

# U.S. Court of International Trade

Slip Op. 20–57

GOODLUCK INDIA LIMITED, Plaintiff, v. UNITED STATES, Defendant, and  
ARCELORMITTAL TUBULAR PRODUCTS, MICHIGAN SEAMLESS TUBE, LLC,  
PLYMOUTH TUBE CO. USA, PTC ALLIANCE CORP., WEBCO INDUSTRIES,  
INC. and ZEKELMAN INDUSTRIES, INC, Defendant-Intervenors.

Before: Gary S. Katzmman, Judge  
Court No. 18–00162

[The court sustains Commerce’s *Remand Results*].

Dated: April 30, 2020

*Ned H. Marshak, Andrew T. Schutz, Jordan C. Kah and Michael S. Holton*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, of New York, NY and Washington, DC, for plaintiff.

*Ann C. Motto*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel was *Ayat Mujais*, Office of the Chief Counsel for Trade Enforcement & Compliance, Office of the General Counsel, U.S. Department of Commerce, of Washington, DC.

*David C. Smith, R. Alan Luberd, Melissa M. Brewer and Kathleen M. Cusack*, Kelley Drye & Warren, LLP, of Washington, DC, for defendant-intervenors.

## OPINION

### **Katzmann, Judge:**

The court returns to an antidumping (“AD”) investigation by the United States Department of Commerce (“Commerce”) in which it rejected corrected information submitted by a respondent during verification of Commerce’s investigation results. Before the court is Commerce’s *Final Results of Redetermination Pursuant to Court Remand* (Dep’t Commerce Dec. 23, 2019), ECF No. 55 (“*Remand Results*”), which the court ordered in *Goodluck India Limited v. United States*, 43 CIT \_\_, 393 F. Supp. 3d 1352 (2019). Under protest, Commerce recalculated Goodluck India Limited’s (“Goodluck”) dumping margin to zero percent, thus excluding Goodluck from AD duties. *Remand Results* at 9. Plaintiff Goodluck and Defendant the United States (“the Government”) request that the court sustain the *Remand Results*. Pl.’s Resp. to Def.-Inters.’ Comments in Opp’n to Final Remand Redetermination at 5, March 6, 2020, ECF No. 59 (“Pl.’s Br.”); Def.’s Reply to Comments on Remand Redetermination at 1, March 6, 2020, ECF No. 60 (“Def.’s Br.”). Defendant-Intervenors ArcelorMittal

Tubular Products, Michigan Seamless Tube, LLC, PTC, Alliance Corp., Webco Industries, Inc., and Zekelman Industries, Inc. request “that the [c]ourt reconsider[] its order directing Commerce to consider the corrected submission filed by Goodluck.” Def.-Inters.’ Comments in Opp’n to Final Remand Redetermination at 1, Feb. 5, 2020, ECF No. 57 (“Def.-Inters.’ Br.”). The court sustains the *Remand Results*.

## BACKGROUND

The court set out the relevant legal and factual background of the proceedings in further detail in its previous opinion, *Goodluck India*, 393 F. Supp. 3d at 1356–62. Information relevant to the instant opinion is set forth below.

On May 16, 2017, Commerce initiated an AD investigation into cold-drawn mechanical tubing from India and selected Goodluck as a mandatory respondent in that investigation. *See Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the Federal Republic of Germany, India, Italy, the Republic of Korea, the People’s Republic of China, and Switzerland: Initiation of Less-Than-Fair-Value Investigations*, 82 Fed. Reg. 22,491 (Dep’t Commerce May 16, 2017); U.S. Dep’t of Commerce Questionnaire to Goodluck (June 19, 2017), P.R. 81. Commerce published the preliminary results of its investigation on November 22, 2017, concluding that Goodluck’s dumping margin was de minimis based on Goodluck’s reported data. *See Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From India: Preliminary Affirmative Determination of Sales at Less Than Fair Value, in Part, Postponement of Final Determination, and Extension of Provisional Measures*, 82 Fed. Reg. 55,567, 55,569 (Nov. 22, 2017). On both the first day of Commerce’s sales verification and on the first day of its cost verification of its preliminary results, Goodluck reported corrections to its previously reported data that affected Commerce’s preliminary dumping margin. *See Remand Results* at 4. However, Commerce rejected these corrections as untimely new factual information submitted outside the investigation period and then rejected Goodluck’s originally reported data as unreliable. *See Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From India: Final Affirmative Determination of Sales at Less than Fair Value*, 83 Fed. Reg. 16,296 (Apr. 16, 2018) (“*Final Determination*”), and accompanying Issues and Decision Memorandum at 10–14 (Apr. 9, 2018), P.R. 311. Commerce thus calculated Goodluck’s AD margin based on adverse facts available (“AFA”) and applied the highest dumping margin of 33.8 percent. *Final Determination* at 16,297.

Goodluck then challenged the *Final Determination* before the court. Goodluck claimed “that Commerce’s determination was unsupported

by substantial evidence and contrary to law because (1) Commerce abused its discretion by rejecting Goodluck’s correction submission at verification; (2) Commerce’s reliance on [AFA] was not warranted where there were no gaps in the record and where Goodluck did not significantly impede the investigation; and (3) Commerce deviated from its typical practice when calculating Goodluck’s export subsidy cash deposit without adequate explanation.” *Goodluck India*, 393 F. Supp. 3d at 1362–63. The court agreed with Goodluck as to its first claim and found that “Goodluck’s revised data submission should [have been] categorized as a correctible importer mistake as opposed to untimely new factual information.” *Id.* at 1370. Therefore, in the previous opinion, the court did not reach “whether Commerce’s reliance on facts otherwise available and adverse inferences is supported by substantial evidence and in accordance with law.” *Id.* The court remanded the case to Commerce “to consider Goodluck’s corrected submission as well as to explain why it . . . departed from its general practice for calculating export subsidy cash deposit offset rates . . . .” *Id.* at 1363.

On remand, Commerce, under protest, “accept[ed] Goodluck’s revised databases, and recalculate[ed] Goodluck’s dumping rate pursuant to the [previous opinion and order].” *Remand Results* at 1. Thus, Commerce did not apply AFA in calculating Goodluck’s dumping margin on remand, but instead calculated Goodluck’s dumping margin as zero based on those revised databases. *Id.* at 9. The Government then filed the final *Remand Results* with the court on December 23, 2019. *Remand Results*. Defendant-Intervenors filed their comments on the *Remand Results* on February 5, 2020. Def.-Inters.’ Br. Goodluck and the Government filed replies to those comments on March 6, 2020. Pl.’s Br.; Def.’s Br. The court now reviews the *Remand Results* “for compliance with the court’s remand order.” *See Beijing Tianhi Indus. Co. v. United States*, 39 CIT \_\_, \_\_, 106 F. Supp. 3d 1342, 1346 (2015) (citations omitted).

## DISCUSSION

The Government and Goodluck request that the court affirm the *Remand Results*. Pl.’s Br. at 5; Def.’s Br. at 1. Defendant-Intervenors, however, challenge the court’s original decision to remand to Commerce its rejection of Goodluck’s corrected data. *See* Def.-Inters.’ Br. at 1. Because Commerce complied with the court’s remand order, the court affirms the *Remand Results*.

In its previous opinion, the court ordered Commerce on remand to accept Goodluck’s corrections to its reported data and to calculate its AD margin using that data. *See Goodluck India*, 393 F. Supp. 3d at

1363. The court agrees with the Government that the *Remand Results* show that “Commerce requested that Goodluck place the corrected database on the remand record, which Goodluck did, and recalculated the margin for Goodluck based on the submission, as directed” by the court. *See* Def.’s Br. at 4. Commerce recalculated an AD margin for Goodluck of zero percent. *Remand Results* at 9. Because Goodluck “will no longer be subject to the AD order on cold-drawn mechanical tubing from India,” Commerce did not need to recalculate a cash deposit rate for Goodluck as ordered by the court’s remand. *Id.* Therefore, the court need not reach the AFA application and cash deposit issues.

Defendant-Intervenors ask the court to reverse its previous opinion, which remanded Commerce’s *Final Determination*, claiming that “the [c]ourt inappropriately substituted its judgment for that of the agency.” Def.-Inters.’ Br. at 5. Defendant-Intervenors argue that, in the *Final Determination*, Commerce correctly relied on 19 U.S.C. § 1677m(d)–(e) in making the factual determination to reject Goodluck’s original databases and in applying adverse facts available to Goodluck in calculating its dumping margin. *Id.* at 5–7. Thus, they argue, “Commerce was entitled to, and properly did, follow the statute in rejecting Goodluck’s new information for the *Final Determination*, and it should not have been directed by the [c]ourt to give consideration to Goodluck’s untimely submitted information.” *Id.* at 12. On that basis, Defendant-Intervenors request that the court reconsider its previous opinion. *Id.*

The court is not persuaded by Defendant-Intervenors’ request. In *Goodluck India*, the court decided that, under existing case law and Commerce’s own practice, Commerce abused its discretion by rejecting Goodluck’s minor corrections, and thus the *Final Determination* was not supported by substantial evidence or in accordance with law. 393 F. Supp. 3d at 1363–64 (citing *NTN Bearing Corp. v. United States*, 74 F.3d 1204 (Fed. Cir. 1995); *Fischer S.A. Comercio v. United States*, 34 CIT 334, 700 F. Supp. 2d 1364 (CIT 2010); *Certain Hot-Rolled Steel Flat Products from the United Kingdom*, 81 Fed. Reg. 53,436 (Dep’t Commerce Aug. 12, 2016)). For that reason, the court was not required to defer to Commerce’s decision to reject Goodluck’s corrected data. The court concluded that Goodluck’s corrections were minor and that Commerce should have accepted those corrections in accordance with its past practice. *Id.* By accepting those corrections, Commerce has now complied with the remand order, acting in accordance with law. Further, as Goodluck notes, Defendant-Intervenors do not cite to any subsequently published precedent that would un-

dermine the court’s analysis in *Goodluck India* or identify any “factual mistakes or clerical errors,” Pl.’s Br. at 2, in that previous opinion. *See* Def.-Inters’ Br.

### CONCLUSION

Commerce complied with the court’s remand instructions, and Defendant-Intervenors’ arguments do not persuade the court to revisit its previous opinion. For the above stated reasons, the court sustains Commerce’s *Remand Results*.

### SO ORDERED.

Dated: April 30, 2020  
New York, New York

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

Slip Op. 20–58

NOVOLIPETSK STEEL PUBLIC JOINT STOCK COMPANY and NOVEX TRADING (SWISS) SA, Plaintiffs, v. UNITED STATES, Defendant, and STEEL DYNAMICS, INC. and NUCOR CORPORATION, Defendant-Intervenors.

Before: Claire R. Kelly, Judge  
Court No. 19–00194

[Granting Defendant and Defendant-Intervenors’ motions to dismiss for lack of subject matter jurisdiction.]

Dated: May 1, 2020

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*Joseph H. Hunt*, Assistant Attorney General, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Jeanne E. Davidson*, Director, *Tara K. Hogan*, Assistant Director, and *Kelly A. Krystyniak*, Trial Attorney. Of counsel was *Brandon J. Custard*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

*Roger B. Schagrin*, *Luke A. Meisner*, and *Kelsey M. Rule*, Schagrin Associates, of Washington, D.C., for defendant-intervenor Steel Dynamics, Inc.

*Alan H. Price*, *Christopher B. Weld*, *Maureen E. Thorson*, and *Cynthia C. Galvez*, Wiley Rein LLP, of Washington, D.C., for defendant-intervenor Nucor Corporation.

### OPINION AND ORDER

#### Kelly, Judge:

Before the court are Defendant the United States’ and Defendant-Intervenors Steel Dynamics, Inc. and Nucor Corporation’s motions to dismiss Plaintiffs’ complaint for lack of subject matter jurisdiction.

See Def.'s Mot. Dismiss, Dec. 23, 2019, ECF No. 19 ("Def.'s Br."); Proposed Def.-Intervenors' Mot. Dismiss Pls.' Compl., Nov. 21, 2019, ECF No. 18 ("Def.-Intervenors' Br.").<sup>1</sup> Plaintiffs Novolipetsk Steel Public Joint Stock Company ("NLMK") and NOVEX Trading (Swiss) SA ("NOVEX") bring this action to challenge the U.S. Department of Commerce's ("Commerce" or "Department") failure to determine an all others rate, following Commerce's determination that it would treat the Russian Federation ("Russia") as a market economy ("ME") country and the United States' extension of permanent normal trading relations ("PNTR") to Russia, in the antidumping duty ("ADD") order on hot-rolled flat-rolled carbon-quality steel products ("HRC") from Russia. See Compl. at ¶¶ 2–3, 6–42, Oct. 22, 2019, ECF No. 5; see also *Termination of the Suspension Agreement on [HRC] from [Russia], Rescission of 2013–2014 Administrative Review, and Issuance of [ADD] Order*, 79 Fed. Reg. 77,455 (Dep't Commerce Dec. 24, 2014) ("ADD Order"). Plaintiffs allege that Commerce unlawfully and erroneously failed to determine an all others rate in the ADD Order, following Russia's graduation to an ME country and the extension of PNTR, when it had, instead, calculated a country-wide rate in the final determination. See Compl. at ¶¶ 17–18, 26(a), 27–28. Plaintiffs also challenge the all others rate as arbitrary and capricious, unsupported by substantial evidence, an abuse of agency discretion, and exceeding express statutory limitations. *Id.* at ¶¶ 26(b), 29–34. Given the application of the country-wide rate as an all others rate, Plaintiffs also contend Russian exporters are treated less favorably than exporters in other former non-market economy ("NME") countries, resulting in unlawful discriminatory treatment. *Id.* at ¶¶ 26(c), 35–42.

Defendant and Defendant-Intervenors, in their motions to dismiss, contend that the court lacks subject matter jurisdiction to entertain Plaintiffs' claims. See Def.'s Br. at 2, 6–13; Def.-Intervenors' Br. at 6–16. According to Defendant and Defendant-Intervenors, Plaintiffs' complaint is a challenge to the all others rate in the ADD Order, a determination reviewable under 28 U.S.C. § 1581(c). See Def.'s Br. at 8–10; Def.-Intervenors' Br. at 6–13. In the alternative, Defendant and Defendant-Intervenors contend that even if the court has jurisdiction under 28 U.S.C. § 1581(i), Plaintiffs' challenge is untimely and barred by the statute of limitations, because their cause of action accrued

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<sup>1</sup> In its motion to dismiss, Defendant cites U.S. Court of International Trade ("USCIT") Rule 12(b)(6) as the basis to dismiss Plaintiffs' complaint. See Def.'s Br. at 2. However, Defendant elaborates that the court lacks subject matter jurisdiction and does not challenge the complaint for failing to state a claim. *Id.* at 2, 6–13. Therefore, the court understands Defendant to move under USCIT Rule 12(b)(1) to dismiss Plaintiffs' complaint.

over two years prior to commencing this action. See Def.'s Br. at 10–13; Def.-Intervenors' Br. at 14–16. Plaintiffs counter that jurisdiction lies under 28 U.S.C. § 1581(i), because they do not contest a final determination by Commerce, but challenge Commerce's alleged discriminatory treatment and its administration and enforcement of the ADD laws, which causes continuing harm. See Pls.' Resp. Opp'n [Def.'s Br.] at 8–17, Jan. 27, 2020, ECF No. 23 (“Pls.' Resp. Def.'s Br.”); Pls.' Resp. Opp'n [Def.-Intervenors' Br.] at 5–15, Dec. 27, 2019, ECF No. 20 (“Pls.' Resp. Def.-Intervenors' Br.”); see also Compl. at ¶¶ 2–3. In addition, Plaintiffs aver that they timely initiated this challenge, because their cause of action accrued within the statute of limitations. See Pls.' Resp. Def.'s Br. at 12–17; Pls.' Resp. Def.-Intervenors' Br. at 12–16.<sup>2</sup> For the reasons that follow, the court lacks jurisdiction over Plaintiffs' claims and Defendant's and Defendant-Intervenors' motions to dismiss are granted.

### BACKGROUND

On October 22, 1998, Commerce initiated an ADD investigation on imports of HRC from Russia, and selected, inter alia, Novolipetsk Iron & Steel Corporation (“NISCO”)<sup>3</sup> as a respondent. See *Initiation of [ADD] Investigations: [HRC] from Brazil, Japan, and [Russia]*, 63 Fed. Reg. 56,607 (Dep't Commerce Oct. 22, 1998); *Notice of Prelim. Determination of Sales at [LTFV]: [HRC] from [Russia]*, 64 Fed. Reg. 9,312, 9,314 (Dep't Commerce Feb. 25, 1999) (“*Prelim. Results*”). Subsequently, on March 1, 1999, NISCO informed Commerce by letter that it was withdrawing from participation in the investigation. See *Notice of Final Determination of Sales at [LTFV]: [HRC] from Russia*, 64 Fed. Reg. 38,626, 38,628 (Dep't Commerce July 19, 1999) (“*Final Results*”). On July 12, 1999, Commerce entered into an agreement with Russia's Ministry of Trade to suspend the investigation (“*Suspension Agreement*”). See *Suspension of [ADD] Investigation: [HRC] from [Russia]*, 64 Fed. Reg. 38,642, 38,642 (Dep't Commerce July 19, 1999). However, at the request of petitioners, Commerce continued the investigation and made an affirmative final determination of

<sup>2</sup> Plaintiffs also allege that Defendant intentionally misled the court in using “Novolipetsk” as a short form to refer to three separate companies—NLMK, NOVEX, and NISCO—and by mischaracterizing certain facts about Commerce's investigation of HRC from Russia. See Pls.' Resp. Def.'s Br. at 1–8. Defendant acknowledges its errors, explains that any mischaracterization was inadvertent, and notes that the factual issues raised are not germane to the jurisdictional question. See Def.'s Reply Supp. Mot. Dismiss at 8–11, Mar. 10, 2020, ECF No. 26. Given that, when the court evaluates a motion to dismiss for lack of subject matter jurisdiction, it must accept all undisputed allegations as true, *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993), Defendants' recognition of its error nullifies any alleged disagreement as to the relevant facts.

<sup>3</sup> According to Plaintiffs, NISCO was a state-owned enterprise and predecessor to NLMK. See Pls.' Resp. Def.'s Br. at 6.

sales at LTFV. *See Final Results*, 64 Fed. Reg. at 38,627.<sup>4</sup> Commerce calculated a country-wide, or Russia-wide, dumping margin of 184.56 percent and a weighted-average dumping margin of 73.59 percent for Joint Stock Company Severstal, which received a separate rate. *See id.*, 64 Fed. Reg. at 38,641. The International Trade Commission (“Commission”) also made an affirmative determination of material injury. *See [HRC] from Brazil and [Russia]*, 64 Fed. Reg. 46,951 (Int’l Trade Comm’n Aug. 27, 1999). No ADD order issued.

In 2002, Commerce announced that it would consider Russia an ME country for purposes of applying U.S. antidumping laws. *See Compl.* at ¶ 11; *see also* 19 U.S.C. § 1677(18)(C) (“Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority.”). A decade later, in 2012, Russia became a member of the World Trade Organization, and the United States extended PNTR. *See Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012*, Pub. L. No. 112–208, 126 Stat. 1496; *Proclamation 8920 of Dec. 20, 2012 to Extend Nondiscriminatory Treatment (Normal Trade Relations) to the Products of [Russia] and the Republic of Moldova*, 77 Fed. Reg. 76,797 (Pres. Doc. Dec. 28, 2012); *see also* 19 U.S.C. § 2434.<sup>5</sup> On July 10, 2014, domestic interested parties asked by letter that Commerce terminate the Suspension Agreement and impose antidumping duties on HRC imports from Russia. *See ADD Order*, 79 Fed. Reg. at 77,455. Soon after, on August 29, 2014, Commerce, at the request of Russian HRC producers, initiated an administrative review of the Suspension Agreement, for the period of July 1, 2013 to June 30, 2014. *See id.* Following a letter sent to Russia stating Commerce’s intent to terminate the Suspension Agreement, Commerce terminated the Suspension Agreement, effective December 19,

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<sup>4</sup> Commerce used “total adverse facts available” to derive the Russia-wide rate, because certain respondents did not respond to Commerce’s request for information and Commerce could not verify, *inter alia*, NISCO’s questionnaire response due to its withdrawal from the investigation. *See Final Results*, 64 Fed. Reg. at 38,630. The phrase “total adverse facts available” or “total AFA” encompasses a series of steps that Commerce takes to reach the conclusion that all of a party’s reported information is unreliable or unusable and that as a result of a party’s failure to cooperate to the best of its ability. Parties and Commerce sometimes use the shorthand “AFA” or “adverse facts available” or “AFA” to refer to Commerce’s reliance on facts otherwise available with an adverse inference to reach a final determination. However, AFA encompasses a two-part inquiry pursuant to which Commerce must first identify why it needs to rely on facts otherwise available, and second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when “selecting among the facts otherwise available.” *See* 19 U.S.C. § 1677e(a)–(b).

<sup>5</sup> PNTR is a legal designation, indicating that the United States has extended “most favored nation” to a trading partner. *See Internal Revenue Service Restructuring and Reform Act of 1998*, Pub. L. No. 105–206, 112 Stat. 685 (replacing the term “most favored nation” with PNTR).

2014. *See id.*, 79 Fed. Reg. at 77,456. Commerce then rescinded the administrative review and issued an ADD order. *See id.* In the *ADD Order*, Commerce set the cash deposit rate equal to the margins calculated in the final determination, setting the Russia-wide rate of 184.56 percent as the all others rate and assigning Joint Stock Company Severstal a weighted-average dumping margin of 73.59 percent. *See Final Results*, 64 Fed. Reg. at 38,641; *ADD Order*, 79 Fed. Reg. at 77,456.

On October 23, 2017, Plaintiffs made an entry of HRC from Russia, and subsequently requested administrative review of the *ADD Order*. *See [HRC] from [Russia]*, 84 Fed. Reg. 4,776 (Dep't Commerce Feb. 19, 2019) (prelim. results of [ADD] admin. review; 2016–2017), and accompanying Decision Memo. for the Prelim. Results of the [ADD] Admin. Review of [HRC] from [Russia], A-821–809 (Feb. 11, 2019), *available at* <https://enforcement.trade.gov/frn/summary/russia/2019-025861.pdf> (last visited Apr. 28, 2020) (“Admin. Rev. Prelim. Decision Memo.”).<sup>6</sup> Commerce preliminarily determined that Plaintiffs did not make a bona fide sale. *See Admin. Rev. Prelim. Decision Memo.* at 7–8. In its final determination, Commerce maintained its finding that Plaintiffs did not make a bona fide sale, rescinded the administrative review, and continued to assign an all others rate of 184.56 percent. *See [HRC] from [Russia]*, 84 Fed. Reg. 38,948, 38,949 (Dep't Commerce Aug. 8, 2019) (final results and rescission of [ADD] admin. review) (“*Final Results in 16–17 Admin. Review*”), and accompanying Issues & Decision Memo. for the [Final Results in 16–17 Admin. Review] at 17–18, A-821–809, (Aug. 2, 2019), *available at* <https://enforcement.trade.gov/frn/summary/russia/2019-17006-1.pdf> (last visited Apr. 28, 2020) (“Final Decision Memo. in 16–17 Admin. Review”). NLMK and NOVEX commenced a separate action, also pending before this court, challenging Commerce’s *Final Results in 16–17 Admin. Review*. *See generally Novolipetsk Steel Public Joint Stock Company v. United States*, Ct. No. 19–00172.

### STANDARD OF REVIEW

The party seeking the Court’s jurisdiction has the burden of establishing that jurisdiction exists. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). When deciding a motion to dismiss for lack of subject-matter jurisdiction, the

<sup>6</sup> Specifically, NLMK had made a sale to NOVEX, the importer of record. *See* Pls.’ Resp. Def.-Intervenors’ Br. at 7; *see also* Final Decision Memo. in 16–17 Admin. Review at 14.

Court must first determine whether the motion seeking dismissal “challenges the sufficiency of the pleadings or controverts the factual allegations made in the pleadings.” *See H & H Wholesale Servs., Inc. v. United States*, 30 CIT 689, 691, 437 F. Supp. 2d 1335, 1339 (2006) (citation omitted). If the motion controverts the basis for jurisdiction pled by the non-moving party, then “the allegations in the complaint are not controlling,” and the court assumes that all undisputed facts alleged in the complaint are true. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993).

## DISCUSSION

Defendant and Defendant-Intervenors contend that the court lacks subject matter jurisdiction over Plaintiffs’ claims under 28 U.S.C. § 1581(i), which requires dismissal of the complaint. *See* Def.’s Br. at 8–13; Def.-Intervenors’ Br. at 7–16. According to both, Plaintiffs challenge an ADD order embodying a final determination that would have been reviewable under 28 U.S.C. § 1581(c) had Plaintiffs brought timely action; now, however, administrative review is the proper means to challenge the all others rate. *See* Def.’s Br. at 10; Def.-Intervenors’ Br. at 10–13. Plaintiffs counter that they do not seek judicial review of an agency determination that would establish jurisdiction under subsection 1581(c); rather, they challenge Commerce’s failure to determine an all others rate, which is reviewable under subsection 1581(i). *See* Pls.’ Resp. Def.’s Br. at 11; Pls.’ Resp. Def.-Intervenors’ Br. at 5–7.<sup>7</sup> Further, Plaintiffs argue that even if they could pursue administrative review as another remedial avenue under subsection 1581(c), the remedy would be manifestly inadequate and, therefore, would support the exercise of residual jurisdiction over the present action. *See* Pls.’ Resp. Def.’s Br. at 10, 17; Pls.’ Resp. Def.-Intervenors’ Br. at 7–12. For the reasons that follow, the court lacks subject matter jurisdiction over Plaintiffs’ claims.

Depending on the designation of a country as an NME or ME, Commerce applies different methodologies to calculate normal value in an antidumping investigation, which affects the calculation of dumping margins. Normal value refers to “the price at which the foreign like product is first sold . . . for consumption in the exporting country[.]” 19 U.S.C. § 1677b(a)(1)(B)(i). A dumping margin is “the amount by which normal value exceeds the export price or con-

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<sup>7</sup> In response to Defendant’s factual allegations concerning the history of the investigation of HRC from Russia, Plaintiffs intimate that “Commerce’s AD order, which ended the investigation segment, is unlawful” because domestic interested parties did not meet the burden of persuasion that the Suspension Agreement should be terminated. *See* Pls.’ Resp. Def.’s Br. at 7–8. However, because Plaintiffs “had not intended to challenge Commerce’s improper termination of the suspension agreement,” the court does not address that issue. *Id.* at 7.

structed export price of the subject merchandise.” *Id.* at § 1677(35)(A). For an ME country, Commerce determines normal value on the basis of sales or constructed normal value. *See* 19 U.S.C. § 1677b(a); *see also* 19 C.F.R. § 351.403–351.407. By contrast, if the exporting country is designated as an NME, “sales of merchandise in [that NME] country do not reflect the fair value of merchandise.” 19 U.S.C. § 1677(18)(A). Therefore, Commerce determines normal value based on an NME producer’s factors of production, used to produce the subject merchandise, in an ME country or countries. *See id.* at § 1677b(c); *see also* 19 C.F.R. § 351.408. Commerce assumes that all producers are part of the government-entity and, in its preliminary and final determinations, calculates one country-wide margin, unless an investigated respondent demonstrates it qualifies for a separate rate. *See* 19 C.F.R. § 351.408.<sup>8</sup>

Irrespective of whether Commerce applies the NME or ME methodology, Commerce issues preliminary and final determinations, where it estimates the “weighted average dumping margin for each exporter and producer individually investigated” and the “all-others rate for all exporters and producers not individually investigated.” 19 U.S.C. §§ 1673b(d)(1)(A), 1673d(c)(1)(B)(i); *see also* 19 C.F.R. §§ 351.205, 351.210. The all others rate is the “amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title” (i.e., based on facts available). 19 U.S.C. § 1673d(c)(5); *see also id.* at § 1677e. Following a final affirmative determination of sales at LTFV, and a final affirmative determination of injury by the Commission, Commerce issues an ADD order, which marks the end of the investigative phase of the proceeding. *See id.* at § 1673e(a)–(b); 19 C.F.R. § 351.211. Commerce imposes antidumping duties “in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.” 19 U.S.C. § 1673; *see also id.* at § 1673e(a).

Section 1581 enumerates the Court’s jurisdictional bases. 28 U.S.C. § 1581. Relevant here, subsection (c) grants the Court “exclusive jurisdiction of any civil action commenced under section 516A or 517 of the Tariff Act of 1930,” *id.* at § 1581(c), which pertain to determinations in countervailing duty and ADD proceedings and claims of

<sup>8</sup> In 1999, when Commerce issued the *Preliminary Results* and *Final Results*, Commerce’s practice was to assign separate rates to NME investigated respondents that completed questionnaire responses and established their eligibility for a separate rate by demonstrating an absence of government control in law and in fact. *See Prelim. Results*, 64 Fed. Reg. at 9,315–16.

evasion of countervailing duty and ADD orders, respectively. 19 U.S.C. §§ 1516a, 1517. Subsection (i) is a “residual” grant of jurisdiction for review of, inter alia, the “administration and enforcement” of claims that can be challenged under 28 U.S.C. § 1581(c), see 28 U.S.C. § 1581(i)(4), and claims when the remedy under another subsection of 1581 would be manifestly inadequate. See *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1371 (Fed. Cir. 2002).

Here, Plaintiffs’ request for a redetermined all others rate lies in a challenge to the *ADD Order*, which would support jurisdiction under 1581(c). See Compl. at ¶ 26, Prayer for Judgment and Relief.<sup>9</sup> Commerce initiated its investigation of HRC imports from Russia, designated at that time as an NME country, and, in its final determination, calculated a Russia-wide rate as well as a weighted-average rate. See *Final Results*, 64 Fed. Reg. at 38,629, 38,641. When Commerce issued its *ADD Order*, following Russia’s designation as an ME country, it stated that it was “instructing CBP to require a cash deposit for each entry equal to the AD weighted-average margin rates found in the Department’s Final Determination” and that the “all others rate applies to all producers and exporters of subject merchandise not specifically listed.” *ADD Order*, 79 Fed. Reg. at 77,456. Commerce made no further reference to the all others rate. See generally *id.* Commerce’s conclusory pronouncement concerning the all others rate in the *ADD Order* does not affect the jurisdictional question before the

<sup>9</sup> Although Plaintiffs allege that Commerce’s failure to determine an all others rate constitutes defective administration of antidumping laws, see Compl. ¶¶ 2, 26–28, Commerce made a final determination and published the *ADD Order*, consistent with its statutory obligations. In the final determination, Commerce applied its NME methodology to determine the amount by which normal value exceeds export price, resulting in the calculation of Russia-wide and weighted-average dumping margins. See generally *Final Results*. When Commerce issued the *ADD Order*, subsequent to the designation of Russia as an ME country, it imposed “an antidumping duty equal to the amount by which the normal value of the merchandise exceeds the export price (or the constructed export price) of the merchandise[.]” 19 U.S.C. § 1673e(a). More specifically, Commerce imposed an ADD in the amount equal to the Russia-wide rate it had found in the final determination.

Further, Plaintiffs’ assertion that “the absence of an all others rate determination is not susceptible to challenge under 19 U.S.C. § 1516a” is mistaken. Pls.’ Resp. Def.-Intervenors’ Br. at 7. Plaintiffs equate Commerce’s failure to include “discussion or information . . . in the AD Order with respect to the all others rate” with a failure to make a determination within the meaning of 19 U.S.C. § 1677f(i). *Id.* at 5–6. Section 1677f(i) sets out the disclosure requirements for, inter alia, preliminary and final determinations, not ADD orders. See 19 U.S.C. 1677f(i)(1). An alleged deficiency in a determination does not mean a determination was not rendered. Here, Plaintiffs do not suggest that Commerce failed to publish a final determination—and indeed acknowledge that Commerce issued the *Final Results*—but, instead, appear to challenge the *ADD Order*’s embodiment of the final determination. More specifically, Plaintiffs challenge the adoption of a country-wide rate as an all others rate without explanation in the *ADD Order*. See Pls.’ Resp. Def.-Intervenors’ Br. at 5–6. The *ADD Order* would be susceptible to judicial review under 19 U.S.C. § 1516a. See 19 U.S.C. § 1516a(a)(2)(A)(i)(II), (a)(2)(B)(i); see also 28 U.S.C. § 1581(c).

court. *See* Compl. at ¶¶ 26–28.<sup>10</sup> Rather, to the extent that there is a mismatch and lack of explanation between the final determination, where Commerce determined a Russia-wide rate, and the *ADD Order*, where Commerce set the all others rate, Plaintiffs would have been able to challenge the all others rate in the *ADD Order*—which embodies the final determination—and to obtain a redetermined cash deposit rate under subsection 1581(c). *See* 19 U.S.C. § 1516a(a)(2)(A)(i)(II), (a)(2)(B)(i); 28 U.S.C. § 1581(c); *see also* *U.S. Steel Corp. v. United States*, 42 CIT \_\_, \_\_, 319 F. Supp. 3d 1295, 1300–01 (2018).

However, jurisdiction under subsection 1581(c) is no longer available. Section 1516a(a)(2)(B)(i) details what determinations may be challenged when. *See* 19 U.S.C. § 1516a(a)(2)(B)(i); *see also* 28 U.S.C. § 2636.<sup>11</sup> A party may challenge an ADD order based upon a final affirmative determination by filing in this Court both a summons, within 30 days of the order’s publication in the Federal Register, and, within 30 days later, a complaint. *See* 19 U.S.C. § 1516a(a)(2)(A)(i)(II), (a)(2)(B)(i). Here, Commerce issued its *Final Results* and, following the termination of the Suspension Agreement, published the *ADD Order*. Neither Plaintiffs nor any participant to the proceeding commenced an action within 30 days of the publication of the *ADD Order*. Given that the *ADD Order* would have been susceptible to challenge, jurisdiction would have laid under subsection (c), foreclosing jurisdiction under subsection (i).<sup>12</sup>

<sup>10</sup> In support of Plaintiffs’ view that Commerce failed to render a determination susceptible to challenge, Plaintiffs contend that a “failure to act does not constitute a final agency action subject to review.” Pls.’ Resp. Def.’s Br. at 11. That argument does not find support in the Administrative Procedure Act, which lists a failure to act as a type of agency action susceptible to judicial review. *See* 5 U.S.C. § 551(13)(defining an “agency action” as, *inter alia*, a “failure to act”); *see also id.* at §§ 701, 705. In addition, Plaintiffs’ theory that a failure to act is not challengeable under the APA contradicts Plaintiffs’ claim for relief under the APA, to compel Commerce to set an all others rate in the *ADD Order*. *See* Compl.; *see also* Pls.’ Resp. Def.’s Br. at 11.

<sup>11</sup> Plaintiffs contend that its action is timely, because they were not injured until they became subject to posting cash deposits on October 23, 2017 and sought administrative review. *See* Pls.’ Resp. Def.’s Br. at 8, 12–13. In making this argument, Plaintiffs focus on the timeliness of an action under 28 U.S.C. § 1581(i). However, for the reasons discussed above, the court does not have subject matter jurisdiction under subsection (i).

<sup>12</sup> Defendant and Defendant-Intervenors argue that Plaintiffs could obtain a new cash deposit rate by making sales of HRC and seeking administrative review of the *ADD Order*. Def.’s Br. at 10; Def.-Intervenors’ Br. at 11–12; *see also* 19 U.S.C. § 1675(a). Plaintiffs disagree. They explain that in the 2017–2018 review Commerce again assigned an all others rate of 184.56 percent and, in January 2020, issued liquidation instructions on NLMK merchandise exported by any party. *See* Pls.’ Resp. Def.’s Br. at 9. Plaintiffs allege that even if they were to win the appeal in the 2016–2017 administrative review, that 2017–2018 review would supersede and re-impose the 184.56 percent rate. *Id.* at 9–10. Plaintiffs characterize the application of a previously established margin as a cash deposit rate in a subsequent administrative review as “an act of sabotage” and claim that the

## CONCLUSION

For the foregoing reasons, it is

**ORDERED** that Defendant's and Defendant-Intervenors' motions to dismiss are granted and Plaintiffs' complaint is dismissed. Judgment will enter accordingly.

Dated: May 1, 2020

New York, New York

*/s/ Claire R. Kelly*  
CLAIRE R. KELLY, JUDGE



Slip Op. 20–59

IN ZONE BRANDS, INC. and GOOD2GROW, INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge  
Court No. 17–00025  
PUBLIC VERSION

[In Customs classification matter, Defendant's motion for summary judgment is granted and Plaintiffs' cross-motion for summary judgment is denied.]

Dated: May 5, 2020

*Daniel G. Jarcho, Kyle G. A. Wallace, Jason M. White, Brian W. Lutz, and Chulian Yang* Allston & Bird LLP, of Washington, D.C. for the Plaintiffs, In Zone Brands, Inc. and Good2Grow, Inc.

*Peter A. Mancuso*, Trial Attorney, Civil Division, U.S. Department of Justice, of Washington, D.C., for the Defendant, the United States of America. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, U.S. Department of Justice and *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office, Civil Division, U.S. Department of Justice, Commercial Litigation Branch. Of Counsel on the brief was *Michael W. Heydrich* Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

## OPINION

### Restani, Judge:

Plaintiffs In Zone Brands, Inc. (“In Zone”) and Good2Grow, Inc. (“Good2Grow”) brought this action contesting U.S. Customs and Border Protection’s (“Customs”) tariff classification of the subject merchandise. The merchandise at issue (“bottle toppers”) depict the governments’ conduct is “likely to recur,” imposing a continuing harm. *See id.* at 10, 12–17. Also, given that Commerce “preordained” the outcome of the 2016–2017 administrative review, Plaintiffs argue that they have no other remedy under section 1581 to challenge the all others rate than subsection (i). *See* Pls.’ Resp. Def.-Intervenors’ Br. at 8. Setting aside Plaintiffs’ characterizations, nothing they assert establishes jurisdiction in this case, because they complain of the appropriateness of the all others rate imposed by the ADD order. Therefore, the court does not reach either Defendant’s and Defendant-Intervenors’ positions regarding the availability of a challenge to an administrative review or Plaintiffs’ response.

heads and/or busts of popular children’s characters such as Iron Man, Thor, Sponge Bob, Angry Birds, Care Bears, Ariel, and Paw Patrol, fastened to a screw-top straw and base made for use with Plaintiffs’ children’s beverages. In cross-motions for summary judgment, Plaintiffs argue that the bottle toppers are properly classified as toys under Heading 9503 of the Harmonized Tariff Schedule of the United States (“HTSUS”) and the government argues that Customs properly classified the bottle toppers under as “stoppers, lids, caps and other closures” under Heading 3923.50. For the reasons stated below, the government’s motion is granted and Plaintiffs’ motion is denied.

## I. BACKGROUND

The bottle toppers were imported between January 9, 2013, and August 16, 2014. Def.’s Statement of Undisputed Material Facts ¶ 3 (“Def. Facts”); Pl.’s Resp. to Def.’s Statement of Undisputed Material Facts ¶ 3 (“Pl. Resp. Facts”). At liquidation, Customs classified the merchandise under subheading 3923.50.00, HTSUS (2013),<sup>1</sup> which provides for “Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics: Stoppers, lids, caps and other closures.” Pl.’s Statement of Material Facts Not in Dispute ¶ 85 (“Pl. Facts”); Def.’s Resp. to Pl.’s Statement of Undisputed Material Facts ¶ 85 (“Def. Resp. Facts”). Good2Grow<sup>2</sup> timely protested, averring that the bottle toppers were properly classified under 9503.00.00, HTSUS as “Tricycles, scooters, pedal cars and similar wheeled toys; dolls’ carriages; dolls; other toys; reduced-scale (‘scale’) models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof.” Pl. Facts ¶¶ 86–87; Def. Resp. Facts ¶¶ 86–87. Although a protest at the Port of Atlanta was approved, Customs then issued HQ H264771, which led to the denial of protests at the Ports of Tampa and Jacksonville. Pl. Facts ¶¶ 88–91; Def. Resp. Facts ¶¶ 88–91. Good2Grow appealed these denials. The parties filed cross-motions for summary judgment and supporting briefs arguing their respective positions. *See* Def.’s Mot. for Summ. J. & Mem. in Supp. of Mot. for Summ. J., ECF No. 51 (June 28, 2019) (“Def. Br.”); Pl.’s Cross-Mot. for Summ. J. & Mem. of Law in Resp. to Def.’s Mot. for Summ. J. & in Supp. of Pl.’s Cross-Mot. for Summ. J., ECF No. 70 (Nov. 8, 2019) (“Pl. Br.”).

The following facts are undisputed. The bottle toppers are three-dimensional molded plastic figures made to resemble various licensed

<sup>1</sup> The Court notes that some of the merchandise at issue is subject to the 2014 version of the HTSUS, but that there are no differences relevant to this case between the two versions. Accordingly, all citations will be to the 2013 version unless otherwise noted.

<sup>2</sup> Prior to 2015, Good2Grow, Inc. was called “In Zone Brands”. *See* First Am. Compl. ¶ 5. For ease of reference, the court will refer to the company as Good2Grow.

characters<sup>3</sup> that can be affixed to a spout with a valve and threaded base made to screw onto Good2Grow juice bottles.<sup>4</sup> Pl. Facts ¶ 5; Def. Resp. Facts ¶ 5. The spout, valve, and threaded base (the “forecap”), Def. Facts ¶ 14; Pl. Resp. Facts ¶ 14, complies with applicable U.S. Food and Drug Administration (“FDA”) standards for beverage use. Def. Facts ¶ 22; Pl. Resp. Facts ¶ 22. Additionally, the bottle toppers also comply with toy-specific standard ASTM F963–11 for choke testing. Pl. Facts ¶ 53; Def. Resp. Facts ¶ 53. The bottle toppers are reusable, dishwasher safe, and spill-proof due to a one-way valve. Def. Facts ¶¶ 11, 13; Pl. Resp. Facts ¶¶ 11, 13. Good2Grow juice bottles are hermetically sealed with foil, which is removed prior to consumption. Pl. Facts ¶ 17; Def. Resp. Facts ¶ 17. Good2Grow primarily targets children ages ten and younger, who comprise the majority of consumers. Pl. Facts ¶¶ 8–9; Def. Resp. Facts ¶¶ 8–9. The bottle toppers are, at times, sold without the juice bottle online, but most often are sold in retail locations (such as grocers, convenience stores, mass merchants, and drug stores) with the juice bottle included. Def. Facts ¶¶ 30, 43; Pl. Resp. Facts ¶¶ 30, 43; Pl. Facts ¶ 24; Def. Resp. Facts ¶ 24.

## II. JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 28 U.S.C. § 1581(a) (2012).<sup>5</sup> The court will grant summary judgment if “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). Summary judgment is appropriate in tariff classification cases where “there is no genuine dispute as to the nature of the merchandise and the classification turns on the proper meaning and scope of the relevant tariff provisions.” *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1371 (Fed. Cir. 2013). The Court decides classification de novo. *See* 28 U.S.C. § 2640 (a)(1); *Telebrands Corp. v. United States*, 865 F. Supp. 2d 1277, 1279–80 (CIT 2012).

## III. DISCUSSION

### a. Legal Framework

The plaintiff has the burden of demonstrating that the government’s classification is incorrect, but the court has an independent

<sup>3</sup> [[ ]] Def. Facts ¶ 28; Pl. Resp. Facts ¶ 28.

<sup>4</sup> The toppers are uniquely threaded such that they do not fit standard bottles. Pl. Facts ¶ 12; Def. Resp. Facts ¶ 12; Def. Facts ¶ 7; Pl. Resp. Facts ¶ 7.

<sup>5</sup> All further references to the U.S. Code will be to the 2012 edition unless otherwise noted.

duty to determine the correct classification. *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). The meaning of a tariff term is a question of law and whether subject merchandise falls under a given tariff term is a question of fact. *See Wilton Indus. v. United States*, 741 F.3d 1263, 1265–6 (Fed. Cir. 2013) (citations omitted). The General Rules of Interpretation (“GRIs”) and, if applicable, the Additional U.S. Rules of Interpretation (“ARIs”), guide classification decisions under the HTSUS. *Id.* at 1266. The court applies the GRIs in numerical order and only continues to a subsequent GRI if “proper classification of the imported goods cannot be accomplished by reference to a preceding GRI.” *Id.* GRI 1 requires classification to “be determined according to the terms of the headings and any relative section or chapter notes.” GRI 1 (2013). HTSUS chapter and section notes are considered binding statutory law. *See BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed Cir. 2011). Once the correct heading is identified, the court determines which subheading correctly identifies the merchandise in question. *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998) (citing GRI 1, 6).

## **b. Competing Tariff Provisions**

The government classified the bottle toppers under subheading 3923.50.00, HTSUS at 5.3% *ad valorem*. The relevant portions of Chapter 39 of the HTSUS read:

3923	Articles for the conveyance or packing or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics:
3923.50.00	Stoppers, lids, caps and other closures.

Good2Grow contends that the bottle toppers should enter free of charge under subheading 9503.00.00, HTSUS, as:

9503.00.00	Tricycles, scooters, pedal cars and similar wheeled toys; dolls’ carriages; dolls, other toys; reduced-scale (“scale”) models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof.
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Although the bottle toppers may be properly classified under 3923.50.00, the court must first assess whether they are properly classified under 9503.00.00, HTSUS because Note 2(y) to Chapter 39 specifically excludes “[a]rticles of chapter 95 (for example, toys, games, sports equipment).” Note 2(y) to ch. 39, HTSUS. Turning to Chapter 95, however, the court is met with another note that the government argues must be considered before the relevant heading.

### c. Note 1(v) to Chapter 95

The government argues that Note 1(v)<sup>6</sup> to Chapter 95 precludes classification of the bottle toppers as toys under Heading 9503. Def. Br. at 11–13. Note 1(v) excludes from classification under Chapter 95:

Tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles having a utilitarian function (classified according to their constituent material).

Note 1(v) to ch. 95, HTSUS. Good2Grow avers that Note 1(v) is of limited application meant to exclude “traditional utilitarian items decorated with a *holiday* motif” from classification under Chapter 95. Pl. Br. at 13. Further, Good2Grow notes that a footnote to Note 1(v) directs one to subheading 9817.95,<sup>7</sup> which allows duty-free entry of certain “utilitarian articles” used in relation to a “religious or cultural ritual” or holiday. *Id.* at 12 (citing 9817.95, HTSUS). The government responds that Good2Grow’s reading is contrary to the text, which is not so limiting, and that the cases Good2Grow cites do not support its interpretation of Note 1(v). *See* Mem. of Law in Resp. to Pl.’s Cross-Mot. for Summ. J. & in Further Supp. of the Gov’t’s Mot. for Summ. J., ECF No. 61, at 8–9 (Oct. 7, 2019) (“Def. Reply”). In reply, Good2Grow argues that the government misapplies the *ejusdem generis* canon and overreads the breadth of Note 1(v). Pl.’s Reply to Def.’s Resp. to Pl.’s Cross-Mot. for Summ. J., ECF No. 65, at 1–2 (Nov. 4, 2019). (“Pl. Reply”). Further, Good2Grow contends that Customs’ stance during the United States International Trade Commission (“ITC”) Investigation No. 1205–6 estops the government from interpreting Note 1(v) to narrow the scope of heading 9503 such that this court’s decision in *Minnetonka Brands, Inc. v. United States*, 110 F. Supp. 2d 1020 (CIT 2000) should be reconsidered. Pl. Reply at 1–4. In supplemental briefing requested by the court, the government maintains that Note 1(v) categorically excludes the bottle toppers from chapter 95 given their inherent utility. *See* Def.’s Sur-Reply, ECF No. 72, at 6–7 (Feb. 26, 2020) (“Def. Suppl. Br.”). Good2Grow continues to argue that Note 1(v) was expressly concerned with festive articles, that it has no applicability here, and that Customs has previously

<sup>6</sup> Now Note 1(w) in the current version of the HTSUS. *See* Note 1(w) to ch. 95, HTSUS (2020).

<sup>7</sup> The relevant provisions are:

9817.95.01 Utilitarian articles of a kind used in the home in the performance of specific religious or cultural ritual celebrations for religious or cultural holidays, or religious festive occasions, such as Seder plates, blessing cups, menorahs or kinaras

9817.95.05 Utilitarian articles in the form of a three-dimensional representation of a symbol or motif clearly associated with a specific holiday in the United States.

found that Note 1(v) does not alter the classification of toys. *See* Pl.’s Resp. to Def.’s Sur-Reply, ECF No. 73, at 1–5 (Mar. 9, 2020) (“Pl. Suppl. Br.”).

The ITC Report referenced by Good2Grow provides some insight as to the proper scope of Note 1(v). *See* Proposed Modifications to the Harmonized Tariff Schedule of the United States, Inv. No. 1205–06, USITC Pub. 3851 (Apr. 2006) (Final) (“*ITC Report*”). As the Court of Appeals for the Federal Circuit noted, concerns regarding the breadth of Note 1(v) led the ITC to recommend new, duty-free subheadings—9817.95.01 and 9817.95.05—for certain festive articles in order to “maintain substantial rate neutrality” of those items. *See Michael Simon Design, Inc. v. United States*, 609 F.3d 1335, 1337 (Fed. Cir. 2010); *see also WWRD US, LLC v. United States*, 886 F.3d 1228, 1234 (Fed. Cir. 2018) (noting that this new duty-free exception was limited to certain festive utilitarian items used “in the performance of specific religious or cultural ritual celebrations.”). Good2Grow appears to understand Note 1(v)’s reference to subheading 9817.95 to mean that Note 1(v) was exclusively concerned with utilitarian items decorated with certain motifs. *See* Pl. Br. at 13. Not so. Note 1(v)’s language is not so narrow, and nothing referenced by either party indicates that it was limited to utilitarian items with certain festive motifs.<sup>8</sup> In fact, Heading 9817.95<sup>9</sup> and the reference to it in Note(1)(v) were added to ensure that certain festive articles received duty-free treatment notwithstanding Note (1)(v). *See* Certain Festive Articles: Recommendations for Modifying the Harmonized Tariff Schedule of the United States, 75 Fed. Reg. 57,293, 57,294 (Int’l Trade Comm’n Sept. 20, 2010); *see also Michael Simon Design*, 609 F.3d at 1337. Note 1(v) appears to simply reinforce the longstanding understanding that certain merchandise with a primarily utilitarian purpose is not properly classified under Chapter 95. *See Childcraft Educ. Corp. v. United States*, 742 F.2d 1413, 1415 (Fed. Cir. 1984) (“When amusement and utility become locked in controversy, the question becomes one of determining whether the amusement is incidental to the utilitarian purpose, or the utility purpose incidental to the amusement”) (quoting *Ideal Toy Corp. v. United States*, 78 Cust. Ct. 28, 33 C.D. 4688

<sup>8</sup> Good2Grow’s citation to this court’s opinions in *Infantino LLC v. United States*, Ct. No. 11497, Slip Op. 14–155, 2014 WL 7331753 (CIT Dec. 24, 2014) and *Springs Creative Prods. Grp. v. United States*, Ct. No. 10–67, Slip Op. 13–107, 2013 WL 4307857 (CIT Aug. 16, 2013) are unavailing. The court in those cases did not address Note 1(v) and stand for the unremarkable position that merchandise with incidental or some utility still may be properly classified under Chapter 95. *See Infantino*, Slip Op. 14–155 at 13–15, 2014 WL 7331753, at \*8; *Springs Creative*, Slip Op. 13–107 at 15–18, 2013 WL 4307857, at \*8.

<sup>9</sup> Chapter 98 is national in scope and not part of the international harmonized system. *See* Certain Festive Articles: Recommendations for Modifying the Harmonized Tariff Schedule of the United States, 75 Fed. Reg. 57,293, 57,294 (Int’l Trade Comm’n Sept. 20, 2010).

(1977)); *see also ITC Report* at 10 (stating that the “intent of note 1(v) was not to alter the classification of toys, but to reflect the existing scope of chapter 95[.]”); Limitation of the Application of the Decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit in *Park B. Smith v. United States*, 40–15 Cust. B. & Dec. 5, 18 (Apr. 5, 2006) (“the new legal note language was viewed as nothing more than a clarification of the existing scope of the heading.”).<sup>10</sup>

Turning to normal principles of classification, Note (1)(v) is only applicable if the bottle toppers do “not have a more specific primary purposes that is inconsistent with the listed exemplars.” *Otter Prods., LLC v. United States*, 834 F.3d 1369, 1376 (Fed. Cir. 2016) (citation and quotation omitted). Some ancillary utility does not necessarily render merchandise improperly classified under Chapter 95. Accordingly, whether the bottle toppers are subject to Note 1(v) is decided by assessing whether its principal purpose is utilitarian in nature. To answer this question, the court addresses Good2Grow’s contention that the principal purpose of the bottle toppers is not utilitarian and instead is “to provide amusement, diversion, or play.” Pl. Br. at 31.

#### **d. The Merchandise is Not Properly Classified Under Chapter 95**

To determine whether subject merchandise is a “toy” under Chapter 95, the court must determine whether its principal use is for “amusement, diversion, or play.” *See Processed Plastics Co. v. United States* 473 F.3d 1164, 1170 (Fed. Cir. 2006)<sup>11</sup> (citing *Minnetonka*, 110 F. Supp. 2d at 1026). ARI 1 “dictates how tariff classification should be construed when the classification decision is controlled by use.” *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1363 (Fed. Cir. 1999). ARI 1(a)<sup>12</sup> requires the court to determine what group of goods “are

<sup>10</sup> Good2Grow’s arguments regarding the interpretive tool *ejusdem generis* are unavailing. Insofar as that framework is helpful, the bottle toppers are similar to “tableware [or] kitchenware” given that their function, at least in part, is to transmit juice for consumption and seal for later use. Accordingly, the bottle toppers are sufficiently “like [the] named exemplars” in Note (1)(v). *See Deckers Corp. v. United States*, 532 F.3d 1312, 1314 (Fed. Cir. 2008). As detailed below, the bottle toppers are additionally “articles having a utilitarian function and classified according to their constituent material.” Note 1(v) to ch. 95, HTSUS.

<sup>11</sup> The Federal Circuit agreed “with the standard adopted in *Minnetonka* to determine whether merchandise should be classified as a toy,” and considered whether the “primary use” of merchandise at issue in that case rendered the product a toy. *Processed Plastics*, 473 F.3d at 1170. Accordingly, the court treats Heading 9503 as a use provision. *See id.*; *see also Streetsurfing LLC v. United States*, 11 F. Supp. 3d 1287, 1294 (CIT 2014) (noting that “9503.00.00, is a principal use provision.”)

<sup>12</sup> In the absence of special language or context which otherwise requires—

(a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use. ARI 1(a).

commercially fungible with the imported goods.” *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1313 (Fed. Cir. 2012) (citation omitted). This court may consider the factors outlined in *United States v. Carborundum Co.*, 536 F.2d 373, 377 (CCPA 1976) to determine the principal use of the subject merchandise. *Aromont*, 671 F.3d at 1312–13; *see also Processed Plastics*, 473 F.3d at 1170 (noting that the *Carborundum* factors “are simply areas of inquiry that may prove useful in determining what is the principal use of merchandise alleged to be a ‘toy.’”). The *Carborundum* factors include: use of the merchandise, physical characteristics of the merchandise, economic practicality, expectations of the ultimate purchasers, channels of trade, environment of sale, and recognition in trade. *See id.*, 671 at 1313–16. The court evaluates each in turn.

**i. Use in the same manner as merchandise which defines the class**

Good2Grow offered evidence showing that children sometimes use the bottle toppers in various fantasy play and sometimes collect them. *See e.g.*, Pl.’s Exs. 8, 51, 52 (photographs of children playing with the toppers and social media comments about children collecting and playing with the toppers). Further, Good2Grow cites surveys showing that a [[ ]]. It avers that the use of the toppers in these ways renders them comparable to toys. Pl. Br. at 26–30. The government argues that notwithstanding evidence that children play with the bottle toppers, they are nearly always bought and used, at least initially, for their functional attributes. Def. Br. 33–36.

Collectability does not a toy make. To be sure, that some customers collect the toppers favors Good2Grow’s argument, but that the bottle toppers are collected by some purchasers does not definitively render them anymore a toy than collectible stamps, coins, or spoons. Likewise, that some children engage in imaginative play with the bottle toppers does not necessarily result in their proper classification as toys. *See Simon Marketing, Inc. v. United States*, 395 F. Supp. 2d at 1280, 1291 (CIT 2005) (“To classify every eye-catching, child-friendly article as a toy, simply because it enhances a child’s imagination, is to unacceptably blur the HTSUS headings defeating their purpose and leading to absurd results.”). Good2Grow’s own research shows that even if children sometimes play with the toppers they are first and foremost bought and used for their functional attributes. *See* Def.’s Ex. 43 ([[ ]]).

Some play value is not enough to overcome this primary functional use. The court will not classify merchandise based on “fugitive” use of

the product. *See Stewart-Warner Corp. v. United States*, 748 F.2d 663, 668–69 (Fed. Cir. 1984).

### ii. Physical characteristics of the merchandise

The physical characteristics distinguish the bottle toppers from toys. Although the toppers resemble popular children’s characters and thus are certainly more like toys than other juice bottle tops, the additional functionality make them distinct from the prototypical toy.

The parties agree that the toppers meet toy-specific specifications, such as for choke testing, beyond what is required for standard lids or closures, which supports Good2Grow’s contention to some extent. Pl. Facts ¶ 53; Def. Resp. Facts ¶ 53; Pl. Br. at 18–20. Good2Grow further points to various production steps that are unnecessary for standard caps or lids. *See* Pl. Br. at 18–19. But the parties also agree that the merchandise has a threaded cap, straw, and valve that allows the topper to serve as a spill-proof drink dispenser. Pl. Facts ¶ 5; Def. Resp. Facts ¶ 5; Def. Facts ¶¶ 11, 13–16; Pl. Resp. Facts ¶¶ 11, 13–16. The character heads/busts are not capable of manipulation and are not intended to be removed from the forecap base. Def. Facts ¶ 17; Pl. Resp. Facts ¶ 17. The government points out that in addition to the toy specifications, the forecap is “specifically tested for compliance with FDA standards for beverage use.” Def. Br. at 18; *see also* Def. Facts ¶ 22; Pl. Resp. Facts ¶ 22. Further, the bottle toppers are dishwasher safe and reusable with Good2Grow beverages. Def. Facts ¶ 40; Pl. Resp. Facts ¶ 40. The functional aspects of the bottle toppers are not hidden, but obvious and affixed to the character depiction. Def. Facts ¶ 15; Pl. Resp. Facts ¶ 15. Although the bottles possess certain “toy-like” features, those are ancillary to the inherent functional qualities.

### iii. Economic Practicality

Good2Grow argues that the toppers should be classified as toys because they are far costlier than traditional closures. Pl. Br. at 14–17. It notes that the functional aspects of the forecap cost less than the character depictions which require licensing and royalty fees, among other additional production costs. *Id.* at 15. Good2Grow spends beyond what is required to ensure that the bottle toppers are spill-proof. *Id.* Although the juice was once sold separately from the bottle toppers, Good2Grow phased out separate sales in stores as they were lackluster. *Id.* at 16. Undoubtedly, the cost of the juice with character bottle topper, far exceeds the cost of most retail children’s juice. *See e.g.* Pl. Facts ¶ 39; Def. Resp. Facts ¶ 39. Good2Grow argues that this makes the bottle toppers impracticable as anything other than a toy. Pl. Br. at 14–17.

Good2Grow’s evidence supports the opposite contention. It shows that pairing the character topper with a juice bottle increases sales. *See Id.* at 16–17 (citing Pl.’s Exs. 3, 13, 41). Thus, rather than being economically impracticable, the toppers are used as a lure to sell more juice at a higher price differential. *See Kraft Inc. v. United States*, 16 C.I.T. 483, 489 (1992) (noting that attractive packaging (in that case bear-shaped jars) “plays a key role in the marketing of food products”). A feature introduced to differentiate a product and increase sales does not necessarily shift a product’s classification from one HTSUS heading to another. That each unit costs more is not dispositive when Good2Grow’s own records shows that the additional topper appears to increase sales. *See e.g.* Def.’s Exs. 33 and 34 ([[ ]]).

#### **iv. Expectations of the ultimate purchasers**

Good2Grow makes a point to distinguish between the typical purchasers of its bottle toppers (parents) and the typical users of the toppers (children). Pl. Br. at 23–30. Good2Grow cites a report by the Blake Project (a brand consulting firm) finding that consumers viewed the product as both a toy and beverage. *Id.* The government notes that Good2Grow markets the bottle toppers with juice as a healthy beverage and advertises the product’s functionality, for instance that it is dishwasher safe, reusable, and spill proof. Def. Br. at 23–28 (citing Def.’s Exs. 18; 20). The government further quotes Good2Grow’s [[ ]] who on the company’s website states that “We put a beverage parents want their children to drink in a package that kids will want to drink from.” Def. Br. at 26 (citing Def.’s Ex. 21). Ultimately, although there is support for both parties’ arguments, this factor ultimately supports the government’s contention that the toppers are not typically understood to be toys.

#### **v. Channels of trade in which the merchandise moves**

The channels of trade in which the bottle toppers are sold is not particularly helpful to the court’s analysis. Although the bottle toppers are distributed to grocery and convenience stores, which weigh against a toy classification, they have also been sold in toy stores. *See* Def. Facts ¶¶ 30, 43, 46–48; Pl. Resp. Facts ¶¶ 30, 43, 46–48; Pl. Facts ¶¶ 24–27; Def. Resp. Facts ¶¶ 24–27. This factor does not benefit either party over the other.

#### **vi. Environment of the sale**

Although the bottle toppers are, at times, sold online without a juice bottle, both parties acknowledge that in stores the bottle toppers are now always sold with the juice bottle attached. Def. Facts ¶¶ 30, 43;

Pl. Resp. Facts ¶¶ 30, 43; Pl. Facts ¶ 24; Def. Resp. Facts ¶ 24. Good2Grow appears to argue that because the merchandise is positioned at children's eye-level, this supports the conclusion that the product is a toy. Pl. Br. at 20–23. The government notes that when sold in stores the [[ ]] and that the products are typically sold near other beverages. Def. Br. 29–31.

That the bottle toppers are displayed in such a way to encourage children to see and pester their parents to buy them does not make the product a toy, despite that such display may be consistent with how toys are sold. The bottle toppers are no doubt eye-catching and have some amusement value. But uncontroverted evidence demonstrates that the toppers are typically sold with other consumables, most often juice, not in the store locations that display toys. Def. Facts ¶¶ 43–45; Pl. Resp. Facts ¶¶ 43–45; *see also* Def.'s Ex. 17 (photographs of Good2Grow displays). Although this factor supports both parties' contentions to some extent, it ultimately favors the government's view that the bottle toppers are not toys.

### **vii. Recognition in Trade**

Good2Grow argues that, like McDonald's Happy Meal toys, its product is understood to be a toy. Pl. Br. at 30–31. It additionally cites a few of its licensing agreements which describe the toppers as “toy-etic.” *Id.* The government notes that Good2Grow portrays itself in advertising and marketing materials as “operating within the children's beverage trade.” Def. Br. at 31–33. It further cites beverage trade magazines featuring Good2Grow products. *Id.* at 32 (citing Def. Ex. 35). Good2Grow's arguments are meritless. The reference to the marketing term “toyetic” in its licensing agreements does not establish that its products are recognized in trade as toys. Good2Grow has not offered significant evidence to support that it is part of the toy industry, rather than the beverage industry. Accordingly, this factor weighs in favor of the government.

### **viii. Balance of the *Carborundum* Factors and this Court's decision in *Minnetonka***

In sum, the *Carborundum* factors, taken together, weigh in favor of finding that the bottle toppers are not properly classified as toys. This case is distinguishable from *Minnetonka*, a case heavily relied on by Good2Grow. *See* Pl. Br. at 32–35. This difference merits additional discussion. This case was decided prior to the addition of Note 1(v), which clarified that utilitarian goods are not properly classified under

Chapter 95. This change to the statutory scheme since *Minnetonka*, even if it was merely to clarify the existing legal parameters, requires the court to carefully consider whether its holding informs our decision here.

The merchandise at issue in that case—bubble bath bottles shaped like children’s characters—arguably had more inherent play value given the resemblance on the bottle to a doll as it was a full-figured representation. See *Minnetonka*, 110 F. Supp. 2d at 1022. At first glance, the product in that case appeared to be a toy, and only upon further inspection was it clear that the body of the character contained bubble bath. See *id.* In contrast, the utility of the bottle toppers is readily apparent, with or without the attached juice bottle. Further, in *Minnetonka*, the character head of the shampoo bottle was completely cosmetic as there was a screw on cap hidden beneath. *Id.* Although the topper at issue here is somewhat redundant to the foil seal, it provides additional functionality beyond the amusement added by affixed character head, namely a spill-proof drinking apparatus and closure. Finally, the court in *Minnetonka* found that merchandise at issue did not compete with other bubble bath and was an “inefficient product for this purpose in terms of both quality and price.” *Id.* at 1027. In contrast, here the evidence demonstrates that the character topper was ultimately employed to increase the profit that Good2Grow made in the children’s beverage industry. See *infra*. At base, although the toppers involve substantial production costs beyond that of standard caps, their inclusion increased the profitability of juice sales and Good2Grow’s competition in that marketplace. Whether a product is properly classified as a toy is not a bright-line question, but the court concludes that whether or not the merchandise at issue in *Minnetonka* would have been correctly classified as a toy under current law, that case’s logic and reasoning does not extend to the bottle toppers at issue here.

The court acknowledges that there is certainly some amusement value to the bottle toppers, but concludes that this is incidental to the product’s practical purposes such that Note 1(v) is applicable here. Further, viewed in their totality, the relevant factors dictate that the bottle toppers are not commercially fungible with the merchandise in Heading 9503, and thus are not classifiable under that heading.

### **e. The Merchandise is Properly Classified Under Chapter 39**

The parties disagree about whether Heading 3923 covering “[a]rticles for the conveyance or packing or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics,” is an *eo nomine* or

a use provision. Good2Grow cites this court's opinion in *S.C. Johnson & Son, Inc. v. United States*, which found that "Articles for the conveyance or packing or packing of goods, of plastics" rendered Heading 3923, a principal use provision. Pl. Br. at 8 (citing 335 F. Supp. 3d 1294, 1299 (CIT 2018)). The government argues that "stoppers, lids, caps and other closures, of plastics" is an *eo nomine* provision as it describes articles by specific names. Def. Br. at 10–11.

Good2Grow is correct that the language cited in *S.C. Johnson* was found to indicate a use provision, but mistakenly attempts to apply the court's analysis to the first portion of Heading 3923 to the court's determination here. As the court has recognized, the use of a semi-colon results in "distinct categories of merchandise." *B.P. Prods. N. Am. Inc. v. United States*, 716 F. Supp. 2d 1291, 1295 (CIT 2010) (citing *Commercial Aluminum Cookware Co. v. United States*, 938 F. Supp. 875, 883 (CIT 1996)). Accordingly, *S.C. Johnson*, is not at odds with this court's determination that the latter clause in Heading 3923, "stoppers, lids, caps and other closures, of plastics," is an *eo nomine* provision as it describes merchandise by name rather than use. Furthermore, since the principle use of this product is to seal or close the juice bottle applying a principal use analysis would not change the result in this case.

"An *eo nomine* designation, with no terms or limitation, will ordinarily include all forms of the named article." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citations and quotations omitted). The parties acknowledge that the toppers serve to close the juice bottle and prevent spills. The decorative aspect does not remove the bottle topper from the scope of HTSUS 3923 as this alteration is not "*substantially in excess* of those within the common meaning of the term." See *Casio, Inc. v. United States*, 73 F.3d 1095, 1098 (Fed. Cir. 1996) (citation and quotation omitted). The bottle toppers are "stoppers, lids, caps and other closures," the court finds no more apt classification heading.

#### **f. Subheading**

Having determined that the proper classification Heading is 3923, the court addresses which subheading best encompasses the merchandise. "For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheadings notes and, mutatis mutandis, to the [GRIs], on the understanding that only subheadings at the same level are comparable." GRI 6, HTSUS. The bottle toppers are not sensibly classified under any alternative subheadings to the

one proffered by the government—3923.50. *Compare* subheadings 3923.10 (“Boxes, cases, crates and similar articles”); 3923.21 (“Sacks and bags (including cones): of polymers of ethylene”); 3923.29 (“Sacks and bags (including cones): of other plastics”); 3923.30 (“Carboys, bottles, flasks and similar articles”); 3923.40 (“Spools, cops, bobbins, and similar supports”); 3923.90, HTSUS (“Other”) *with* subheading 3923.50.00, HTSUS, providing for “[s]toppers, lids, caps and other closures” plainly encompasses the merchandise at issue. Accordingly, the court finds the bottle toppers appropriately classified under 3923.50.00, HTSUS.

#### IV. CONCLUSION

For the foregoing reasons, the court grants the government’s motion for summary judgment, denies Plaintiffs’ cross-motion for summary judgment, and holds that the government properly classified the bottle toppers under subheading 3923.50.00, HTSUS, at 5.3% *ad valorem*. Judgment will be entered accordingly.

Dated: May 5, 2020

New York, New York

*/s/ Jane A. Restani*  
JANE A. RESTANI, JUDGE



Slip Op. 20–60

DIS VINTAGE LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy M. Reif, Judge  
Court No. 16–00013

[Staying the cross-motions for summary judgment and remanding to Customs to determine the classification and appropriate rate of duty in conformity with this decision.]

Dated: May 6, 2020

*Peter S. Herrick*, Peter S. Herrick, P.A. of St. Petersburg, FL argued for plaintiff DIS Vintage LLC. With him on the brief was *Josh Levy*, Marlow, Adler, Abrams, Newman and Lewis, P.A. of Coral Gables, FL.

*Monica P. Triana*, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice of New York, NY argued for defendant United States. With her on the brief was *Chad A. Readler*, Acting Assistant Attorney General and *Amy M. Rubin*, Assistant Director, International Trade Field Office of New York, NY. Of Counsel was *Sheryl A. French*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

#### OPINION

##### Reif, Judge:

This case is before the court to determine the proper classification of the imported subject merchandise. The dispute concerns the tariff

classification of secondhand clothing imported by DIS Vintage LLC (“plaintiff” or “DIS Vintage”). Plaintiff challenges the determination by United States Customs and Border Protection (“Customs”) that the subject merchandise comprises “commingled goods.” This determination in turn led to Customs’ subsequent classification of the subject merchandise under subheading 6204.63.3510 of the Harmonized Tariff Schedule of the United States (“HTSUS”),<sup>1</sup> which covers women’s trousers or breeches and carries a 28.6 percent *ad valorem* duty. Plaintiff argues that the subject merchandise is properly classified under subheading 6309.00.0010 of the HTSUS, which covers “worn clothing” and is duty-free. The question presented is whether the subject merchandise is properly classified as “worn clothing” in Heading 6309 or whether the subject merchandise is “commingled goods” and properly classified as “women’s trousers or breeches” under Heading 6204 or as another item of clothing contained in the entry.

Plaintiff and the United States (“defendant” or “Government”) filed cross-motions for summary judgment addressing the proper classification of the imported merchandise. *See* Pl.’s Mem. of Law in Supp. of Pl.’s Mot. For Summ. J., ECF No. 26 (“Pl. Br.”); Mem. In Opp. to Pl.’s Motion for Summ. J and in Supp. of Def. Cross-Mot. For Summ. J., ECF No. 36 (“Def. Br.”). This Court has jurisdiction over this action under 28 U.S.C. § 1581(a).

For the reasons set forth below, the court stays the cross-motions for summary judgment and remands to Customs to determine the appropriate classification and rate of duty in conformity with this decision.

## BACKGROUND

The action before the court pertains to 443 bales of secondhand clothing imported into the United States (the “subject merchandise”). DIS Vintage Statement of Material Facts for Which There is No Genuine Issue to be Tried (“Pl. Stmt. Facts”), ECF No. 27 ¶ 16; Defendant’s Responses to Plaintiff DIS Vintage’s Rule 56.3 Statement of Material Facts (“Def.’s Resp. to Pl. Stmt. Facts”), ECF No. 36–3 ¶ 16. The bales were entered in two sizes, 100 pounds and 1,000 pounds. Def.’s Statement of Undisputed Facts (“Def. Stmt. Facts”), ECF No. 36–2. ¶ 6; DIS Vintage’s Responses to Defendant’s Rule 56.3 Statement of Undisputed Facts (“Pl.’s Resp. to Def. Stmt. Facts”), ECF No. 41. ¶ 6. The subject merchandise was filed under Entry No. AFP-1304311 on April 23, 2013, at the Port of Miami, with a declared

<sup>1</sup> All citations to the HTSUS, including Chapter Notes and General Notes, are to the 2013 edition. This version was in effect on April 23, 2013, when plaintiff entered the subject merchandise. *See* 19 C.F.R. § 141.69.

value of \$23,079.45. Pl. Stmt. Facts ¶¶ 13, 16; Def.'s Resp. to Pl. Stmt. Facts ¶¶ 13, 16. Plaintiff entered the subject merchandise as “[w]orn clothing” under HTSUS heading 6309.00.0010, which is duty-free. Pl. Stmt. Facts ¶ 18; Def.'s Resp. to Pl. Stmt. Facts ¶ 18. The subject merchandise was sold to DIS Vintage (a broker of secondhand clothing) by Le Relais, an entity in France that receives donated clothing.<sup>2</sup> Pl. Stmt. Facts ¶¶ 3, 19–20, 23; Def.'s Resp. to Pl. Stmt. Facts ¶¶ 3, 19–20, 23.

After the subject merchandise was entered, Customs selected 20 samples for review and inspection. Pl. Stmt. Facts ¶ 31; Def. Stmt. Facts ¶ 27. On June 3, 2013, Customs notified DIS Vintage that the “review of the samples and prior rulings revealed that the subject [merchandise] ‘did not meet the requirements of appreciable wear in order to be classified under HTS 6309.00.0010.’” Pl. Stmt. Facts ¶ 33; Def.'s Resp. to Pl. Stmt. Facts ¶ 33. Customs determined that, while some of the samples were classifiable as “[w]orn clothing”, other samples were properly classified in a heading in Chapter 61 or 62. *See*, Def. Stmt. Facts ¶ 29; Pl.'s Resp. to Def. Stmt. Facts ¶ 29. As such, Customs ascertained that the subject merchandise was “comingled goods” and thus subject to the highest duty rate of any one of the samples, which led to the classification of the subject merchandise under subheading 6204.63.3510 with a duty rate of 28.6 percent. Pl. Stmt. Facts ¶ 34; Def.'s Resp. to Pl. Stmt. Facts ¶ 34.

Plaintiff timely filed administrative protest 5201–13–100191 challenging Customs’ classification of subject merchandise. Pl. Stmt. Facts ¶ 53; Def.'s Resp. to Pl. Stmt. Facts ¶ 53. The protest was denied, and on January 13, 2016, plaintiff filed this action with the Court to contest the final decision under section 515 of the Tariff Act of 1930, as amended (19 U.S.C. §1515). Second Amended Compl., ECF No. 19 ¶¶ 1, 11.

In addition to the 20 samples selected and reviewed by Customs, plaintiff submitted 16 and defendant submitted 5 additional samples to the Court. Def. Stmt. Facts ¶¶ 43, 50; Pl.'s Resp. to Def. Stmt. Facts ¶¶ 43, 50. Plaintiff retained possession of four bales from the entry at issue in its warehouse. Def. Stmt. Facts ¶ 38; Pl.'s Resp. to Def. Stmt. Facts ¶ 38. The four bales were marked with green inspection tape stating that they had been “examined by U.S. Customs and Border Protection.” Def. Stmt. Facts ¶ 39; Pl.'s Resp. to Def. Stmt. Facts ¶ 39.

<sup>2</sup> Plaintiff maintains that Le Relais is “one of the biggest charitable institutions in France that receives donations of used clothes.” Pl. Stmt. Facts ¶ 19. Defendant does not dispute that the subject merchandise from Le Relais is donated clothing, but denies that “plaintiff has cited or produced any evidence to establish that all clothing imported from Le Relais is ‘used.’” Def.'s Resp. to Pl. Stmt. Facts ¶¶ 19–20. Defendant “[d]enies that plaintiff has provided any evidence to establish that Le Relais is a charity.” Def.'s Resp. to Pl. Stmt. Facts ¶ 19. This dispute is not material to the classification of the goods.

On February 24, 2017, “Plaintiff selected and removed four samples from each of the four bales it retained.” Def. Stmt. Facts ¶¶ 41, 42 (quoting Pl. Ex. 1 (Interrogatories) at 11). Plaintiff supplied defendant with pictures of the 16 additional samples during discovery. Def. Stmt. Facts ¶ 40; Pl.’s Resp. to Def. Stmt. Facts ¶ 40.

Defendant obtained the five samples that it submitted to the Court during an inspection on March 14, 2017 of the four bales in plaintiff’s possession. Def. Stmt. Facts ¶¶ 47, 50; Pl.’s Resp. to Def. Stmt. Facts ¶ 47, 50. The parties agree that the 41 samples in the Court’s possession are representative of the subject merchandise. Def. Reply Br. at 14; Pl.’s Resp. to Def. Stmt. Facts ¶¶ 23–24.

### STANDARD OF REVIEW

Customs’ protest decisions are reviewed *de novo* on the record before the Court. 28 U.S.C. § 2640(a)(1). USCIT Rule 56 permits summary judgment when “there is no genuine dispute as to any material fact....” USCIT R. 56(a). “[A]ll evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable factual inferences should be drawn in favor of the nonmoving party.” *Dairyland Power Coop. v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994) (citations omitted). In a dispute over a tariff classification, plaintiff has the burden of showing that Customs’ classification is incorrect. *Jarvis Clark Co. v. United States*, 733 F.2d 873, 876 (Fed. Cir. 1984). If plaintiff meets that burden, the court has an obligation to arrive at “the correct result, by whatever procedure is best suited to the case at hand.” *Id.* at 878 (footnote omitted).

The Court has “an independent responsibility” to ascertain the proper meaning and scope of HTSUS terms in a tariff classification dispute. *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005). Determining whether an imported item has been properly classified necessitates a two-step process. *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994). First, the Court must “ascertain[] the proper meaning of specific terms within the tariff provision.” *BenQ America Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011) (citations omitted). Second, the Court needs to “determin[e] whether the merchandise at issue comes within the description of such terms as properly construed.” *Id.* The first step is a question of law and the second step is one of fact. *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999).

### LEGAL FRAMEWORK

The General Rules of Interpretation (“GRIs”) of the HTSUS govern the proper classification of merchandise coming into the United States. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir.

1999). GRI 1 requires that classification “be determined according to the terms of the headings and any relative section or chapter notes.” GRI 1. “Section and chapter notes are not optional interpretive rules, but are statutory law...” *Aves. in Leather, Inc. v. United States*, 423 F.3d 1326, 1333 (Fed. Cir. 2005) (internal quotations omitted). “HT-SUS terms are construed according to their common commercial meanings.” *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). To construe a given term, the Court may rely on its own understanding of terms as well as consult sources such as lexicographic and scientific authorities, dictionaries and other reliable information. *Baxter Healthcare Corp. v. United States*, 182 F. 3d 1333, 1338 (Fed. Cir. 1999). For additional guidance on the scope and meaning of tariff headings and chapter and section notes, the Court may also look to the Harmonized Commodity Description and Coding System Explanatory Notes which are developed by the World Customs Organization (WCO). *Dell Prods. LP v. United States*, 34 CIT 688, 692, 714 F. Supp. 2d 1252, 1257 (2010). While not binding law, Explanatory Notes are “generally indicative of the proper interpretation of a tariff provision.” *Agfa Corp. v. United States*, 520 F.3d 1326, 1239 (Fed. Cir. 2008) (citation omitted).

## DISCUSSION

In conducting its *de novo* review, first, the court will state the positions of the parties. Second, the court will turn to interpreting Heading 6309 “[w]orn clothing and other worn articles” (collectively, “worn clothing”). To do so, the court will define “appreciable wear” in Chapter Note 3(i), which requires that “worn clothing” “show signs of appreciable wear.” The court will also determine whether the requirement in Chapter Note 3(ii), that “worn clothing” be entered “in bulk or in bales, sacks or similar packings” (collectively, “in bales”), is a “particular tariff treatment” such that it prevails over the general rule for commingled goods in General Note 3(f)(i). Additionally, the court will address Customs’ reliance on past HQ Rulings that applied Heading 6309, specifically as Customs’ reliance on those rulings helped to guide Customs’ review with regard to the samples in the instant case. Finally, the court will determine that a remand to Customs is the appropriate remedy in deciding whether the subject merchandise is classifiable under Heading 6309 or whether the subject merchandise is properly identified as “commingled goods” and, thus, subject to a rate of duty under an alternative heading.

### I. Positions of the Parties

Plaintiff supports classification of the subject merchandise under Heading 6309, which covers “worn clothing.” Pl. Br. at 16. Specifically,

plaintiff contends that the subject merchandise is classifiable under subheading 6309.00.0010, which provides as follows:

6309	Worn clothing and other worn articles.
6309.00.00	Worn clothing and other worn articles.
6309.00.0010	Worn clothing.

Plaintiff's proposed criteria for "worn clothing" "permit[s] all used or secondhand clothing with any trace of diminished value or appearance as a result of any previous use, wear, or handling" to satisfy the requirements of Heading 6309. Pl.'s Combined Reply in Support of Mot. for Summ. J. and Resp. to Def.'s Cross-Mot. for Summ. J., ECF No. 40 ("Pl. Reply Br.") at 6. In sum, plaintiff's position is that all "used clothing" presented in bales is "worn clothing" under Heading 6309. Pl. Br. at 25.

Defendant's standard for "worn clothing" requires that an item must "(1) 'show visible damage, impairment or change to its physical condition,' and that change must be (2) the 'result of use.'" Def. Reply Mem. in Further Support of Cross-Mot. for Summ. J., ECF No. 42 ("Def. Reply Br.") at 6. Applying this standard, defendant agrees that some of the samples taken from the subject merchandise would have been classifiable as "worn clothing" under Heading 6309 and, as such, duty-free; however, defendant argues that other samples were classifiable under other headings that are dutiable. Def. Br. at 24.

On this basis, defendant concludes that Customs was required to apply General Note 3(f), which defines "commingled goods" as goods that are subject to different rates of duty and are mingled together. Def. Br. at 26–27. Applying General Note 3(f), defendant argues that when a shipment is found to be comprised of commingled goods, the entire shipment is subject to the rate of duty of the sample with the highest rate of duty from the entry. Def. Br. at 23. In this case, Customs determined that at least one of the samples was classifiable in subheading 6204.63.3510, dutiable at 28.6 percent, which covers women's trousers and breeches.<sup>3 4</sup> Def. Br. at 9.

<sup>3</sup> The record does not contain an itemized list of the classification determinations within Chapters 61 ("Articles of Apparel and Clothing Accessories; Knitted or Crocheted") and 62 ("Articles of Apparel and Clothing Accessories; Not Knitted or Crocheted") as assigned to each of the 20 samples reviewed by Customs. The record shows only that Customs determined that subheading 6204.63.3510 was the proper classification for at least one of the samples, which Customs determined to be the highest duty rate among the samples, and, therefore, determined to be the classification for the entire entry. Def. Br. at 31.

<sup>4</sup> The relevant subheading provides as follows:

6204	Women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear); Suits:
6204.63	Of synthetic fibers:
6204.63.35	Other. Trousers and breeches.
6204.63.3510	Women's (648).

## II. The Tariff Provision

Heading 6309 covers “[w]orn clothing and other worn articles.” As the positions of the parties, above, indicate, proper classification of the subject merchandise in this case hinges on the meaning of “worn clothing.” The term “worn clothing” is not defined in the HTSUS and has not been defined by this Court. Chapter Note 3 provides additional requirements for Heading 6309.

Heading 6309 applies only to the following goods:

- (a) Articles of textile materials:
  - (i) Clothing and clothing accessories, and parts thereof;
  - (ii) Blankets and traveling rugs;
  - (iii) Bed linen, table linen, toilet linen and kitchen linen;
  - (iv) Furnishings, other than carpets of headings 5701 to 5705 and tapestries of heading 5805.
- (b) Footwear and headgear of any material other than asbestos.

In order to be classified in this heading, the articles mentioned above must comply with both of the following requirements:

- (i) They must show signs of appreciable wear; and
- (ii) They must be entered in bulk or in bales, sacks or similar packings.

In sum, for the subject merchandise to be covered by Heading 6309, it must meet three requirements: (1) be one of the aforementioned articles of textile materials or specified footwear and headgear; (2) “show signs of appreciable wear”; and, (3) be entered “in bales.” The parties do not contest that the subject merchandise meets the first requirement. Accordingly, the court proceeds to consider the second and third requirements.

### A. Show Signs of Appreciable Wear

The first requirement of Chapter Note 3 mandates that the merchandise “show signs of appreciable wear.” “Appreciable wear” is not defined by the HTSUS and has not been defined by this Court.

Both parties offer dictionary definitions of “appreciable.” Plaintiff cites WEBSTER’S THIRD NEW INT’L DICT. UNABRIDGED (1993), “capable of being readily perceived or estimated.” Pl. Br. at 25. Defendant supplies the definition “large enough to be important or clearly noticed.” Def. Br. at 16 (citing COLLINS DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/appreciable> (last visited July 16, 2017)). Defendant also offers, “enough to be perceived or estimated; noticeable; measurable.” Def. Br. at 17 (citing WEBSTER’S

NEW WORLD DICTIONARY, THIRD COLLEGE EDITION 67 (1988)). Based on the definitions provided, defendant asserts that “appreciable” means “visible” in the context of the Chapter Note. Def. Reply Br. at 9.

While the parties offer different definitions, the definitions share a common thread. All of the definitions provided support a reading of “appreciable” that is synonymous with “noticeable.” Pl. Br. at 25; Def. Br. at 16–17. The definition offered by plaintiff includes the term “*readily* perceived,” and the definition offered by defendant includes the term “*clearly* noticed” (emphasis supplied). *Id.* Thus, under Heading 6309, “appreciable” means that the quantity or extent of the “wear” matters only inasmuch as the “wear” on the merchandise can be *readily* or *clearly* noticed. In full context, the requirement reads that “[the articles] must *show signs* of appreciable wear” (emphasis supplied). The phrasing “show signs” bolsters the understanding that for the “wear” to be readily or clearly noticeable, it needs to be visible to eye.

Next, the court turns to defining “wear” in the context of the term “appreciable wear” as it appears in Chapter Note 3. The parties provided numerous definitions, which fall into two main categories: (1) a definition offered by plaintiff meaning “the *act* of wearing” (emphasis supplied); and, (2) various definitions offered by both parties meaning “the *result* of wear” or “damage” (emphasis supplied).

For the first category, plaintiff offered the definition “[t]he act of wearing or the state of being worn; use” from the AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2011). Pl. Br. at 25. The definition of “wear” as “the act of wearing...” is not *per se* inconsistent with the term “worn” in the Heading; however, the definition is inconsistent with Chapter Note 3(i) because “the *act* of wearing” cannot show signs that are “appreciable.” It would not make sense for “worn” to have one meaning in the Heading and “wear” to have another meaning in the Chapter Note intending to clarify the Heading. Therefore, notwithstanding that “worn” is an adjective in “worn clothing” and “wear” is a noun in “appreciable wear,” the two must share the same underlying meaning. In sum, the court concludes that the definition of “wear” as “the act of wearing” is not supported by the language of Heading 6309 and Chapter Note 3.

None of the definitions in the second category that were offered by both parties is inconsistent with the language of Heading 6309 and Chapter Note 3. The definitions support “worn” as meaning “damaged” or “impaired,” and “wear” as meaning “damage” or “impairment.”<sup>5</sup> In the forthcoming discussion, “wear” will be used to include “wear” and its corresponding adjective form “worn.”

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<sup>5</sup> Plaintiff offers two definitions: (1) “worn” as “diminished in value or usefulness through wear, use, handling, etc.: worn clothing” RANDOM HOUSE DICT. OF THE ENGLISH LANGUAGE (1973)

It is clear from the definitions provided that “wear” has two components: (1) a change involving deterioration; and, (2) how the change came to be. With regard to the first component, a change, the parties disagree as to whether that change has to be a physical change. Plaintiff’s preferred definition is one in which “wear” includes a change in “value or usefulness.” See Pl. Br. at 25–26. However, all other definitions provided by plaintiff and defendant involve a physical change. See *supra* note 5. The court determines that the change involving deterioration is a physical change — damage or impairment. For reasons similar to above, this component of “wear” is supported by the requirement in Chapter Note 3(i) that an article must “show signs of appreciable wear.”

The second component of “wear” is how the damage or impairment came to be. The court determines that the physical change comes to be by “use.” To “use” a garment means to wear a garment on one’s person. In discussing the second component, the court will utilize the word “use” exclusively so as to avoid confusion with the term the court seeks to define: “wear.”

In defendant’s briefs and at Oral Argument, defendant at times supports having “continued use” be the standard for the second component — how the damage or impairment came to be. Def. Br. at 16–17; Recording of Oral Argument at 37:38–37:45. Customs has also offered “continued use” as the standard for this component since issuing HQ 960577 in 1998. Customs Ruling Letter, HQ 960577 (Aug. 7, 1998).

The court determines that “continued use” is not necessary, “use” is sufficient, and “use” is the correct definition for the second component of the meaning of “wear.” The court reaches this conclusion because the first component of “wear” requires physical damage or impairment. If “use” is not sufficient to cause damage or impairment, then the merchandise will not and should not meet the definition of “wear.”

(“RANDOM HOUSE DICTIONARY definition”); and, (2) “wear” as “The result of wearing or use: diminution or impairment due to use.” WEBSTER’S THIRD NEW INT’L DICT. UNABRIDGED (1993). Pl. Br. at 25. Defendant offers seven definitions: (1) “worn” as “past participle of wear,” “1. Showing the effects of use, wear, etc.” and “2. Damaged by use or wear.” WEBSTER’S NEW WORLD DICTIONARY, THIRD COLLEGE EDITION 1540 (1988); (2) “worn” as “1. Damaged and shabby as a result of much use.” NEW OXFORD AMERICAN DICTIONARY, THIRD EDITION 1993 (2010); (3) “worn” as “2. Used, as a garment; hence, much used and showing the results of wear.” FUNK & WAGNALL’S NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 273 (1952); (4) “worn” as “1. Affected by wear or use,” “2. Impaired or damaged by wear or use.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, NEW COLLEGE EDITION 1475–76 (1976); (5) “worn” as “something that is worn looks old and damaged because it has been used a lot.” MACMILLAN DICTIONARY; (6) “wear” as “to cause to deteriorate by use...b: to impair or diminish by use or attrition.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2589 (1981); and, (7) “wear” as “the verb as ‘damage or destroy something by friction or continued use’ or the noun as ‘damage caused by continuous use.’” OXFORD AMERICAN DICTIONARY AND THESAURUS, SECOND EDITION 1484. Def. Br. at 15–16.

Plaintiff favors a definition of “wear” in which “handling” is one means by which the wear may occur. Pl. Br. at 26. Plaintiff relies on the RANDOM HOUSE DICTIONARY definition to argue that the first component — *viz.*, the physical change — can come from something other than “use,” namely “packing, shipping, and handling.”<sup>6</sup> Pl. Reply Br. at 11. Defendant points to Explanatory Note 63.09 to support its contention that damage or impairment from handling does not have a place within the definition of “worn clothing.” Def. Br. at 16. Explanatory Note 63.09 states:

To be classified in this heading the articles...must comply with both of the following requirements. If they do not meet these requirements, they are classified in their appropriate headings.

(A) They must show signs of appreciable wear, whether or not they require cleaning or repair before use; New articles with faults in weaving, dyeing, etc., and shop-soiled articles are excluded from this heading.

(B) They must be presented in bulk (e.g., in railway goods wagons) or in bales, sacks or similar bulk packings, or in bundles tied together without external wrapping, or packed roughly in crates....<sup>7</sup>

Defendant argues that subsection A is “a list of items *damaged other than by use.*” Def. Br. at 16 (emphasis in original).

The court finds this explanation convincing. “New articles with faults” are items with damage or impairment caused by manufacturing. Dictionary definitions of the term “shop-soiled” indicate that the damage or impairment is caused to items from being on display, or handled, in a store.<sup>8</sup> While Explanatory Notes are not binding on this Court, they are persuasive, and further support the court’s determi-

<sup>6</sup> Related to this point, plaintiff argues that the “in bales” requirement of Chapter Note 3(ii) diminishes the appearance of the clothing. Pl. Reply Br. at 11. Plaintiff points to clothing being “disheveled and wrinkled as a result of being pressure-crammed into bales.” Pl. Reply Br. at 11. Essentially, plaintiff argues that the “in bales” requirement makes the clothing contained therein show “appreciable wear.” *Id.* This logic is circular and would mean that any clothing arriving “in bales” *per se* satisfies both requirements of Heading 6309. Chapter Note 3 and Explanatory Note 63.09 make clear that articles having to “show signs of appreciable wear” and to be entered “in bales” are two separate requirements. *See* Chapter Note 3; Explanatory Note 63.09. The “in bales” requirement cannot impart “appreciable wear” onto the articles.

<sup>7</sup> All citations to the Explanatory Notes are to the 2012 edition. *See* World Customs Org., Harmonized Commodity Description and Coding System.

<sup>8</sup> “Shopsoiled: 1. Worn, faded, tarnished, etc. from being displayed in a shop or store. US equivalent: shopworn.” (COLLINS DICTIONARY, <https://www.collinsdictionary.com/dictionary/english/shopsoiled> (last visited April 14, 2020)). “Shop-soiled: 1. If goods sold in shops are shop-soiled, they are slightly dirty or damaged and therefore reduced in price.” (CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/shop-soiled> (last visited April 14, 2020)). “Shopworn: 1. If clothes or other goods in a store are shopworn, they look

nation that the second component of the term “wear” requires that the damage or impairment be by “use.” In sum, the court determines that the term “appreciable wear” is *noticeable damage or impairment caused by use*.

### **B. Entered in Bulk or in Bales, Sacks or Similar Packings**

The third requirement in Chapter Note 3 is that “worn clothing” be entered “in bulk or in bales, sacks or similar packings.” The parties agree on what it means for articles to be entered “in bales.” However, plaintiff challenges the justification provided by Customs for its determination that the subject merchandise is commingled goods. Plaintiff bases its challenge on the grounds that the “in bales” requirement is a “particular tariff treatment” that supersedes Customs’ authority to apply the general rule for commingled goods. *See* Pl. Br. at 28–29. Plaintiff argues in particular that the weight and packaging requirements in Heading 6309 constitute a particular tariff treatment. Recording of Oral Argument at 32:20–32:59.

The relevant parts of HTSUS General Note 3(f) are as follows:

(i) Whenever goods subject to different rates of duty are so packed together or mingled that the quantity or value of each class of goods cannot be readily ascertained by customs officers (without physical segregation of the shipment or the contents of any entire package thereof), by one or more of the following means: (A) sampling, (B) verification of packing lists or other documents filed at the time of entry, or (C) evidence showing performance of commercial settlement tests ... the commingled goods shall be subject to the highest rate of duty applicable to any part thereof unless the consignee or his agent segregates the goods pursuant to subdivision (f)(ii) hereof.

...

(v) The provisions of subdivision (f) of this note shall apply only in cases where the tariff schedule does not *expressly provide* a particular tariff treatment for commingled goods.

General Note 3(f) (emphasis supplied). General Note 3(f)(v) declares that the HTSUS must “*expressly provide* a particular tariff treatment” and that if a “particular tariff treatment” is provided, that tariff treatment would take precedence over the default “commingled goods” rule of General Note 3(f)(i) (emphasis supplied).

slightly damaged or dirty, especially because they have been used in a display.” (MACMILLAN DICTIONARY, <https://www.macmillandictionary.com/us/dictionary/american/shopworn> (last visited April 14, 2020)).

A “particular tariff treatment” is “expressly provide[d]” by the HTSUS when goods subject to different rates of duty are so mingled that a classification as commingled goods would be appropriate, but for the HTSUS providing a specific tariff provision for the goods. See *Amoco Oil Co. v. United States*, 749 F.2d 1576 (Fed. Cir. 1984) (where the Court of Appeals for the Federal Circuit (“CAFC”) affirmed this Court’s decision to uphold the determination by the U.S. Customs Service (“USCS,” the agency predecessor to Customs) that the merchandise of plaintiff Amoco was not “commingled goods”); see also General Note 3(f). In *Amoco Oil*, Amoco imported a mixture of center-cut natural gas liquids (NGLs) and propane (“Amoco Mixture”). *Amoco Oil Co.* at 1577–1578. NGLs and propane each received duty-free treatment under the predecessor to the HTSUS, the Tariff Schedule of the United States (“TSUS”).<sup>9</sup> Amoco argued that the Amoco Mixture was “commingled goods” under General Heading 7 (the TSUS equivalent to General Note 3(f)) and subject to classification under either heading.<sup>10</sup> Instead, the USCS classified the Amoco Mixture under TSUS 430.00, which covered “mixtures of two or more organic compounds.” This provision carried a duty rate of 5 percent *ad valorem*.

The CAFC found that by the terms of General Heading 7, the Amoco Mixture could not be “commingled goods” because the “highest rate rule is applicable only where articles subject to different rates of duty are commingled.” *Id.* at 1580. Additionally, the CAFC noted “that case law supports the conclusion that where merchandise is determined to be a mixture, the commingling headnote does not apply.” *Id.* Therefore, *Amoco Oil* suggests that a mixture of two goods, provided for in a specific tariff provision, is an example of a “particular tariff treatment.”

Plaintiff asserts that “[a] tariff heading that requires massive amounts of clothing with uncertain quantities to be mixed together in a specific type of packaging qualifies as a ‘particular’ treatment for commingled goods.” Pl. Br. at 29. Plaintiff finds it significant that

<sup>9</sup> Under the TSUS, propane was classified under Heading 475.15 and NGLs under 475.70.

<sup>10</sup> TSUS, General Heading 7, stated as follows:

“7. Commingling of articles:

(a) Whenever articles subject to different rates of duty are so packed together or mingled that the quantity or value of each class of articles cannot be readily ascertained by customs officers (without physical segregation of the shipment or the contents of any entire package thereof), by one or more of the following means ... the commingled articles shall be subject to the highest rate of duty applicable to any part thereof unless the consignee or his agent segregates the articles pursuant to subdivision (b) hereof.

...

(e) The provisions of this headnote shall apply only in cases where the schedules do not expressly provide a particular tariff treatment for commingled articles.”

importers have “no choice” in packaging if they want their merchandise to enter duty-free under Heading 6309. *Id.* Plaintiff seeks to differentiate Heading 6309 from other headings pertaining to articles of clothing by pointing out that no other articles classified under Chapters 61 or 62 are required to be entered “in bales.” *Id.*

Defendant offers two points in response. First, defendant argues that the “in bales” language is a packaging requirement, not a tariff treatment. Def. Reply Br. at 13. Defendant adds that “a packaging requirement does not dictate that all goods in the same package receive the same tariff treatment.” *Id.* Second, defendant notes that the packaging requirement in Heading 6309 is the second of two requirements for classification under that Heading. *Id.* Defendant argues that “to apply [Chapter] Note 3 in the manner that plaintiff suggests would eviscerate the first independent requirement,” *id.*: *viz.*, that every article “show signs of appreciable wear.” Chapter Note 3(i). In other words, defendant argues that plaintiff’s reading would lead to the result that any clothing, so long as it was imported “in bales,” would be eligible for duty-free treatment, regardless of whether the clothing showed “signs of appreciable wear.”

The court determines that the requirement that an article be entered “in bales” and by weight is not a “particular tariff treatment.” The HTSUS contains other tariff provisions that include packing requirements, which, similarly, do not constitute a particular tariff treatment.<sup>11</sup> Conversely, the HTSUS contains particular tariff treatments.<sup>12</sup> Finally, if the “in bales” requirement of Heading 6309 were treated as a “particular tariff treatment” within the meaning of General Note 3(f)(v), that treatment would render the first requirement of Heading 6309 — that the articles “show signs of appreciable wear” — a nullity, contrary to basic precepts of statutory interpretation.<sup>13</sup> In

<sup>11</sup> For example: subheading 1604.14.40, “Prepared fish...tunas, skipjack, and bonito...In bulk or in immediate containers weighing with their contents over 6.8 kg each...”; subheading 1806.20.20, “Chocolate and other food preparations containing cocoa...Other preparations in blocks, slabs or bars, weighing more than 2 kg or in liquid, paste, powder, granular or other bulk form in containers or immediate packings, of a content exceeding 2 kg ... In blocks or slabs weighing 4.5 kg or more each;” and, subheading 0804.30.20, “Pineapples, fresh or dried, not reduced in size: in bulk.”

<sup>12</sup> At Oral Argument, defendant offered “mixed vegetables” in subheading 0712.90.85 and “mixed nuts” in subheading 0813.50.00 as examples of items that could be considered “commingled goods” under General Note 3(f), but are not, because particular tariff provisions are provided for these items in the HTSUS. Recording of Oral Argument at 25:15–26:01.

<sup>13</sup> “The cardinal principle of statutory construction is to save and not to destroy. It is our duty to give effect, if possible, to every clause and word of a statute...” *United States v. Menasche*, 348 U.S. 528, 538–539 (1955) (internal citations and quotations omitted). See also “The rules of statutory construction require a reading that avoids rendering superfluous any provision of a statute.” *Isida v. United States*, 59 F.3d 1224, 1230 (Fed. Cir. 1995) (internal citation omitted).

conclusion, “worn clothing” under Heading 6309 is merchandise that complies with the three requirements of Chapter Note 3, including the above definition of “appreciable wear.”

### **III. Classification of the Subject Merchandise**

The subject merchandise is comprised of 443 bales of secondhand clothing. Pl. Br. at 2. There are 41 samples in the court’s possession. It is not disputed that the subject merchandise is comprised of articles of textile materials or the specified footwear or headgear as required under Chapter Note 3. It is also not disputed that the subject merchandise arrived “in bales,” under Chapter Note 3(ii). Classification, therefore, of the subject merchandise hinges on the requirement of Chapter Note 3(i) — whether the samples of the subject merchandise “show signs of appreciable wear.”

#### **A. Customs’ Rulings and Guidance Pertaining to “Show Signs of Appreciable Wear” Are Inconsistent with Heading 6309**

The court defined “appreciable wear” as noticeable damage or impairment caused by use. *See supra* Section II. A. In this case, Customs’ determination of whether the samples “show signs of appreciable wear” “was based, in part, on a review of Customs rulings, including rulings interpreting heading 6309...” Answer, ECF No. 23 ¶ 39. In particular, on June 3, 2013, Customs issued a Notice of Action advising plaintiff that Customs was relying on several past Customs and USCS rulings, including HQ960577, HQ967718, HQ968010 and HQ967814:

Review of samples from entry AFP-1304309–5 and Headquarters rulings HQ960577, HQ967718, HQ968010 and HQ967814, revealed that the merchandise imported does not meet the requirements of appreciable wear in order to be classified under HTS 6309.00.0010/Free. The imported garments are classifiable under Chapter 61 or 62. The commingled garments are subject to the appropriate provision of Chapter 61 or 62 for which the highest duty rate applies. The entries will be liquidated at the highest duty rate of the commingled goods under HTS 6204.63.3510 at 28.6%.

Second Amended Compl. ¶ 21.<sup>14</sup>

In HQ 960577 (the “1998 ruling”), the USCS explained “appreciable wear” as follows: “In essence, appreciable wear is descriptive of a

<sup>14</sup> *See also* “Admits that plaintiff correctly quotes portions of the CBP Form 29, Notice of Action, issued on June 3, 2013; however, avers that the CBP Form 29, Notice of Action speaks for itself and is the best evidence of what is provided therein.” Answer ¶ 21.

garment or other article whose appearance has noticeably changed from its original/new/unused stage. This change in appearance must be the result of the various naturally occurring stages to which a fabric succumbs as a result of continuous use.” Customs Ruling Letter, HQ 960577 (Aug. 7, 1998) (“1998 ruling”) at 9. In the 1998 ruling, USCS reviewed 16 garments in an attempt to provide guidance for importers regarding what merchandise qualifies for classification within Heading 6309. Fourteen of the garments were determined to not have “appreciable wear” because they did not “exhibit fabric which is greatly stressed or fabric which reflects the physical deterioration resulting from continued use.” *Id.* at 11.

The 1998 ruling by the USCS is inconsistent with Heading 6309 because, as settled in Section II, the definition for the first component of “wear” is “damage or impairment.” Damage or impairment within the meaning of Heading 6309 may include “fabric which is greatly stressed or fabric which reflects physical deterioration resulting from continued use”; however, neither of those elements — greatly stressed fabric, or fabric reflecting physical deterioration resulting from continued use — is necessary to find “damage or impairment” within the meaning of Heading 6309.

Heading 6309 and Chapter Note 3 also do not require that the damage or impairment occur only to a garment’s *fabric* to meet the definition of “appreciable wear.” The language of Heading 6309 and Chapter Note 3 permit the possibility that damage to something other than fabric can comprise “appreciable wear.” As defendant conceded at Oral Argument, the damage may be to *any* part of the garment—not only the fabric.<sup>15</sup> With respect to the second component of “wear”—how the damage or impairment came to be—“use” is the appropriate definition, not “resulting from *continued* use” as offered by the 1998 ruling. 1998 ruling at 9 (emphasis supplied). As shown, the “practical understanding” of “appreciable wear” that USCS offers in the 1998 ruling is not supported by the Heading or Chapter Note 3.

The 1998 ruling has informed Customs’ treatment of secondhand clothing for more than two decades and has been in force and applied by subsequent rulings and guidance. HQ967718 and HQ967814 in 2005, and HQ 968010 in 2006 relied heavily on the 1998 ruling. The 1998 and 2006 rulings also culminated in guidance issued in 2014 by Customs. This guidance, addressed by both parties in this action, provides (in relevant part):

<sup>15</sup> “We don’t contend that the damage has to be to the fabric, the damage from the continued use has to be to the article.” Recording of Oral Argument at 37:38–37:45.

Heading 6309 in the Harmonized Tariff Schedule (HTS) allows previously worn clothing entering the U.S. to enter free of duty. However, most shipments of “used clothing” imported commercially for sale would not be eligible for the provision 6309. In order to qualify for the provision 6309, the goods must show clear signs of appreciable wear (be in poor condition) and must be entered in bulk or in bales, sacks or similar packing. *The assumption is that clothing imported under this provision will most likely be used as rags or other non-apparel purpose.*

Pl. Br. Exhibit A (emphasis supplied).

This guidance has been in effect for a number of years. Defendant stated that the guidance was posted in several different places. Defendant also asserted that the guidance was intended to be removed “several years ago.” Recording of Oral Argument at 48:27 – 50:55. However, defendant further stated that, as of February 21, 2020, the guidance remained posted. *Id.*<sup>16</sup>

The court determines that the 2014 guidance is inconsistent on its face with Heading 6309. In fact, Customs’ guidance meets the definition of an entirely different provision of the HTSUS, Heading 6310. Heading 6310 covers “used or new rags... and worn out articles of twine, cordage, rope or cables, of textile materials.” In short, Customs has been erroneously applying Heading 6309 for at least 22 years, including as represented in the 1998 and 2006 rulings and in the 2014 guidance.

### **B. Subject Merchandise as “Commingled Goods”**

As discussed in Section II.B, above, General Note 3(f) sets out the general rule for “commingled goods.” General Note 3(f) requires that the goods are: (1) “subject to different rates of duty;” (2) “so packed together or mingled;” and, (3) that the “quantity or value of each class of goods cannot be readily ascertained by ... (A) sampling, (B) verification of packing lists ....” If these conditions are met, “the commingled goods shall be subject to the highest rate of duty applicable to any part thereof unless the consignee or his agent segregates the goods pursuant to subdivision (f)(ii) hereof.”

In the instant case, at least two of the three requirements are met. The court will address requirements (2) and (3) at the outset. The court determines that the subject merchandise is “so packed together or mingled”—having arrived in 100-pound and 1000-pound bales, whether the bales were “loosely packed” or “compressed”—as to not

<sup>16</sup> Defendant stated at Oral Argument that defendant removed the guidance in February 2020. Defendant also sought to emphasize that, from its perspective, this guidance does not represent the position of the Government, notwithstanding that it remained in place until February 2020. *Id.*

be segregable. The court further establishes that the “quantity or value of each class of goods cannot be readily ascertained” because the subject merchandise may be composed of a potentially voluminous number of classes. The subject merchandise is composed of articles that if determined not to be “worn clothing” under Heading 6309, are properly classified under various provisions in Chapters 61 or 62, which carry varying rates of duty based on the type of garment and the type of fabric. *See* Def. Br. at 28–29.

With respect to the first requirement, it is possible that some of the samples of the subject merchandise may be classifiable at different duty rates. However, because Customs misapplied Heading 6309 and Chapter Note 3 to the samples, a determination with respect to this requirement would be premature. Therefore, a determination as to whether the subject merchandise comprises “commingled goods” is also premature.

#### **IV. Remedy**

The Court “may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.” 28 U.S.C. § 2643(b). *See United States v. UPS Customhouse Brokerage, Inc.*, 34 CIT 96, 128, 686 F. Supp. 2d 1337, 1365–1366 (2010) (internal citations omitted) (*holding* that remand is within the Court’s discretion and a case should be remanded “when doing so will assist the Court in reaching the correct result”). In a civil action, the Court may order any form of appropriate relief, including an order of remand. 28 U.S.C. § 2643(c)(1). “When an administrative agency has made an error of law, the duty of the Court is to correct the error of law committed by that body, and after doing so to remand the case to the agency so as to afford it the opportunity of examining the evidence and finding the facts as required by law.” *NLRB v. Enterprise Ass’n of Steam*, 429 U.S. 507, 522 (1977) (internal quotations and citations omitted). The reviewing court must ensure “not [to] intrude impermissibly on the authority of the administrative agency by itself taking action that implicates the agency’s expertise and discretion.” *Int’l Light Metals v. United States*, 279 F.3d 999, 1003 (Fed. Cir. 2002). Whether the Court should remand a case to an administrative agency to correct an error of law “necessarily turns upon the precise issues the reviewing court has decided and what questions remain for the agency to decide on remand.” *Id.*

The court determines that Customs committed an error of law in interpreting Heading 6309 and Chapter Note 3. Accordingly, the court concludes that a remand to Customs pursuant to 28 U.S.C. § 2643 is appropriate.

## CONCLUSION

Upon meeting their new nanny, Mary Poppins, Jane and Michael Banks show Mary Poppins the nursery and her new room.<sup>17</sup> Mary Poppins is wearing a long dress, with an overcoat, a pink scarf and a hat with flowers. She is holding an umbrella and carrying a large bag.

Michael notices Mary Poppins' bag: "That's a funny sort of bag."

Mary Poppins: "Carpet."

Michael: "You mean to carry carpets in?"

Mary Poppins: "No. Made of."

Jane: "This is your room, and there's a lovely view of the park."

Mary Poppins: "Hmm. Well, it's not exactly Buckingham Palace. Still, it's clean. Yes, I think it will be quite suitable. Just needs a touch here and there. Well, first things first. I always say, the place to hang a hat is on a hat stand." Mary Poppins pulls a six-foot tall hat stand out of her bag whilst Jane and Michael stare in amazement, then peer inside Mary Poppins' empty bag and turn it upside down. "Ah! This will never do!" Mary Poppins says, removing a small mirror from the wall. "I much prefer seeing *all* of my face at the *same time*." Mary Poppins pulls a large mirror out of her bag.

Michael, amazed again: "There — but there was nothing in it!"

Mary Poppins: "Never judge things by their appearance. Even carpetbags. I'm sure *I* never do." Mary Poppins pulls out a three-foot tall plant: "A thing of beauty is a joy forever." Michael, looking under the table on which Mary Poppins has placed her bag, seeing nothing there. Mary Poppins pulls out a five-foot tall lamp, a pair of shoes and jacket.

Michael to Jane: "We better keep our eye on this one."

In this instant case, the court remands to Customs for it to keep its eye on the subject merchandise and take the following steps in conformity with this decision: (1) examine and apply Heading 6309 and Chapter Note 3 to the 41 samples of subject merchandise to determine the appropriate classification of each sample; and, (2) if Customs determines that the subject merchandise is "commingled goods" pursuant to General Note 3(f), Customs shall then apply the highest rate of duty for any one of the samples to the subject merchandise.

For the foregoing reasons, it is hereby

**ORDERED** that consideration of the parties' cross-motions for summary judgment is stayed; it is further

**ORDERED** that this matter is remanded to Customs to determine the appropriate classification and rate of duty in conformity with this decision; it is further

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<sup>17</sup> Walt Disney's MARY POPPINS (1964), based on the book series MARY POPPINS (1933 – 1962) by P. L. Travers (Pamela Lyndon Travers, OBE, born Helen Lyndon Goff).

**ORDERED** that remand results are due within 90 days of the date of this decision; it is further

**ORDERED** that any comments on the remand results shall be submitted within 30 days of the filing of the results; and it is further

**ORDERED** that any replies to the comments are due 15 days thereafter.

Dated: May 6, 2020

New York, New York

*/s/ Timothy M. Reif*

TIMOTHY M. REIF, JUDGE