consumers. Why this should be the case is a bit of a mystery. Should it have developed that respondents were paying less than others similarly situated for the provision of electrical service, this would be evidence that the rate paid by respondents was not arrived at by the

---

<sup>15</sup> In *Steel Wire Rod From Germany*, Commerce determined that the Government of the Free and Hanseatic City of Hamburg ("GOH"), which leased land to producers and exporters of steel wire rod from Germany, used a "standard lease for all enterprises in the port area" and that "[t]here are no special provisions made for different industries." *Steel Wire Rod From Germany*, 62 Fed. Reg. at 54,994. Therefore, because the respondent "pa[id] a standard rate charged by the GOH to all enterprises leasing land similar to [respondent's], and because these prices are set in reference to market conditions, [Commerce] determin[e]d that [respondent's] lease rate is not countervailable." *Steel Wire Rod From Germany*, 62 Fed. Reg. at 54,994.

application of KEPCO's standard pricing mechanism (*i.e.*, that the rate was not based on the electricity "market" in Korea). In other words, plaintiff's assertions fail to consider that Commerce first examined how the rates were set, and only then asked if the market-based rates (albeit a monopolistic market) were calculated the same as the rates respondents paid for electricity. Merely because Commerce employed an analysis it used for other purposes elsewhere to make this comparison does not (1) prohibit Commerce from collecting evidence of the existence (or lack thereof) of a cheap rate for respondents or (2) prohibit Commerce from using this information to make a determination as to whether respondents' rate was set by the principles used to determine the rate of others purchasing electricity in the Korean market.

Plaintiff also maintains that Commerce's explanation for its determination "is insufficient and patently unreasonable." Pl.'s Br. 30. The court, though, agrees with the defendant that Maverick "cannot substitute [various third party reports] for the benchmark analysis Commerce is required to perform pursuant to 19 C.F.R. § 351.511(a)(2)." Def.'s Br. 22. Here, Commerce found that KEPCO's standard pricing mechanism was developed based on its annual cost data as calculated by an independent accounting firm. Final Determination at 17. In addition, Commerce found that KEPCO used these figures to "calculate the tariff for each customer classification" based on standard methodologies set forth in the standards for calculation of electricity charges issued by the Korean Ministry of Knowledge Economy. Final Determination at 17 (citing *Detailed Approval Standards for Power Generation Business, Standards for Calculation of Electricity Charges, Tolerance of Electricity Meters and Electric Power System Operation* (Apr. 1, 2012), ECF No. 42). Commerce then found that KEPCO applied this same standard pricing mechanism to determine respondents' tariff rates and that respondents were not treated any differently from "other industrial users of electricity that purchase comparable amounts of electricity." Final Determination at 18. Finally, as Commerce noted in its Final Determination, "[t]he principle of the standard pricing mechanism recognizes the commercial and market practices and conditions for the provision of electricity." Final Determination 17 n.79. In other words, under the tier three benchmark analysis Commerce takes the market as it finds it, even if it is, for all practical purposes, a monopoly.

Accordingly, the court holds that Commerce's construction of the statute—that Commerce may determine the adequacy of remuneration based on the standard pricing mechanism analysis developed in

*Magnesium from Canada*—is reasonable, and thus, in accordance with law.

### **B. Commerce’s Interpretation of “Adequate Remuneration” was in Accordance with Law**

Maverick’s second, and related, argument is that the Department’s interpretation of “adequate remuneration” is not in accordance with law. Pl.’s Br. 20. Specifically, plaintiff maintains that Commerce “erred in its interpretation of ‘adequate’ because failing to recover costs can never be adequate.” Pl.’s Br. 20. In support of its position, plaintiff cites to *Webster’s II New College Dictionary*, which defines “adequate” as “able to satisfy a requirement” and “remunerate” as “to pay one for goods provided, services rendered, or losses incurred.” Pl.’s Br. 21 (quoting *Webster’s II New College Dictionary* (2001)). Plaintiff maintains that, in accordance with these definitions, the plain meaning of § 1677(5)(E) requires that adequate remuneration mean, at a minimum, that “the seller is able to cover its costs to provide a good.” Pl.’s Br. 21.

The court, however, finds that defendant’s interpretation of “adequate remuneration” is in accordance with law. Although plaintiff argues that Commerce misinterpreted the statute, the real thrust of its argument is that Commerce did not look at the right information. Specifically, plaintiff seems to argue that the only appropriate way to determine the adequacy of remuneration in this case would be to examine KEPCO’s suppliers’ costs. *See, e.g.*, Pl.’s Br. 22 (“[W]ithout a complete cost build up from Korean electricity generators, beginning with fuel costs, there was no way for the Department to determine whether [KEPCO’s] prices were set according to market principles.”). As discussed previously, however, the preamble to § 351.511 reasonably provides that Commerce may look solely at a government’s price-setting philosophy (*i.e.*, its standard pricing mechanism) under a tier three benchmark analysis. Preamble, 63 Fed. Reg. at 65,378 (“Where the government is the sole provider of a good or service, and there are no world market prices available or accessible to the purchaser, we will assess whether the government price was set in accordance with market principles through an analysis of such factors as the government’s price-setting philosophy, costs . . . or possible price discrimination. We are not putting these factors in any hierarchy, and we may rely on one or more of these factors in any particular case.”).

Indeed, § 351.511 accomplishes the post-URAA preference for market-based prices through its hierarchical approach. When

market-based prices (*i.e.*, prices derived from actual transactions in the country under investigation or available on the world market) are available, Commerce must compare the government price to these benchmarks. *See* 19 C.F.R. § 351.511(a)(2)(i)-(ii). When the government is the “sole supplier of a good or service,” however, three factors are useful in determining whether a government provision of goods or services is provided for less than adequate remuneration: the standard pricing mechanism, costs, and possible price discrimination. Preamble, 63 Fed. Reg. at 65,378. Here, Commerce reasonably examined KEPCO’s standard pricing mechanism and found that the Korean Government received adequate remuneration for its electricity because it determined the respondent’s rate in the same manner it did other industrial consumers.

While these prices were not set by what would normally be thought of as free market principles (*i.e.*, prices set by supply and demand), they were not the result of guesswork. In this case, the “market” is not some hypothetical world market for electricity or even an imagined regional one. Rather, it is the actual market for electricity in Korea. Accordingly, Commerce verified how KEPCO developed its electricity tariffs during the POI:

KEPCO first calculated its overall cost including an amount for investment return. This cost includes the operational cost for generating and supplying electricity<sup>16</sup> to the consumers as well as taxes. The cost for each electricity classification was calculated by (1) distributing the overall cost according to the stages of providing electricity (generation, transmission, distribution, and sales); (2) dividing each cost into fixed cost, variable cost, and the consumer management fee; and (3) then calculating the cost by applying the electricity load level, peak level, and the patterns of consuming electricity. Each cost was then distributed into the fixed charge and the variable charge. KEPCO then divided each cost taking into consideration the electricity load level, the usage pattern of electricity, and the volume of the electricity consumed. Costs were then distributed according to the number of consumers for each classification of electricity.

<sup>16</sup> As Commerce later clarified in its Final Determination,

[e]lectricity generators, including subsidiaries of KEPCO, sell electricity to the KPX and KEPCO purchases the electricity that it distributes from the KPX. . . . Therefore, the cost of this electricity is identical for all the tariff classes . . . within Korea. Although [Maverick] is correct that the [Korean Government] did not provide the individual generating costs for KEPCO’s generating subsidiaries, the Department did not request this information. The costs for electricity are based upon the purchase price of electricity from the KPX; therefore this is the cost that is relevant for determining whether KEPCO’s industrial tariff schedule is developed using a standard pricing mechanism.

Final Determination at 27.

Final Determination at 17. Commerce verified that KEPCO's annual costs were calculated by an independent accounting firm. Final Determination at 17. Thus, although Commerce itself did not make a detailed analysis of KEPCO's costs, it verified KEPCO's costs and how they were used to set the rates.

Commerce then focused on whether respondents were treated the same as other industrial consumers. The Department found that respondents were not "treated differently from other industrial users of electricity that purchase comparable amounts of electricity," and they were charged in accordance with KEPCO's standard pricing mechanism. Final Determination at 18. Commerce then reasonably determined that KEPCO's prices reflected the Korean electricity market, and thus, that respondents were not receiving a better price than other consumers in the Korean market.

Plaintiff insists, however, that the Department was required to determine if the price respondents paid covered the costs to provide electricity in all market conditions. Pl.'s Br. 21–22. Not only is this finding not directed by the dictionary definitions of "adequate" and "remuneration" plaintiff provides in its papers (*i.e.*, "able to satisfy a requirement" and "pay one for goods provided" does not equal cover costs), but it is elemental that the functioning of a free market guided by the law of supply and demand sometimes results in sales below cost. Since covering costs would not be required in a tier one or tier two benchmark analysis, it is difficult to see how it should be required here.

Accordingly, Commerce's interpretation of "adequate remuneration," namely, that in a tier three benchmark analysis, the adequacy of remuneration may be determined by taking into account a standard pricing mechanism analysis, was reasonable and thus in accordance with law.

### **C. Commerce Has Supported its Benefit Analysis with Substantial Evidence**

Plaintiff argues that "Commerce failed to provide a satisfactory explanation for concluding that Korean electricity prices are set in accordance with market principles" as required by 19 C.F.R. § 351.511(a)(2)(iii). Pl.'s Br. 28. Specifically, plaintiff contends that, because there is record evidence that KEPCO's electricity tariffs were not set by supply and demand and may be below cost, there are therefore "significant pricing distortions throughout the Korean electricity market." Pl.'s Br. 28. For plaintiff, Commerce must explain why such evidence does not undermine its determination that the KEPCO's prices were set in accordance with market principles under

the regulation. Pl.'s Br. 30. Accordingly, plaintiff argues that Commerce's conclusion unlawfully "suggest[s] a result contrary to clear weight of the evidence" and thus is not supported by substantial evidence. Pl.'s Br. 18 (quoting *USX Corp. v. United States*, 11 CIT 82, 84, 655 F. Supp. 487, 489 (1987)).

Maverick bases this argument on the results of a 2013 Korean National Assembly report, which found that KEPCO sells electricity for less than cost. Pl.'s Br. 29 ("The government subsidizes and charges less-than-normal electricity cost to the steel industries for their exceeding use of electricity. . . . The 100 biggest corporations [in Korea] are using over KRW 9 trillion worth of discounted industrial scale electricity. . . . There are huge losses because of discounted industrial electricity consumption." (quoting Initial Questionnaire Resp., C.R. 76, P.R. 127, ECF No. 35-2 (Jan. 21, 2015) Ex. E-4)). Plaintiff also supports its argument by referencing the Korean Board of Audit and Inspection report, which stated that KEPCO's electricity tariffs for industrial use covered only 85.8 percent of its production costs. Pl.'s Br. 29 (citing Petition for Imposition of Antidumping and Countervailing Duties, C.R. 1-28, P.R. 1-28, ECF No. 35-2 (Oct. 16, 2014) Ex. IV-49). Maverick then notes that some record evidence indicates that KEPCO itself has conceded that it sells electricity at a loss. Pl.'s Br. 30 ("The distortion of the energy price structure resulting from the less-than-cost electricity prices has rapidly increased electricity consumption in place of petroleum or gas, which has resulted in record high electricity consumption peaks in winter seasons since 2009." (quoting Suppl. Questionnaire Resp., Ex. GSQ4RE-4)).

Finally, Maverick adds that the Korean Government's "failure to provide and Commerce's refusal to request data regarding KEPCO's actual costs of generating electricity" undermines its conclusion that the cost of electricity is identical for all classes of consumers and for Commerce "to conclude that the only relevant question is the price at which KEPCO purchased the electricity from its affiliate, the KPX, wholly ignores the fact that KEPCO's subsidiaries generated the electricity, which KEPCO is reselling at a loss." Pl.'s Br. 31, 33. Therefore, plaintiff argues that Commerce's determination is not supported by substantial evidence.

In response, the Government argues that Commerce verified that KEPCO developed its electricity tariff schedules during the POI based on (1) the company's annual cost data, as audited and calculated by an independent accounting firm, and (2) Korea's standard methodology for establishing electricity tariffs. Def.'s Br. 13 (citing Final Determination at 17). Defendant then notes that Commerce also verified that this same standard pricing mechanism was applied

during the POI. Accordingly, defendant argues that, using the factors found in 19 C.F.R. § 351.511(a)(2)(iii) and the Preamble, substantial evidence supported Commerce's determination that the prices were set in accordance with market principles. Def.'s Br. 15–16.

Also, as has been noted, defendant maintains that Commerce did not ignore costs in its analysis. Def.'s Br. 17. Specifically, the Government contends that “KEPCO developed its electricity tariff schedules based on the company's annual cost data, as audited and calculated by an independent accounting firm, and an amount for investment return . . . [and] Commerce explained that it relied on the cost data underlying KEPCO's standard price calculations because they were prepared by an independent accounting firm, which served to support their accuracy.” Def.'s Br. 17 (citing Final Determination at 17, 28, 30 n.132). Therefore, in Commerce's view, the use of numbers overseen by an independent accounting firm as part of KEPCO's standard pricing mechanism established that the electricity tariffs would capture KEPCO's costs, even if Commerce did not actually audit the numbers provided. *See* Def.'s Br. 17.

Defendant further argues that “Commerce did not ignore the reports [cited by plaintiff]; rather, it utilized and referred to multiple reports in its summary of background information in the [Final Determination].” Def.'s Br. 22. The Government then notes that Commerce reviewed the Korea National Assembly report on KEPCO, but found that respondents were not among the companies for which KEPCO reported losses. Def.'s Br. 23 (citing Final Determination at 14, 23). In other words, Commerce did not find this evidence as convincing as plaintiff.

As to Commerce's decision not to request cost information from KEPCO's electricity-generating subsidiaries, defendant insists that this information “was not relevant” to its analysis because KEPCO's subsidiaries “sold electricity to the [KPX], which then sold KEPCO nearly all of the electricity it distributed.” Def.'s Br. 17–18 (citing Final Determination at 23–24). Put another way, for defendant, the relevant cost associated with KEPCO's standard pricing mechanism was the purchase price paid to KPX, not electricity-generation costs. Def.'s Br. 18. Therefore, defendant maintains that, by verifying the information used to develop KEPCO's rates, Commerce verified all that was required under its regulations and the preamble to § 351.511(a)(2)(iii) (*i.e.*, that KEPCO used a standard pricing mechanism), and its determination is thus supported by substantial evidence.

The court finds that Commerce’s determination was supported by substantial evidence. “Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369,1374 (quoting *Consol. Edison Co.*, 305 U.S. at 229). As discussed above, Commerce provided a clear explanation for why KEPCO’s standard pricing mechanism was in accordance with market principles (albeit the principles of a monopolistic market), and thus, why the Korean Government received adequate remuneration. *See supra* Section I.B. Here, Commerce was able to verify that “KEPCO applied the same price-setting philosophy or standard pricing mechanism to determine the electricity tariffs for each tariff classification including the industrial tariff that was paid by [SeAH] during the POI” and further found that “there is no information on the record that SeAH . . . [is] treated differently from other industrial users of electricity that purchase comparable amounts of electricity,” and thus, reasonably determined that, pursuant to § 351.511(a)(2)(iii), respondents did not receive a benefit. Final Determination at 17–18.

Although plaintiff makes arguments that the record is devoid of evidence supporting Commerce’s conclusion because certain financial information could not be traced, the court notes that Commerce reasonably found that this evidence (*e.g.*, data sourced from the KEPCO Data Network<sup>17</sup>) was not necessary to verify the standard pricing mechanism used by KEPCO to set its electricity tariffs as required under a tier three benchmark analysis. Therefore, because Commerce’s method conformed to the law and the information Commerce relied on was fully verifiable, its determination is supported by substantial evidence.

Based on the forgoing, the court finds that the Department has cited substantial evidence that respondents did not receive a benefit by KEPCO’s provision of electricity.

## **II. Commerce’s Determination not to Apply Adverse Facts Available to the Korean Government was Supported by Substantial Evidence**

Finally, Maverick argues that the Department’s failure to apply AFA to the Korean Government is unsupported by substantial evidence and an abuse of discretion. Pl.’s Br. 43. Under 19 U.S.C. § 1677e(b), when a party fails to act to the best of its ability in responding to information requests, Commerce may apply AFA. According to Maverick, “the [Korean Government] blatant[ly] refus[ed] to cooper-

<sup>17</sup> The KEPCO Data Network is a “statistical division within KEPCO.” Verification Questionnaire Resp. at 10.

ate to the best of its ability with Commerce's repeated requests for necessary information." Pl.'s Br. 43. Specifically, plaintiff claims that the Korean Government did not provide cost data in electronic format, did not make necessary officials available, did not provide electricity generation costs, and that it provided "insufficient, incomplete, and inconsistent questionnaire responses to Commerce." Pl.'s Br. 43.

Defendant argues that the Korean Government was "fully cooperative," and responded to Commerce's multiple and detailed questionnaires. Def.'s Br. 23. Defendant notes that "an interested party fails to cooperate to 'the best of its ability'" when it fails to "put forth its maximum effort to provide Commerce with full and complete answers to all inquiries." Def.'s Br. 24 (quoting *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003)). Defendant emphasizes, that Commerce is "only required to verify factual information relied upon in making its final determination." Def.'s Br. 24 (citing 19 U.S.C. § 1677e(a)(2)(D)); 19 U.S.C. § 1677m(i)(1). Thus, Commerce claims that it did not rely on unverified data in making its final determination and that it was able to verify how KEPCO set its prices based on the questionnaire responses. Def.'s Br. 24 (citing Final Determination at 26–27, 30). Commerce states that the Korean Government cooperated by providing the information needed to complete this verification. Final Determination at 29–30.

With regard to the lack of electricity-generating cost information, defendant contends that Commerce did not ask the Korean Government to provide this information, because, as has been seen, it deemed that the information was irrelevant. Def.'s Br. 25 (citing Final Determination at 27). Next, the Government maintains that Commerce issued a substantial number of questionnaires not because of the Korean Government's "unwillingness to respond, but rather of the complicated nature of an analysis of market principles under 19 C.F.R. § 351.511(a)(2)(iii)." Def.'s Br. 25 (citing Final Determination at 29). Therefore, according to defendant, none of the grounds for applying AFA pursuant to § 1677e(b) were present, and Commerce's failure to apply AFA was supported by substantial evidence.

The court finds that Commerce reasonably determined that the use of AFA was not required by the facts or the law. The Korean Government provided extensive answers to Commerce's detailed and complicated questions in its January 21, 2015, March 6, 2015, March 11, 2015, April 14, 2015, and May 19, 2015 responses. *See* Final Determination at 29. Based on these responses, Commerce was able to verify the information it actually used to reach its determination. No interested party can be found to have failed to cooperate for not answering questions it was not asked. Nor can a party be found to

have failed to cooperate by not providing information irrelevant to a proceeding. Accordingly, it cannot be said that the Korean Government failed to “put forth its maximum effort to provide Commerce with full and complete answers to all inquiries” in this investigation. *Nippon Steel Corp.*, 337 F.3d at 1382. Commerce, then, reasonably determined it was unnecessary to apply AFA in this case.

### CONCLUSION

For the foregoing reasons, plaintiff’s motion for judgment on the agency record is denied. Judgment will be entered accordingly.

Dated: October 27, 2017

New York, New York

*/s/ Richard K. Eaton*  
RICHARD K. EATON, JUDGE

Slip Op. 17–147

RUBIES COSTUME CO., Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge  
Court No. 13–00407

[The court denies Plaintiff’s motion for summary judgment and grants Defendant’s cross-motion for summary judgment.]

Dated: October 31, 2017

*Glenn H. Ripa, John A. Bessich, and Suzanne L. McCaffery*, Follick & Bessich, of New York, NY, for Plaintiff.

*Peter A. Mancuso*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of Counsel on the brief was *Michael W. Heydrich*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

### OPINION

#### **Barnett, Judge:**

In this case, the court addresses the issue of the proper classification of a Santa Claus costume. Is it a “festive article” entitled to duty free treatment, or is it fancy dress, of textile, akin to wearing apparel, dutiable at the rates applicable to the particular parts of the costume? Application of classification principles in this case (the General Rules of Interpretation, which direct the court to apply the terms of the Harmonized Tariff Schedule, and relevant judicial precedent) leads to a finding that, while flimsy and non-durable costumes (whether for Halloween, Christmas, or any other holiday) generally receive duty

free treatment as festive articles, and non-flimsy, durable Christmas sweaters may also receive duty free treatment as festive articles (because they are not fancy dress), a relatively well-made, durable, dry clean only Santa Claus costume constitutes fancy dress, of textile, and is, therefore, excluded from classification as a festive article.

Before the court are cross-motions for summary judgment. *See* Pl.'s Mot. for Summ. J., ECF No. 28, and Mem. of Law in Supp. of Pl.'s Mot. for Summ. J ("Pl.'s MSJ"), ECF No. 28–1; Def.'s Cross-Mot. for Summ. J. and Mem. in Supp. of Def.'s Cross-Mot. for Summ. J ("Def.'s XMSJ"), ECF No. 30. Plaintiff Rubies Costume Company ("Rubies" or "Plaintiff") contests the denial of its protest challenging U.S. Customs and Border Protection's ("Customs" or "CBP") classification of a multi-piece Santa Claus suit ("Santa Suit"). *See* Summons, ECF No. 1; Compl., ECF No. 5. Plaintiff contends the Santa Suit qualifies for duty free treatment as a "[f]estive, carnival or other entertainment article[]" (hereinafter referred to as a "festive article") pursuant to subheading 9505.10.50 of the Harmonized Tariff Schedule of the United States ("HTSUS"), or, alternatively, subheading 9505.90.60 of the HTSUS. Pl.'s MSJ at 2–3. Defendant United States ("Defendant" or the "Government") contends that Customs correctly classified the Santa Suit under tariff provisions corresponding to the individual garments and accessories that, together, compose the Santa Suit. Def.'s XMSJ at 1–2. For the following reasons, the court finds that the Santa Suit is not a festive article, and, therefore, is properly classified pursuant to the below-stated individual tariff provisions.

## BACKGROUND

### I. Material Facts Not in Dispute

The party moving for summary judgment must show "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." United States Court of International Trade ("USCIT") Rule 56(a). Movants should present material facts as short and concise statements, in numbered paragraphs, and cite to "particular parts of materials in the record" as support. USCIT Rule 56(c)(1)(A); *see also* USCIT Rule 56.3(a) ("factual positions described in Rule 56(c)(1)(A) must be annexed to the motion in a separate, short and concise statement, in numbered paragraphs"). In responsive papers, the nonmovant "must include correspondingly numbered paragraphs responding to the numbered paragraphs in the statement of the movant." USCIT Rule 56.3(b). Parties filed cross motions for summary judgment and submitted separate statements of undisputed material facts with their respective motions. *See* Pl.'s Am. Statement of Material Facts Not in Dispute ("Pl.'s SOF"), ECF No. 34;

Def.'s Statement of Undisputed Material Facts ("Def.'s SOF"), ECF No. 30–1. Defendant also filed a response to Plaintiff's statement of facts. *See* Def.'s Resp. to Pl.'s Statement of Material Facts Not in Dispute ("Def.'s Resp. to Pl.'s SOF"), ECF No. 30–2. Plaintiff did not file a response to Defendant's statement of facts and has informed the court that it admits all of Defendant's factual assertions. *See* Notice from the Court (June 26, 2017), ECF No. 36. Parties also filed supplemental facts specific to the Santa Suit jacket. *See* Pl.'s Resp. to the Court's Order of July 28, 2017 ("Pl.'s Suppl. Br."), Ex. 1 (CBP Lab Report NY20171073), ECF No. 40–1; Def.'s Resp. to the Court Order Dated July 28, 2017 Req. Suppl. Briefing ("Def.'s Suppl. Br."), Ex. 2 (CBP Lab Report NY20171073), ECF No. 41–2. Upon review of the Parties' facts (and supporting exhibits),<sup>1</sup> the court finds the following undisputed and material facts.<sup>2</sup>

Rubies, a wholesale and retail costume company, is the importer of record of the subject Santa Suit. Pl.'s SOF ¶¶ 1, 9; Def.'s Resp. to Pl.'s SOF ¶¶ 1, 9; *see also* Pl.'s SOF ¶ 21; Def.'s Resp. to Pl.'s SOF ¶ 21 (subject merchandise is imported for domestic resale).<sup>3</sup> The Santa Suit consists of a red jacket, pants, and hat, a black belt with a metal buckle, white gloves, black shoe covers, a white wig, and a Santa sack that are packaged together for retail sale as the "Premier Plush 9 Piece Santa Suit." Def.'s SOF ¶ 1. Only the jacket, pants, gloves, and sack are at issue in this case.<sup>4</sup>

The jacket and pants consist of 73% acrylic and 27% knit polyester material,<sup>5</sup> and have sewn-in care labels stating that each item is "Dry Clean Only." *Id.* ¶¶ 2, 3. The jacket is made in one "standard size," consists of plush fabric, and is fully lined with satin polyester. *Id.* ¶ 4; Physical Sample. The jacket fabric "has a stitch count per one centimeter of [seven] in the horizontal [direction] and [seven] in the vertical direction." Pl.'s Suppl. Br, Ex. 1; Def.'s Suppl. Br., Ex. 2. The jacket has "a full front opening secured by a zipper," which is hidden

<sup>1</sup> The exhibits include a physical sample of the Santa Suit. *See* Def.'s XMSJ, Ex. 3 ("Physical Sample"), ECF No. 30–5 (certification of filing and service of physical exhibit or item).

<sup>2</sup> Citations are provided to the relevant paragraph number of the undisputed facts and response; internal citations generally have been omitted.

<sup>3</sup> Plaintiff also produces and sells children's Halloween costumes. The "typical" children's Halloween costumes Plaintiff markets "do not have finished edges or zippers, and close in the back with Velcro or a snap, or are made to 'slipover' the wearer." Def.'s SOF ¶¶ 19, 21. Those costumes are intended for one-time use and retail for 10–20 USD. *Id.* ¶¶ 22–23.

<sup>4</sup> The belt, beard, wig, hat, and shoe covers were liquidated duty free as entered under subheading 9505.90.60. Pl.'s SOF ¶ 4; Def.'s Resp. to Pl.'s SOF ¶ 4; *see also* Def.'s XMSJ at 2 n. 1.

<sup>5</sup> Defendant does not expressly state that the jacket and pants are made from "knitted" material. However, laboratory testing on the jacket performed in response to the court's inquiry demonstrates that the fabric (which matches the fabric used to construct the pants) "is of cut-pile weft knit construction." Pl.'s Suppl. Br, Ex. 1; Def.'s Suppl. Br., Ex. 2.

by a left-over-right faux fur cover held in place by two metal snaps, one at the collar of the jacket and one at the base of the jacket. Def.'s SOF ¶¶ 6–7. The double-layer collar consists of white faux fur fabric. *Id.* ¶ 5. “The jacket has long sleeves with turned edges, trimmed with white faux fur fabric cuffs,” *id.* ¶ 8, and “a straight cut hemmed bottom trimmed with the same white faux fur fabric,” *id.* ¶ 9. The jacket may be worn over other clothing or undergarments, *id.* ¶ 10, and has belt loops for the belt, Physical Sample. The pants have a satin polyester lining, pockets with hemmed edges, an elasticized waist, and tightly stitched interior seams. Def.'s SOF ¶¶ 11–12. The white knit gloves consist of 100% polyester knit fabric. *Id.* ¶ 13.<sup>6</sup> The sack is made from the same material as the jacket and pants, and has a drawstring cord. *Id.* ¶ 14. The Santa Suit packaging describes the sack as a “toy bag.” Physical Sample.

The Santa Suit has a wholesale price of USD 60–70 and a retail price of USD 100, which is considered “a mid-to-high price point.” *Id.* ¶ 24. It is “manufactured to be worn repeatedly during a single Christmas season” and “is intended to survive multiple wearings and cleanings” over several Christmas seasons. *Id.* ¶¶ 25–26. The Santa Suit covers the body of the individual wearing it and provides warmth and protection to the wearer. *Id.* ¶ 27.

## II. Procedural History

On June 20, 2012, Rubies sought a binding pre-importation ruling from Customs regarding the classification of the Santa Suit. *See* Def.'s XMSJ, Ex. 2 (“HQ H237067”), ECF No. 30–4. On June 20, 2013, Customs issued its ruling. *See generally* HQ H237067. Relying on the Court of Appeals for the Federal Circuit’s (“Federal Circuit”) opinion in *Rubie’s Costume Co. v. United States* (“*Rubie’s II*”),<sup>7</sup> 337 F.3d 1350 (Fed. Cir. 2003),<sup>8</sup> and Customs’ informed compliance publication regarding the classification of textile costumes, Customs distinguished the “well-made” Santa Suit from the “flimsy costumes” it classifies as

<sup>6</sup> Physical inspection of the gloves reveals strips of material that form the sides of two adjacent fingers. *See* Physical Sample.

<sup>7</sup> *Rubie’s II* reversed the USCIT’s decision in *Rubie’s Costume Co. v. United States* (“*Rubie’s I*”), 26 CIT 209, 196 F. Supp. 2d 1320 (2002). In *Rubie’s II*, the same plaintiff as in this case (but therein described as a domestic manufacturer of costumes) had filed a Domestic Interested Party Petition asserting that all imported textile costumes should be classified as wearing apparel in Chapters 61 or 62. 337 F.3d at 1352.

<sup>8</sup> In accordance with the summons filed in this case, there is no apostrophe in “Rubies.” *See* Summons at 1. In contrast, in the case giving rise to the *Rubie’s I* and *Rubie’s II* opinions, the summons contains an apostrophe in “Rubie’s” in the case caption. *See Rubie’s Costume Co. v. United States*, Court No. 99–00388, ECF No. 44 (electronic docket sheet).

festive articles. HQ H237067 at 6–9.<sup>9</sup> Accordingly, Customs determined that the jacket and pants are classifiable as “wearing apparel” under headings 6105 and 6103, respectively. *Id.* at 9. Customs further found that the gloves and sack are classifiable under headings 6116 and 4202, respectively. *Id.* at 9–10.

On August 20, 2013, Plaintiff entered 36 Santa Suits under Entry Number BPQ1066668–8 through the John F. Kennedy Airport in New York. Compl. ¶¶ 5–6; Answer ¶¶ 5–6, ECF No. 11; *see also* Summons at 1. On October 25, 2013, Customs liquidated the Santa Suits as follows:

Item	HTSUS Classification	Duty Rate
Jacket	6105.20.20	32.0% <i>ad valorem</i>
Pants	6103.43.15	28.2% <i>ad valorem</i>
Gloves	6115.95.60 <sup>10</sup>	10.0% <i>ad valorem</i>
Sack	4202.92.30	17.6% <i>ad valorem</i>
Beard, Wig, Hat, Belt, and Shoe covers	9505.90.60	Free of Duty

Pl.’s SOF ¶ 4; Def.’s Resp. to Pl.’s SOF ¶ 4.

Rubies timely protested Customs’ classification of the subject merchandise; on December 14, 2013, that protest was deemed denied. Pl.’s SOF ¶¶ 5–6; Def.’s Resp. to Pl.’s SOF ¶¶ 5–6; *see also* Summons at 1. Rubies challenges the denial of its protest. Parties have fully briefed the issues. The court now rules on the cross-motions for summary judgment.

### JURISDICTION AND STANDARD OF REVIEW

The court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(a). Jurisdiction is uncontroverted in this case. Pl.’s SOF ¶ 2; Def.’s Resp. to Pl.’s SOF ¶ 2.

The court may grant summary judgment when “there is no genuine issue as to any material fact,” and “the moving party is entitled to judgment as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); USCIT R. 56(a). The court’s review of a classi-

<sup>9</sup> Following the Federal Circuit’s opinion in *Rubie’s II*, in June 2008 Customs issued an informed compliance publication titled, “*What Every Member of the Trade Community Should Know About: Classification of Textile Costumes under the HTSUS.*” *See* Def.’s XMSJ, Ex. 5 (“Textile Costumes ICP” or “the ICP”), ECF No. 30–7.

<sup>10</sup> Defendant contends the gloves should have been classified under subheading 6116.93.94. Def.’s Resp. to Pl.’s SOF ¶ 4. *Cf.* HQ H237067 at 9 (finding the gloves classifiable under heading 6116). Heading 6115 covers “Panty hose, tights, stockings, socks and other hosiery, including graduated compression hosiery (for example, stockings for varicose veins) and footwear without applied soles, knitted or crocheted,” and, thus, does not describe the subject gloves.

fication decision involves two steps. First, it must determine the meaning of the relevant tariff provisions, which is a question of law. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citation omitted); *see also id.* at 1366 (characterizing the first step as “constru[ing] the relevant (competing) classification headings”). Second, it must determine “what the merchandise at issue is,” which is a question of fact. *Id.* at 1366. When no factual dispute exists regarding the merchandise, summary judgment is appropriate and resolution of the classification turns solely on the first step. *See id.* at 1365–66; *id.* at 1365 (“The ultimate question in a classification case is whether the merchandise is properly classified under one or another classification heading,” which is “a question of law[] . . . because what is at issue is the meaning of the terms set out in the statute . . . .”) (citations omitted); *see also Sigma-Tau Health-Science, Inc. v. United States*, 838 F.3d 1272, 1276 (Fed. Cir. 2016) (citations omitted).

The court reviews classification cases on “the basis of the record made before the court.” 28 U.S.C. § 2640(a). While the court accords deference to Customs’ classification rulings relative to their “power to persuade,” *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), it has “an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms,” *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)). It is “the court’s duty to find the *correct* result, by whatever procedure is best suited to the case at hand.” *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

## DISCUSSION

### I. Legal Framework

The General Rules of Interpretation (“GRIs”) provide the analytical framework for the court’s classification of goods. *See N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001). “The HTSUS is designed so that most classification questions can be answered by GRI 1.” *Telebrands Corp. v. United States*, 36 CIT \_\_\_, \_\_\_, 865 F. Supp. 2d 1277, 1280 (2012), *aff’d* 522 F. App’x 915 (Fed. Cir. 2013). GRI 1 states that, “for legal purposes, classification shall be determined according to the terms of the headings and any [relevant] section or chapter notes.” GRI 1, HTSUS. The court considers chapter and section notes of the HTSUS in resolving classification disputes because they are statutory law, not interpretive rules. *See Arko Foods Int’l, Inc. v. United States*, 654 F.3d 1361, 1364 (Fed. Cir. 2011)

(citations omitted); *see also Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 929 n. 3 (Fed. Cir. 2003) (chapter and section notes are binding on the court).

“Absent contrary legislative intent, HTSUS terms are to be ‘construed [according] to their common and popular meaning.’” *Baxter Healthcare Corp. of Puerto Rico v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999) (quoting *Marubeni Am. Corp. v. United States*, 35 F.3d 530, 533 (Fed. Cir. 1994)). Courts may rely upon their own understanding of terms or consult dictionaries, encyclopedias, scientific authorities, and other reliable information. *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988); *BASF Corp. v. United States*, 35 CIT \_\_\_, \_\_\_, 798 F. Supp. 2d 1353, 1357 (2011). For additional guidance on the scope and meaning of tariff headings and chapter and section notes, the court also may consider the Explanatory Notes to the Harmonized Commodity Description and Coding System, developed by the World Customs Organization. *See Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1367 n. 1 (Fed. Cir. 2013). Although Explanatory Notes do not bind the court’s analysis, they are “indicative of proper interpretation” of the tariff schedule. *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992) (quoting H.R. Rep. No. 100–576, at 549 (1988) (Conf. Rep.), reprinted in 1988 U.S.C.C.A.N. 1547, 1582).

## II. Competing Tariff Provisions

Plaintiff contends the Santa Suits are properly classified as festive articles under subheading 9505.10.50 or, alternatively, 9505.90.60. Pl.’s MSJ at 2–3. Chapter 95 covers “Toys, Games, and Sports Requisites; Parts and Accessories thereof.” The asserted subheadings (and relevant legal notes) are as follows:

- 9505:** Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof:
  - 9505.10 :** Articles for Christmas festivities and parts and accessories thereof:
    - 9505.10.50 :** Other ..... Free.
  - 9505.90 :** Other:
    - 9505.90.60 :** Other ..... Free.

Pursuant to the chapter notes, “fancy dress, of textiles, of chapter 61 or 62,” are excluded from classification under Chapter 95. Ch. 95, Note 1(e). Also excluded are “[s]ports bags or other containers of heading 4202, 4303 or 4304,” Ch. 95, Note 1(d), and “gloves, mittens and mitts (classified according to their constituent material),” Ch. 95, Note 1(u).

Defendant contends the jacket, pants, and gloves are properly classified as articles of apparel pursuant to subheadings of Chapter 61, and the sack is properly classified pursuant to a subheading of Chapter 42. Def.’s XMSJ at 1–2. Chapter 61 covers “Articles of Apparel and Clothing Accessories, Knitted or Crocheted.” Chapter 42 covers “Articles of Leather; Saddlery and Harness; Travel Goods, Handbags and Similar Containers; Articles of Animal Gut (other than Silkworm Gut).” The specific subheadings (and relevant legal notes) asserted by Defendant are as follows:

- 6103:** Men’s or boys’ . . . trousers, . . . breeches and shorts (other than swimwear), knitted or crocheted:
  - 6103.43 :** Of synthetic fibers:
    - 6103.43.15 :** Other ..... 28.2% *ad valorem*.
- 6105:** Men’s or boys’ shirts, knitted or crocheted:
  - 6105.20 :** Of man-made fibers:
    - 6105.20.20 :** Other ..... 32% *ad valorem*.
- 6116:** Gloves, mittens and mitts, knitted or crocheted:
  - 6116.93 :** Of synthetic fibers:
    - 6116.93.94 :** Other: With fourchettes ..... 18.6% *ad valorem*.
- 4202:** [T]raveling bags, . . . knapsacks and backpacks, handbags, shopping bags, . . . sports bags, . . . and similar containers, . . . of textile materials, . . . or wholly or mainly covered with such materials . . . :
  - 4202.92 :** Other: With outer surface of sheeting of plastic or of textile materials: Travel, sports and similar bags: With outer surface of textile materials:
    - 4202.92.30 :** Other ..... 17.6% *ad valorem*.

Section XI, which includes Chapter 61, excludes “[a]rticles of chapter 95.” Sect. XI, Note 1(t).<sup>11</sup> Pursuant to Note 9 to Chapter 61, “[g]arments of this chapter designed for left over right closure at the front shall be regarded as men’s or boys’ garments.” Ch. 61, Note 9. Chapter 42 also excludes “[a]rticles of chapter 95.” Ch. 42, Note 1(l). Pursuant to Additional U.S. Note 1 to Chapter 42, “[f]or the purposes of heading 4202, the expression ‘travel, sports and similar bags’ means goods . . . of a kind designed for carrying clothing and other personal effects during travel, including backpacks and shopping bags of this heading . . . .” Ch. 42, Add’l U.S. Note 1.

The legally binding notes attendant to Chapters 42, 61, and 95 demonstrate that articles may be described by headings of each

<sup>11</sup> Also relevant is Note 14 to Section XI, which provides that “[u]nless the context otherwise requires, textile garments of different headings are to be classified in their own headings even if put up in sets for retail sale. For the purposes of this note, the expression ‘textile garments’ means garments of headings 6101 to 6114 and headings 6201 to 6211.” Sect. XI, Note 14.

chapter, and “expressly resolve[] this conflict in favor of classification in chapter 95” unless the article falls into one of Chapter 95’s exclusionary notes. See *Michael Simon Design, Inc. v. United States*, 501 F.3d 1303, 1305, 1306–07 (Fed. Cir. 2007) (explaining that note 1(e) to Chapter 95 excludes “only certain clothing articles”; thus, festive sweaters were properly classified as festive articles and not wearing apparel). In other words, Chapter 95’s exclusionary notes provide exceptions to the general rule of classification thereunder for particular articles of Chapters 42, 61, and 62. See Sect. XI, Note 1(t) (Chapter 61 excludes “[a]rticles of chapter 95); Ch. 42, Note 1(l) (Chapter 42 excludes “[a]rticles of chapter 95). *But see* Ch. 95, Notes 1(d), (e), (u) (“[s]ports bags or other containers” of headings 4202, 4303, and 4304; “fancy dress, of textiles, of chapter 61 or 62”; and “gloves . . . (classified according to their constituent material)” are not covered by Chapter 95). Accordingly, for Plaintiff’s asserted classification to be correct, the components of the Santa Suit must be *prima facie* classifiable as festive articles and must not be covered by any of Chapter 95’s exclusions. As discussed below, the Santa Suit components are covered by the exclusions to Chapter 95; thus, the court need not and does not reach the issue of whether they constitute festive articles.<sup>12</sup>

### III. Classification of the Jacket and Pants

The GRIs govern the proper classification of merchandise and are applied in numerical order. *N. Am. Processing Co.*, 236 F.3d at 698. Pursuant to GRI 1, the court first “must determine the appropriate classification ‘according to the terms of the headings and any relative section or chapter notes’ . . . [with] terms of the HTSUS . . . construed

<sup>12</sup> In its moving brief, Plaintiff contends that

the classification of the Santa [Suit] at issue *should not* be determined on the basis of an analysis that focuses primarily and arbitrarily on the type of construction and/or the quality of the materials, and diminishes the intended use of the costume, and the festive holiday or occasion for which it was designed. . . . The determination as to whether a costume is classifiable as a festive article *is more properly based upon* whether it is closely associated with a festive occasion, whether it is displayed or used principally during that festive occasion, and whether its nature and appearance precludes its characterization as wearing apparel.

Pl.’s MSJ at 22 (emphasis added). According to Plaintiff, the Federal Circuit’s opinions in *Michael Simon Design*, 501 F.3d 1303, and *Park B. Smith*, 347 F.3d 922, provide the proper criteria for classifying the Santa Suit. Pl.’s MSJ at 22–23. Those cases provide the test for determining whether an article is a festive article under heading 9505. See *Michael Simon Design*, 501 F.3d at 1306 (citing *Park B. Smith*, 347 F.3d at 927). They do not interpret Chapter 95’s exclusionary notes, and, thus, address only part of the pertinent inquiry. As discussed *infra*, Chapter 95’s exclusionary notes bar classification pursuant to that chapter; therefore, the court does not address Plaintiff’s arguments regarding the proper application of the Federal Circuit’s festive article test to the subject merchandise. See Pl.’s MSJ at 19–21; Pl.’s Affirmation in Opp’n to Summ. J. Mot. (“Pl.’s Resp.”) at 8–9, ECF No. 32; see also Def.’s XMSJ at 20–21; Reply Mem. of Law in Supp. of the Government’s Cross-Mot. for Summ. J. (“Def.’s Reply”) at 12–13, ECF No. 35.

according to their common commercial meaning.” *Millenium Lumber Dist. Ltd. v. United States*, 558 F.3d 1326, 1328–29 (Fed. Cir. 2009) (citations omitted).

### A. Construction of Note 1(e) to Chapter 95

Pursuant to Note 1(e), “fancy dress, of textiles, of chapter 61 or 62,” is barred from classification under chapter 95. Ch. 95, Note 1(e). That phrase is not defined in the HTSUS. In *Rubie’s II*, however, the Federal Circuit spoke to the meaning of the phrase and addressed when costumes should be classified as festive articles rather than wearing apparel. 337 F.3d at 1356–60. The court’s analysis, therefore, begins with an explication of the Federal Circuit’s opinion and related judicial and Customs rulings to the extent that they illuminate the proper construction of Note 1(e).

The merchandise at issue in *Rubie’s II* consisted of five textile costumes “traditionally worn [at] . . . Halloween or to costume parties.” *Id.* at 1352. They included a child-sized “Witch of the Webs” dress, “Pirate Boy” top and pants, and “Witch” dress, an adult-sized “Abdul, Sheik of Arabia” sheath, and a “Cute and Cuddly Clown” jumpsuit. *Id.* at 1352 & n.2. On June 2, 1997, in response to a request filed by Rubie’s, Customs determined “that the ‘Cute and Cuddly Clown’ would be classified as ‘Babies’ garments and clothing accessories’ with a duty rate of 16.7 (now 16.1) percent *ad valorem*, while the other costumes . . . would be classified as ‘festive articles,’ requiring duty free entry.” *Id.* at 1352 (citing HQ 959545 (June 2, 1997)). Thereafter, Customs denied the Domestic Interested Party Petition filed by Rubie’s, which asserted that the five textile costumes should be classified as wearing apparel, and affirmed its prior determination. *Id.* at 1352–53 (citing HQ 961447 (July 22, 1998) (“HQ 961447”)); *see also supra* note 8.

HQ 961447 reiterated the classification analysis that Customs had relied on for the decade prior to its issuance, tracing its origin to a case in this court styled as *Traveler Trading Co. v. United States*, 13 CIT 380, 713 F. Supp. 409 (1989)). *See* HQ 961447 at 2; *Rubie’s II*, 337 F.3d at 1353, 1358. In that case, Traveler Trading Co. (“Traveler”) sued the United States regarding Customs’ classification of “flimsy” adult textile costumes as “wearing apparel” under the predecessor to the HTSUS, the TSUS, rather than as “toys” as it classifies children’s costumes. *Traveler*, 13 CIT at 380, 384, 713 F. Supp. at 410, 413. During settlement negotiations, Customs reconsidered its basis for distinguishing adult Halloween costumes from children’s Halloween costumes. *Id.* at 380–81, 713 F. Supp. at 410–11. Customs reasoned that “[t]hese are costumes which are flimsily constructed and possess

no significant utilitarian value. . . . These costumes are distinguishable from theatrical costumes or religious and folk-like regalia which are detailed, well-constructed, and intended for a specific use other than mere amusement.” *Id.* at 380–81, 713 F. Supp. at 410–11 (citation omitted). In ruling on Traveler’s application for attorneys’ fees and costs, the court deemed “unreasonable” Customs’ initial classification of “flimsy [adult] Halloween costumes as wearing apparel.” *Id.* at 383–84, 713 F. Supp. at 412–13 (distinguishing “expensive, well-constructed ballroom gowns, safari outfits, certain types of uniforms, and other adult garments,” which “may serve as both Halloween costumes and wearing apparel” from “witches, pirates, and [similar costumes], which are flimsily constructed”) (internal quotation marks and citation omitted).

A few years later, Traveler again sued the United States over Customs’ “classification of textile costumes as articles of ‘fancy dress’ excluded from classification in Chapter 95 [of the HTSUS].” HQ 961447 at 2 (citing *Traveler Trading Co. v. United States*, Court No. 91–02–00084). Customs subsequently determined that the court’s opinion in *Traveler* and recent judicial opinions concerning relevant provisions of the HTSUS meant that it should “reexamine[] its view regarding the scope of the term ‘fancy dress’ as it relates to costumes.” HQ 961447 at 2 (noting that “Customs [initially] took the view that fancy dress included ‘all’ textile costumes regardless of quality, durability, or the nature of the item”). Following the execution of a settlement agreement between Customs and Traveler, Customs issued HQ 957318 (Nov. 15, 1994) (“HQ 957318”), wherein it stated that costumes that “are of a flimsy nature and construction, lack durability, and are generally recognized as not normal articles of apparel” would be classified as festive articles. HQ 957318 at 1; *see also* HQ 961447 at 2.

In later rulings, Customs identified certain characteristics that it would assess to determine whether an article was “of a flimsy nature and construction, lacking in durability, and generally [not] recognized as a normal article of apparel.” HQ 961447 at 4 (citations omitted) (identifying “zipper closures,” “abundant styling features such as a fitted bodice with darts,” “petal shaped panels sewn into a waistline,” and “sheer/decorative panels sewn into the seams of costumes” as indicative of fancy dress). Applying those characteristics to the merchandise at issue in *Rubie’s II*, Customs determined that four of the five costumes were classifiable as festive articles. *Id.* (noting that those costumes “featured simple pull-on type garments with no zippers, inset panels, darts, or hoops,” and raw and unhemmed edges leaving the costumes “susceptible to runs and frays”). In contrast, the

“Cute and Cuddly Clown” costume “was particularly well-constructed and had a substantial amount of finishing work (i.e., the sewing used to construct the article),” and did not have any raw edges. *Id.* For those reasons, Customs classified the Cute and Cuddly Clown costume as wearing apparel. *Id.*

On appeal to the USCIT, the court disagreed with Customs’ interpretation of Note 1(e). *Rubie’s I*, 26 CIT at 210, 196 F. Supp. 2d at 1322. Citing several dictionary definitions, the court defined “fancy dress” as synonymous with “costume” generally, and, therefore, rejected the Government’s argument that “fancy dress” is limited to “elaborate or substantial costumes such as those worn by actors in the theater, and formal wear such as tuxedos and ball gowns worn to special events.” *Id.* at 216–17, 19 F. Supp. 2d at 1328 (citations omitted).<sup>13</sup> The *Rubie’s I* court proceeded to examine the scope of Chapters 61 and 62 to determine the type of fancy dress (costumes) excluded. *Id.* at 219, 196 F. Supp. 2d at 1330–31. Relying on the U.S. Supreme Court’s opinion in *Arnold*<sup>14</sup> and this court’s opinion in *H.I.M./Fathom*,<sup>15</sup> the *Rubie’s I* court found that “for merchandise to be properly classified within Chapters 61 or 62, strong emphasis must be placed on the material<sup>16</sup> of the merchandise and whether it could be worn at a particular time.” *Id.* at 219, 196 F. Supp. at 1331. Because the costumes at issue were “meant to adorn the human body at a particular time, either on Halloween or at any other event where the wearer desires to mimic another,” and as they were “within the norms of apparel as it is viewed in the United States,” the *Rubie’s I* court held that the costumes were classifiable pursuant to subheading 6114.30.30 of the HTSUS. *Id.* at 219–220, 196 F. Supp. at 1331.

The Federal Circuit reversed on the basis that HQ 961447 was sufficiently persuasive to be accorded *Skidmore* deference. *See Rubie’s II*, 337 F.3d at 1356; *Skidmore*, 323 U.S. at 140. The Federal Circuit agreed with the lower court that “fancy dress” means “a costume (as for a masquerade or party) departing from conventional style and

<sup>13</sup> The *Rubie’s I* court determined that *Traveler*, which addressed tariff provisions covering wearing apparel and toys, was inapposite because it related to the pre-HTSUS code and the interpretation of the term “fancy dress” was not at issue. *Rubie’s I*, 26 CIT at 217–18, 196 F. Supp. 2d at 1329. Accordingly, the *Rubie’s I* court rejected Customs’ reliance on “[t]he criteria of flimsiness” favored in *Traveler* as a way to distinguish costumes that are classifiable as toys from costumes that are classifiable as wearing apparel. *Id.*

<sup>14</sup> In *Arnold*, the Court defined “wearing apparel” as “embracing all articles which are ordinarily worn, [] dress in general.” *Arnold v. United States*, 147 U.S. 494, 496 (1893).

<sup>15</sup> In *H.I.M./Fathom*, the court concluded that wetsuits constituted clothing because they “are articles worn as an outer covering for the human body at a particular time.” *H.I.M./Fathom, Inc. v. United States*, 21 CIT 776, 781, 981 F. Supp. 610, 615 (1997).

<sup>16</sup> Chapter 61 covers *knitted or crocheted* “Articles of Apparel and Clothing Accessories,” whereas Chapter 62 covers “Articles of Apparel and Clothing Accessories” that are *not knitted or crocheted*.

[usually] representing a fictional or historical character.” *Rubie’s II*, 337 F.3d at 1356–57 (citing *Rubie’s I*, 26 CIT at 216, 196 F. Supp. at 1327); see also *id.* at 1357 (“That the term ‘fancy dress,’ . . . includes costumes is plain enough . . .”). According to the Federal Circuit, however, the lower court insufficiently analyzed the *type* of fancy dress excluded:

a reading of the exclusion in Note 1(e) to Chapter 95, HTSUS, that focuses solely on the term “fancy dress” and turns a blind eye to the immediately following words “of textiles, of chapter 61 or 62” construes the term fancy dress in disregard of the context of the exclusion as a whole. . . . The words in Note 1(e) “of textiles, of chapter 61 or 62” immediately following “fancy dress,” establish the context in which the term “fancy dress” is to be applied, and thereby *circumscribe, qualify, and limit the type of “fancy dress”* that was intended by the drafters to be excluded from Chapter 95, HTSUS, to textile costumes falling within the purview “of chapter 61 or 62.” Thus, . . . the exclusion to Chapter 95, HTSUS, encompasses textile costumes that are classifiable as “wearing apparel” under Chapter 61 or 62.

*Id.* (emphasis added). The Federal Circuit interpreted “wearing apparel” as “embracing all articles which are *ordinarily* worn—dress in general,” *id.* (quoting *Arnold*, 147 U.S. at 496), and “clothes or coverings for the human body worn for decency or comfort,” *id.* (quoting *Antonio Pompeo v. United States*, 40 Cust. Ct. 362, 364 (1958) (also noting that “common knowledge indicates that adornment is also an element of many articles of wearing apparel”)).

“Cognizant of [those] definitions,” the Federal Circuit found HQ 961447 “logical and well-reasoned.” *Id.* The court determined that HQ 961447 correctly classifies as festive articles “flimsy, non-durable costumes having utility and used as well for festive occasions, based on functional or structural deficiencies as compared with the standard counterpart articles (e.g., wearing apparel).” *Id.* The court cited Customs’ identification of “the texture and quality of the materials as ‘flimsy and non-durable’” suggesting that the textile costumes’ “principal intended use is for a one time festive occasion [which] [is] distinct from ‘wearing apparel’ which the courts have held to be used for decency, comfort, adornment or protection.” *Id.* (quoting HQ 961447) (second alteration added).<sup>17</sup> Additionally, although the sub-

<sup>17</sup> The court also approved of Customs’ consideration of “such factors as the extent of the styling features such as zippers, inset panels, darts or hoops, and whether the edges of the materials had been left raw or finished” to determine the “texture and quality of the [costumes] materials.” *Rubie’s II*, 337 F.3d at 1357 (citing HQ 961447).

ject merchandise “may simulate the structural features of wearing apparel, and have some incidents of ‘clothes or coverings for the human body worn for decency or comfort,” *id.* at 1358 (quoting *Antonio Pompeo*, 40 Cust. Ct. at 364), “they are not practical ‘articles which are ordinarily worn,” *id.* (quoting *Arnold*, 147 U.S. at 496); *see also id.* (“[T]he Halloween costumes . . . have enormous ‘make believe’ or festive value . . . and incidentally afford the element of covering for decency or comfort.”). The Federal Circuit, therefore, was persuaded by Customs’ view that “fancy dress” for purposes of Note 1(e) does not include “imported textile costumes [that] are of a flimsy nature and construction, lacking in durability and generally not recognized as normal articles of wearing apparel”; instead, such costumes are classifiable as “festive articles.” *Id.* at 1360.<sup>18</sup> Accordingly, this court is guided by the same criteria.<sup>19</sup> *Avenues in Leather, Inc. v. United States*, 423 F.3d 1326, 1331 (Fed. Cir. 2005) (the Federal Circuit’s interpretation of tariff terms are binding on this court).

<sup>18</sup> Strictly speaking, the Federal Circuit held that “[w]hen the imported textile costumes are of a flimsy nature and construction, lacking in durability and generally not recognized as normal articles of wearing apparel, it is neither illogical nor unreasonable to conclude that the subject merchandise is classifiable as festive articles.” *Id.* at 1360. However, the context of the opinion, the court’s discussion therein, and the fact that “festive articles” and “fancy dress, of textiles, of Chapters 61 or 62” are mutually exclusive categories, supports the conclusion that the court’s holding regarding the nature of the items that belong in the first category reflect its opinion regarding those that do not belong in the second category.

This understanding is supported by Customs’ ICP regarding the classification of textile costumes. *See supra* note 9; Textile Costumes ICP. Pursuant to *Rubie’s II*, the Textile Costumes ICP recommends that “all flimsy, non-durable textile costumes that are not recognized as ordinary articles of apparel are classified under 9505.90.6000, HTSUS[] (flimsy); all textile costumes that exceed the flimsy, non-durable standards or are recognized as ordinary articles of apparel are classified in Chapters 61 or 62, HTSUS[] (well-made).” *Id.* at 10.

Additionally, the ICP’s guidance recognizes that Customs’ flimsiness analysis is distinct from the inquiry whether an item is an ordinary article of apparel. This distinction makes sense given the origin of Customs’ flimsiness analysis as determining “the scope of the term ‘fancy dress’ as it relates to costumes.” Textile Costumes ICP at 9; *see also* HQ 961447 at 2. Customs does not employ its flimsiness analysis to determine what constitutes apparel for purposes of Chapter 61 or 62; rather, “CBP only applies this test to garments which are *prima facie* classifiable in Chapter 95.” HQ H145555 (Aug. 6, 2012) at 9 (declining to apply the test for what constitutes “fancy dress” for purposes of Note 1(e) as discussed in *Rubie’s II* to determine whether the subject item (the “Snuggie®”) should be classified as a garment or a blanket) (citing Textile Costumes ICP). *But cf. Allstar Marketing Group, LLC v. United States*, 41 CIT \_\_\_, \_\_\_, 211 F. Supp. 3d 1319, 1329–31 (2017) (*Rubie’s II*’s discussion of what constitutes “wearing apparel” informs the court’s interpretation of “garment” pursuant to subheading 6114.30.30).

<sup>19</sup> Plaintiff contends that *Rubie’s II* “established” that the type of fancy dress excluded by Note 1(e) consists of “expensive and well-constructed *ballroom gowns, safari outfits* such as those used for hunting, certain types of *uniforms*, and other adult *garments*. Pl.’s MSJ at 15. As Defendant contends, however, the Federal Circuit did not disturb Customs’ finding that the “Cute and Cuddly Clown” costume met the criteria for fancy dress. Def.’s XMSJ at 15. Thus, the Federal Circuit’s understanding of that term is not so limited. Moreover, the *Rubie’s II* court’s only reference to such items is contained in a passing reference to what “Customs determined.” 337 F.3d at 1356 (“Customs determined that ‘fancy dress . . . of

## B. Whether the Jacket and Pants are “Fancy Dress, of Textiles, of Chapter 61 or 62”

### a. Parties’ Contentions

Plaintiff contends that the Santa Suit “is not well-made, and does not meet wearing apparel production standards.” Pl.’s MSJ at 9.<sup>20</sup> To support its contention, Plaintiff primarily relies on a report prepared by its expert witness, Roni Start.<sup>21</sup> See Pl.’s MSJ, Ex. 3 (“Start Report”), ECF No. 28–3.<sup>22</sup> Ms. Start distinguishes “well-made” from “well-sewn,” and concludes that the Santa Suit “is not well-made.” Start Report at 10 (“Parts of Rubies’ Santa Claus costume are ‘well sewn’ but not ‘well made’ . . .”); see also Pl.’s Resp. at 2 (“A well-sewn costume . . . [is] not necessarily . . . an article of wearing apparel for tariff classification purposes.”); *id.* at 5 (“The distinction between a well-made garment and a well-sewn costume is critical [to] determining whether . . . the [Santa Suit] is ‘fancy dress.’”). As evidence that the Santa Suit is not well-made, Ms. Start points to its one-size fits all sizing, the quality of fabric and lining, and its flammability directive. Start Report at 10–11; see also Pl.’s MSJ at 10–11; Pl.’s Resp. at 3–4.

Plaintiff also contends that the Santa Suit “is not a well-constructed ball gown, a safari outfit, or like garment that one would expect to find at a stylish *soiree*. It is not a uniform or an adult garment. It is a costume . . .” Pl.’s MSJ at 15. According to Plaintiff, the Santa Suit “is worn, [but] it is not ordinarily worn; instead, it is placed on the body and intended to depict Santa Claus.” Pl.’s Resp. at 8; see also Pl.’s MSJ at 23 (“The [Santa Suit is] not ordinarily worn and [was]

chapter 61 or 62’ refers to elaborate or substantial costumes such as ‘expensive, well-constructed ballroom gowns, safari outfits, certain types of uniforms, and other adult garments.’”) (citing HQ 961447). Customs did not, however, define fancy dress in that manner. Rather, it was, in part, the *Traveler* court’s view that “expensive, well-constructed ballroom gowns, safari outfits, certain types of uniforms, and other adult garments may serve both as Halloween costumes and wearing apparel” that prompted Customs to “reexamine[] its view regarding the scope of the term ‘fancy dress’ as it relates to costumes.” HQ 961447 at 2; see also *Traveler*, 13 CIT at 383, 713 F. Supp. at 412.

<sup>20</sup> Plaintiff presents its arguments in connection with the Santa Suit generally, although, as previously noted, only the jacket, pants, gloves, and sack are at issue here. See *supra* note 4 and accompanying text.

<sup>21</sup> Defendant does not contest Ms. Start’s qualifications. See Def.’s XMSJ at 28–32. Ms. Start is the Department Chair of Apparel Industry Management and Menswear at the Fashion Institute of Design and Merchandising in Los Angeles, California, and the Owner/President of RJM Consulting. Start Report, Ex. A (“Start Resume”), ECF No. 28–3. Plaintiff also submitted Ms. Start’s deposition testimony. See Pl.’s MSJ, Ex. 5 (“Start Dep.”), ECF No. 28–5.

<sup>22</sup> Plaintiff also contends that Customs erred because “[v]irtually all of Rubies’ costumes are . . . sewn in [costume] factories,” and “[a] ‘costume’ factory . . . generally [does not] make[] . . . apparel[,] which has vastly different quality requirements.” Pl.’s MSJ at 11 (citing Pl.’s MSJ, Ex. 7 (“Beige Decl.”), ECF No. 28–7). Plaintiff’s argument is premised on facts that are both disputed by Defendant and that are immaterial to the classification issue in question; thus, the court will not consider it. See Pl.’s SOF ¶ 10; Def.’s Resp. to Pl.’s SOF ¶ 10.

created for Christmas festivities.”). Finally, Plaintiff contends that the Santa Suit’s design, use, function, and commercial market are relevant factors. Pl.’s Resp. at 9–11.

In response to Plaintiff’s expert, Defendant asserts that Ms. Start has too “narrowly define[d] articles of apparel by equating them with articles of ‘fashion.’” Def.’s XMSJ at 17 (noting that Ms. Start concluded that because the Santa Suit “was never part of any fashion development process” it is not “apparel” but is instead a “costume”) (quoting Start Report at 5–8). Pointing to the court’s *Allstar* opinion, Defendant notes that none of the dictionary definitions cited by the court in its examination of the term “apparel” refer to “fashion” or a “fashion development process.” *Id.* at 17–18 (citing *Allstar*, 211 F. Supp. 3d at 1329–31). Defendant cites several additional cases to support its contention “that ‘non-traditional’ articles of clothing constitute wearing apparel for classification purposes.” *Id.* at 18–19 (citing *Riddell, Inc. v. United States*, 754 F.3d 1375 (Fed. Cir. 2014) (football jerseys, pants, and girdles); *Lemans Corp. v. United States*, 660 F.3d 1311 (Fed. Cir. 2011) (motocross jerseys and pants, and motorcycle jackets); *H.I.M. / Fathom*, 981 F. Supp. 610 (wetsuits and related accessories)).

Additionally, Defendant asserts the court should accord little weight to Ms. Start’s expert opinion because it is unreliable and irrelevant. Def.’s XMSJ at 28–32; Def.’s Reply at 9–12. Specifically, Defendant contends that Ms. Start’s opinion is “not based on relevant industry standards” and instead represents her “subjective beliefs,” is contradictory at times, arbitrary, and lacking a logical foundation. Def.’s XMSJ at 30. Defendant further contends that Ms. Start’s opinion “touch[es] on issues of common knowledge” and contains “an entire section dedicated to fashion theory and development,” which is “irrelevant to whether the Santa Suit is an article of ‘wearing apparel’ or a ‘festive article’” for classification purposes. *Id.* at 31.

Finally, Defendant contends that the Santa Suit “is well[-]constructed, made to last[,] and [able to] withstand multiple wearings and cleanings,” and “provides decency, comfort, adornment and protection.” *Id.* at 13.

### **b. Consideration of Plaintiff’s Expert’s Opinion**

The court’s consideration of Plaintiff’s proffered expert testimony is guided by the factors stated in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and Rule 702 of the Federal Rules of Evidence. *See Libas, Ltd. v. United States*, 193 F.3d 1361, 1366 (Fed. Cir. 1999); *G.G. Marck & Associates, Inc. v. United States*, Slip Op. 15–62, 2015 WL 3757040, at \*9 (2015) (relying on Rule 702 to determine the

weight to afford expert testimony to resolve summary judgment motions in a classification case). Pursuant to Rule 702, expert testimony is admissible when

(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. The “trial judge, acting as ‘gatekeeper,’ must ‘ensure that any and all [expert] testimony or evidence admitted is not only relevant, but reliable.’” *Libas*, 193 F.3d at 1366 (quoting *Daubert*, 509 U.S. at 589); see also *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (extending the court’s “gatekeeping” role to all expert testimony).<sup>23</sup> In short, “for an expert witness’s testimony to be admissible, it must be reliable, relevant, and helpful to the trier of fact.” *G.G. Marck*, 2015 WL 3757040, at \*9.

Ms. Start’s opinion fails to meet any of the Rule 702 requirements. Preliminarily, the correct classification of the Santa Suit is a legal issue, not a factual issue, and one that is resolved on the basis of the undisputed material facts set forth above. *Bausch & Lomb*, 148 F.3d at 1365; *supra* Background Sect. I. Thus, there is no “trier of fact” to aid.

Moreover, Ms. Start’s opinion is unhelpful--and, thus, irrelevant--because she approaches the inquiry from the perspective of “fashion theory” and “fashion development,” Start Report at 5–8, but whether an article constitutes apparel or fancy dress for classification purposes does not depend on whether it is fashionable, see, e.g., *Rubie’s II*, 337 F.3d at 1357. Ms. Start’s analysis of the Santa Suit applies standards relevant to “menswear,” Start Report at 10–11, but those are not the standards articulated by the Federal Circuit, see *Rubie’s II*, 337 F.3d at 1357, 1360.<sup>24</sup>

Ms. Start’s opinion on this issue is also unreliable. “[R]eliability is the touchstone for expert testimony,” *Libas*, 193 F.3d at 1366, and it requires more than subjective belief or unsupported speculation,

<sup>23</sup> The *Libas* court noted that “*Daubert* and *Kumho* were decided in the context of determining standards for the admissibility of expert testimony under the Federal Rules of Evidence,” but opined that “the proposition for which they stand, that expert testimony must be reliable, goes to the weight that evidence is to be accorded as well as to its admissibility.” 193 F.3d at 1366.

<sup>24</sup> Plaintiff, therefore, is incorrect in its assertion that the Start Report “is based upon [Ms. Start’s] comprehension and understanding of *relevant* industrial standards in the wearing apparel industry, and not on any subjective belief.” Pl.’s Resp. at 4 (emphasis added).

*Daubert*, 509 U.S. at 590. Ms. Start’s assertions are highly general and often unsupported. For example, she offers no basis for her distinction between “well-made” and “well-sewn” for purposes of identifying wearing apparel. See Start Report at 10. Ms. Start then contradicts her report during her deposition when she acknowledges that apparel need not be “well-made,” see Start Dep. 122:11–14, and that the “[Santa Suit] jacket in particular was pretty much well-made but [has] an acetate lining,” *id.* at 149:20–150:3. In fact, Ms. Start admitted that she formed her opinion that the Santa Suit was not apparel before she even examined it. *Id.* at 124:13–21; see also *id.* at 182:22–183:4 (opining that a Santa Claus costume “would still be a costume” even if “it was the most well-made”).

Ms. Start’s preconceived opinion regarding the Santa Suit highlights the problem with her expert testimony. She begins her report by stating that she has “been asked by counsel for investigate [sic] and opine on the extent to which the Santa Claus costume which [Plaintiff] created is a costume or well-made apparel, and therefore which customs classification should be applied.” Start Report at 4. She concludes her report by noting that “[i]n casual discussions with friends and colleagues about this question of whether a Santa Claus costume is a costume or apparel, it is usually followed by laughter. They cannot believe someone would consider a Santa costume as apparel.” Start Report at 12. Ms. Start misunderstands the precise nature of the inquiry--or was misinformed. The issue is not whether the Santa Suit is a costume or apparel as those terms are colloquially understood; rather, the issue is whether the Santa Suit is “fancy dress, of textiles, of Chapters 61 or 62,” or a “festive article,” as those terms are defined in the HTSUS and relevant case law, which is a legal question. Though Ms. Start may be a menswear/apparel fashion expert, her expertise is not helpful to the court’s analysis of the legal question before it, and, therefore, the court will not consider the Start Report in making its determination.

**c. The Jacket and Pants are “Fancy Dress, of Textiles, of Chapters 61 or 62”**

The court is guided by the criteria stated in *Rubie’s II*; that is, whether the jacket and pants “are of a flimsy nature and construction, lacking in durability[,] and generally not recognized as normal articles of wearing apparel.” 337 F.3d at 1360.<sup>25</sup> Considerations

<sup>25</sup> Customs’ Textile Costumes ICP, upon which CBP relied in the underlying ruling, further sets forth four criteria for assessing flimsiness and durability: styling, construction, finishing touches, and embellishments. See Textile Costumes ICP at 11; HQ H237067 at 8. The

relevant to flimsiness and durability include the presence of “zippers, inset panels, [and] darts or hoops, and whether the edges of the materials [are] raw or finished.” *Id.* at 1357 (citing HQ 961447 generally as well as HQ 957948 and HQ 957952, which “set[] forth certain styling and sewing features of costumes which exemplify the characteristics of ‘textile articles of fancy dress’ under Chapter 61 or 62”).

In contrast to the merchandise at issue in *Rubie’s II*, which “featured simple pull-on type garments with no zippers,” and raw and unhemmed edges, HQ 961447 at 4; *see also Rubie’s II*, 337 F.3d at 1352 n.2, the jacket, which is lined, has “a full front opening secured by a zipper,” which is hidden by a left-over-right faux fur cover held in place by two metal snaps, one at the collar of the jacket and one at the base of the jacket, Def.’s SOF ¶¶ 4, 6–7. “The jacket has long sleeves with turned edges, trimmed with white faux fur fabric cuffs,” *id.* ¶ 8, and “a straight cut hemmed bottom trimmed with the same white faux fur fabric,” *id.* ¶ 9. The physical characteristics (and physical inspection) of the jacket indicate a substantial, durable item that will survive multiple wearings and cleanings over several Christmas seasons, *see id.* ¶¶ 3, 25–26.

The pants present a closer question. They are a “simple pull-on type garment” with an elastic waist, but common knowledge dictates that the same may be said of many pairs of pants that are unquestionably “wearing apparel.” The bottom of the pants are not hemmed, though the image depicted on the packaging demonstrates that the pants are to be tucked into the shoe covers; thus, the unhemmed bottom will not be visible. *See* Physical Sample. The pants are lined, with tightly stitched interior seams, and feature pockets with hemmed edges. Def.’s SOF ¶¶ 11–12. Taken together, the pants, like the jacket, indicate a durable item that will survive multiple wearings and cleanings. *Id.* ¶¶ 3, 25–26.

To be sure, the jacket and pants may be intended for use only during the Christmas season. *See* Pl.’s MSJ at 22 (“It cannot be argued that people wear Santa Claus costumes as everyday apparel . . . .”); Def.’s SOF ¶ 25. But regularity of wear is not dispositive; items that are worn for specific, perhaps infrequent, purposes may constitute wearing apparel. *See Riddell*, 754 F.3d at 1375 (football jersey’s

Textile Costumes ICP also recommends that “it is important to consider the *garment as a whole*,” and “whether . . . it is reasonable to conclude that the article is a normal article of apparel.” Textile Costumes ICP at 11. The only additional criteria provided for determining whether an article is a normal article of apparel are that “[n]ormal articles of apparel are usually designed for multiple wear and cleaning.” *Id.* Here, Customs based its classification determination on its finding that the jacket and pants are “well-made” pursuant to the ICP’s four-factor flimsiness criteria and “are suitable for repeated wear and can only be dry cleaned.” *See* HQ H237067 at 9.

pants, and girdles are classifiable as wearing apparel); *Lemans*, 660 F.3d at 1311 (motocross jerseys and pants, and motorcycle jackets are wearing apparel); *H.I.M./Fathom*, 981 F. Supp. at 610 (wetsuits and related accessories are wearing apparel).

There is language in *Rubie's II* that suggests the festive value of the costumes at issue disfavored classification as wearing apparel:

[while the imports may simulate the structural features of wearing apparel, and have some incidents of “clothes or coverings for the human body worn for decency or comfort,” *Antonio [Pompeo]*, 40 Cust. Ct. at 364, they are not *practical* “articles which are ordinarily worn,” *Arnold*, 147 U.S. at 496. . . . Rather, the Halloween costumes for consumers have enormous “make believe” or festive value during appropriate occasions such as Halloween and incidentally afford the element of covering for decency or comfort. To the extent that such elements have any characteristics similar to “wearing apparel” to consumers of Halloween costumes, such features are clearly secondary to the costumes’ festive value.

*Rubie's II*, 337 F.3d at 1358 (emphasis added); see Pl.’s MSJ at 15–16 (contending the Santa Suit’s “value as wearing apparel to the consumer is clearly secondary to its ‘make-believe’ or festive value”). The context in which the statement in *Rubie's II* was made, however, involved costumes so flimsy their “principal intended use [was] for a one time festive occasion,” as “distinct from ‘wearing apparel’ which courts have held to be used for decency, comfort, adornment or protection.” *Rubie's II*, 337 F.3d at 1356 (quoting HQ 961447 at 3).<sup>26</sup> Thus, they were not “practical” articles of apparel, and their festive value exceeded their value as wearing apparel. See *id.* at 1358. In contrast, the Santa Suit jacket and pants are manufactured for “repeated[]” wear over several Christmas seasons, i.e., years, are suitable for dry cleaning, and provide warmth and protection to the wearer. Def.’s SOF ¶¶ 3, 25–27. They are articles—jackets and pants—that are “ordinarily worn.” See *Arnold*, 147 U.S. at 496 (the term “wearing apparel” covers “all articles of dress”).

Further, the court does not interpret *Rubie's II* as supplying a bright-line rule whereby any item of festive value is excluded from classification as wearing apparel. Note 1(e) excludes from Chapter 95

<sup>26</sup> The costumes at issue in *Rubie's II* appear to resemble the children’s Halloween costumes Plaintiff produces and sells, which “do not have finished edges or zippers, and close in the back with Velcro or a snap, or are made to ‘slipover’ the wearer,” are intended for one-time use, and retail for 10–20 USD. Def.’s SOF ¶¶ 19, 21–23. In contrast, the Santa Suit retails for 100 USD and is intended to be worn numerous times. *Id.* ¶¶ 25–26.

articles that are *prima facie* festive articles but also “fancy dress, of textiles, of Chapter 61 or 62.” In other words, Note 1(e) excludes a subset of festive articles that also meet certain requirements. Undue emphasis on the festive or make-believe nature of the article would nullify Note 1(e); such an interpretive approach has long been disfavored. *Cf., e.g., D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) (it is a “cardinal rule” that “if possible, effect shall be given to every clause and part of a statute”). Accordingly, the Santa Suit’s association with the Christmas season does not foreclose its classification as wearing apparel.<sup>27</sup>

In sum, the jacket and pants constitute fancy dress of a durable, non-flimsy nature, and are normal articles of apparel classifiable pursuant to Chapter 61. They are, therefore, excluded from Chapter 95.<sup>28</sup>

Proceeding to the precise classification, “[g]arments of [Chapter 61] designed for left over right closure at the front shall be regarded as men’s or boys’ garments.” Ch. 61, Note 9. The jacket has a left-over-right faux fur cover held in place by two metal snaps, one at the collar of the jacket and one at the base of the jacket, Def.’s SOF ¶¶ 67; thus, it is classifiable as a men’s or boy’s garment.

Heading 6105, pursuant to which Customs classified the jacket, covers “[m]en’s or boy’s shirts, knitted or crocheted.” *See* HQ H237067

<sup>27</sup> Plaintiff seeks to rely on the court’s recent *Allstar* opinion. Pl.’s MSJ at 23. According to Plaintiff, the court, in *Allstar*, noted that *Rubie’s II* held that costumes are not ordinarily worn, and although costumes impart decency or comfort for the wearer, such benefits were incidental to their primary purpose, that is, . . . Halloween fun.” *Id.* (citing *Allstar*, 211 F. Supp. 3d at 1331). The *Allstar* court discusses the *Rubie’s II* court’s findings vis-à-vis the costumes at issue in that case, not costumes generally. The court did not—and does not—construe *Rubie’s II* as foreclosing all costumes from classification as wearing apparel. If all items reflecting festive or make-believe value were eliminated from the scope of the phrase “of textiles, of Chapter 61 or 62,” there would be nothing for Note 1(e) to exclude.

<sup>28</sup> This finding is supported by Explanatory Note (“EN”) 95.05, which suggests that heading 9505 covers “[f]estive, carnival or other entertainment articles, *which in view of their intended use are generally made of non-durable material*,” for example, “[a]rticles of fancy dress, [such as] masks, false ears and noses, wigs, false beards and moustaches,” but not “fancy dress of textile materials, of Chapter 61 or 62.” EN 95.05 (boldtype omitted) (other emphasis added). The Federal Circuit disapproved of the *Rubie’s I* court’s reliance on EN 95.05 as support for the lower court’s conclusion that the costumes at issue did not belong in Chapter 95 because the type of fancy dress EN 95.05 contemplates as covered thereunder includes accessories to costumes rather than the actual textile costumes. *Rubie’s II*, 337 F.3d at 1359 (“Although the examples in the Explanatory Notes are probative and sometimes illuminating, we shall not employ their limiting characteristics, to the extent there are any, to narrow the language of the classification heading itself. Nothing from the pertinent subheading 9505.90.6000— ‘Festive, carnival or other entertainment articles: Other: Other’—limits 9505.90.6000 only to accessories.”). It is also true, however, that the ENs are generally “indicative of proper interpretation” of the tariff schedule. *Lynteq*, 976 F.2d at 699. Although not all festive articles are made of non-durable material, *see Michael Simon Design*, 501 F.3d at 1305, 1306–07 (classifying festive sweaters as festive articles), EN 95.05 supports the court’s consideration of the Santa Suit jacket’s durability, and its finding that the jacket’s durability distinguishes it from the costumes in *Rubie’s II* and disfavors classification in Chapter 95.

at 11. However, Note 4 to Chapter 61 states that “[h]eading[] 6105 . . . [does] not cover . . . garments having an average of less than 10 stitches per linear centimeter in each direction counted on an area measuring at least 10 centimeters by 10 centimeters.” Ch. 61, Note 4. Laboratory testing conducted in the course of this litigation demonstrates that the jacket does not meet Note 4’s requirement. Pl.’s Suppl. Br, Ex. 1; Def.’s Suppl. Br., Ex. 2. Thus, it is not classifiable as a shirt.

Parties dispute the proper alternative classification. Plaintiff contends the jacket may be classifiable as a coat pursuant to HTSUS 6101.30.20, a suit-type jacket pursuant to HTSUS 6103.33.20, or in the “basket” provision pursuant to HTSUS 6114.30.30, which covers articles not specifically described elsewhere in Chapter 61. Pl.’s Suppl. Br. at 3–4.<sup>29</sup> Defendant disagrees with most of Plaintiff’s proposed alternatives. *See generally* Def.’s Resp. to Pl.’s Suppl. Br., ECF No. 42. Defendant instead contends that the jacket is classifiable as a “[s]weater[], pullover[], sweatshirt[], waistcoat[] (vest[]) [or ] similar article[]” pursuant to HTSUS 6110.30.30. Def.’s Suppl. Br. at 3–5 (emphasis added). Defendant alternatively contends the jacket is classifiable pursuant to the basket provision, HTSUS 6114.30.10. *Id.* at 5–6. Plaintiff disagrees with Defendant’s assertion that the jacket is classifiable pursuant to HTSUS 6110.30.30, *see* Pl.’s Reply to Government’s Resp. as to Alternative Classifications (“Pl.’s Suppl. Reply”) at 2, ECF No. 43, and contends that the whole inquiry underscores its assertion that the Santa Suit “is a ‘festive’ article celebrating the Christmas holiday, and not an ‘apparel’ article normally worn as clothing,” *id.* at 3.

Heading 6101 covers “Men’s or boys’ overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles, knitted or crocheted, other than those of heading 6103.” The relevant Explanatory Note indicates that such items are “characterised [sic] by the fact that they are generally worn over all other clothing for protection against the weather.” EN 61.01. The subject jacket may be worn over other clothing or just undergarments, Def.’s SOF ¶ 10, and although it affords some protection, *id.* ¶ 27, it is not worn *for* protection as are the heading’s exemplars.

Heading 6103 covers “suit-type jackets [and] blazers.”<sup>30</sup> The relevant Explanatory Note indicates that “[t]he ‘jackets or blazers’ have

<sup>29</sup> Plaintiff affirms its position that the Santa Suit should be classified pursuant to Chapter 95, and responds to the court’s order only “by assuming *arguendo* that it is not.” Pl.’s Suppl. Br. at 1.

<sup>30</sup> Heading 6103 also covers “[m]en’s or boy’s suits [and] ensembles.” Note 3(a) provides that “[t]he term ‘suit’ means,” *inter alia*, “two or three pieces made up, in respect of their outer surface, in identical fabric.” Ch. 61, Note 3(a). Likewise, the term “ensemble” refers to “a set

the same characteristics as the suit coats and suit jackets described in Chapter Note 3(a) and in Part (A) [to EN 61.03].” EN 61.03. Part (A) to EN 61.03 describes jackets with “a full front opening without a closure or with a closure other than a slide fastener (zipper).” The Santa Suit jacket has a zipper closure, Def.’s SOF ¶ 6; thus, it is not covered by heading 6103.

Heading 6110 covers “[s]weaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted.” Defendant offers the following dictionary definitions of the named articles: (1) sweater: “[c]lothing for the upper part of the body worn either as an outer-garment or under a coat or jacket,” Charlotte Mankey Calasibetta, *Essential Terms of Fashion: A Collection of Definitions* (“*Essential Terms of Fashion*”) 210 (Fairchild Publications) (1986));<sup>31</sup> (2) pull-over: “[a]ny light knit shirt without neck placket or fastening,” alternatively, “[s]weater with round, crew, or V-neck pulled on over the head as contrasted with a cardigan or coat sweater, which opens down the front, Charlotte Mankey Calasibetta & Phyllis Tortora, *The Fairchild Dictionary of Fashion* (“*Dictionary of Fashion*”) 408, 441 (Fairchild Publications, Inc.) (2003);<sup>32</sup> (3) sweatshirt: “[l]ong-sleeved, fleece-backed, cotton-knit pullover or zipped-front knit shirt made with rib-knit crew neck . . . , rib-knit cuffs and waistband,” *id.* at 408; and (4) vest: “[a]n item of wearing apparel extending to the waist or longer . . . , usually worn over a blouse or shirt and sometimes under a suit jacket,” *Essential Terms of Fashion* at 225. According to Defendant, the named articles

are united by the following essential characteristics: each article covers the upper body; provides some warmth but does not protect against the elements (wind, rain or extreme cold); and, may be worn over a lighter garment (shirt or undershirt) but is not designed to be worn over all other clothing.

Def.’s Suppl. Br. at 4. Defendant contends that because the jacket shares these characteristics, it is a “similar article” pursuant to the rule of *ejusdem generis*. *Id.* at 3–4.

of garments . . . composed of several pieces made up in identical fabric.” Ch. 61, Note 3(b). The subject jacket and pants are not made of identical fabric: the jacket features faux fur fabric, whereas the pants do not. Def.’s SOF ¶¶ 8, 11–12. And, the Santa Suit as a whole is composed of several additional pieces made up of different materials. *Id.* ¶ 1. Thus, neither the jacket and pants, nor the Santa Suit as a whole, are classifiable as a “suit” or “ensemble.”

<sup>31</sup> *Essential Terms of Fashion* is Exhibit 3 to Defendant’s supplemental brief. See Def.’s Suppl. Br., Ex. 3, ECF No. 41–3.

<sup>32</sup> *Dictionary of Fashion* is Exhibit 1 to Defendant’s supplemental brief. See Def.’s Suppl. Br., Ex. 1, ECF No. 41–1.

The rule of *ejusdem generis*<sup>33</sup> provides that when “general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated.” *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1165 n.8 (Fed. Cir. 2017) (citation omitted). In “classification cases, *ejusdem generis* requires that the imported merchandise possess the *essential characteristics or purposes* that unite the articles enumerated *eo nomine* [by name] in order to be classified under the general terms.” *Totes II*, 69 F.3d at 498 (citation omitted) (emphasis added); *see also Victoria’s Secret Direct, LLC v. United States*, 769 F.3d 1102, 1107 (Fed. Cir. 2014) (“Applying the phrase ‘and similar articles’ to the merchandise at issue, then, requires determining whether the merchandise, considering all of its features, shares the unifying characteristics of the particular heading.”)<sup>34</sup> Identifying the essential (or unifying) characteristics is “a question of law” and “a matter of common sense.” *Victoria’s Secret*, 769 F.3d at 1107. “[T]he unifying characteristics may consist of both affirmative features and limitations.” *Id.*

As Defendant suggests, the named articles share the essential characteristics of covering the upper body, providing some degree of warmth, and being suitable for wear over a light garment. The Santa Suit jacket shares these characteristics. *See* Physical Sample (demonstrating the obvious point that the jacket is worn on the upper body); Def.’s SOF ¶¶ 10, 27 (it is undisputed that the jacket may be worn over an undergarment or clothing, and provides warmth to the wearer); *Victoria’s Secret*, 769 F.3d at 1107 (instructing courts to first consider the unifying characteristics before determining whether the subject merchandise shares those characteristics).<sup>35</sup>

The relevant Explanatory Note supports the court’s finding with respect to the exemplars’ essential characteristics and the jacket’s

<sup>33</sup> *Ejusdem generis* “means ‘of the same kind.’” *Totes, Inc. v. United States* (“*Totes II*”), 69 F.3d 495, 498 (Fed. Cir. 1995), *aff’g Totes, Inc. v. United States* (“*Totes I*”), 18 CIT 919, 865 F. Supp. 867 (1994).

<sup>34</sup> The rule of *ejusdem generis* “does not apply . . . when the items do not fit into any kind of definable category.” *Victoria’s Secret*, 769 F.3d at 1107 n.1 (internal quotation marks and citation omitted).

<sup>35</sup> The Federal Circuit notes that an article may not “share[] the heading’s unifying characteristics” when it has “a more specific primary purpose that is inconsistent with the listed exemplars.” *Victoria’s Secret*, 769 F.3d at 1107 (citation omitted). In other words, the subject merchandise may share the essential characteristics but have some other features that “defeat ‘similarity’— necessarily meaning that the unifying characteristics of the heading’s list include a limitation that excludes such other features.” *Id.* at 1107–08. The Santa Suit jacket’s festive value is not inconsistent with the named articles. Moreover, the enumerated items are not strictly limited to items lacking festive or make-believe value. Indeed, Note 1(e) instructs that wearing apparel may have festive or make-believe value, or else there would be no “fancy dress, of textiles, of chapter 61 or 62” to exclude. *See supra* note 27 and accompanying text.

sharing of those characteristics. It provides that “heading [6110] covers a category of knitted or crocheted articles, without distinction between male or female wear, *designed to cover the upper parts of the body* (jerseys, pullovers, cardigans, waistcoats *and similar articles*).” EN 61.10 (emphasis added). Defendant defines “cardigan” as “a sweater or jacket that opens the full length of the center front and usu. has a round or V-shaped collarless neck,” Def.’s Suppl. Br. at 5 (quoting Webster’s Third New Int’l Dictionary of the English Language Unabridged (1993) (“Webster’s”) at 337), or as “[a]n adjective used to describe collarless garments with round or V-necklines that button down the front,” *id.* (quoting *Dictionary of Fashion* at 61). Defendant contends that the jacket is like a cardigan “because, although it has a collar which cardigans do not, it is a knitted article, designed to cover the upper body, and it has a full length opening in the center front.” *Id.* (citing Physical Sample). Plaintiff characterizes Defendant’s argument as “convoluted” and “ludicrous.” Pl.’s Suppl. Reply at 2 (“In support of its position, [D]efendant actually makes the convoluted argument that since a cardigan is a collarless sweater or jacket, a jacket can be classified as a sweater. This argument is ludicrous . . . .”). But Plaintiff is incorrect.

The Explanatory Note provides examples of articles that share the essential characteristics of the articles named in the heading; that is, articles that cover the upper body, provide warmth, and may be worn over a light garment. Moreover, the Explanatory Note’s exemplars do not represent the limits of what may be deemed “similar” to the heading’s exemplars. *See* EN 61.10 (heading 6110 includes “jerseys, pullovers, cardigans, waistcoats *and similar articles*”) (emphasis added); *Rubie’s II*, 337 F.3d at 1359 (courts should not employ any “limiting characteristics [in the Explanatory Notes’ exemplars], to the extent there are any, to narrow the language of the classification heading itself”). The jacket’s addition of a collar, which a cardigan *may* have, *see* Def.’s Suppl. Br. at 5 (quoting Webster’s at 337), is not dispositive because the absence of a collar is not a defining feature of the exemplars in the heading or Explanatory Note. Moreover, common knowledge dictates that waistcoats (or vests) may have a collar and, thus, are not, by definition, collarless. *See Brookside Veneers*, 847 F.2d at 789 (courts may rely upon their own understanding of HTSUS terms). The exemplars in the heading and the Explanatory Note are all distinct in various respects, but they also share the essential characteristics of covering the upper body, providing warmth, and being suitable for wear over a light garment, as does the Santa Suit jacket. Accordingly, it is classifiable pursuant to heading 6110, specifically, HTSUS 6110.30.30, which covers “[s]weaters, pullovers,

sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted. . . . [o]f man-made fibers . . . [o]ther.”<sup>36</sup>

As to the pants, heading 6103 covers “men’s or boy’s . . . trousers . . . .” “Trousers” may be defined as “an outer garment extending from the waist to the ankle . . . , covering each leg separately, made close-fitting or loose-fitting in accord with the fashion of different periods.” Webster’s at 2453. The pants are classifiable pursuant thereto; specifically, HTSUS 6103.43.15 (covering “men’s or boy’s . . . trousers . . . [o]f synthetic fibers . . . [o]ther”).<sup>37</sup>

#### IV. Classification of the Gloves

Heading 6116 covers knitted gloves, mittens and mitts. The gloves, which consist of polyester knit fabric, Def.’s SOF ¶ 13, are *prima facie* classifiable pursuant to heading 6116. Accordingly, they are excluded from classification under Chapter 95. See Ch. 95, Note 1(u). The gloves are properly classified pursuant to HTSUS 6116.93.94<sup>38</sup> (covering “[g]loves . . . [o]f synthetic fibers . . . . [o]ther . . . [w]ith fourchettes”).<sup>39</sup>

<sup>36</sup> HTSUS 6110.30.30 provides a rate of duty of 32% *ad valorem*, which is the same as HTSUS 6105.20.20 pursuant to which Customs classified the jacket. See Pl.’s SOF ¶ 4; Def.’s Resp. to Pl.’s SOF ¶ 4.

<sup>37</sup> Plaintiff contends, without citation to supporting authority, that the Santa Suit’s “design, use, function[,] and commercial market” are “highly relevant” to its classification. Pl.’s Resp. at 9–10. The Federal Circuit has held that use may be an appropriate consideration when examining classification under competing *eo nomine* provisions. *GRK Can., Ltd. v. United States*, 761 F.3d 1354, 1355 (Fed. Cir. 2014) (trial court erred in refusing to consider use to determine whether subject merchandise should be classified as self-tapping screws or wood screws). Accordingly, use may be considered when determining the commercial meaning of a term in an *eo nomine* provision when the merchandise named in that provision “inherently suggests a type of use,” or when determining whether a particular article “fits within the classification’s scope.” *Id.* at 1358–59 (citations omitted). As to the latter inquiry, the court may consider “the subject article’s physical characteristics, as well as what features the article has for typical users, how it was designed and for what objectives, and how it is marketed.” *Id.* at 1358 (citations omitted). Here, the court is tasked with determining whether the Santa Suit jacket and pants are described by Note 1(e) to Chapter 95, thereby foreclosing them from classification as festive articles pursuant to that chapter. *Cf. Sigma-Tau HealthScience, Inc.*, 838 F.3d at 1277, 1278 (declining to consider use when interpreting an *eo nomine* provision, and noting that a chapter note determined under which of two competing provisions the subject merchandise must be classified); *Allstar*, 211 F. Supp. 3d at 1332–37 (considering such factors as design, use, function, and marketing to determine whether the Snuggie® is classifiable as a garment or blanket). That determination is guided by the Federal Circuit’s interpretation of the relevant tariff terms. See *Avenues in Leather*, 423 F.3d at 1331 (the court is bound by the Federal Circuit’s interpretation of tariff terms). Accordingly, Plaintiff’s argument is unavailing.

<sup>38</sup> HTSUS 6116.93.94 provides a rate of duty of 18.6% *ad valorem*, which is more than the 10% duty rate Customs assessed pursuant to HTSUS 6115.95.60. See Pl.’s SOF ¶ 4; Def.’s Resp. to Pl.’s SOF ¶ 4.

<sup>39</sup> A “fourchette” is “the strip or shaped piece used for the sides of the fingers of a glove.” Webster’s at 898. The subject gloves have fourchettes. See *supra* note 6.

## V. Classification of the Sack

Heading 4202 covers “traveling bags, . . . knapsacks and backpacks, handbags, shopping bags, . . . sports bags, . . . and similar containers, . . . of textile materials.” The sack consists of the same plush fabric as the jacket and pants, and has a drawstring cord. Def.’s SOF ¶ 14. It is described in the packaging as a “toy bag.” Physical Sample. The Government contends that the sack is classifiable pursuant to heading 4202 because it shares the “essential purpose” or “essential characteristics,” and “is of the same class of kind,” as the named articles. Def.’s XMSJ at 24, 25.<sup>40</sup> Defendant points the court to *Totes I*, 18 CIT at 924–25, 865 F. Supp. at 872,<sup>41</sup> and *Processed Plastic Co. v. United States*, 29 CIT 1129, 395 F. Supp. 2d 1296 (2005).<sup>42</sup>

Heading 4202 is an *eo nomine* provision, *Totes II*, 69 F.3d at 498, which therefore “include[s] all forms of the named article,” *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). Additionally, the term “similar containers” implicates the rule of *ejusdem generis*. *Processed Plastics*, 29 CIT at 1147 n.30, 395 F. Supp. 2d at 1313 n.30. The Federal Circuit has defined the essential characteristics of the heading 4202 exemplars as “organizing, storing, protecting, and carrying various items.” *Totes II*, 69 F.3d at 498 (approving of the trial court’s determination of same).

Here, the sack’s plush material, drawstring cord, and description as a “toy bag” indicates that it serves the purpose of storing, protecting, and carrying toys. Def.’s SOF ¶ 14; Physical Sample.<sup>43</sup> With some effort, the drawstring cord may be pulled tightly closed to prevent toys from falling out, or it may be used to tie off the top of the sack. Physical Sample. To the extent the sack lacks compartments and pockets, its organizational capacity is unclear. However, the ubiquitous textile “shopping bag,” one of the named articles, also generally lacks organizational features, so the court does not find the lack of

<sup>40</sup> Plaintiff did not respond to Defendant’s argument. *See generally* Pl.’s Resp.

<sup>41</sup> In *Totes I*, the court applied the rule of *ejusdem generis* to classify trunk organizers pursuant to Heading 4202 because they “possess[ed] the essential characteristics of or served[ed] a common purpose like that served by the exemplars in Heading 4202, and hence by the operation of *ejusdem generis* fall within the purview of ‘similar containers.’” 18 CIT at 924–25, 865 F. Supp. at 872.

<sup>42</sup> In *Process Plastics*, the court determined that children’s backpacks and beach bags were properly classified pursuant to Heading 4202, and not as “toys” pursuant to heading 9503, in part, because they “serve[d] the purposes of *organizing, storing, and protecting* toys or other personal effects.” 29 CIT at 1145–48, 395 F. Supp. 2d at 1312–14.

<sup>43</sup> Webster’s defines “bag,” *inter alia*, as “a container made of . . . cloth, . . . or other flexible material and usu. closed on all sides except for an opening that may be closed (as by folding, pasting, tying, or sewing), being of sizes ranging from small to very large and being specially designed and treated for properly holding, storing, carrying, shipping, or distributing any material or product—compare POUCH, SACK.” Webster’s at 162. The sack fits that definition. *See* Physical Sample.

organizational capacity dispositive. *See, e.g., Brookside Veneers*, 847 F.2d at 789 (courts may rely on their own understanding of terms). Further, not all of heading 4202's exemplar's necessarily share all of the above-stated essential characteristics. *See Totes I*, 18 CIT at 925, 865 F. Supp. at 873 (noting that "some" of the exemplars are designed to carry their contents). Because the sack serves the purposes of storing, protecting, and carrying, it is *prima facie* classifiable pursuant to heading 4202. It is, therefore, foreclosed from classification pursuant to Chapter 95. Ch. 95, Note 1(d).

Proceeding to the appropriate subheading, "[t]ravel, sports and similar bags . . . of textile materials: [o]ther," are covered by subheading 4202.92.30. The phrase "travel, sports and similar bags," includes articles "designed for carrying clothing and other personal effects during travel, including . . . shopping bags." Ch. 42, Add'l U.S. Note 1. The sack appears capable of carrying toys (or other personal effects) from A to B, similar to a shopping bag. Accordingly, the sack is properly classified pursuant to HTSUS 4202.92.30.

### CONCLUSION

For the reasons discussed above, the components of the Santa Suit at issue in this case are properly classified pursuant to the following HTSUS provisions: (1) jacket: HTSUS 6110.30.30; (2) pants: HTSUS 6103.43.15; (3) gloves: HTSUS 6116.93.94; and (4) sack: HTSUS 4202.92.30. Accordingly, the court denies Plaintiff's motion for summary judgment and grants Defendant's cross-motion for summary judgment.<sup>44</sup> Judgment will be entered accordingly.

Dated: October 31, 2017

New York, New York

*/s/ Mark A. Barnett*

MARK A. BARNETT, JUDGE

---

<sup>44</sup> Defendant requested summary judgment for the reasons "explained in [its] accompanying memorandum of law." Def.'s Cross-Mot. for Summ. J. at 1. Defendant's memorandum of law urged the court to affirm Customs' classification of the subject jacket pursuant to HTSUS 6105.20.20. Def.'s XMSJ at 1. As discussed above, in supplemental briefing, Defendant acknowledged that HTSUS 6105.20.20 does not cover the subject jacket, and asserted that HTSUS 6110.30.30 is the correct classification. Def.'s Suppl. Br. at 4–5. The court agrees. Accordingly, the court construes Defendant's cross-motion as being amended by its supplemental brief, and therefore grants the motion in full.

## Slip Op. 17–149

KALLE USA, INC, Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmman, Judge  
Court No. 13–00003

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

Dated: November 2, 2017

*Frederick Van Arnan, Jr.*, Barnes, Richardson, & Colburn, LLP, of New York, argued for plaintiff. Of counsel on the brief was *Alan Goggins*.

*Hardeep K. Josan*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for defendant. With her on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Amy M. Rubin*, Assistant Director, and *Lisa M. Gonzalo*, as Trial Attorney. Of counsel on the brief was *Paula Smith*, Office of the Assistant Chief Counsel for International Trade Litigation, U.S. Department of Customs & Border Patrol of New York. With them on the supplemental brief was *Benjamin C. Mizer* and on the Defendant’s Response to Court Order was *Chad A. Readler*, Acting Assistant Attorney General of New York.

**OPINION****Katzmann, Judge:**

How should food casings composed of both textile and plastic be classified for the purposes of determining what tariff rate should apply to their importation? In this action, Plaintiff Kalle USA Inc. (“Kalle”) contests the denials of its administrative protests by U.S. Customs and Border Protection (“Customs”) and disputes the tariff classification under the Harmonized Tariff Schedule of the United States (2010) (HTSUS)<sup>1</sup> which Customs determined for two of its food casing products, NaloProtex G1 (“G1”) and NaloProtex G2 (“G2”). Specifically, Kalle contends that the G1 and G2 products—which are used for encasing raw sausage, scalded-emulsion sausage, cooked-meat emulsion sausage, ham and other processed meat products, and cheese—should be classified as plastics, while the United States (“the Government”) argues that Customs correctly classified the casings as made up textile products. Joint Statement of Undisputed Facts ¶ 4, Sept. 19, 2014, ECF No. 23 (“JSUF”). Before the court is Kalle’s Motion for Summary Judgment (“Pl.’s Br.”) and the Government’s Cross Motion for Summary Judgment on behalf of Customs (“Def.’s Br.”). The court concludes that Customs correctly classified the G1

<sup>1</sup> All references to section notes, chapter notes, headings or subheadings contained herein are to 2010 HTSUS.

and G2 casings, and therefore denies Kalle's Motion for Summary Judgment and grants the Government's Cross Motion for Summary Judgment.

## **BACKGROUND**

### **1. The Merchandise at Issue**

#### *a. Facts Common to Both NaloProtex G1 and NaloProtex G2 Casings*

The following facts are not in dispute. The merchandise at issue is known as NaloProtex G1 and NaloProtex G2 casings ("G1 and G2 casings"). JSUF ¶ 2. These products are imported into the United States from Germany by Kalle USA Inc. *Id.*; Oral Argument, ECF No. 68. The G1 and G2 products are casings used for encasing raw sausage, scalded-emulsion sausage, cooked-meat emulsion sausage, ham and other processed meat products, and can also be used for encasing cheese. JSUF ¶ 4.

The starting material for both the G1 and G2 casings is a textile flat sheeting. *Id.* ¶ 5. The textile fabric portion of the casings is coated in plastic on one side, the outer side. *Id.* ¶ 6. U.S. Patent 8,147,933 B2, dated April 3, 2012, describes the G1 and G2 casings as "textile food casings" consisting of a "textile envelope" with a "longitudinal seam," and a plastic "coating applied in an amount to allow said textile structure to be recognized within the coated casing." *Id.* ¶ 7. The inner textile fabric layer and the outer plastic coating layer together provide a casing that has several desirable features, including the ability to absorb dyes and aroma substances and transfer these substances into the encased product. *Id.* ¶ 8. The textile material gives the casings strength and shape, and provides a matrix to hold the plastic coating. *Id.* ¶ 9. The textile material also ensures the mechanical stability of the casings. *Id.* ¶ 10. The plastic coating material "only fills the interstitial spaces between the textile fibers" and is applied in a thin enough layer that the textile structure of the casing is still recognizable. *Id.* ¶¶ 11–13. The plastic coating serves to prevent moisture transmission both into and out of the casings. *Id.* ¶ 14. During manufacture of the G1 and G2 casings, the coated textile sheeting is trimmed to the appropriate width, folded over on its sides to form a tube, and then fixed with a seam by gluing. *Id.* ¶ 15. The casings are flexible. *Id.* ¶ 16. Both products are imported in rolls of flattened tubes which are wound around a cardboard core. *Id.* ¶ 17. Both G1 and G2 casings are used for the same applications. *Id.* ¶ 18. The key difference between the G1 and G2 casings is that the G2 casing is stronger and thinner than the G1, giving the G2 better tear strength and better

machineability. *Id.* ¶ 19. After importation, Kalle cuts the G1 and G2 casings to lengths required by customers, impregnates the casings with flavors, and then sells the casings to the processed meat industry. *Id.* ¶ 20. Kalle’s customers stuff the casings with cooked sausages, ham, or other processed meats to create finished products for end users. *Id.* ¶ 21.

*b. Characteristics Particular to NaloProtex G1 Casings*

The G1 casing was imported under one of the nine entries at issue, JJ8–0290211-I. *Id.* ¶ 34. The commercial invoice describes NaloProtex G1 casings as “150–210–23 NaloProtex \_ FP Dia. 108 Flw. 165.0,” with or without other words, letters, or numbers of description. *Id.* ¶ 35. The G1 product is described by Kalle in its marketing literature as a “textile barrier casing” with transfer properties. *Id.* ¶ 36. Pursuant to U.S. Customs and Border Protection Laboratory Report Number CH20090925, dated October 5, 2009 (“Lab Report”), the outer surface of the G1 casing consists of a rubber/plastic material and an inner surface layer of woven fabric. *Id.* ¶ 37. The woven fabric portion of the G1 casing is composed of 100%, by weight, man-made viscose rayon and polyester fibers. *Id.* ¶ 38; Lab Report. The G1 casing is composed of approximately 63% rubber/plastic and 37% woven fabric. JSUF ¶ 39; Lab Report. The rubber/plastic material is composed of polyvinylidene chloride. JSUF ¶ 40; Lab Report. The woven fabric portion of the G1 casing is a textile. JSUF ¶ 41. The textile and plastic portions of the G1 casings are both measurable layers. *Id.* ¶ 42. The textile portion of the G1 casing has a thickness of 180 µm, a weight of 60g/m<sup>2</sup>, and a cost of .64 Euro/165cm. *Id.* ¶ 43. The textile portion of the G1 casing is coated in plastic on the outer surface. *Id.* ¶ 44. The plastic portion of the G1 casing has a thickness of 30µm, a weight of 90g/m<sup>2</sup>, and a cost of 1.10 Euro/165cm. *Id.* ¶ 45. The thickness of the textile fabric portion of the G1 casing is six times greater than the thickness of the plastic coating. *Id.* ¶ 46. The G1 casing comes in a variety of widths and diameters, ranging from 58 mm wide (when flat) and 37 mm in diameter to 245 mm wide and 156 mm in diameter. *Id.* ¶ 47. All sizes of the NaloProtex G1 casings are imported in 500 m rolls. *Id.* ¶ 48 (as corrected).<sup>2</sup>

---

<sup>2</sup> During Oral Argument on October 11, 2017, the parties moved to correct errors in the record, stating that the G1 and G2 casings come in rolls of 500 m (meters), rather than the 500 mm indicated in the JSUF. ECF No. 68. The court granted their motion. *Id.*

*c. Characteristics Particular to NaloProtex G2 Casings*

Eight of the nine entries at issue contain G2 casings, including entry numbers JJ8-02896602, JJ8-0289688-3, JJ8-0289987-9, JJ8-0290123-8, JJ8-0290210-3, JJ8-0290213-7, JJ8-02905817, and JJ8-0290584-1. *Id.* ¶ 22. The NaloProtex G2 casings are designated on the commercial invoices as “NaloProtex G2” with or without other words, letters, or numbers of description. *Id.* ¶ 23. The G2 product is described by Kalle in its marketing literature as a “textile casing with barrier and transfer properties.” *Id.* ¶ 24. The G2 casing consists of a high strength woven polyester fabric with a plastic polymer coating that is part acrylic and part polyvinylidene chloride. *Id.* ¶ 25. The woven fabric of the NaloProtex G2 product is a textile. *Id.* ¶ 26. The textile and plastic portions of the G2 are both measurable layers. *Id.* ¶ 27. The textile fabric portion of the G2 casing has a thickness of 140 µm, a weight of 67 g/m<sup>2</sup>, and a cost of .96 Euro/165cm. *Id.* ¶ 28. The textile portion of the G2 casing is coated with plastic on the outer surface. *Id.* ¶ 29. The plastic portion of the G2 casing has a thickness of 20µm, a weight of 62 g/m<sup>2</sup>, and a cost of .73 Euro/165 cm. *Id.* ¶ 30. The thickness of the textile portion of the G2 is seven times greater than the thickness of the plastic coating. *Id.* ¶ 31. The G2 casings range in width (when flat) from 111 mm to 245 mm, and in diameter from 74 mm to 156 mm. *Id.* ¶ 32. All sizes of the G2 casings are imported in 500 m rolls. *Id.* ¶ 33 (as corrected); *see supra* n.2.

## 2. Procedural History

Kalle was the importer of record of nine entries of casings (described above) made through the port of Chicago, Illinois, between July 26, 2010 and August 11, 2010. Summons, Jan. 4, 2013, ECF No. 1. The entries were liquidated between June 10, 2011 and June 24, 2011 subheading 6307.90.98 HTSUS “Other made up articles, including dress patterns: . . . Other . . . Other” subject to duty at 7% ad valorem. *Id.*; Def.’s Br. at 1. Kalle—believing that the casings should have been classified under subheading 3917.39.0050, HTSUS “Plastics and Articles thereof . . . Tubes, pipes and hoses and fittings therefor (for example, joints, elbows, flanges), of plastics: . . . Other . . . Other,” subject to duty at 3.1%—contested the liquidations by filing a protest on September 10, 2011. Summons; Pl.’s Br. at 1. Customs denied the protest on November 5, 2012, based on the reasoning from its earlier classification decisions involving the same

products.<sup>3</sup> *Id.*; see HQ155323, Application for Further Review of protest No. 3901–10–100443: Naloprotex G-1 Sausage Casing (March 30, 2012), Def.’s Br. Ex. A (“HQ155323”); NY N086782, The tariff classification of sausage casings from China (Dec. 10, 2009), Def.’s Br. Ex. B (“NY N086782”). This action followed. Kalle moved for summary judgment on September 29, 2014. Pl.’s Br. The Government cross-moved for summary judgment on November 24, 2014. Def.’s Br.

Oral argument was held on September 24, 2015, and the court requested supplemental briefing on October 9, 2015. ECF No. 43. Both parties filed their supplemental briefs on November 20, 2015 and their supplemental replies on December 23, 2015. Pl.’s Suppl. Br. 1, ECF No. 47; Def.’s Suppl. Br. 1, ECF No. 48; Pl.’s Suppl. Reply 1, ECF No. 52; Def.’s Suppl. Reply 1, ECF No. 53. The court again ordered supplemental briefing on March 7, 2016, and both parties filed their supplemental briefs in response to that order on April 22, 2016. Order, ECF No. 54; Pl.’s Suppl. Br. 2, ECF No. 56; Def.’s Suppl. Br. 2, ECF No. 55. Kalle and the Government also filed supplemental replies on May 20, 2016. Pl.’s Suppl. Reply 2, ECF No. 59; Def.’s Suppl. Reply 2, ECF No. 60.

On August 10, 2017, the case was reassigned to a new judge, and oral argument was held anew on October 11, 2017. Reassignment Order, ECF No. 62; Oral Argument, ECF No. 68.

## **APPLICABLE LAW**

### **1. Jurisdiction and Standard of Review**

The Court has jurisdiction over this action under 28 U.S.C. § 1581(a) (2012), according to which the court has jurisdiction over an action brought under section 515 of the Tariff Act of 1930 as amended, 19 U.S.C. § 1515 (2012) to contest a denial of a protest by customs.<sup>4</sup>

In a tariff classification case, the Court proceeds de novo. *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 924 (Fed. Cir. 2003); see Customs Courts Act of 1980 § 301, 28 U.S.C. § 2640(a)(1)(2012) (directing the Court of International Trade to review classification rulings on “the basis of the record made before the court”). The Court first considers whether “the government’s classification is correct, both independently and in comparison with the importer’s alterna-

<sup>3</sup> Both HQ155323 and NY 086782 address protests and classification inquiries that occurred prior to Protest 3901–11–100951—at issue here—and the record does not contain a separate report specifically addressing Protest 3901–11–100951. See HQ155323, NY N086782. But HQ155323 and NY 086782 involve the same G1 and G2 casings, and the Government states that these earlier decisions contain the basis for Customs’ classifications. Def.’s Br. at 7 n.4.

<sup>4</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant provision of Title 19 of the U.S. Code, 2012 edition.

tive.” *Value Vinyls, Inc. v. United States*, 568 F.3d 1374, 1377, 1380 (Fed. Cir. 2009); *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). The plaintiff has the burden of showing the government’s determined classification to be incorrect. *Park B. Smith*, 347 F.3d at 925; *Jarvis*, 733 F.2d at 876. If the plaintiff meets that burden, the Court has an independent duty to arrive at “the *correct* result, by whatever procedure is best suited to the case at hand.” *Value Vinyls*, 568 F.3d at 1377 (citing *Jarvis*, 733 F.2d at 878) (emphasis in original).

While the Court accords respect to Customs’ classification rulings relative to their “power to persuade,” *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), the Court also has “an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms.” *Wilton Indus., Inc. v. United States*, 741 F.3d 1263, 1265 (Fed. Cir. 2013) (citing *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005)).

## **2. Summary Judgment under Rule 56**

The Court grants summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” USCIT R. 56(a). In a tariff classification action, summary judgment is appropriate when “the material facts of what the merchandise is and what it does are not at issue.” *Wilton Indus.*, 741 F.3d at 1266–67; *Bausch & Lomb*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). In ruling on a summary judgment motion, the Court credits the non-moving party’s evidence and draws all inferences in that party’s favor. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248. The issue here is whether either the Government or Kalle is entitled to summary judgment. The analysis turns on the meaning and scope of the relevant tariff provisions. *See Wilton Indus.*, 741 F.3d at 1266–67; *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999); *Bausch & Lomb*, 148 F.3d at 1365–66.

## **3. Tariff Classification under the General Rules of Interpretation HTSUS**

“In a classification case, the court construes the relevant (competing) classification headings, a question of law; determines what the merchandise at issue is, a question of fact; and then determines ‘the

proper classification under which [the merchandise] falls, the ultimate question in every classification case and one that has always been treated as a question of law.” *Bausch & Lomb*, 148 F.3d at 1366; see *Wilton Indus.*, 741 F.3d at 1266. When there is no factual dispute regarding the merchandise, the resolution of the classification issue turns on the first step, determining the proper meaning and scope of the relevant tariff provisions. See *Wilton Indus.*, 741 F.3d at 1266–67; *Carl Zeiss*, 195 F.3d at 1378; *Bausch & Lomb*, 148 F.3d at 1365–66.

“The HTSUS scheme is organized by headings, each of which has one or more subheadings; the headings set forth general categories of merchandise, and the subheadings provide a more particularized segregation of the goods within each category.” *Alcan Food Packaging (Shelbyville) v. United States*, 773 F.3d 1364, 1366 (Fed. Cir. 2014) (quoting *Wilton Indus.*, 741 F.3d at 1266). The Court considers chapter and section notes of the HTSUS in resolving classification disputes because they are statutory law, not interpretative rules. See *Arko Foods Intern., Inc. v. United States*, 654 F.3d 1361, 1364 (Fed. Cir. 2011) (citations omitted). As such, they are binding on the Court. See *Park B. Smith, Ltd.*, 347 F.3d at 929.

Tariff classification is determined according to the General Rules of Interpretation (“GRIs”), and, if applicable, the Additional U.S. Rules of Interpretation (“ARIs”). The “General Rules of Interpretation govern classification of merchandise under the HTSUS, and are applied in numerical order.” *Honda of Am. Mfg. v. United States*, 607 F.3d 771, 773 (Fed. Cir. 2010) (internal quotations and citations omitted).

Under GRI 1, “classification shall be determined according to the terms of the headings and any relative section or chapter notes.”<sup>5</sup> See *Faus Grp., Inc. v. United States*, 581 F.3d 1369, 1372 (Fed. Cir. 2009) (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998)). Unless there is evidence of “contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings.” *La Crosse Tech., Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013); *Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1048 (Fed. Cir. 2001). In ascertaining a term’s common meaning, the court may “consult lexicographic and scientific authorities, dictionaries, and other reliable information” or may rely on its “own understanding of the terms used.” *Baxter Healthcare*

<sup>5</sup> GRI 1 provides that:

The table of contents, alphabetical index, and titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following [GRI] provisions.

*Corp. v. United States*, 182 F.3d 1333, 1337–38 (Fed. Cir. 1999); see *Millennium Lumber Distrib., Ltd. v. United States*, 558 F.3d 1326, 1328–29 (Fed. Cir. 2009) (citation omitted); *Carl Zeiss*, 195 F.3d at 1379 (citation omitted). “Where a tariff term has various definitions or meanings and has broad and narrow interpretations, the court must determine which definition best expresses the congressional intent.” *Richards Med. Co. v. United States*, 910 F.2d 828, 830 (Fed. Cir. 1990). Although not binding law, courts also look to the Explanatory Notes (“ENs”) to the Harmonized Commodity Description and Coding System, maintained by the World Customs Organization, as persuasive authority on how to interpret and apply HTSUS provisions. See *Home Depot*, 491 F.3d at 1336 (“Although the Explanatory Notes ‘do not constitute controlling legislative history,’ they are nonetheless intended to offer guidance in clarifying the scope of HTSUS subheadings.” (citing *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994))); *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1367 n.1 (Fed. Cir. 2013); see generally *Alcan Food Packaging (Shelbyville) v. United States*, 37 CIT \_\_\_, 929 F. Supp. 2d 1338 (2013) (relying extensively on the guidance provided by the ENs to resolve the case under GRI 1), *aff’d*, 771 F.3d 1364 (Fed. Cir. 2014).

“The HTSUS is designed so that most classification questions can be answered by GRI 1.” *Telebrands Corp. v. United States*, 36 CIT \_\_\_, \_\_\_, 865 F. Supp. 2d 1277, 1280 (2012), *aff’d*, 522 Fed. App’x 915 (Fed. Cir. 2013). “What is clear from the legislative history of the World Customs Organization and case law is that GRI 1 is paramount. . . . The HTSUS is designed so that most classification questions can be answered by GRI 1, so that there would be no need to delve into the less precise inquiries presented by GRI 3.” *Id.*<sup>6</sup> A product is classifiable under GRI 1 if it “is described in whole by a single classification heading or subheading” of the HTSUS; however, “[w]hen goods are in character or function something other than as described by a specific statutory provision—either more limited or more diversified—and the difference is significant, then the goods cannot be classified” pursuant to GRI 1. *La Crosse Tech.*, 723 F.3d at 1358 (quoting *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011)).

### DISCUSSION

Applying GRI 1, the court concludes that Customs correctly classified the G1 and G2 casings under heading 6307.90.98 (“Other made up articles, including dress patterns: . . . Other . . . Other,” subject to duty at 7% ad valorem) rather than under heading 3917.39.0050 (“Plastics and Articles thereof . . . Tubes, pipes and hoses and fittings

<sup>6</sup> Regarding GRI 3 and sequential antecedent GRI 2, see *infra* n.7.

therefor (for example, joints, elbows, flanges), of plastics: . . . Other . . . Other,” subject to duty at 3.1%). Heading 6307 covers “made up” articles of textiles. 6307; Chapter 63, Note 1. Given that G1 and G2 casings are composed of a plastic-coated textile assembled into a casing by gluing, they meet the requirements of heading 6307. JSUF ¶¶ 5–6, 15. Kalle argues that the casings instead fall into heading 3917 because (1) Section XI, Note 1(h) automatically excludes textile-plastic composites from Chapter 63; (2) even if Note 1(h) does not exclude them, Chapter 59, Note 2 places them in Chapter 39; and (3) gluing the ends of the textile-plastic sheeting together to make a tube does not meet the definition of “made up” under Chapter 63. The court concludes that (1) Section XI, Note 1(h) does not automatically exclude the casings from Chapter 63; (2) none of the provisions in Chapter 59, Note 2 that place products in Chapter 39 apply to the casings; and (3) the gluing process does fit the requirements for “made up” as defined by the HTSUS provisions and case law. Thus, the casings were properly classified under 6307. Because this case can be resolved under GRI 1, resort to the subsequent sequenced GRI provisions, to which the parties refer in their alternative arguments, is unnecessary.<sup>7</sup>

<sup>7</sup> Kalle argued in the alternative that, should GRI 1 not resolve the case, the casings would be classified under heading 3917 according to GRI 3(a). The Government, for its part, contended that GRI 3(a) could not resolve the case and that the casings should be classified under heading 6307 according to GRI 3(b).

GRI 2(b) provides that principles of GRI 3 should be applied to classify composite products like the G1 and G2 casings when GRI 1 does not resolve the issue. *See* GRI 2(b). GRI 3(a) states that:

The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

Kalle argues that 3917 is more specific because, according to Chapter 39, Note 8, heading 3917 explicitly includes sausage casings and other lay-flat tubing, while heading 6307 broadly covers “other made up articles.” Pl.’s Br. at 18–19. The Government contends that the two provisions are equally specific because (1) only headings themselves, and not chapter notes, are considered under GRI 3(a); (2) the G1 and G2 casings can be used for food products other than sausage, and thus are not “sausage casings;” and (3) GRI 3(a) explicitly states that “when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.” Def.’s Br. at 24–26.

The Government further argues that, because GRI 3(a) could not resolve the issue, the casings should be classified under heading 6307 according to GRI 3(b), which states provides that:

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

## 1. Application of GRI 1

GRI 1 requires that the classification be determined “according to the terms of the headings and any relative section or chapter notes.” The court thus first considers the headings identified by the parties and any additional headings that might merit consideration. See *Park B. Smith*, 347 F.3d at 928; *Gerson Co. v. United States*, 41 CIT \_\_\_, Slip Op. 17–96 (Aug. 2, 2017) (citing GRI 1), *appeal filed*, No. 18–1011 (Fed. Cir. Oct. 4, 2017). Given that the casings are composed of textile and plastic components, the court here considers provisions covering each type of material. Kalle and the Government have identified 3917 and 6307, respectively, as the HTSUS headings under which they believe the casings should be classified. Because the texts of headings 5407 and 5903 also appear to address materials contained in the casings and are relevant for analyzing the applicability of 6307 (discussed *infra*), the court considers those headings in its analysis as well. See *Value Vinyls*, 568 F.3d at 1377 (citing *Jarvis*, 733 F.2d at 878) (stating that the court has an independent duty to arrive at “the *correct* result, by whatever procedure is best suited to the case at hand” (emphasis in original)). These headings are listed in numerical order and with the heading terms relevant to the classification issue presented by this case:

- 3917 Tubes, pipes and hoses and fittings therefor (for example, joints, elbows, flanges), of plastics.
- 5407 Woven fabrics of synthetic filament yarn, including woven fabrics obtained from materials of heading 5404.
- 5903 Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902.
- 6307 Other made up articles, including dress patterns.

Heading 3917 is part of Section VII of HTSUS, and headings 5407, 5903, and 6307 are within Section XI. The court now turns to a consideration of the relevant section and chapter notes for the headings.

---

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.

The Government claims that the “essential character” of the casings is imparted by the textile component because the textile performs the indispensable function of absorbing and transferring dyes, aroma, and flavoring to encased food—which is marketed by Kalle as a primary advantage of the G1 and G2 casings—and because the textile ensures mechanical stability. Def.’s Br. at 27–28. Kalle, however, contends that the classification issue cannot be determined under GRI 3(b), because both the textile’s transfer qualities and the plastic’s moisture control property are equally indispensable to the casings’ function, and thus, equally essential aspects of its character. Def.’s Reply Br. at 11.

As suggested by both parties and noted in the text *supra*, however, the court can resolve this case according to GRI 1, and thus does not reach the parties’ arguments under GRI 2(b), 3(a), and 3(c).

*a. Relevant Section, Chapter, and Explanatory Notes*

The court finds the following notes to be particularly relevant to the candidate headings and to the court's analysis overall.

*i. Chapter 39, Note 1*

[In relevant part:]

"[t]he expression [plastics], however, does not apply to materials regarded as textile materials of section XI."

*ii. Chapter 39, Note 2(p)*

"2. This chapter does not cover:

(p) Goods of section XI (textiles and textile articles)."

*iii. Chapter 39, Note 8*

"For the purposes of heading 3917, the expression "tubes, pipes and hoses" means hollow products, whether semi-manufactures or finished products, of a kind generally used for conveying, conducting or distributing gases or liquids (for example, ribbed garden hose, perforated tubes). This expression also includes sausage casings and other lay-flat tubing."

*iv. Chapter 39, Explanatory Notes*

[In relevant part:]

"Plastics and textile combinations

Wall or ceiling coverings which comply with Note 9 to this Chapter are classified in heading 39.18. Otherwise, the classification of plastics and textile combinations is essentially governed by Note 1 (h) to Section XI, Note 3 to Chapter 56 and Note 2 to Chapter 59."

*v. Section XI Note 1(h)*

"This section does not cover:

(h) Woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of chapter 39."

*vi. Section XI, Note 7(e)*

“For the purposes of this section, the expression “made up” means:

(e) Assembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded).”

*vii. Section XI, Note 8*

[In relevant part:]

“[f]or purposes of Chapters 50 to 60 . . . except where the context otherwise requires, Chapters 56 to 59 do not apply to goods made up within the meaning of [N]ote 7 above.”

*viii. Chapter 54, Note 1*

“Throughout the tariff schedule, the term “man-made fibers” means staple fibers and filaments of organic polymers produced by manufacturing processes, either:

(a) By polymerization of organic monomers to produce polymers such as polyamides, polyesters, polyolefins or polyurethanes, or by chemical modification of polymers produced by this process (for example, poly(vinyl alcohol) prepared by the hydrolysis of poly(vinyl acetate)); or

(b) By dissolution or chemical treatment of natural organic polymers (for example, cellulose) to produce polymers such as cuprammonium rayon (cupro) or viscose rayon, or by chemical modification of natural organic polymers (for example, cellulose, casein and other proteins, or alginic acid), to produce polymers such as cellulose acetate or alginates.”

*ix. Chapter 59, Note 1*

“Except where the context otherwise requires, for the purposes of this chapter the expression “textile fabrics” applies only to the woven fabrics of chapters 50 to 55 and headings 5803 and 5806, the braids and ornamental trimmings in the piece of heading 5808 and the knitted or crocheted fabrics of headings 6002 to 6006.”

*x. Chapter 59, Note 2*

“Heading 5903 applies to:

(a) Textile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (compact or cellular), other than:

(3) Products in which the textile fabric is either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of color (chapter 39);

(5) Plates, Sheets or strip of cellular plastics, combined with textile fabric, where the textile is present merely for reinforcing purposes (chapter 39).”

*xi. Chapter 63, Note 1*

“Sub-Chapter I [63.01–63.07] applies only to made up articles, of any textile fabric.”

*xii. Chapter 63, Explanatory Notes*

[In relevant part:]

“This Chapter [63] includes:

(1) Under headings 63.01 to 63.07 (sub-Chapter I) made up textile articles of any textile fabric (woven or knitted fabric, felt, nonwovens, etc.) which are *not* more specifically described in other Chapters of Section XI or elsewhere in the Nomenclature. (The expression “made up textile articles” means articles made up in the sense defined in Note 7 to Section XI).” (emphasis in original).

*b. Analysis*

The G1 and G2 casings are composite products of textile and plastic materials. JSUF ¶¶ 5–6. Although a “GRI 3(b) analysis is often applied to resolve classification disputes involving composite goods . . . here it is not necessary because both tariff provisions [3917 and 6307] contemplate goods that have been combined with other materials.” *Alcan Food*, 929 F. Supp. 2d at 1348; see Chapter 39, ENs; Chapter 59, Note 2; Chapter 63, ENs.

The Government argues that Customs correctly classified the G1 and G2 casings under heading 6307--“other made up articles” of textiles--because the casings are created by gluing the ends of sheets partially composed of textiles together, as described *supra*. 6307; JSUF ¶ 15. Kalle contends that the casings cannot be classified under heading 6307 for essentially three reasons. First, Kalle argues that Section XI, Note 1(h) excludes the casings from any consideration under Section XI because it states that Section XI does not include “fabrics...impregnated, coated, covered or laminated with plastics, or articles thereof, of chapter 39.” Section XI, Note 1(h). Kalle advances a theory that “a section note would trump the chapter note[,]” and cites *Mita Copystar*, 160 F.3d at 714, for support. Pl.’s Br. at 11–12. Second, Kalle contends that, even if Section XI, Note 1(h) does not automatically exclude them, the casings fall within one of the exclusions to heading 5903 and therefore are properly classified in Chapter 39. Finally, Kalle submits that the casings are not “made up” and therefore cannot be covered by 6307.

The court concludes that the G1 and G2 casings are made up articles composed of a textile fabric under the HTSUS, and therefore are properly classified under heading 6307, for the reasons stated below.

*i. Section Notes Are Not Entitled to Greater Weight than Chapter Notes*

The court is not persuaded by Kalle’s assertion that section notes always trump chapter notes in a classification case. The court does not read *Mita Copystar* as standing for that proposition, although the Court of Appeals for the Federal Circuit happened to analyze Note 2 of section VI before analyzing Note 2(b) of Chapter 90 in that case. 160 F.3d at 711–14. Additionally, such an assertion is unsupported by the text of GRI 1, which does not state that a section note trumps a chapter note, or indicate any preferential treatment for section notes over chapter notes. Instead, GRI 1 requires that the court apply “any relative section or chapter notes.” (emphasis added). Further, Chap-

ter 59, Note 2<sup>8</sup> and Chapter 56, Note 3<sup>9</sup>--which address chapters contained within Section XI--distinguish, in detail, between products that belong in Chapter 39 and in Chapters 56 or 59. If Section XI, Note 1(h) excluded all such textile-plastic composite products, as Kalle suggests, then these provisions detailing how to determine which textile-plastic composites are excluded from chapters within Section XI would serve no purpose. Adopting Kalle's interpretation would thus render these provisions surplusage. Finally, the ENs to Chapter 39 instruct that, for products such as the sausage casings which are combinations of plastics and textiles, "the classification of plastics and textile combinations is essentially governed by Note 1(h) to Section XI, Note 3 to Chapter 56 and Note 2 to Chapter 59," indicating that these three notes should be considered together when Customs, or this Court, is making a classification determination. *See* ENs to Chapter 39. In sum, the court finds Kalle's section note primacy argument unavailing.

Assuming *arguendo* that section notes had priority over chapter notes, however, Section XI, Note 1(h) would not automatically preclude the casings from being classified in Chapter 63. Note 1(h) only states that Section XI does not include "fabrics... impregnated, coated, covered or laminated with plastics, or articles thereof, *of chapter 39,*" not that *all* such products are excluded. Section XI, Note 1(h) (emphasis added). Thus, a product which is not classifiable under Chapter 39 would not be excluded from Section XI under Note 1(h).

The question remains: do the casings fall under Chapter 39? Kalle's argument seems to presume that, because heading 3917 covers "tubes, pipes and hoses...of plastic," including "sausage casings and other lay-flat tubing" and the casings here are flattened, hollow tubes partially made of plastic, they must be classified under 3917 and are

<sup>8</sup> Chapter 59, Note 2 is set forth *supra* at pp.15–16.

<sup>9</sup> Chapter 56, Note 3 provides:

"Headings 5602 and 5603 cover respectively felt and nonwovens, impregnated, coated, covered or laminated with plastics or rubber whatever the nature of these materials (compact or cellular).

Heading 5603 also includes nonwovens in which plastics or rubber forms the bonding substance.

Headings 5602 and 5603 do not, however, cover:

- (a) Felt impregnated, coated, covered or laminated with plastics or rubber, containing 50 percent or less by weight of textile material or felt completely embedded in plastics or rubber (chapter 39 or 40);
- (b) Nonwovens, either completely embedded in plastics or rubber, or entirely coated or covered on both sides with such materials, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of color (chapter 39 or 40); or
- (c) Plates, sheets or strip of cellular plastics or cellular rubber combined with felt or nonwovens, where the textile material is present merely for reinforcing purposes (chapter 39 or 40).

therefore excluded from Section XI by Note 1(h). Pl.'s Br. at 8; *see* 3917; Chapter 39, Note 8; JSUF ¶ 17. However, not all such plastic tubes are classified under Chapter 39; in fact, Chapter 39, Notes 1 and 2(p) state explicitly that Chapter 39 excludes goods covered by Section XI, indicating that some textile-plastic composite products are classifiable under Section XI and not categorically excluded by Section XI, Note 1(h). Chapter 39, Note 1; Chapter 39, Note 2(p). Further, as noted, *supra*, the Chapter 39 ENs indicate that the court should look to not just Section XI, Note 1(h), but to Chapter 56, Note 3 and Chapter 59, Note 2 as well to distinguish between goods of Chapter 39 and Section XI. Indeed, based on an analysis of these provisions, the court concludes that the casings do not belong in Chapter 39, but rather, under the Government's proffered heading 6307. As required for a product to be classified under 6307, the casings are (1) of any textile fabric and (2) made up, as discussed below. Chapter 63, Note 1; ENs, Chapter 63.

*ii. The Plastic and Textile Sheeting is a "Textile Fabric"*

According to the undisputed facts, the woven portions of the G1 and G2 casings are textiles created from, respectively, man-made viscose rayon and polyester fibers and a polyester fabric that is part acrylic and part polyvinylidene chloride. JSUF ¶¶ 25, 26, 38, 41. The G1 and G2 casings are also coated in plastic. JSUF ¶ 6. Heading 5903 contains "textile fabrics impregnated, coated, covered or laminated with plastics," including "the woven fabrics of chapters 50 to 55." 5903; Chapter 59, Note 1. Heading 5407 contains "woven fabrics of synthetic filament yarn, including woven fabrics obtained from materials of heading 5404." 5407. Further, woven textiles composed of the man-made materials such as those contained in the woven portion of the G1 and G2 casings are considered textile fabrics under Chapter 54, as explicitly stated in Chapter 54, Note 1:

Throughout the tariff schedule, the term "man-made fibers" means staple fibers and filaments of organic polymers produced by manufacturing processes, either:

- (a) By polymerization of organic monomers to produce polymers such as polyamides, *polyesters*, polyolefins or polyurethanes, or by chemical modification of polymers produced by this process (for example, poly(vinyl alcohol) prepared by the hydrolysis of poly(vinyl acetate)); or
- (b) By dissolution or chemical treatment of natural organic polymers (for example, cellulose) to produce polymers such as

cuprammonium rayon (cupro) or *viscose rayon*, or by chemical modification of natural organic polymers (for example, cellulose, casein and other proteins, or alginic acid), to produce polymers such as cellulose acetate or alginates.

Chapter 54, Note 1 (emphasis added). Thus, the textile component in the G1 and G2 casings appears to fall under heading 5903.

Heading 5903 does not contain all textile fabrics coated in plastic, however, as Section XI, Note 1(h), and Chapter 59, Note 2, make clear. Note 1(h) states that woven fabrics coated with plastic and articles thereof that belong in Chapter 39 are excluded from all of Section XI, which includes 5903. Section XI, Note 1(h). Chapter 59, Note 2(a) provides the exclusions relevant to 5903, two of which could potentially apply to the textile and plastic sheeting at issue here:

(3) Products in which the textile fabric is either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of color (chapter 39);

(5) Plates, Sheets or strip of cellular plastics, combined with textile fabric, where the textile is present merely for reinforcing purposes (chapter 39).

Chapter 59, Note 2(a).

The court turns first to Note 2(a)(3). Under this provision, products must be (1) completely embedded in plastics or (2) entirely coated or covered on both sides with plastic. As has been noted, courts give all terms “their common commercial meaning,” relying on their own understanding of the terms used, lexicographic and scientific authorities, dictionaries, and other reliable information sources. *Millennium Lumber Distrib.*, 558 F.3d at 1328–29 (citation omitted); *Carl Zeiss*, 195 F.3d at 1379 (citation omitted).

*Webster’s New World Dictionary* defines “embedded” as “set or fix[ed] firmly in a surrounding mass” and “completely” as “full[y], whole [ly], entire[ly].” *Webster’s New World Dictionary*, Third College Edition 285, 442–443 (1988). Thus, for a textile to be completely embedded in plastic, it must be entirely firmly fixed in the plastic. Here, it is undisputed that the G1 and G2 casings are only coated on one side and that the coating material only fills the interstitial spaces between the textile fibers. JSUF ¶¶ 6, 13. Thus, the textile is not embedded in the plastic for the purposes of 2(a)(3).

Kalle, citing the *McGaw-Hill Dictionary of Scientific and Technical Terms* (Fifth Ed. 1994) and the *Shorter Oxford English Dictionary*, vol 1, A-M (Fifth Ed. 2002), provides a slightly different definitions of “embed”-- “[t]o enclose in a matrix; to surround” and “to fix firmly in a surrounding mass of solids or semi-solid materials,” respectively--and argues that the casing’s one-sided coating fits these definitions. Pl.’s Suppl. Br. 1 at 8–9. However, as the Government points out:

to “surround” means “to form an enclosure around; encompass” or “to be present on all or nearly all sides of; encircle.” *Webster’s New World Dictionary* (Third College Ed. 1988) (emphasis added). Here, it is undisputed that the textile fabric of the casings is coated with a thin layer of plastic *on only one side*. JSUF at ¶¶ 6, 12; *see also* Kalle Suppl. Br. at 1, 9. Thus, the textile fabric is not “completely embedded” in plastics – *i.e.*, fully fixed on *all sides* in a surrounding mass of plastics.

Def.’s Suppl. Reply Br. 1 at 6 (emphasis original).

“Coated” means having “a layer of some substance, as paint, over a surface,” while “covered” means “to place something on, over, or in front of, so as to conceal, protect, or close.” *Webster’s New World Dictionary* at 267, 320. So, for a textile to be “entirely coated or covered on both sides” with plastic, it must be completely coated or covered with the plastic material on each side.

Although Kalle provides very similar definitions of “coated” and “entirely,” it suggests that because “the plastic completely and entirely coats one side of the textile fabric,” it is “coated” for purposes of 5903, Note 2(a)(3), and therefore should be properly classified in Chapter 39. Pl.’s Suppl. Br. 1 at 10–11. But products must be coated on *both* sides, not just one, as shown by reading the plain text of the provision: “(3) Products in which the textile fabric is either completely embedded in *plastics or entirely coated or covered on both sides* with such material.” Chapter 59, Note 2 (emphasis added); *see Bradford Indus., Inc. v. United States*, 21 CIT 665, 668, 968 F. Supp. 732, 733, 736 (1997), *aff’d*, 152 F.3d 1339 (Fed. Cir. 1998) (finding, when addressing the related provision for nonwoven fabrics, that “Plaintiff failed to demonstrate that the nonwoven component of the subject merchandise is ‘completely embedded’ or ‘entirely coated or covered’ because only one side of the fabric was coated or covered in plastic). Here, it is undisputed that the G1 and G2 casings are only coated on one side and that the coating material only fills the interstitial spaces between the textile fibers. JSUF ¶¶ 6, 13. So, the casings are neither embedded nor covered or coated on both sides, and therefore do not fall within the Note 2(a)(3) exclusion.

Turning to Chapter 59, Note 2(a)(5), the court must interpret the meaning of “merely for reinforcing purposes.” Something “reinforcing” is “designed to provide additional strength (as in a weak area).” *Webster’s Third New International Dictionary* (unabridged) at 1915 (1993). “Merely” means “no more than: barely, only, simply, solely.” *Id.* at 1413. Taken together, the phrase means that the textile must have no other purpose beyond strengthening the plastic.

The court finds that the textile component serves purposes beyond merely reinforcing the plastic. Here, it is undisputed that the textile also serves to “absorb dyes and aroma substances and transfer these substances to the encased [food] product.” JSUF ¶ 8. According to the G1 patent, the textile “directly stores the dyes, aroma substances and/or flavorings and can release them to a food situated therein. In contrast to [previous casings], the textile material simultaneously ensures the mechanical stability of the casing.” Patent 1. The absorption and transfer properties conferred by the textile material are discussed extensively in the patent and Kalle’s advertising materials as one of the most important features of the product. Patent; Pl.’s Br. Ex. E, Kalle Marketing Literature Pertaining to the NaloProtex G1; Pl.’s Br. Ex. D, Kalle Marketing Literature Pertaining to the NaloProtex G2. Thus, since the casings serve more than a reinforcing purpose, the casings also do not fall within the 2(a)(5) exclusion.

The *Bradford* case further supports the court’s interpretation of these provisions. The court in *Bradford* interpreted the nearly identical HTSUS provisions and notes regarding nonwoven textile fabrics coated in plastic, and came to the same conclusions regarding the meaning of the terms.<sup>10</sup> *Bradford Indus., Inc. v. United States*, 152 F.3d 1339 (Fed. Cir. 1998). In addition, that court classified the products at issue there—imitation leather articles composed of a nonwoven textile component and polyurethane on one side—under the textile provision. *Id.* at 1342.

For these reasons, the casings are composed of a textile fabric, as required for classification under 6307.<sup>11</sup>

### iii. *The Casings Are “Made Up”*

The second requirement for classification under 6307 is that the article is “made up.” Section XI, Note 7(e) defines “made up” for the purposes of Chapter 63 as “[a]ssembled by sewing, gumming or otherwise.” Section XI, Note 7(e); ENs, Chapter 63.

<sup>10</sup> Heading 5603 covers nonwoven textiles coated in plastic. The exclusions contained in Chapter 56, Note 3—which is interpreted by the court in *Bradford*—are nearly identical to those in Chapter 59, Note 2, at issue here. See *supra* n.9.

<sup>11</sup> Chapter 59 does not include “made up” articles. Because the court finds that the casings are made up, see *infra*, they cannot be classified under 5903. Section XI, Note 8.

According to Kalle, “[t]he gluing of one edge of the sausage casing to the other edge to form a tube is not an assembly, as that term involves two or more components being joined together, and does not apply to operations involving only one component.” Pl.’s Br. at 8. Kalle cites *The American Heritage Dictionary of The English Language*, 110 (3rd Ed. 1992) (defining assemble as “[t]o fit together the parts or pieces of”) and *ABB, Inc. v. United States*, 421 F.3d 1274, 1276 (Fed. Cir. 2005) for support. *ABB* states that:

[b]ecause the term “assemble” is not defined in the HTSUS, “its common or dictionary meaning” governs. *Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097 (Fed. Cir. 1984). According to *Webster’s Third New International Dictionary* 131 (1993), ‘assemble’ means “to fit together various parts of [sic] so as to make into an operative whole.” (Emphasis in original).

*ABB*, 421 F.3d at 1276.

Kalle also claims that *L’Eggs Products, Inc. v. United States*, 13 CIT 40, 704 F. Supp. 1127 (1989) and *Peg Bandage, Inc. v. United States*, 17 CIT 1337 (1993) (not reported in the Federal Supplement) buttress its argument concerning the definition of assembled, because both cases, in addition to *ABB*, use the same definition. Pl.’s Reply at 7–8.

The court is not persuaded by Kalle’s argument that the casings are not “made up,” and therefore cannot be covered by 6307. Pl.’s Br. at 8. Here, the tubes are manufactured using two components: the textile-plastic sheeting and glue. Kalle’s argument based on *L’Eggs* and *Peg Bandage* is unavailing: the court instead finds that those cases support the conclusion that the casings are “made up.” In those cases, thread used to sew together a stocking leg and a cloth bandage, respectively, was considered a second component for purposes of assembly under 6307. *L’Eggs*, 13 CIT at 49–50; *Peg Bandage*, 17 CIT at 1348–49. The court does not see how this principle is any different when considering the glue and the textile/plastic sheet in this case.

Further, the court is not persuaded that “assembly,” which is not defined by the HTSUS or legislative history, requires the joining of two separate components. Although Kalle does rely on one dictionary definition of assembly, Kalle ignores other definitions which make no mention of two different parts. See, e.g., *Webster’s Third New International Dictionary*, 131 (2002) (defining “assemble” as “2: to bring together: as a: to put or join together, usu. in an orderly way with logical selection or sequence”); *The Random House Dictionary of the English Language*, 89 (1969) (defining “assemble” as “2. to put or fit together”). Additionally, the Federal Circuit in *ABB* focused its definition of “assembl[ed]” on the creation of an “operative whole:” a

“distinct and separate commercial entity” that, regardless of the number of parts, is “complete in itself” and capable of performing its function. *ABB*, 421 F.3d at 1276–77. Here, as the patent and undisputed record establish, one of the casings’ purposes is to encase food. See Patent; JSUF ¶ 4. As defined by *The Oxford English Dictionary Online*, available at <http://www.oed.com/view/Entry/61610?redirectedFrom=encase#eid> (last visited Oct. 30, 2017), something is encased if it is “put into or enclose[d] within a case or receptacle” or “overla[id], surround[ed], or hem[med] in as with a case.” The textile-plastic composite material cannot do that until it is transformed from a flat sheet into a tube--a receptacle capable of surrounding or enclosing the food products--by the gluing process. Thus, the textile-composite sheeting can only function as a casing--as an “operative whole”--once its sides are glued together. Therefore, the casings fall within the definition of “assembled” and “made up” under Section XI, Note 7(e).

### **CONCLUSION**

Given that the casings are made up articles of textile fabric, they are properly classified under heading 6307. Further, since goods of Section XI--which includes heading 6307--are excluded from Chapter 39, they cannot be classified under heading 3917. Accordingly, the court denies Kalle’s motion for summary judgment and grants the Government’s cross motion for summary judgment.

*So Ordered.*

Dated: November 2, 2017  
New York, New York

*/s/ Gary S. Katzmann*  
GARY S. KATZMANN, JUDGE

