

# U.S. Customs and Border Protection



## **PROPOSED REVOCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF DIETARY SUPPLEMENT PRODUCTS**

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

**ACTION:** Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of “Amway Immunity Gummies” and “Amway Sleep Gummies” dietary supplement products.

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

**DATE:** Comments must be received on or before April 16, 2021.

**ADDRESS:** Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: [1625Comments@cbp.dhs.gov](mailto:1625Comments@cbp.dhs.gov). All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to

inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

**FOR FURTHER INFORMATION CONTACT:** Tatiana Salnik Matherne, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0351.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of “Amway Immunity Gummies” and “Amway Sleep Gummies” dietary supplement products. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) N314621, dated October 1, 2020 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N314621, CBP classified the “Amway Immunity Gummies” and “Amway Sleep Gummies” dietary supplement products in heading 2106, HTSUS, specifically in subheading 2106.90.9500, HTSUSA, which provides for “Food preparations not elsewhere specified or included: Other: Other: Other: Other: Other: Articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17: Described in additional U.S. note 8 to chapter 17 and entered pursuant to its provisions.” CBP has reviewed NY N314621 and has determined the ruling letter to be in error. It is now CBP’s position that the dietary supplement products at issue are properly classified in heading 2106, HTSUS, specifically in subheading 2106.90.9897, HTSUSA, which provides for “Food preparations not elsewhere specified or included: Other: Other: Other: Other: Other: Other: Other: Other: Other: Other: Containing sugar derived from sugar cane and/or sugar beets.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N314621 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H316413, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

*For*  
CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*

Attachments

HQ H316413  
OT:RR:CTF:FTM H316413 TSM  
CATEGORY: Classification  
TARIFF NO.: 2106.90.9897

MR. GEORGE C. LOVEQUIST  
ACCESS BUSINESS GROUP INTERNATIONAL LLC  
7575 FULTON STREET EAST  
ADA, MI 49355

Re: Revocation of NY N314621; Tariff classification of dietary supplements from Colombia

DEAR MR. LOVEQUIST:

This is in reference to New York Ruling Letter (“NY”) N314621, issued to Access Business Group International LLC, on October 1, 2020. In that ruling, U.S. Customs and Border Protection (“CBP”) classified products described as “Amway Immunity Gummies” and “Amway Sleep Gummies” under subheading 2106.90.9500, Harmonized Tariff Schedule of the United States (Annotated) (“HTSUSA”), which provides for “Food preparations not elsewhere specified or included: Other: Other: Other: Other: Other: Articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17: Described in additional U.S. note 8 to chapter 17 and entered pursuant to its provisions.” We have reviewed NY N314621 and found it to be incorrect. For the reasons set forth below, we are revoking NY N314621.

**FACTS:**

In NY N314621, the products at issue were described as follows:

The first product, “Amway Immunity Gummies”, is said to contain organic sugar, organic tapioca syrup, water, vitamin C, glycerin, elderberry extract, agar, flavors consisting of elderberry, lemon and masking flavors, zinc, lactic acid and citric acid.

The second product, “Amway Sleep Gummies”, is said to contain organic sugar, organic tapioca syrup, water, magnesium, glycerin, agar, lactic acid, citric acid, blueberry and lavender flavors, magenta color, melatonin, and passion flower extract.

Ingredients breakdowns, a manufacturing flowchart and photocopies of the packaging were provided to CBP for consideration.

**ISSUE:**

What is the tariff classification of the dietary supplement products at issue?

**LAW AND ANALYSIS:**

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

The 2021 HTSUSA provisions under consideration are as follows:

2106	Food preparations not elsewhere specified or included:	
2106.90	Other:	
	Other:	
	Other:	
	Other:	Articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17:
2106.90.9500		Described in additional U.S. note 8 to chapter 17 and entered pursuant to its provisions
		* * *
2106.90.98		Other:
		* * *
		Other:
		* * *
		Other:
		* * *
2106.90.9897		Other: Containing sugar derived from sugar cane and/or sugar beets
		* * *

Additional U.S. Note 3 to Chapter 17, HTSUS, reads the following:

For the purposes of this schedule, the term “articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17” means articles containing over 10 percent by dry weight of sugars derived from sugar cane or sugar beets, whether or not mixed with other ingredients, except (a) articles not principally of crystalline structure or not in dry amorphous form, the foregoing that are prepared for marketing to the ultimate consumer in the identical form and package in which imported; (b) blended syrups containing sugars derived from sugar cane or sugar beets, capable of being further processed or mixed with similar or other ingredients, and not prepared for marketing to the ultimate consumer in the identical form and package in which imported; (c) articles containing over 65 percent by dry weight of sugars derived from sugar cane or sugar beets, whether or not mixed with other ingredients, capable of being further processed or mixed with similar or other ingredients, and not prepared for marketing to the ultimate consumer in the identical form and package in which imported; or (d) cake decorations and similar products to be used in the same condition as imported without any further processing other than the direct application to individual pastries

or confections, finely ground or masticated coconut meat or juice thereof mixed with those sugars, and sauces and preparations therefor.

\* \* \*

Additional U.S. Note 8 to Chapter 17, HTSUS, reads the following:

The aggregate quantity of articles containing over 10 percent by dry weight of sugars described in additional U.S. note 3 to chapter 17, entered under subheadings 1701.91.54, 1704.90.74, 1806.20.75, 1806.20.95, 1806.90.55, 1901.90.56, 2101.12.54, 2101.20.54, 2106.90.78 and 2106.90.95 during the 12-month period from October 1 in any year to the following September 30, inclusive, shall not exceed 64,709 metric tons (articles the product of Mexico shall not be permitted or included under this quantitative limitation and no such articles shall be classifiable therein).

\* \* \*

In understanding the language of the HTSUS, the Explanatory Notes (“ENs”) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although neither dispositive nor legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the Harmonized System at the international level. See T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The EN to heading 2106, HTSUS, states, in pertinent part, the following:

Provided that they are not covered by any other heading of the Nomenclature, this heading covers:

- (A) Preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk, etc.), for human consumption.
- (B) Preparations consisting wholly or partly of foodstuffs, used in the making of beverages or food preparations for human consumption. The heading includes preparations consisting of mixtures of chemicals (organic acids, calcium salts, etc.) with foodstuffs (flour, sugar, milk powder, etc.), for incorporation in food preparations either as ingredients or to improve some of their characteristics (appearance, keeping qualities, etc.) (see the General Explanatory Note to Chapter 38).

\* \* \*

The heading includes, *inter alia*:

\* \* \*

- (16) Preparations, often referred to as food supplements or dietary supplements, consisting of, or based on, one or more vitamins, minerals, amino acids, concentrates, extracts, isolates or the like of substances found within foods, or synthetic versions of such substances, put up as a supplement to the normal diet. It includes such products whether or not also containing sweeteners, colours, flavours, odoriferous substances, carriers, fillers, stabilisers or other technical aids. Such products are often put up in packaging with indications that they maintain general health or well-being, improve athletic performance, prevent possible nutritional deficiencies or correct sub-optimal levels of nutrients.

\* \* \*

In NY N314621, CBP classified the “Amway Immunity Gummies” and “Amway Sleep Gummies” under subheading 2106.90.9500, HTSUSA, which provides for “Food preparations not elsewhere specified or included: Other: Other: Other: Other: Articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17: Described in additional U.S. note 8 to chapter 17 and entered pursuant to its provisions.”

Heading 2106, HTSUS, provides for “Food preparations, not elsewhere specified or included.” Thus, in order for a product to fall under heading 2106, HTSUS, two criteria must be met. First, the product must be a food preparation, and second, the food preparation must not be classified in the tariff more specifically elsewhere. *See R. T. Foods, Inc. v. United States*, 887 F. Supp. 2d 1351, 1358 (C.I.T. 2012) (stating that heading 2106 was an “expansive basket heading that only applies in the absence of another applicable heading”). The terms “food,” “preparation,” and “food preparation” are not defined in the HTSUS. EN 21.06 provides two definitions for the phrase “food preparation”. *See* EN (A) and EN (B) to 21.06. The first definition for the phrase “food preparation” is “Preparations for use, either directly or after processing . . . for human consumption”. *See* EN (A) 21.06.

In *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1994), the Court of Appeals for the Federal Circuit (CAFC) stated that:

Inherent in the term “preparation” is the notion that the object involved is destined for a specific use. The relevant definition from *The Oxford English Dictionary* defines “preparation” as “a substance specially prepared, or made up for its appropriate use or application, e.g. as food or medicine, or in the arts or sciences.” (internal citations omitted.)

Upon review, we find that the “Amway Immunity Gummies” and “Amway Sleep Gummies” products at issue are “food preparations” of heading 2106, HTSUS, because they contain substances with nutritive value and are preparations for human consumption that provide general health and well-being benefits not meant to treat or prevent any specific diseases. Accordingly, they are of the kind of preparations described in EN 21.06 (A)(16) and not more specifically classified elsewhere. However, the products at issue are not classified under subheading 2106.90.9500, HTSUSA, because they fall within one of the exceptions to Additional U.S. Note 3 to Chapter 17.

Additional U.S. Note 3 to Chapter 17 provides in relevant part that the term “‘articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17’ means articles containing over 10 percent by dry weight of sugars derived from sugar cane or sugar beets, whether or not mixed with other ingredients, except (a) articles not principally of crystalline structure or not in dry amorphous form, the foregoing that are prepared for marketing to the ultimate consumer in the identical form and package in which imported.” While the “Amway Immunity Gummies” and “Amway Sleep Gummies” contain over 10 percent of sugar derived from sugar cane (based on the products’ ingredient breakdown that accompanied the original request for a ruling), the products at issue are not “principally of crystalline structure” or “in dry amorphous form” when they are imported and prepared for marketing to the ultimate consumer. In fact, the “Amway Immunity Gummies” and “Amway Sleep Gummies” are imported and marketed to the ultimate consumer in solid form, specifically in the form of nutritional supplement gummies. Because the products at issue fall within one of the exceptions to U.S. Note 3 to Chapter 17, it follows that the

quantitative limitations of Additional U.S. Note 8 to Chapter 17, HTSUS, also do not apply to these products. Therefore, as referenced above the “Amway Immunity Gummies” and “Amway Sleep Gummies” are not classified in subheading 2106.90.9500, HTSUSA.

The products at issue in NY N314621 are nutritional supplements consisting of substances with nutritive value, imported and prepared for marketing to the ultimate consumer in solid form, specifically in the form of nutritional supplement gummies, and containing sugar derived from sugar cane. Therefore, we find that they are described by heading 2106, HTSUS, and specifically by subheading 2106.90.9897, HTSUSA, which provides for “Food preparations not elsewhere specified or included: Other: Other: Other: Other: Other: Other: Other: Other: Other: Other: Containing sugar derived from sugar cane and/or sugar beets.” See NY N314583, dated October 13, 2020 (classifying dietary supplements imported and prepared for marketing to the ultimate consumer in the form of nutritional supplement gummies containing sugar derived from sugar cane, under subheading 2106.90.9897, HTSUSA.)

**HOLDING:**

By application of GRIs 1 and 6, we find that “Amway Immunity Gummies” and “Amway Sleep Gummies” are classified under heading 2106, HTSUS, and specifically under subheading 2106.90.9897, HTSUSA, which provides for “Food preparations not elsewhere specified or included: Other: Other: Other: Other: Other: Other: Other: Other: Other: Other: Containing sugar derived from sugar cane and/or sugar beets.” The 2021 column one, general rate of duty is 6.4% *ad valorem*.

**EFFECT ON OTHER RULINGS:**

N314621, dated October 1, 2020, is hereby REVOKED.

*Sincerely,*

*For*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*



N314621

October 1, 2020

CLA-2-21:OT:RR:NC:N2:228

CATEGORY: Classification

TARIFF NO.: 2106.90.9500

MR. GEORGE C. LOVEQUIST  
ACCESS BUSINESS GROUP INTERNATIONAL LLC  
7575 FULTON STREET EAST  
ADA, MI 49355

RE: The tariff classification of dietary supplements from Colombia

DEAR MR. LOVEQUIST:

In your letter dated September 17, 2020, you requested a tariff classification ruling.

Ingredients breakdowns, a manufacturing flowchart and photocopies of the packaging accompanied your inquiry.

The first product, “Amway Immunity Gummies”, is said to contain organic sugar, organic tapioca syrup, water, vitamin C, glycerin, elderberry extract, agar, flavors consisting of elderberry, lemon and masking flavors, zinc, lactic acid and citric acid.

The second product, “Amway Sleep Gummies”, is said to contain organic sugar, organic tapioca syrup, water, magnesium, glycerin, agar, lactic acid, citric acid, blueberry and lavender flavors, magenta color, melatonin, and passion flower extract.

In your letter, you suggested that the products may be classified under subheading 2106.90.9898, Harmonized Tariff Schedule of the United States (HTSUS), which provides for food preparations not elsewhere specified or included . . . other . . . other . . . other . . . other . . . other . . . other. Based on the composition of the ingredients, the products will be classified elsewhere.

The applicable subheading for the two products, if imported in quantities that fall within the limits described in additional U.S. note 8 to chapter 17, will be 2106.90.9500, HTSUS, which provides for food preparations not elsewhere specified or included . . . other . . . other . . . articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17 . . . described in additional U.S. note 8 to chapter 17 and entered pursuant to its provisions. The general rate of duty will be 10 percent ad valorem.

If the quantitative limits of additional U.S. note 8 to chapter 17 have been reached, the products will be classified in subheading 2106.90.9700, HTSUS, and dutiable at the general rate of 28.8 cents per kilogram plus 8.5 percent ad valorem. In addition, products classified in subheading 2106.90.9700, HTSUS, will be subject to additional duties based on their value, as described in subheadings 9904.17.49 to 9904.17.65, HTSUS.

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

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling FDA at 301-575-0156, or at the Web site [www.fda.gov/oc/bioterrorism/bioact.html](http://www.fda.gov/oc/bioterrorism/bioact.html).

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Timothy Petrulonis at [timothy.petrulonis@cbp.dhs.gov](mailto:timothy.petrulonis@cbp.dhs.gov).

*Sincerely,*

STEVEN A. MACK

*Director*

*National Commodity Specialist Division*

HQ H316413  
OT:RR:CTF:FTM H316413 TSM  
CATEGORY: Classification  
TARIFF NO.: 2106.90.9897

MR. GEORGE C. LOVEQUIST  
ACCESS BUSINESS GROUP INTERNATIONAL LLC  
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**FACTS:**

In NY N314621, the products at issue were described as follows:

The first product, “Amway Immunity Gummies”, is said to contain organic sugar, organic tapioca syrup, water, vitamin C, glycerin, elderberry extract, agar, flavors consisting of elderberry, lemon and masking flavors, zinc, lactic acid and citric acid.

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Ingredients breakdowns, a manufacturing flowchart and photocopies of the packaging were provided to CBP for consideration.

**ISSUE:**

What is the tariff classification of the dietary supplement products at issue?

**LAW AND ANALYSIS:**

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

The 2021 HTSUSA provisions under consideration are as follows:

2106	Food preparations not elsewhere specified or included:
2106.90	Other:
	Other:
	Other:
	Other:
	Articles containing over 10 per-
	cent by dry weight of sugar de-
	scribed in additional U.S. note 3
	to chapter 17:
2106.90.9500	Described in additional U.S.
	note 8 to chapter 17 and
	entered pursuant to its pro-
	visions
	* * *
2106.90.98	Other:
	* * *
	Other:
	* * *
	Other:
	* * *
2106.90.9897	Other:
	Containing
	sugar de-
	rived from
	sugar cane
	and/or sugar
	beets
	* * *

Additional U.S. Note 3 to Chapter 17, HTSUS, reads the following:

For the purposes of this schedule, the term “articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17” means articles containing over 10 percent by dry weight of sugars derived from sugar cane or sugar beets, whether or not mixed with other ingredients, except (a) articles not principally of crystalline structure or not in dry amorphous form, the foregoing that are prepared for marketing to the ultimate consumer in the identical form and package in which imported; (b) blended syrups containing sugars derived from sugar cane or sugar beets, capable of being further processed or mixed with similar or other ingredients, and not prepared for marketing to the ultimate consumer in the identical form and package in which imported; (c) articles containing over 65 percent by dry weight of sugars derived from sugar cane or sugar beets, whether or not mixed with other ingredients, capable of being further processed or mixed with similar or other ingredients, and not prepared for marketing to the ultimate consumer in the identical form and package in which imported; or (d) cake decorations and similar products to be used in the same condition as imported without any further processing other than the direct application to individual pastries

or confections, finely ground or masticated coconut meat or juice thereof mixed with those sugars, and sauces and preparations therefor.

\* \* \*

Additional U.S. Note 8 to Chapter 17, HTSUS, reads the following:

The aggregate quantity of articles containing over 10 percent by dry weight of sugars described in additional U.S. note 3 to chapter 17, entered under subheadings 1701.91.54, 1704.90.74, 1806.20.75, 1806.20.95, 1806.90.55, 1901.90.56, 2101.12.54, 2101.20.54, 2106.90.78 and 2106.90.95 during the 12-month period from October 1 in any year to the following September 30, inclusive, shall not exceed 64,709 metric tons (articles the product of Mexico shall not be permitted or included under this quantitative limitation and no such articles shall be classifiable therein).

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In understanding the language of the HTSUS, the Explanatory Notes (“ENS”) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although neither dispositive nor legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the Harmonized System at the international level. See T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The EN to heading 2106, HTSUS, states, in pertinent part, the following:

Provided that they are not covered by any other heading of the Nomenclature, this heading covers:

- (A) Preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk, etc.), for human consumption.
- (B) Preparations consisting wholly or partly of foodstuffs, used in the making of beverages or food preparations for human consumption. The heading includes preparations consisting of mixtures of chemicals (organic acids, calcium salts, etc.) with foodstuffs (flour, sugar, milk powder, etc.), for incorporation in food preparations either as ingredients or to improve some of their characteristics (appearance, keeping qualities, etc.) (see the General Explanatory Note to Chapter 38).

\* \* \*

The heading includes, *inter alia*:

\* \* \*

- (16) Preparations, often referred to as food supplements or dietary supplements, consisting of, or based on, one or more vitamins, minerals, amino acids, concentrates, extracts, isolates or the like of substances found within foods, or synthetic versions of such substances, put up as a supplement to the normal diet. It includes such products whether or not also containing sweeteners, colours, flavours, odoriferous substances, carriers, fillers, stabilisers or other technical aids. Such products are often put up in packaging with indications that they maintain general health or well-being, improve athletic performance, prevent possible nutritional deficiencies or correct sub-optimal levels of nutrients.

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In NY N314621, CBP classified the “Amway Immunity Gummies” and “Amway Sleep Gummies” under subheading 2106.90.9500, HTSUSA, which provides for “Food preparations not elsewhere specified or included: Other: Other: Other: Other: Articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17: Described in additional U.S. note 8 to chapter 17 and entered pursuant to its provisions.”

Heading 2106, HTSUS, provides for “Food preparations, not elsewhere specified or included.” Thus, in order for a product to fall under heading 2106, HTSUS, two criteria must be met. First, the product must be a food preparation, and second, the food preparation must not be classified in the tariff more specifically elsewhere. See *R.T. Foods, Inc. v. United States*, 887 F. Supp. 2d 1351, 1358 (C.I.T. 2012) (stating that heading 2106 was an “expansive basket heading that only applies in the absence of another applicable heading”). The terms “food,” “preparation,” and “food preparation” are not defined in the HTSUS. EN 21.06 provides two definitions for the phrase “food preparation”. See EN (A) and EN (B) to 21.06. The first definition for the phrase “food preparation” is “Preparations for use, either directly or after processing ... for human consumption”. See EN (A) 21.06.

In *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1994), the Court of Appeals for the Federal Circuit (CAFC) stated that:

Inherent in the term “preparation” is the notion that the object involved is destined for a specific use. The relevant definition from *The Oxford English Dictionary* defines “preparation” as “a substance specially prepared, or made up for its appropriate use or application, e.g. as food or medicine, or in the arts or sciences.” (internal citations omitted.)

Upon review, we find that the “Amway Immunity Gummies” and “Amway Sleep Gummies” products at issue are “food preparations” of heading 2106, HTSUS, because they contain substances with nutritive value and are preparations for human consumption that provide general health and well-being benefits not meant to treat or prevent any specific diseases. Accordingly, they are of the kind of preparations described in EN 21.06 (A)(16) and not more specifically classified elsewhere. However, the products at issue are not classified under subheading 2106.90.9500, HTSUSA, because they fall within one of the exceptions to Additional U.S. Note 3 to Chapter 17.

Additional U.S. Note 3 to Chapter 17 provides in relevant part that the term “‘articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17’ means articles containing over 10 percent by dry weight of sugars derived from sugar cane or sugar beets, whether or not mixed with other ingredients, except (a) articles not principally of crystalline structure or not in dry amorphous form, the foregoing that are prepared for marketing to the ultimate consumer in the identical form and package in which imported.” While the “Amway Immunity Gummies” and “Amway Sleep Gummies” contain over 10 percent of sugar derived from sugar cane (based on the products’ ingredient breakdown that accompanied the original request for a ruling), the products at issue are not “principally of crystalline structure” or “in dry amorphous form” when they are imported and prepared for marketing to the ultimate consumer. In fact, the “Amway Immunity Gummies” and “Amway Sleep Gummies” are imported and marketed to the ultimate consumer in solid form, specifically in the form of nutritional supplement gummies. Because the products at issue fall within one of the exceptions to U.S. Note 3 to Chapter 17, it follows that the

quantitative limitations of Additional U.S. Note 8 to Chapter 17, HTSUS, also do not apply to these products. Therefore, as referenced above the “Amway Immunity Gummies” and “Amway Sleep Gummies” are not classified in subheading 2106.90.9500, HTSUSA.

The products at issue in NY N314621 are nutritional supplements consisting of substances with nutritive value, imported and prepared for marketing to the ultimate consumer in solid form, specifically in the form of nutritional supplement gummies, and containing sugar derived from sugar cane. Therefore, we find that they are described by heading 2106, HTSUS, and specifically by subheading 2106.90.9897, HTSUSA, which provides for “Food preparations not elsewhere specified or included: Other: Other: Other: Other: Other: Other: Other: Other: Other: Other: Containing sugar derived from sugar cane and/or sugar beets.” *See* NY N314583, dated October 13, 2020 (classifying dietary supplements imported and prepared for marketing to the ultimate consumer in the form of nutritional supplement gummies containing sugar derived from sugar cane, under subheading 2106.90.9897, HTSUSA.)

**HOLDING:**

By application of GRIs 1 and 6, we find that “Amway Immunity Gummies” and “Amway Sleep Gummies” are classified under heading 2106, HTSUS, and specifically under subheading 2106.90.9897, HTSUSA, which provides for “Food preparations not elsewhere specified or included: Other: Other: Other: Other: Other: Other: Other: Other: Other: Other: Containing sugar derived from sugar cane and/or sugar beets.” The 2021 column one, general rate of duty is 6.4% *ad valorem*.

**EFFECT ON OTHER RULINGS:**

N314621, dated October 1, 2020, is hereby REVOKED.

*Sincerely,*

*For*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

**PROPOSED REVOCATION OF ONE RULING LETTER AND  
PROPOSED REVOCATION OF TREATMENT RELATING TO  
THE TARIFF CLASSIFICATION OF THE ACTIVPANEL  
VERSION 7**

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

**ACTION:** Notice of proposed revocation of one ruling letter, and proposed revocation of treatment relating to the tariff classification of the ActivPanel Version 7.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning tariff classification of the ActivPanel Version 7 under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

**DATE:** Comments must be received on or before April 16, 2021.

**ADDRESS:** Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

**FOR FURTHER INFORMATION CONTACT:** Patricia Fogle, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–0061.



**SUPPLEMENTARY INFORMATION:****BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of the ActivPanel Version 7. Although in this notice, CBP is specifically referring to Headquarters Ruling Letter ("HQ") H304416, dated August 10, 2020 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In HQ H304416, CBP classified the ActivPanel Version 7 in heading 8471, HTSUS, specifically in subheading 8471.60.10, HTSUS, which provides for "Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included: Input or output units, whether or not

containing storage units in the same housing: Combined input/output units.” CBP has reviewed HQ H304416 and has determined the ruling letter to be in error. It is now CBP’s position that the ActivPanel Version 7 is properly classified, in heading 8471, HTSUS, specifically in subheading 8471.41.01, HTSUS, which provides for “Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included: Other automatic data processing machines: Comprising in the same housing at least a central processing unit and an input and output unit, whether or not combined.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke HQ H304416 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H314277, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

GREGORY CONNOR  
*for*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

Attachments

ATTACHMENT A

HQ H304416

August 10, 2020

CLA-2 OT:RR:CTF:EMAIN H304416 PF

CATEGORY: Classification

TARIFF NO.: 8471.60.10

MICHAEL K. TOMENGA  
NEVILLE PETERSON LLP  
1400 16TH STREET, N.W.  
WASHINGTON, D.C. 20036

RE: Tariff classification of the ActivPanel Version 7

DEAR MR. TOMENGA:

This is in reply to your correspondence to U.S. Customs and Border Protection (“CBP”), Office of Trade, Regulations and Rulings, on behalf of your client Promethean, Inc. (“Promethean”). In your letter, you seek a prospective ruling under the Harmonized Tariff Schedule of the United States (“HTSUS”) regarding the tariff classification of the ActivPanel Interactive Display version 7 (“ActivPanel v7”). We have taken into consideration supplemental information received on October 24, 2019 and January 30, 2020.

**FACTS:**

There are two models of the ActivPanel v7 subject to this request, which are the ActivPanel Nickel and ActivPanel Titanium. Both models contain a 4K ultra high-definition liquid crystal display (“LCD”) video monitor containing a touch overlay, a CPU, speakers and connectors for various signal inputs and outputs, including VGA, USD, and HDMI, and a remote control. The LCD screen size of the ActivPanel Nickel is available from 65 inches to 86 inches and the LCD screen size of the ActivPanel Titanium is available from 70 inches to 86 inches. Both ActivPanel v7 models are configured with a Quad Core processor, 2GB to 4GB of memory, 16GB to 64GB internal storage, a graphics processor, audio, Ethernet, Wi-Fi and Bluetooth connectivity.

The ActivPanel v7 is described as an interactive display and includes a menu bar that allows users access to applications, tools, files, and other attached computing machines. The ActivPanel v7 is sold with Promethean Classroom Essential Applications, which include Whiteboard, Annotate, Screen Share, Spinner and Timer. The Promethean Classroom Essential Apps are educational applications that provide a user with whiteboard, screen capture, annotating, and mirroring functions.<sup>1</sup> The ActivPanel v7 also has an application or control feature entitled the “Locker” that displays and provides access to the applications that are installed onto the ActivPanel v7 as well as the applications that are stored on a separate computing device. The ActivPanel v7 includes a preinstalled Promethean Store, which includes curated educational applications.<sup>2</sup> In order to install an application from the Promethean Store or from the Google Play Store onto the ActivPanel v7, a separate computing system is required.

<sup>1</sup> See <https://www.prometheanworld.com/products/interactive-displays/activpanel-elements-series/> (last visited February 7, 2020).

<sup>2</sup> <https://www.prometheanworld.com/products/interactive-displays/activpanel-elements-series/> (last visited February 7, 2020).

Promethean sells different types of computing/Open Pluggable Specification (“OPS”) modules that are externally connected to the ActivPanel v7, including Chromebox, OPS-M, and ActivConnect OPS-G.<sup>3</sup> These OPS modules are considered optional devices and are not imported with the ActivPanel v7. The Chromebox uses a Chrome operating system, contains 4GB of RAM, a 128GB solid-state drive, and has Wi-Fi and Bluetooth connectivity.<sup>4</sup> The Chromebox is connected to the ActivPanel v7 via an HDMI cable, the OPS-M is connected to the ActivPanel v7 via an OPS connection port on the ActivPanel v7’s housing, and the ActiveConnect OPS-G is mounted directly onto the ActivPanel v7 via a mounting bracket. The Chromebox allows a user to download applications from the Google Play Store directly onto the ActivPanel v7, which appear on the ActivPanel v7’s screen.<sup>5</sup> The OPS-M (Windows version) is pre-loaded with Windows 10 and allows a user to install applications and software packages such as Microsoft Office.<sup>6</sup> The ActivConnect G uses an Android operating system and allows the downloading of applications from any Android Application Store to the ActivPanel v7.<sup>7</sup> The ActiveConnect G is described as an external Android Module that gives the ActivPanel v7 “tablet-like capabilities, [and] puts the digital world at your fingertips with access to apps, content, mirroring, and more.”<sup>8</sup>

Promethean’s website also provides a description of the OPS modules on its website and describes the objective of these devices:

The objective of the OPS is to provide the ability for a wide range of computing units to be integrated into display units such as the ActivPanel based on standardized dimensions and the use of a common 80-pin JEA socket and other connectors.<sup>9</sup>

The Chromebox is described as follows:

The Promethean Chromebox is the perfect solution for extending an existing Chrome OS ecosystem to the ActivPanel Elements Series, providing certified and seamless access to your preferred apps from the

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<sup>3</sup> See <https://www.prometheanworld.com/products/accessories/computing-modules/> (last visited February 7, 2020).

<sup>4</sup> See <https://www.prometheanworld.com/products/accessories/promethean-chromebox/> and [https://cdn.prometheanworld.com/wp-content/uploads/2019/08/Promethean\\_Chromebox\\_2019\\_SS\\_0619v1.5\\_EN.pdf](https://cdn.prometheanworld.com/wp-content/uploads/2019/08/Promethean_Chromebox_2019_SS_0619v1.5_EN.pdf) (last visited February 7, 2020).

<sup>5</sup> See <https://www.prometheanworld.com/products/accessories/promethean-chromebox/> (last visited February 7, 2020).

<sup>6</sup> See <https://support.prometheanworld.com/product/-ops-m-/> and <https://support.prometheanworld.com/article/1734/> (last visited February 7, 2020). There are two versions of the OPS-M, one with pre-installed Windows 10 operating system and another version with no operating system.

<sup>7</sup> See <https://support.prometheanworld.com/product/-activconnect-g-/> (last visited February 7, 2020).

<sup>8</sup> See <https://support.prometheanworld.com/product/-activconnect-g-/> (last visited February 7, 2020) and <https://blog.prometheanworld.com/tech-insights/educational-apps-to-use-with-the-activpanel/> (discussing how the “ActivConnect coupled with your Promethean display to leverage educational apps is a great way to keep students engaged, working together, and having fun as they learn!”).

<sup>9</sup> See <https://support.prometheanworld.com/article/1015/> (last visited February 7, 2020).

Google Play Store. View and launch downloaded apps directly from the Unified Menu with one-click access and no need for source switching.<sup>10</sup>

The ActivPanel v7 has a CPU on a scaler board. The CPU that runs the Android operating system functions as an image processor that takes a signal from an automatic data processing (“ADP”) machine input and translates it onto the LCD in the form of an image. Aside from the control and interface applications that are installed directly onto the internal scaler CPU, users are limited as to what they can directly install on the scaler board CPU. Applications that provide general purpose computing functions reside on the computing/OPS modules, such as the ActiveConnect OPS-G, Chromebox, and OPS-M and not on the ActivPanel v7. A support video from Promethean describes how a user can “integrate the ActiveConnect OPS-G with the ActivPanel Elements Series so the apps will exist in the Locker alongside the apps from the ActivPanel.”<sup>11</sup> In addition, a separate support video states that the OPS-M and Active Connect G are required to install applications.<sup>12</sup> Moreover, in order to manually install applications, users must download the specific application from their personal computer, save it to a USB drive, and insert it into the mounted OPS/ActiveConnect OPS-G/Chromebox.<sup>13</sup>

Promethean also creates and supports lesson delivery software, entitled ActivInspire and ClassFlow for use on its ActivPanels v7<sup>14</sup>. These applications are not physically installed on the ActivPanel v7, but instead are installed on a separate ADP machine. The ClassFlow application is installed on the ActiveConnect OPS and is marketed is for its ability to “deliver lessons, write, draw, annotate and poll students.”<sup>15</sup> In addition, the ActivInspire specifications require a Windows, Mac or Linux operating<sup>16</sup> system to function and the ActivPanel v7 runs on an Android operating system. Based on the ActivInspire specifications, this software has to be installed on a separate ADP machine and not on the ActivPanel v7. Neither the ActivInspire nor Classflow programs allow users to perform general purpose computing functions.

<sup>10</sup> See <https://www.prometheanworld.com/products/accessories/promethean-chromebox/> (last visited February 7, 2020).

<sup>11</sup> See <https://support.prometheanworld.com/video/activpanel-elements-ops-integration/> (last visited February 7, 2020).

<sup>12</sup> See <https://www.youtube.com/watch?v=r-nbs8KUVsw> (last visited February 7, 2020) and <https://edtechmagazine.com/k12/article/2019/12/review-promethean-activpanel-titanium-has-many-teacher-friendly-features> (noting that an OPS computing module is a must for teachers who wish to run Google apps through their interactive whiteboard) (last visited February 7, 2020).

<sup>13</sup> See <https://www.youtube.com/watch?v=rvakgLzD2sA> (last visited February 7, 2020).

<sup>14</sup> See <https://www.prometheanworld.com/products/interactive-displays/activpanel-elements-series/> (last visited February 7, 2020).

<sup>15</sup> See <https://support.prometheanworld.com/article/1565>, <https://support.prometheanworld.com/download/45992> and <https://support.prometheanworld.com/download/45776> (last visited February 7, 2020).

<sup>16</sup> See <https://support.prometheanworld.com/activinspire-system-requirements-en/> (last visited February 7, 2020).

**ISSUE:**

Whether the ActivPanel v7 is classified as an automatic data processing (“ADP”) machine of heading 8471, HTSUS or a combined input/output unit of an ADP machine of heading 8471, HTSUS.

**LAW AND ANALYSIS:**

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (“GRIs”) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation (“AUSR”). The GRIs and the AUSR are part of the HTSUS, and are considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS headings under consideration are as follows:

8471	Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included: * * *
	Other automatic data processing machines:
8471.41.01	Compromising in the same housing at least a central processing unit and an input and output unit, whether or not combined.. * * *
8471.60	Input or output units, whether or not containing storage units in the same housing:
8471.60.10	Combined input/output units...

ADP machines are defined in Legal Note 5(A) to Chapter 84, HTSUS, which provide as follows:

For the purposes of heading 8471, the expression “automatic data processing machines” means machines capable of:

- (i) Storing the processing program or programs and at least the data immediately necessary for the execution of the program;
- (ii) Being freely programmed in accordance with the requirements of the user;
- (iii) Performing arithmetical computations specified by the user; and
- (iv) Executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run.

To be classified as an ADP unit under heading 8471, HTSUS, an article must meet the terms of Legal Note 5(C) to Chapter 84, HTSUS, which provides that:

Subject to paragraphs (D) and (E) below, a unit is to be regarded as being a part of an automatic data processing system if it meets all the following conditions:

- (i) It is of a kind solely or principally used in an automatic data processing system;
- (ii) It is connectable to the central processing unit [CPU] either directly or through one or more other units; and
- (iii) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.

Separately presented units of an automatic data processing machine are to be classified in heading 8471... .

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

The ENs to heading 8471 provide, in pertinent part:

**(I) AUTOMATIC DATA PROCESSING MACHINES  
AND UNITS THEREOF**

Data processing is the handling of information of all kinds, in pre-established logical sequences and for a specific purpose or purposes.

Automatic data processing machines are machines which, by logically interrelated operations performed in accordance with pre-established instructions (program), furnish data which can be used as such, or, in some cases, serve in turn as data for other data processing operations.

This heading covers data processing machines in which the logical sequences of the operations can be changed from one job to another, and in which the operation can be automatic, that is to say with no manual intervention for the duration of the task... .

However, the heading **excludes** machines, instruments or apparatus incorporating or working in conjunction with an automatic data processing machine and performing a specific function. Such machines, instruments or apparatus are classified in the headings appropriate to their respective functions or, failing that, in residual headings (See Part (E) of the General Explanatory Note to this Chapter).

**(A) AUTOMATIC DATA PROCESSING MACHINES**

The automatic data processing machines of this heading must be capable of fulfilling **simultaneously** the conditions laid down in Note 5(A) to this Chapter. [...]

Thus, machines which operate only on fixed programs, i.e., programs which cannot be modified by the user, are **excluded** even though the user may be able to choose from a number of such fixed programs.

These machines have storage capability and also stored programs which can be changed from job to job... .

The ActivPanel v7 is capable of “storing the processing program or programs and at least the data immediately necessary for the execution of the program;” “performing arithmetical computations specified by the user;” and “executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run.” See Note 5(A)(i), (iii) and (iv) to Chapter 84, HTSUS. At issue in this case is whether the device is “capable of ... being freely programmed in accordance with the requirements of the user.” See Note 5(A)(ii) to Chapter 84, HTSUS.

In *Optrex America Inc. v. United States*, 427 F. Supp. 2d 1177 (Ct. Int'l Trade 2006), *aff'd*, 475 F.3d 1367 (Fed. Cir. 2007) (“*Optrex*”), the U.S. Court of Appeals for the Federal Circuit (“CAFC”) upheld CBP’s longstanding interpretation that a “freely programmable” ADP machine is one that: (i) applications can be written for, (ii) does not impose artificial limitations upon such applications, and (iii) will accept new applications that allow the user to manipulate the data as deemed necessary by the user. 475 F.3d at 1368. See also Headquarters Ruling Letter (“HQ”) 964880, dated December 21, 2001. The *Optrex* court noted that “[CBP’s] interpretation is supported by the World Customs Organization’s Explanatory Notes [...] which provide that ‘machines which operate only on fixed programs, that is, programs which cannot be modified by the user, are excluded [from heading 8471] even though the user may be able to choose from a number of such fixed programs.’ Explanatory Note 84.71(I)(A).” *Id.* at 1370. The court added that “[a]pplication programs are not ‘fixed’ because they can be installed or deleted from a machine.” 427 F. Supp. 2d at 1197.

CBP has ruled that devices which enable the user to decide which applications to install or delete from the device are freely programmable. For example, in HQ 964880, *supra*, CBP examined the classification of the Palm VII and VIIx – personal digital assistants (“Palm PDAs”) with Internet connectivity. Both models used Palm’s 3.2.0 OS, a 16MHz microprocessor, and came with 2 MB of random access memory and 2 MB of read-only memory. They were imported with pre-installed applications (including a date book, an address book, a memo pad, and desk top e-mail connectivity software) and could accept additional applications that were available directly from Palm or from third-party vendors. In finding that the devices were freely programmable, CBP stressed the fact that they could be programmed in several ways: directly on the devices, with a host computer to generate a generic application, or with a host computer to generate a native application. CBP also noted that:

- (a) the Palm [OS] is an open operating system; programming tools are readily available to any user either directly from Palm or from other commercial sources;
- (b) programming tools are readily available to any user either directly from Palm or from other commercial sources; [and]
- (c) hundreds of software applications are currently available for the Palm OS through a variety of vendors who distribute them either as free-ware, shareware, or commercial applications ...

CBP classified the PDAs in subheading 8471.30.00, HTSUS, as portable ADP machines.



Conversely, in HQ H026665, dated July 9, 2008, CBP ruled that the AIDA System Compact II, a machine used in hospitals to archive images, video and audio files associated with patient information onto a database, was not freely programmable because users were not free to add or remove software from the device. There, CBP noted, first, that the importer could not provide “... an affirmative representation that the hardware and software are installed into the AIDA without any proprietary restrictions or blocks” and second, that “the software installation manual and license prohibited the downloading of additional software and also identified such action as an impediment to the operation of the device.”

Similarly, in HQ 964682, dated July 15, 2002, we determined that the Sony PlayStation2 (“PS2”), a video game console, was not freely programmable because:

[p]roprietary blocks in the PS2 prevent the console from running any commercially available Linux OS and only specially designed Sony disks can be read by the system. If a non-PS2 compatible disc is inserted in the console, the hardware layer (with the firmware) determines that the disc does not contain one of the accepted formats and thus does not acknowledge it as accepted media.

Significantly, we noted that to run additional Linux-based programs on the PS2, the user was required to install Sony’s version of the Linux OS, which was not included with the console. Moreover, in HQ 952862, dated November 1, 1994, CBP determined that Teklogix data collection devices were not freely programmable, in part, because they were not “general purpose” machines and were designed for certain specific applications and could not by themselves perform the typical applications of computers or personal computers. HQ 952862 discussed the concept of freely programmable by examining the definitions of computer and personal computer and stated as follows:

In determining whether a particular machine is “freely programmable,” it is helpful to examine the definitions of the terms “computer” and “personal computer.” A computer, which is freely programmable, is a “[g]eneral-purpose machine that processes data according to a set of instructions that are stored internally either temporarily or permanently.” A. Freedman, *The Computer Glossary*, Sixth Edition, pg. 95 (1993). A personal computer “is functionally similar to larger computers, but serves only one user. It is used at home and in the office for almost all applications traditionally performed on larger computers.” *Computer Glossary* (1993), pg. 400. Personal Computers “are typically used for applications, such as word processing, spreadsheets, database management and various graphics-based programs, such as computer-aided design (CAD) and desktop publishing. They are also used to handle traditional business applications, such as invoicing, payroll and general ledger. At home, personal computers are primarily used for games, education and word processing.” A. Freedman, *The Computer Glossary*, Fourth Edition, pg. 524 (1989). Because they can perform any of the above-listed applications, personal computers are considered to be “freely programmable.”

The ActivPanel v7 is not freely programmable because it runs on fixed programs, specifically, its Promethean Classroom Essential Applications. The installation and execution of applications beyond the Promethean Classroom Essential Applications requires an external computing module, such as the

ActivConnect OPS-G, OPS-M, or Chromebox. Promethean's website discusses the OPS Modules and notes that:

The objective of the OPS is to provide the ability for a wide range of computing units to be integrated into display units such as the ActivPanel based on standardized dimensions and the use of a common 80-pin JEA socket and other connectors.<sup>17</sup>

It is apparent that a user cannot install, modify or remove program applications on the ActivPanel v7. For example, the ActivPanel v7 cannot receive third-party applications, such as a word processing program or a virus protection program without the presence of an ADP machine. Numerous ActivPanel v7 support videos discuss that a separate OPS is required to install third-party applications.<sup>18</sup> The ActivPanel v7 also requires a separate OPS/computing machine for the installation of the ActivInspire and ClassFlow software programs. EN 84.71(I)(A) provides that machines which operate only on fixed programs that cannot be modified by the user are excluded from heading 8471, HTSUS, even when the user may be able to choose from a number of such fixed programs. In this case, the ActivPanel v7 operates on fixed programs and does not accept the installation or removal of applications at will.

Unlike the Palm VII and Palm VIIx in HQ 964880, *supra*, the ActivPanel v7 requires a separate ADP machine to execute applications or programs apart from its limited classroom applications. In HQ 964880, CBP found that the Palm VII and Palm VIIx were freely programmable because when applications were downloaded to these devices, the programs could be stored, retained, and execute on the Palm devices. In the present case, the ActivPanel v7 cannot store, retain, or execute third-party applications without being connected to a separate OPS/computing device.

Promethean maintains that the scaler board CPU runs the educational and application software for the ActivPanel v7 such that a separate ADP machine is not required for the installation and execution of all third-party programs. However, the scaler board CPU that is installed inside the ActivPanel v7 functions as an image processor that takes the signal from the ADP machine input and translate it onto the LCD in the form of an image. The functionality of the scaler board CPU does not rise to the level of an ADP machine.

The ActivPanel v7 is not a general purpose ADP machine because it cannot by itself perform the functions of computers or personal computers, including general purpose computing tasks. The ActivPanel v7 has no word processing functions, spreadsheet, database management, desktop publishing, or email functions, nor is it capable of handling traditional business applications, such as invoicing, payroll, general ledger. These limitations preclude the use of the ActivPanel v7 for the typical applications associated with ADP machines. *See* HQ 952862.

For the foregoing reasons, we find that the ActivPanel v7 is not "freely programmable" as required by Note 5(A)(ii) to Chapter 84, HTSUS. There-

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<sup>17</sup> *See* <https://support.prometheanworld.com/article/1015/> (last visited February 7, 2020).

<sup>18</sup> *See* <https://support.prometheanworld.com/video/activpanel-elements-ops-integration/> and <https://www.youtube.com/watch?v=r-nbs8KUVsw> (last visited February 7, 2020); *see also* <https://www.youtube.com/watch?v=rvakgLzD2sA> (last visited February 7, 2020) (discussing that in order to manually install applications a separate OPS machine is required).

fore, the ActivPanel v7 does not meet the requirements of Note 5(A) to Chapter 84, HTSUS, and it is not an ADP machine of heading 8471.50, HTSUS.

The ActivPanel v7 is an interactive display unit designed to connect to an ADP machine for the purpose of performing input and output functions in an ADP system. Legal Note 5(B) to Chapter 84, HTSUS, provides guidance regarding units of ADP machines. It states that “[a]utomatic data processing machines may be in the form of systems consisting of a variable number of separate units.” Per EN 84.71, a unit is to be regarded as a part of the complete system if it meets all of the following conditions:

- (a) Performs a data processing function;
- (b) Meets the following criteria set out in Note 5 (C) to [Chapter 84, *supra*]:
  - (i) It is of a kind solely or principally used in an automatic data processing system;
  - (ii) It is connectable to the central processing unit either directly or through one or more other units; and
  - (iii) It is able to accept or deliver data in a form (codes or signals) which can be used by the system; and
- (c) Is not excluded by the provisions of Notes 5 (D) and (E) to this Chapter... .

According to Legal Note 5(B), the subject ActivPanel v7 must be: connectable to a CPU; capable of receiving data from an ADP system; and of a type of display that is principally or solely used in an ADP system. The subject ActivPanel v7 meets this criteria as it is directly connectable to a CPU, is able to accept or deliver data from an ADP system, and is of a kind solely or principally used in a ADP system. The ActivPanel v7 is also not excluded by the provisions of Notes 5(D) or 5(E).

The ActivPanel v7 allows users to manipulate on-screen data directly and to a PC. The touch and LCD panel provide for an input and output medium and allow multiple users to connect their laptop or computing device to the ActivPanel v7 for the purpose of displaying, interacting, screen sharing from the user’s computing machine. Because the ActivPanel v7’s infrared touch-screen and LCD panel are permanently combined into a single unit and the display unit is principally used within an ADP system for the purpose of performing a data processing function, the subject ActivePanel v7 display unit is classified as a combined input output unit for ADP machines under subheading 8471.60.10, HTSUS.

Our decision is consistent with New York Ruling (“NY”) N300326, dated September 11, 2018 where we found that Clevertouch LED touch screens that were designed to be used in a classroom or business setting as an interactive whiteboard in a standalone configuration (and not imported with an ADP module) were units of an ADP machine and were classified in 8471.60.10, HTSUS.<sup>19</sup> In addition, in NY N285600, dated May 15, 2017, we determined that a different ActivePanel model, that consisted of an LCD display with multiple connection terminals and which allowed the unit to connect to an

<sup>19</sup> CBP also noted that when the Clevertouch LED touch screens were imported with an Android OS module, which was able to process applications compatible with an Android OS,

ADP machine for the display and manipulation of content, was an interactive display unit of subheading 8471.60.10, HTSUS.

**HOLDING:**

By application of GRIs 1 and 6, the subject ActivPanel v7 is classified in heading 8471, HTSUS, and specifically in subheading 8471.60.10, HTSUS, which provides for “Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included: Input or output units, whether or not containing storage units in the same housing: Combined input/output units.” The 2020 column one, general rate of duty for merchandise of this heading is Free.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 8471.60.1000, HTSUS, unless specifically excluded, are subject to an additional 25 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.03, in addition to subheading 8471.60.10, HTSUS, listed above.

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

For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, you may refer to the relevant parts of the USTR and CBP websites, which are available at:

<https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions> <https://www.cbp.gov/trade/remedies/301-certain-products-china>

Duty rates are subject to change. The text of the most recent HTSUS and the accompany duty rates are provided at [www.usitc.gov](http://www.usitc.gov). A copy of this ruling letter should be attached to the entry documents filed at the time the goods are entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the CBP officer handling the transaction.

*Sincerely,*

GREGORY CONNOR,

*Branch Chief*

*Electronics, Machinery, Automotive, and  
International Nomenclature Branch*

ATTACHMENT B

HQ H314277  
OT:RR:CTF:EMAIN: H314277 PF  
CATEGORY: Classification  
TARIFF NO.: 8471.41.01

MICHAEL K. TOMENGA  
NEVILLE PETERSON LLP  
1400 16TH STREET, N.W.  
WASHINGTON, D.C. 20036

Re: Revocation of HQ H304416; Tariff Classification of the ActivPanel Version 7

DEAR MR. TOMENGA:

This is in response to your letter to U.S. Customs and Border Protection (“CBP”), submitted on behalf of Promethean, Inc. (“Promethean”) requesting reconsideration of Headquarters Ruling Letter (“HQ”) H304416, dated, August 10, 2020 (“reconsideration request”). We have reviewed HQ H304416 and found it to be in error based on the revised facts set forth in the request for reconsideration. In reaching our decision, we have also considered a video submitted with the reconsideration request. Accordingly, for the reasons set forth below, CBP is revoking HQ H304416.

**FACTS:**

In HQ H304416, the ActivPanel 7 was described as follows:

There are two models of the ActivPanel v7 subject to this request, which are the ActivPanel Nickel and ActivPanel Titanium. Both models contain a 4K ultra high-definition liquid crystal display (“LCD”) video monitor containing a touch overlay, a CPU, speakers and connectors for various signal inputs and outputs, including VGA, USD, and HDMI, and a remote control. The LCD screen size of the ActivPanel Nickel is available from 65 inches to 86 inches and the LCD screen size of the ActivPanel Titanium is available from 70 inches to 86 inches. Both ActivPanel v7 models are configured with a Quad Core processor, 2GB to 4GB of memory, 16GB to 64GB internal storage, a graphics processor, audio, Ethernet, Wi-Fi and Bluetooth connectivity.

The ActivPanel v7 is described as an interactive display and includes a menu bar that allows users access to applications, tools, files, and other attached computing machines. The ActivPanel v7 is sold with Promethean Classroom Essential Applications, which include Whiteboard, Annotate, Screen Share, Spinner and Timer. The Promethean Classroom Essential Apps are educational applications that provide a user with whiteboard, screen capture, annotating, and mirroring functions.<sup>20</sup> The ActivPanel v7 also has an application or control feature entitled the “Locker” that displays and provides access to the applications that are installed onto the ActivPanel v7 as well as the applications that are stored on a separate computing device. The ActivPanel v7 includes a pre-installed Promethean Store, which includes curated educational applica-

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<sup>20</sup> See <https://www.prometheanworld.com/products/interactive-displays/activpanel-elements-series/> (last visited February 7, 2020).

tions.<sup>21</sup> In order to install an application from the Promethean Store or from the Google Play Store onto the ActivPanel v7, a separate computing system is required.

Promethean sells different types of computing/Open Pluggable Specification (“OPS”) modules that are externally connected to the ActivPanel v7, including Chromebox, OPS-M, and ActivConnect OPS-G.<sup>22</sup> These OPS modules are considered optional devices and are not imported with the ActivPanel v7. The Chromebox uses a Chrome operating system, contains 4GB of RAM, a 128GB solid-state drive, and has Wi-Fi and Bluetooth connectivity.<sup>23</sup> The Chromebox is connected to the ActivPanel v7 via an HDMI cable, the OPS-M is connected to the ActivPanel v7 via an OPS connection port on the ActivPanel v7’s housing, and the ActiveConnect OPS-G is mounted directly onto the ActivPanel v7 via a mounting bracket. The Chromebox allows a user to download applications from the Google Play Store directly onto the ActivPanel v7, which appear on the ActivPanel v7’s screen.<sup>24</sup> The OPS-M (Windows version) is pre-loaded with Windows 10 and allows a user to install applications and software packages such as Microsoft Office.<sup>25</sup> The ActivConnect G uses an Android operating system and allows the downloading of applications from any Android Application Store to the ActivPanel v7.<sup>26</sup> The ActiveConnect G is described as an external Android Module that gives the ActivPanel v7 “tablet-like capabilities, [and] puts the digital world at your fingertips with access to apps, content, mirroring, and more.”<sup>27</sup>

Promethean’s website also provides a description of the OPS modules on its website and describes the objective of these devices:

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<sup>21</sup> <https://www.prometheanworld.com/products/interactive-displays/activpanel-elements-series/> (last visited February 7, 2020).

<sup>22</sup> See <https://support.prometheanworld.com/article/1015/> and <https://www.prometheanworld.com/products/accessories/computing-modules/> (last visited February 7, 2020).

<sup>23</sup> See <https://www.prometheanworld.com/products/accessories/promethean-chromebox/> and [https://cdn.prometheanworld.com/wp-content/uploads/2019/08/Promethean\\_Chromebox\\_2019\\_SS\\_0619v1.5\\_EN.pdf](https://cdn.prometheanworld.com/wp-content/uploads/2019/08/Promethean_Chromebox_2019_SS_0619v1.5_EN.pdf) (last visited February 7, 2020).

<sup>24</sup> See <https://www.prometheanworld.com/products/accessories/promethean-chromebox/> (last visited February 7, 2020).

<sup>25</sup> See <https://support.prometheanworld.com/product/-ops-m-/> and <https://support.prometheanworld.com/article/1734/> (last visited February 7, 2020). There are two versions of the OPS-M, one with pre-installed Windows 10 operating system and another version with no operating system.

<sup>26</sup> See <https://support.prometheanworld.com/product/-activconnect-g-/> (last visited February 7, 2020).

<sup>27</sup> See <https://support.prometheanworld.com/product/-activconnect-g-/> (last visited February 7, 2020) and <https://blog.prometheanworld.com/tech-insights/educational-apps-to-use-with-the-activpanel/> (discussing how the “ActivConnect coupled with your Promethean display to leverage educational apps is a great way to keep students engaged, working together, and having fun as they learn!”).

The objective of the OPS is to provide the ability for a wide range of computing units to be integrated into display units such as the ActivPanel based on standardized dimensions and the use of a common 80-pin JEA socket and other connectors.<sup>28</sup>

The Chromebox is described as follows:

The Promethean Chromebox is the perfect solution for extending an existing Chrome OS ecosystem to the ActivPanel Elements Series, providing certified and seamless access to your preferred apps from the Google Play Store. View and launch downloaded apps directly from the Unified Menu with one-click access and no need for source switching.<sup>29</sup>

The ActivPanel v7 has a CPU on a scaler board. The CPU that runs the Android operating system functions as an image processor that takes a signal from an automatic data processing (“ADP”) machine input and translates it onto the LCD in the form of an image. Aside from the control and interface applications that are installed directly onto the internal scaler CPU, users are limited as to what they can directly install on the scaler board CPU. Applications that provide general purpose computing functions reside on the computing/OPS modules, such as the ActiveConnect OPS-G, Chromebox, and OPS-M and not on the ActivPanel v7. A support video from Promethean describes how a user can “integrate the ActiveConnect OPS-G with the ActivPanel Elements Series so the apps will exist in the Locker alongside the apps from the ActivPanel.”<sup>30</sup> In addition, a separate support video states that the OPS-M and Active Connect G are required to install applications.<sup>31</sup> Moreover, in order to manually install applications, users must download the specific application from their personal computer, save it to a USB drive, and insert it into the mounted OPS/ActiveConnect OPS-G/Chromebox.<sup>32</sup>

Promethean also creates and supports lesson delivery software, entitled ActivInspire and ClassFlow for use on its ActivPanels v7<sup>33</sup>. These applications are not physically installed on the ActivPanel v7, but instead are installed on a separate ADP machine. The ClassFlow application is installed on the ActiveConnect OPS and is marketed is for its ability to “deliver lessons, write, draw, annotate and poll students.”<sup>34</sup> In addition,

<sup>28</sup> See <https://support.prometheanworld.com/article/1015/> (last visited February 7, 2020).

<sup>29</sup> See <https://www.prometheanworld.com/products/accessories/promethean-chromebox/> (last visited February 7, 2020).

<sup>30</sup> See <https://support.prometheanworld.com/video/activpanel-elements-ops-integration/> (last visited February 7, 2020).

<sup>31</sup> See <https://www.youtube.com/watch?v=r-nbs8KUVsw> (last visited February 7, 2020) and <https://edtechmagazine.com/k12/article/2019/12/review-promethean-activpanel-titanium-has-many-teacher-friendly-features> (noting that an OPS computing module is a must for teachers who wish to run Google apps through their interactive whiteboard) (last visited February 7, 2020).

<sup>32</sup> See <https://www.youtube.com/watch?v=rvakgLzD2sA> (last visited February 7, 2020).

<sup>33</sup> See <https://www.prometheanworld.com/products/interactive-displays/activpanel-elements-series/> (last visited February 7, 2020).

<sup>34</sup> See <https://support.prometheanworld.com/article/1565>, <https://support.prometheanworld.com/download/45992> and <https://support.prometheanworld.com/download/45776> (last visited February 7, 2020).

the ActivInspire specifications require a Windows, Mac or Linux operating<sup>35</sup> system to function and the ActivPanel v7 runs on an Android operating system. Based on the ActivInspire specifications, this software has to be installed on a separate ADP machine and not on the ActivPanel v7. Neither the ActivInspire nor Classflow programs allow users to perform general purpose computing functions.

The request for reconsideration includes a video presentation by a software product manager showing the installation and execution of third-party software on the ActivPanel v7. The video demonstration shows three ways that a user can download and run applications directly to the ActivPanel v7 using the Promethean Store, a web browser, and a DOS Box DOS emulator.

The first method allows a user to download and install applications directly on the ActivPanel v7 via the Promethean Store, which is a software application on the ActivPanel v7, that links to the Promethean Store website. The applications available on the Promethean Store include Microsoft Word, a word processing program that allows users to create and edit documents; Microsoft Excel, a spreadsheet program that allows users to create and edit spreadsheets; Microsoft Outlook, a personal information program that allows user to use webmail, calendars, and tasks services; Microsoft Teams, which allow users to video conference, call, chat, and collaborate on Microsoft 365 applications; and Zoho Books, which is accounting software. Using an Internet connection, a user can download and run these third-party software applications directly on the ActivePanel v7. The ActivPanel's v7 USB drive allows programs to be loaded onto the device. As a result, a user can also load, read, and write files on the ActivPanel can using a USB device.

The second method allows a user to download web based third-party applications directly from the Internet. A user can download and run applications from the Google Play Store onto the ActivPanel v7. In addition, the ActivPanel v7 can run ClassFlow, the lesson software, directly from the Internet. According to Promethean, ClassFlow is a cloud-based application that runs on external servers and can be accessed via a browser which can be accessed from the ActivPanel v7.

The third method allows a user to install and run applications written in DOS. The ActivPanel v7 includes a DOS emulator, which is a software application that comes with and runs on the ActivPanel v7. The DOS emulator allows users the ability to load custom programs written in DOS to run on the ActivPanel v7.

As shown in the demonstration video, the third-party applications that were installed and executed on the ActivPanel v7 as described above were installed without the use of the Chromebox, OPS-M and/or ActivConnect computing modules.

#### **ISSUE:**

Whether the ActivPanel v7 is classified as an automatic data processing ("ADP") machine of heading 8471, HTSUS or a combined input/output unit of an ADP machine of heading 8471, HTSUS.

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<sup>35</sup> See <https://support.prometheanworld.com/activinspire-system-requirements-en/> (last visited February 7, 2020).



**LAW AND ANALYSIS:**

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (“GRIs”) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation (“AUSR”). The GRIs and the AUSR are part of the HTSUS, and are considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

GRI 6 provides as follows:

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

The HTSUS headings under consideration are as follows:

- |            |  |
|------------|--|
| 8471       | Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included:<br>* * * |
|            | Other automatic data processing machines:  |
| 8471.41.01 | Compromising in the same housing at least a central processing unit and an input and output unit, whether or not combined..<br>* * *   |
| 8471.60    | Input or output units, whether or not containing storage units in the same housing:  |
| 8471.60.10 | Combined input/output units...   |

ADP machines are defined in Legal Note 5(A) to Chapter 84, HTSUS, which provide as follows:

For the purposes of heading 8471, the expression “automatic data processing machines” means machines capable of:

- (i) Storing the processing program or programs and at least the data immediately necessary for the execution of the program;
- (ii) Being freely programmed in accordance with the requirements of the user;
- (iii) Performing arithmetical computations specified by the user; and
- (iv) Executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run.

To be classified as an ADP unit under heading 8471, HTSUS, an article must meet the terms of Legal Note 5(C) to Chapter 84, HTSUS, which provides that:

Subject to paragraphs (D) and (E) below, a unit is to be regarded as being a part of an automatic data processing system if it meets all the following conditions:

- (i) It is of a kind solely or principally used in an automatic data processing system;
- (ii) It is connectable to the central processing unit [CPU] either directly or through one or more other units; and
- (iii) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.

Separately presented units of an automatic data processing machine are to be classified in heading 8471... .

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

The ENs to heading 8471 provide, in pertinent part:

**(I) AUTOMATIC DATA PROCESSING MACHINES AND UNITS THEREOF**

Data processing is the handling of information of all kinds, in pre-established logical sequences and for a specific purpose or purposes.

Automatic data processing machines are machines which, by logically interrelated operations performed in accordance with pre-established instructions (program), furnish data which can be used as such, or, in some cases, serve in turn as data for other data processing operations.

This heading covers data processing machines in which the logical sequences of the operations can be changed from one job to another, and in which the operation can be automatic, that is to say with no manual intervention for the duration of the task... .

However, the heading **excludes** machines, instruments or apparatus incorporating or working in conjunction with an automatic data processing machine and performing a specific function. Such machines, instruments or apparatus are classified in the headings appropriate to their respective functions or, failing that, in residual headings (See Part (E) of the General Explanatory Note to this Chapter).

**(A) AUTOMATIC DATA PROCESSING MACHINES**

The automatic data processing machines of this heading must be capable of fulfilling **simultaneously** the conditions laid down in Note 5(A) to this Chapter. [...]

Thus, machines which operate only on fixed programs, i.e., programs which cannot be modified by the user, are **excluded** even though the user may be able to choose from a number of such fixed programs.

These machines have storage capability and also stored programs which can be changed from job to job... .

Prior to issuing HQ H304416, CBP had considered and rejected classification under subheading 8471.41.01, HTSUS. In HQ H304416, CBP explained that the ActivPanel v7 was not freely programmable. CBP noted that the ActivPanel v7 ran on fixed programs and that a user could not install, modify, or remove program applications on the ActivPanel v7 itself. As a result, we concluded that the ActivPanel v7 did not meet all of the requirements of Note 5(A) to Chapter 84, HTSUS. This conclusion would be correct if the ActivPanel v7 required the OPS modules, such as the Chromebox, OPS-M and ActivConnect, to download, install, and execute third-party applications. However, the information provided in your reconsideration request confirms that the ActivPanel v7 can download, install, and execute third-party applications without these OPS modules.

The applications described above must also comport with the second requirement set forth in Note 5(A) to Chapter 84, which is that an automatic data processing machine of heading 8471 must be capable of “[b]eing freely programmed in accordance with the requirements of the user.” Note 5(A)(ii) to Chapter 84, HTSUS. In HQ H075336, dated May 16, 2011, CBP analyzed the meaning of “freely programmable” in this context and explained as follows:

In *Optrex America Inc. v. United States*, 4[27] F. Supp. 2d. 1177 (Ct. Int’l Trade 2006), *aff’d*, [47]5 F.3d 1367 (Fed. Cir. 2007) (“Optrex”), the U.S. Court of Appeals for the Federal Circuit (“CAFC”) upheld CBP’s long-standing interpretation that a “freely programmable” ADP machine is one that: (i) applications can be written for, (ii) does not impose artificial limitations upon such applications, and (iii) will accept new applications that allow the user to manipulate the data as deemed necessary by the user. [47]5 F.3d at 1368. *See also* Headquarters Ruling Letter (“HQ”) 964880, dated December 21, 2001. The *Optrex* court noted that “[CBP’s] interpretation is supported by the World Customs Organization’s Explanatory Notes [...] which provide that ‘machines which operate only on fixed programs, that is, programs which cannot be modified by the user, are excluded [from heading 8471] even though the user may be able to choose from a number of such fixed programs.’ Explanatory Note 84.71(I)(A).” *Id.* The court added that “[a]pplication programs are not ‘fixed’ because they can be installed or deleted from a machine.” 427 F. Supp. 2d at 1197.

Moreover, in HQ 952862, dated November 1, 1994, CBP determined that Teklogix data collection devices were not freely programmable, in part, because they were not “general purpose” machines and were designed for certain specific applications and could not by themselves perform the typical applications of computers or personal computers. HQ 952862 discussed the concept of freely programmable by examining the definitions of computer and personal computer and stated as follows:

In determining whether a particular machine is “freely programmable,” it is helpful to examine the definitions of the terms “computer” and “personal computer.” A computer, which is freely programmable, is a

“[g]eneral-purpose machine that processes data according to a set of instructions that are stored internally either temporarily or permanently.” A. Freedman, *The Computer Glossary*, Sixth Edition, pg. 95 (1993). A personal computer “is functionally similar to larger computers, but serves only one user. It is used at home and in the office for almost all applications traditionally performed on larger computers.” *Computer Glossary* (1993), pg. 400. Personal Computers “are typically used for applications, such as word processing, spreadsheets, database management and various graphics-based programs, such as computer-aided design (CAD) and desktop publishing. They are also used to handle traditional business applications, such as invoicing, payroll and general ledger. At home, personal computers are primarily used for games, education and word processing.” A. Freedman, *The Computer Glossary*, Fourth Edition, pg. 524 (1989). Because they can perform any of the above-listed applications, personal computers are considered to be “freely programmable.

The ActivPanel v7 is freely programmable under the criteria set forth above because it is not limited to fixed programs and there are no hardware or software blocks preventing the end user from downloading off-the-shelf, third party applications. Moreover, the Promethean Store is not the exclusive source of applications that can be downloaded for use by the end user for installation on the ActivPanel v7; other sources are available online and programs can be manually created by the end users. As such, the user of the ActivPanel v7 can perform the functions of word processing, web surfing, email, spreadsheet manipulation, etc., which provide general purpose computing while the devices also serve as a display and interactive medium for specific classroom programs.

Except for what is discussed above, none of the other requirements for automatic data processing machines of heading 8471, HTSUS, is in controversy in this case; and, in light of the discussion, the ActivPanel v7 is properly classified under subheading 8471.41.01, HTSUS. Our decision is consistent with New York Ruling (“NY”) N296923, dated June 7, 2018, where CBP determined that a tablet that was installed onto a treadmill, having the capability of downloading and running various applications via the Android OS, satisfied Note 5(A) to Chapter 84 even though the performing of such functions on the machine was very limited. The Android tablet in NY N296923 was also responsible for the power (on/off), the speed control, and the elevation control of the treadmill. CBP classified the Life Cycle Android Tablet under 8471.41.01, HTSUS.

#### **HOLDING:**

By application of GRIs 1 and 6, the ActivPanel Version 7 is classified under heading 8471, HTSUS, and specifically under subheading 8471.41.01, HTSUS, which provides for “Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included: Other automatic data processing machines: Comprising in the same housing at least a central processing unit and an input and output unit, whether or not combined.” The column one, general rate of duty is free.

Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided at [www.usitc.gov](http://www.usitc.gov).

**EFFECT ON OTHER RULINGS:**

HQ H304416, dated August 10, 2020, is hereby REVOKED.

*Sincerely,*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

**19 CFR PART 177****REVOCAION OF TWO RULING LETTERS AND  
REVOCAION OF TREATMENT RELATING TO THE  
TARIFF CLASSIFICATION OF EMPTY COSMETIC  
CONTAINER WITH BRUSH**

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

**ACTION:** Notice of revocation of two ruling letters and of revocation of treatment relating to the tariff classification of an empty cosmetic container with a brush.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking two ruling letters concerning tariff classification of an empty cosmetic container with a brush under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 54, No. 48, on December 9, 2020. One comment was received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after May 16, 2021.

**FOR FURTHER INFORMATION CONTACT:** Ms. Arim J. Kim, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0266.

**SUPPLEMENTARY INFORMATION:****BACKGROUND**

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

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 54, No. 48, on December 9, 2020, proposing to revoke two ruling letters pertaining to the tariff classification of an empty mascara cosmetic container with a brush. Any party who has received an interpretive ruling or decision (*i.e.*, a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In NY I82716, CBP classified an empty cosmetic container with a brush in heading 9603, HTSUS, specifically in subheading 9603.29.40, HTSUS, which provides for brushes, other, valued not over 40 cents each. Similarly, in NY D88064, CBP classified a similar merchandise in heading 9603, HTSUS. There, CBP held that the merchandise is classifiable under three different subheadings, which provide for “[a]rtists’ brushes, writing brushes and similar brushes for the application of cosmetics”: (1) 9603.30.20, HTSUS, if valued not over five cents each; (2) 9603.30.40, HTSUS, if valued over 5 cents each but not over 10 cents each; and (3) 9603.30.60, HTSUS, if valued over 10 cents each. CBP has reviewed NY I82716 and NY D88064, and has determined the ruling letters to be in error. It is now CBP's position that the empty cosmetic container with a brush, which is expected to be filled with cosmetics after importation, is properly classified, in heading 3923, HTSUS, specifically in subheading 3923.90.00, HTSUS, which provides for “[a]rticles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics: [o]ther”.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY I82716 and NY D88064, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H313938, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated: February 26, 2021

*for*  
CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*

*Attachment*



HQ H313938

February 26, 2021

OT:RR:CTF:CPMMA H313938 AJK

CATEGORY: Classification

TARIFF NO: 3923.90.00

MS. SARA BARNES  
PHOENIX INTERNATIONAL  
18900 – 8TH AVENUE SOUTH  
SUITE 500  
SEA TAC, WA 98148

MR. ARLEN T. EPSTEIN  
TOMPKINS & DAVIDSON, LLP  
ONE ASTOR PLAZA  
1515 BROADWAY  
NEW YORK, NY 10036-8901

RE: Revocation of NY I82716 and NY D88064; Classification of Empty Cosmetic Container with Brush

DEAR MS. BARNES AND MR. EPSTEIN:

This letter is reference to New York Ruling Letters (NY) I82716, dated June 21, 2002, and NY D88064, dated February 22, 1999, concerning the tariff classification of an empty cosmetic container with a brush. In NY I82716 and NY D88064, U.S. Customs and Broder Protection (CBP) classified the merchandise in heading 9603, Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed the aforementioned rulings, and have determined that the classification of an empty cosmetic container with a brush in heading 9603, HTSUS, was incorrect.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), a notice of the proposed action was published in the Customs Bulletin, Volume 54, No. 48, on December 9, 2020. One comment was received in response to this notice.

**FACTS:**

The subject merchandise was described in NY I82716 as follows:

The imported item is a mascara brush/case. It consists of a molded plastic and metal tube container with an applicator eyelash brush. When the cap of the tube container is unscrewed, the cap serves as the brush handle. The tube will be filled with mascara after importation.

The subject merchandise was described in NY D88064 as follows:

The merchandise at issue ... is components for a mascara pen and consists of a hollow molded plastic tube and applicator brush. The tube will be filled with mascara after importation. The molded plastic cover will be imported separately.

**ISSUE:**

Whether the empty cosmetic container with a brush is classified in heading 3923, HTSUS, as a plastic article for the conveyance or packing of goods, or heading 9603, HTSUS, as a brush.

**LAW AND ANALYSIS:**

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

GRI 3(b) states, in pertinent part:

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

\* \* \* \* \*

The HTSUS provisions at issue are as follows:

- 3923: Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics.
- 9603: Brooms, brushes (including brushes constituting parts of machines, appliances or vehicles), hand-operated mechanical floor sweepers, not motorized, mops and feather dusters; prepared knots and tufts for broom or brush making; paint pads and rollers; squeegees (other than roller squeegees).

Note 2 to Chapter 39, HTSUS, provides, in pertinent part:

2. This chapter does not cover:

...

- (z) Articles of chapter 96 (for example, brushes, buttons, slide fasteners, combs, mouthpieces or stems for smoking pipes, cigarette holders or the like, parts of vacuum flasks or the like, pens, mechanical pencils, and monopods, bipods, tripods and similar articles).

\* \* \* \* \*

The Harmonized Commodity Description and Coding System (HS) Explanatory Notes (ENs) constitute the official interpretation of the HS. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HS at the international level, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89-80, 54 Fed. Reg. 35127 (August 23, 1989).

EN RULE 3(b) provides as follows:

(VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

EN 39.23 provides, in pertinent part, as follows:

This heading covers all articles of plastics commonly used for the packing or conveyance of all kinds of products. The articles covered include:

(a) Containers such as boxes, cases, crates, sacks and bags (including cones and refuse sacks), casks, cans, carboys, bottles and flasks.

\* \* \* \* \*

As a preliminary matter, we wish to clarify the difference between the subject merchandise in NY I82716 and NY D88064, and the exclusion provision for Chapter 39. First, the empty cosmetic containers with a brush in NY I82716 and NY D88064 have one minor distinguishable character. In NY I82716, the brush of the merchandise is designed for two purposes: (1) to serve as a cap for the molded plastic container while the merchandise is being stored, and (2) to be utilized as a tool to apply the cosmetic that is packed inside the container. The brush in NY D88064, however, is attached to the top of the molded plastic container. As further explained below, the difference in the two subject merchandise does not effectuate change in our analysis.

Note 2 of Chapter 39, which excludes “[a]rticles of chapter 96”, including brushes, from classification under heading 3923, HTSUS, as plastic articles for the conveyance or packing of goods, does not apply to the empty cosmetic container with a brush. Note 2 excludes an item that is classified in chapter 96 at GRI 1; however, heading 9603, HTSUS, only describes the brush portion of the entire good. Thus, the subject merchandise is not excluded from heading 3923, HTSUS, by Note 2 to Chapter 39.

In NY A85166, dated July 2, 1996; and NY N018435, dated October 23, 2007, we found that a mascara container and cap with brush insert was classified in heading 3923, HTSUS as a plastic container for the conveyance of goods. The instant merchandise is substantially similar to that in described in those rulings. As stated in the General EN to Chapter 39, chapter 39 encompasses “all articles of plastics commonly used for the packing or conveyance of all kinds of products.” See *S.C. Johnson & Son, Inc. v. United States*, 415 F. Supp. 3d 1373 (Ct. Int’l Trade 2019). As such, the empty container here is classifiable in heading 3923, HTSUS, even though the cap, which is classified with the container, includes a brush.

Even if resort to GRI 3 is necessary to account for the brush, in order to classify the subject merchandise under GRI 3(b), CBP must identify the component of the subject merchandise that imparts the merchandise with its essential character. “The ‘essential character’ of an article is ‘that which is indispensable to the structure, core or condition of the article, i.e., what it is.’” *Structural Industries v. United States*, 360 F. Supp. 2d 1330, 1336 (Ct. Int’l Trade 2005). As explained above, the core function of the subject merchandise is to contain and store cosmetics in the molded plastic container upon importation into the United States. The utility of the brush is not realized until the product is filled with the mascara and it is applied to the user’s eyelashes. As imported, however, the good is a container with a brush attached to its cap or body. Hence, the role of the container in relation to the use of the entire good, to convey mascara and its applicator to the purchaser, imparts the essential character of the subject merchandise. Moreover, the molded plastic container accounts for the bulk of the merchandise. Thus, even under the analysis of GRI 3(b), the empty cosmetic container with a brush is classified in heading 3923, HTSUS.

Pursuant to GRI 1 and GRI 3(b), the empty cosmetic container with a brush is classified in heading 3923, HTSUS, as “[a]rticles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics: [o]ther.” This conclusion is consistent with prior CBP rulings classifying other empty cosmetic containers with a brush and similar articles under heading 3923, HTSUS.

As noted above, we received one comment in response to the notice of the proposed revocation. The commenter argues that the essential character of the empty cosmetic container with a brush is imparted by the brush under GRI 3(b). As stated above, however, the essential character of the merchandise is imparted by the container because it is the part that is used immediately upon importation and serves the core function of containing cosmetics prior to sale to final consumers. Therefore, the empty cosmetic container with a brush is classified in heading 3923, HTSUS.

**HOLDING:**

By application of GRI 1, the empty cosmetic container with a brush is classified in heading 3923, HTSUS, specifically subheading 3923.90.00, HTSUS, which provides for “[a]rticles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics: [o]ther.” The 2021 column one, general rate of duty is three percent *ad valorem*.

Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided at [www.usitc.gov](http://www.usitc.gov).

**EFFECT ON OTHER RULINGS:**

NY I82716, dated June 21, 2002, and NY D88064, dated February 22, 1999, are hereby revoked.

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

*Sincerely,*  
*for*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

## 19 CFR PART 177

### **MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF REFINERY MODULES**

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

**ACTION:** Notice of modification of one ruling letter and of revocation of treatment relating to the tariff classification of refinery modules.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying New York Ruling Letter (NY) N047164, concerning the tariff classification of refinery modules under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 50, No. 38, on September 21, 2016. Two comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after May 16, 2021.

**FOR FURTHER INFORMATION CONTACT:** Claudia Garver, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0024.

#### **SUPPLEMENTARY INFORMATION:**

##### **BACKGROUND**

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

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 50, No. 38, on September 21, 2016, proposing to modify one ruling letter pertaining to the tariff classification of refinery modules. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In NY N047164, CBP classified three types of refinery modules in heading 7308, HTSUS, specifically in subheading 7308.90.95, HTSUS, which provides for "Structures (excluding prefabricated buildings of heading 9406) and parts of structures (for example, bridges and bridge sections, lock gates, towers, lattice masts, roofs, roofing frameworks, doors and windows and their frames and thresholds for doors, shutters, balustrades, pillars and columns) of iron or steel; plates, rods, angles, shapes, sections, tubes and the like, prepared for use in structures, of iron or steel: Other: Other: Other." It is now CBP's position that two of the three refinery module types are properly classified, by operation of GRIs 1 and 3(b), in the heading describing the material that imparts the modules' essential character.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N047164 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H269853, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated: February 26, 2021

*for*  
CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*

*Attachment*

HQ H269853

February 26, 2021

CLA-2 OT:RR:CTF:TCM H269853 NCD

CATEGORY: Classification

TARIFF NO.: 7304; 7305; 7306; 7308

MATTHEW D. ANDERSON

CHARTER BROKERAGE

22762 WESTHEIMER PARKWAY, SUITE 530

KATY, TX 77450

RE: Modification of NY N047164; classification of refinery modules

DEAR MR. ANDERSON:

This is in reference to New York Ruling Letter (NY) N047164, issued to you on January 8, 2009 by U.S. Customs and Border Protection (CBP), in which CBP provided a determination as to the proper classification of various refinery modules under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed NY N047164, determined that it is partially incorrect, and, for the reasons set forth below, are modifying that ruling.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice of the proposed action was published in the *Customs Bulletin*, Vol. 50, No. 38, on September 21, 2016. Two comments opposing the proposed action were received. Those comments will be addressed in this decision.

**FACTS:**

The articles at issue in NY N047164 consist of three types of prefabricated, interconnecting modules designed for installation in a pre-existing oil refinery complex. NY N047164 was issued in response to your letter of October 23, 2008, in which a determination from CBP as to the classification of the modules was requested (“ruling request”). The ruling request included descriptions and technical renderings of the modules, as well as photos of the modules taken at various stages of their construction. The diagrams and photos depict the modules as consisting primarily of multilevel steel frameworks within which numerous pipes are affixed to load-bearing crossbeams, and the photos indicate that the pipes are installed in the course of the modules’ assembly.

On November 3, 2008, prior to issuing the requested ruling, CBP issued a letter requesting additional information concerning the modules at issue. CBP specifically requested, *inter alia*, descriptions of “each component, its purpose and by what means its purpose is achieved.” The following response to our request was provided in a letter of December 9, 2008 (“supplemental submission”):

*Module Type #1 – Interbattery Connection (“IBC”) Pipe Racks*

The IBC pipe racks are fabricated structural steel skeletal structures that can be shipped and installed on foundations built to receive the modules...These module racks support several pipe lines, that are connected on the site in order to quickly and efficiently build the necessary infrastructure between various new and existing refinery units as well [as] conveying the received crude and products... Once the piping on these racks is connected this provides the interconnecting piping that primarily receive input streams (called feedstock streams) from prior (called upstream)



process units or crude tanks to subsequent (called downstream) process units or storage tankage for product blending.

In addition to the piping used to move refinery product streams between units, the IBC pipe racks will also support piping that will be used to convey utilities such as raw water, clarified water and filtered water required to operate a new...[p]ower facility, cooling water, natural gas, plant and instrument air. This piping will also convey other utility streams and...process storm water for treatment and disposal...Finally, in addition to the piping used for products and utilities the IBC racks will provide additional levels to support cable trays to support electrical cables for distributing electrical power from the power facility to a main substation and to the local process unit substation.

*Module #2 – Power Station 4 (“PS4”) Pipe Racks*

The PS4 pipe racks are fabricated metal skeletal structures that can be shipped and connected to one another on-site at the refinery in order to quickly and efficiently build the necessary infrastructure between the refinery units and the on-site power plant in the refinery. The structures are connected together to create the steam and water distribution system for the power plant. The connection of these units uses piping to transport and circulate steam, cooling water and filtered water to and/or from various units and the on-site power plant[.]

*Module #3 – Stair Tower Modules*

The stair tower modules are fabricated modules with...stairways. These modules are strictly used as stairways and have no process functions. These modules connect with the other modules described herein, to allow for plant employees to have access to the various modules and the contents of the modules (i.e. piping, utilities, etc.).

The supplemental submission also states as follows with respect to the functions performed by the modules:

The IBC pipe racks purpose is to support the pipes that carry the various fluids to and from the refinery process units. The electrical cables will be installed after importation and once the modules are in the processing of being connected at the Port Arthur Refinery. Some of the IBC pipe rack piping is insulated and some has electric heat tracing on it, however, the primary function of the pipes is to convey liquids.

The PS4 pipe racks purpose is also to support the pipes that carry various types of water and steam. The PS4 pipe racks also support cable trays that will hold electrical cables. The electrical cables will be installed after importation and once the modules are in the processing of being connected at the Port Arthur Refinery.

On the basis of the information provided in the ruling request and supplemental submission, NY N047164 contained the following descriptions of the modules at issue:

Module Type 1, referred to as Interbattery Connection Pipe Racks, are steel skeletal structures that are used to support pipes that carry the various fluids to and from the refinery process units as well as supporting electrical trays which hold electrical cables. Module Type 2, known as Power Station 4 Pipe Racks, function in the same manner as do the Interbattery Connection Pipe Racks. However, they support piping which

transports and circulates steam, cooling water and filtered water to and from the power station. Module Type 3, Stair Towers, are pre-fabricated stairways that are used in conjunction with, and allow access to, the other modules.

All three refinery modules were classified in heading 7308, HTSUS. They were specifically classified in subheading 7308.90.95, HTSUS, which provides for: "Structures (excluding prefabricated buildings of heading 9406) and parts of structures (for example, bridges and bridge sections, lock gates, towers, lattice masts, roofs, roofing frameworks, doors and windows and their frames and thresholds for doors, shutters, balustrades, pillars and columns) of iron or steel; plates, rods, angles, shapes, sections, tubes and the like, prepared for use in structures, of iron or steel: Other: Other: Other."

On October 14, 2015, in the course of reviewing NY N047164, we contacted you to inquire as to whether the modules at issue contained pipes and/or other components at the time of entry. In your response of October 19, 2015, you indicated your understanding that pipes are in fact present in the modules at entry, based on the following statement by a project coordinator:

All of the pipe rack modules have structural steel columns and beams that comprise the skeleton, with internal piping. There are a few valves. Depending on the nature of the flow stream in each pipe, the material for that pipe may differ. The bulk of the piping is either a type of carbon steel or stainless steel.

We have not received any further information concerning the modules and their constituent components at any point prior to, during, or following the above-mentioned comment period.

#### **ISSUE:**

Whether the subject refinery modules are properly classified as seamless steel pipe in heading 7304, HTSUS, as "other" steel pipes with circular cross-sections of an external diameter exceeding 406.4 mm, in heading 7305, HTSUS, as "other" steel pipes in heading 7306, HTSUS, or as structures of steel in heading 7308, HTSUS.

#### **LAW AND ANALYSIS:**

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 3 governs the classification of goods that are *prima facie* classifiable in two or more headings, including, *inter alia*, composite goods. GRI 3(b) provides, in relevant part, that "composite goods consisting of different materials or made up of different components...shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable."

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

For purposes of this ruling, we consider whether the subject refinery modules are classified in the following 2018 HTSUS provision:

<b>7304</b>	Tubes, pipes and hollow profiles, seamless, of iron (other than cast iron) or steel
<b>7305</b>	Other tubes and pipes (for example, welded, riveted or similarly closed), having circular cross sections, the external diameter of which exceeds 406.4 mm, of iron or steel
<b>7306</b>	Other tubes, pipes and hollow profiles (for example, open seamed or welded, riveted or similarly closed), of iron or steel
<b>7308</b>	Structures (excluding prefabricated buildings of heading 9406) and parts of structures (for example, bridges and bridge sections, lock gates, towers, lattice masts, roofs, roofing frameworks, doors and windows and their frames and thresholds for doors, shutters, balustrades, pillars and columns) of iron or steel; plates, rods, angles, shapes, sections, tubes and the like, prepared for use in structures, of iron or steel

Heading 7308 applies, by its own terms, to steel “structures” and their parts, including “bridges and bridge sections, lock gates, towers, lattice masts, roofs, roofing frameworks, doors and windows and their frames and thresholds for doors, shutters, balustrades, pillars and columns.” The term “structure” is not defined in the HTSUS. It is axiomatic that undefined tariff terms are to be understood in accordance with (*inter alia*) lexicographical definitions and relevant Explanatory Notes (“ENs”). *See GRK Can., Ltd. v. United States*, 761 F.3d 1354, 1357 (Fed. Cir. 2014) (“Where the HTSUS does not expressly define a term...a court...may consult standard lexicographic and scientific authorities...In particular, a court also refers to the Explanatory Notes accompanying the HTSUS, which, though not controlling, provide interpretive guidance.”).

In undertaking to define “structure” for classification purposes, the courts have observed that “a complete definition of ‘structural’ or ‘structure’ is not to be found” in lexicographic sources. *Supermarket Systems, U.S. v. United States*, 13 C.I.T. 907, 912 (1989) (citing *S.G.B. Steel Scaffolding & Shoring Co., Inc. v. United States*, 82 Cust. Ct. 197 (1979)). Likewise, EN 73.08 lacks a comprehensive definition of “structure” for purposes of heading 7308. The EN, however, does provide the following indicia as to the term’s meaning:

This heading covers complete or incomplete metal structures, as well as parts of structures. For the purpose of this heading, these structures are characterised by the fact that once they are put in position, they generally remain in that position. They are usually made up from bars, rods, tubes, angles, shapes, sections, sheets, plates, wide flats including so-called universal plates, hoop, strip, forgings or castings, by riveting, bolting, welding, etc. Such structures sometimes incorporate products of other headings such as panels of woven wire or expanded metal of heading 73.14. Parts of structures include clamps and other devices specially designed for assembling metal structural elements of round cross-section

(tubular or other). These devices usually have protuberances with tapped holes in which screws are inserted, at the time of assembly, to fix the clamps to the tubing.

*Apart from the structures and parts of structures mentioned in the heading, the heading also includes products such as:*

Pit head frames and superstructures; adjustable telescopic props, tubular props, extensible coffering beams, tubular scaffolding and similar equipment; sluice-gates, piers, jetties and marine moles; lighthouse superstructures; masts, gangways, rails, bulkheads, etc., for ships; balconies and verandas, shutters, gates, sliding doors; assembled railings and fencing; level-crossing gates and similar barriers; frameworks for greenhouses and forcing frames; large-scale shelving for assembly and permanent installation in shops, workshops, storehouses, etc.; stalls and racks; certain protective barriers for motorways, made from sheet metal or from angles, shapes or sections.

(emphasis added).

Notably, like the legal text of heading 7308 itself, EN 73.08 sets forth various examples of articles to be considered “structures” for purposes if the heading. We consider these examples to be probative of the term’s scope, particularly in the absence of a “complete definition” anywhere in the instructional sources. *See LeMans Corp. v. United States*, 660 F.3d 1311, 1320–21 (Fed. Cir. 2011) (endorsing use of EN examples to clarify the scope of a tariff term where they are consistent with the provision in which the term is found). In reviewing the combined examples of structures set forth in heading 7308 and EN 73.08 – including bridges, lock-gates, towers, lattice masts, roofs and frameworks, masts, gangways, lighthouse superstructures, balconies and verandas, fences, level-crossing gates, greenhouse frames, shelving systems, and protective barriers – we observe that they unfailingly include only items which enclose, partition, or support the weight of persons or separate objects. Not one of the exemplars is in and of itself capable of conducting a separate mechanical or otherwise non-structural function; nor do the exemplars support or contain separate articles capable of such.

That “structures” are to be considered limited in this regard comports with CBP’s prior treatment of heading 7308, HTSUS. For example, we ruled in Headquarters Ruling Letter (HQ) 085145, dated September 15, 1989, that oil rig “jackets” were structures within the meaning of the heading because they provided the foundations for the topside platforms, but did not contain any drilling or production equipment. *See also* HQ 964757, dated September 25, 2001 (classifying wind turbine towers in heading 7308 upon finding that “[t]he towers do not provide operational or mechanical interaction with the turbine or its rotor”) and HQ 087730, dated September 5, 1990 (classifying telephone booths without telephones in heading 7308). By contrast, we determined in HQ 966175, dated January 30, 2003, that the topside platforms were not classifiable in the heading because, unlike the jackets, they housed the equipment that was used to drill for and extract oil. Insofar as this classification practice is supported by the legal text and EN 73.08 alike, it reflects a correct interpretation of heading 7308, HTSUS.

Here, of the three refinery modules at issue, the subject IBC Pipe Racks and PS4 Pipe Racks are described as “steel skeletal structures” which “support several pipelines.” By all available indications, including the photos

included with your ruling request and the statements provided in your October 19, 2015 communication, the referenced pipes are installed in the modules at the time the modules are entered. As stated in the supplemental submission, these pipes are not used to form the crossbeams, uprights, or other components comprising the “steel skeletal structures”; rather, they are separate items that conduct a multitude of functions directly supporting refinery operations within the complex. According to your supplemental submission, the pipes installed in the IBC Pipe Racks transport feedstock from various upstream units to downstream units for product blending, transport water necessary for the operation of an on-site power facility, direct other utility streams, and transport storm water for treatment and disposal. Meanwhile, the PS4 Pipe Racks support pipes which transport steam and water to and from the on-site power plant. These functions – i.e., supply of power, supply of raw materials for processing, and conveyance other fluids necessary for refinery operations – go far beyond structural functions such as enclosure, support, or partitioning. Accordingly, as entered, the IBC Pipe Racks and PS4 Pipe Racks are cannot be considered structures of heading 7308, HTSUS. To the extent that we determined otherwise in NY N047164, this determination was in error. However, our determination concerning the Stair Tower Modules, which consist only of metal frames that bear the weights of their users, and do not include separate items which conduct “process functions,” remains correct.

Both commenters challenge this conclusion, averring that EN 73.08 broadly permits structures to “incorporate products of other headings,” including pipes. One commenter further asserts that this interpretation is supported by a proffered technical reference. We disagree with both assertions. The EN states that structures are “usually made up from...tubes” and “sometimes incorporate products of other headings *such as panels of woven wire or expanded metal of heading 73.14.*” (emphasis added). “Panels of woven wire or expanded metal of heading 7314,” included to contextualize and qualify the “products of other headings” that may be used, are articles designed to create or complete enclosures or to reinforce existing portions of a structure. *See* EN 73.14 (“Expanded metal...is used instead of wire grill or perforated sheets for fencing, safety guards for machines, flooring of footbridges or crane runways, reinforcement of various building materials (e.g., concrete, cement, plaster, glass), etc.”). There is no indication that these materials and others, including tubes, may be in the form of separate articles with functions fully tangential to those of the structures in which they are incorporated. Nor is such a reading of “structure” supported by above-mentioned technical reference. *See* Richard M. Drake and Robert J. Walter, Design of Structural Steel Pipe Racks, *ENGINEERING JOURNAL* 241 (2010) (indicating only that pipe racks “support” pipes, power cables and instrument trays without clarifying whether the latter are considered components of the former).

One commenter further asserts that all refinery modules at issue satisfy descriptions of structures set forth in EN 73.08 because they remain stationary once placed; include allowable protuberances to fix clamps to tubes; and are analogous in function to sluice-gates, which the EN lists as a product classifiable in heading 7308. We do not contest that the pipe racks remain stationary once positioned or that they include clamps and other devices for affixing tubing. With respect to the latter point, the EN specifies that tubes affixed by permissible clamps are structural in function. Moreover, we do not

agree that the modules can be likened to sluice-gates or to any of the other exemplars listed in EN 73.08. Whereas sluice-gates operate as partial enclosures to prevent or reduce the outflow of water already present in sluices, the IBC Pipe Racks and PS4 Pipe Racks function as conveyance mechanisms by transporting various liquids between refinery units, as described above. Accordingly, our determination that those modules fall outside the scope of heading 7308, HTSUS, is not inconsistent with EN 73.08. We remain of the position that they cannot be considered structures of heading 7308 when entered replete with pipes.

Rather, the IBC Pipe Racks and PS4 Pipe Racks are “composite goods” within the meaning of GRI 3(b) insofar as they are made up of components described in separate headings. Specifically, whereas the steel structural frameworks are products of heading 7308, HTSUS, the pipes are products of headings 7304, 7305, or 7306, HTSUS, as determined by their construction, profiles, and dimensions.\* The modules are accordingly classified “as if they consisted of the...component which gives them their essential character.” While “essential character” is not defined in the HTSUS, EN(VIII) to GRI 3(b) states as follows:

The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

As stated in the above-referenced EN, as well as in various court decisions, the essential character of a given article turns on its particular attributes and the facts of the case at hand. *See, e.g., Alcan Food Packaging (Shelbyville) v. United States*, 771 F.3d 1364, 1366 (Fed. Cir. 2014) (“The ‘essential character’ of merchandise is a fact-intensive issue.”). With this understanding, courts have consistently applied the factors listed in the EN(VIII) to GRI 3(b), as well as additional factors, to determine essential character. *See id.* at 1367 (Fed. Cir. 2014); *Home Depot USA, Inc. v. United States*, 491 F.3d 1334, 1337 (Fed. Cir. 2007) (“Many factors should be considered when determining the essential character...specifically including but not limited to those factors enumerated in Explanatory Note (VIII) to GRI 3(b).”). Among the additional factors previously considered are “ordinary common sense,” an article’s recognized names, its primary function, and its uses. *See Tyco Fire Products v. United States*, 841 F.3d 1353, 1361 (Fed. Cir. 2016).

Here, it is unclear whether the steel frameworks or the pipes are the predominant components of the IBC Pipe Racks and PS4 Pipe Racks in terms of quantity, weight, or value. The diagrams and photos indicate that the steel frames and collective pipes account for comparably sizable portions of each refinery module’s overall mass. However, we are unable to make quantifiable size and weight determinations without precise product specifications. The absence of probative information concerning the modules’ components was initially noted in proposed ruling letter HQ H269853, published in conjunction with the above-mentioned notice of proposed action, yet we have not

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\* We note that while valves, electrical cables, and cable trays are ultimately incorporated into the modules, this does not necessarily occur prior to the modules’ importation. In fact, the supplemental submission expressly states that the cables and trays are installed following entry, and it has not been confirmed whether the valves are installed prior to this point. As such, for purposes of applying GRI 3(b), we do not consider the provisions covering these items.

received any additional information that could assist in our analysis. Accordingly, we look to the roles of the components in relation to the finished refinery modules, as well as the additional factors previously considered by the courts, to inform our determination of essential character.

To this end, we find that the pipes are the most important components in relation to the modules' use and primary function. Simply put, the primary function of the modules is to support the pipes, which, as explained above, directly contribute to refinery operations by transporting liquids as needed for production, power supply, and waste disposal. This is all but explicitly confirmed in the supplemental submission, which states that "[t]he IBC pipe racks purpose is to support the pipes that carry the various fluids to and from the refinery process units" and that [t]he PS4 pipe racks purpose is also to support the pipes that carry various types of water and steam." The pipes themselves are clearly the most important components in relation to this function, whereas the steel frameworks cannot be considered more than auxiliary components. This is further evident in the modules' commercial designation as "Pipe Racks." See *Tyco*, 841 F.3d at 1361 (determining an explicit reference to a component or material in a product's commercial name to be probative of essential character). It is therefore our determination that the essential character of the IBC Pipe Racks and PS4 Pipe Racks is imparted by their component pipes, and that those modules are therefore classified in heading 7304, 7305, or 7306, in accordance with the construction, profiles, and dimensions of these pipes.

One commenter opposes our application of GRI 3(b) to pipe-equipped modules generally, averring that it may incur increases in expenditures for importers and bring about a negative economic impact. However, because classification is governed by the HTSUS, which constitutes binding, statutory law, it must be determined by the strict application of the GRIs. As stated above, because the refinery modules are composite articles that cannot be classified by application of GRI 1, we must unequivocally apply GRI 3(b) in reaching a classification determination.

#### **HOLDING:**

By application of GRIs 1 and 3(b), the IBC Pipe Racks and PS4 Pipe Racks are classified in heading 7304, HTSUS, if the pipes contained therein are predominantly seamless with hollow profiles. They are classified in heading 7304, HTSUS, if the pipes contained therein are predominantly non-seamless or non-hollow and have circular cross-sections, the external diameter of which exceeds 406.4 millimeters. They are classified in heading 7306, HTSUS, if the pipes contained therein are non-seamless or do not have a circular cross-section with an external diameter exceeding 406.4 millimeters. By application of GRI 1, the Stair Tower Modules remain classified in heading 7308, HTSUS.

On March 8, 2018, Presidential proclamations 9704 and 9705 imposed additional tariffs and quotas on a number of steel and aluminum mill products. Exemptions have been made on a temporary basis for some countries. Quantitative limitations or quotas may apply for certain exempted countries and can also be found in Chapter 99. Additional duties for steel of 25 percent and for aluminum of 10 percent are reflected in Chapter 99, subheading 9903.80.01 for steel and subheading 9903.85.03 for aluminum. Products classified under headings 7304, 7305, and 7306, HTSUS, may be subject to additional duties or quota. At the time of importation, you must report the

Chapter 99 subheading applicable to your product classification in addition to the Chapter 72, 73 or 76 subheading listed above. The Proclamations are subject to periodic amendment of the exclusions, so you should exercise reasonable care in monitoring the status of goods covered by the Proclamations and the applicable Chapter 99 subheadings.

Should you require a determination as to the specific classification of the IBC Pipe Racks and PS4 Pipe Racks, please submit a request for a binding ruling, along with any information required for this determination, to CBP's National Commodities Specialist Division (NCSD). Requests for a binding ruling may be made electronically via CBP's website, <https://apps.cbp.gov/erulings/index.asp>, or by writing to NCSD at the following address:

Director, National Commodity Specialist Division  
Regulations and Rulings  
Office of Trade  
U.S. Customs and Border Protection  
201 Varick Street, Suite 501  
New York, NY 10014  
Attn.: Binding Ruling Request

**EFFECT ON OTHER RULINGS:**

New York Ruling Letter N047164 is hereby MODIFIED in accordance with the above analysis.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

*Sincerely,*  
*for*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*



**PROPOSED MODIFICATION OF SIX RULING LETTERS  
AND PROPOSED REVOCATION OF TREATMENT  
RELATING TO THE TARIFF CLASSIFICATION OF TEXTILE  
LEG COVERINGS**

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

**ACTION:** Notice of proposed modification of six ruling letters and proposed revocation of treatment relating to the tariff classification of textile leg coverings.

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

**DATE:** Comments must be received on or before April 16, 2021.

**ADDRESS:** Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: [1625Comments@cbp.dhs.gov](mailto:1625Comments@cbp.dhs.gov). All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

**FOR FURTHER INFORMATION CONTACT:** Parisa J. Ghazi, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0272.

**SUPPLEMENTARY INFORMATION:****BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modification of six ruling letters pertaining to the tariff classification of textile leg coverings. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N086942, dated December 29, 2009 (Attachment A), NY N080395, dated November 6, 2009 (Attachment B), NY N003909, dated December 21, 2006 (Attachment C), NY G88706, dated April 18, 2001 (Attachment D), NY D85843, dated January 8, 1999 (Attachment E), NY D83322, dated October 29, 1998 (Attachment F), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the six identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N086942, NY N080395, NY N003909, NY G88706, NY D85843 and NY D83322, CBP classified certain textile leg coverings

in heading 6117, HTSUS, which provides for “Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories.” CBP has reviewed NY N086942, NY N080395, NY N003909, NY G88706, NY D85843 and NY D83322 and has determined the ruling letters to be in error. It is now CBP’s position that the textile leg coverings are properly classified, in heading 6406, HTSUS, specifically in subheading 6406.90.15, HTSUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY N086942, NY N080395, NY N003909, NY G88706, NY D85843 and NY D83322 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H239482, set forth as Attachment G to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*

Attachments

HQ H239482  
OT:RR:CTF:FTM H239482 PJG  
CATEGORY: Classification  
TARIFF NO.: 6406.90.15

MS. CHRISTIAN LEE  
HANDERSON HANDICRAFT MFG. CO.  
11F/6, No.2 JIAN-BA ROAD, CHUNG-HO  
TAIPEI, TAIWAN

RE: Modification of NY N086942, NY N080395, NY N003909, NY G88706, NY D85843 and NY D83322: Classification of Textile Leg Coverings

DEAR MS. LEE:

This is in reference to New York Ruling Letter (“NY”) N086942, dated December 29, 2009, issued to you concerning the tariff classification of five different adult costumes under the Harmonized Tariff Schedule of the United States (“HTSUS”). Specifically, NY N086942 classified the following costumes: Style W-3030-01 Countryside Lady Costume; Style M-1639-00 Robin Hood Costume; Style W-3221-00 Maid Marian Costume; Style M-1623-01 Mad Hatter Costume; and Style W-3223-00 Darkness Alice Costume. This decision concerns Style M-1639-00 Robin Hood Costume, and in particular, two knee-high, polyester leg coverings, which are referred to as “boot covers” in NY N086942, designed to resemble the boots worn by the character Robin Hood when worn over the consumer’s shoes.

In NY N086942, U.S. Customs and Border Protection (“CBP”) classified the leg coverings in subheading 6117.80.95, HTSUS, which provides for “Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Other.” We have reviewed NY N086942 and find it to be in error with regard to the tariff classification of the leg coverings. For the reasons set forth below, we hereby modify NY N086942 and five other rulings with substantially similar merchandise: NY N080395, dated November 6, 2009, NY N003909, dated December 21, 2006, NY G88706, dated April 18, 2001, NY D85843, dated January 8, 1999, and NY D83322, dated October 29, 1998.

**FACTS:**

The Robin Hood polyester leg coverings have elastic straps on the bottom. These elastic straps secure the leg coverings around the shoe. The leg coverings extend up to the consumer’s knees and have cuffs. They are trimmed with gold-colored trim. When the consumer pulls the leg coverings on top of regular shoes, the leg coverings resemble the boots worn by the character Robin Hood.

**ISSUE:**

Whether the leg coverings are classified as clothing accessories under heading 6117, HTSUS, or as gaiters, leggings and similar articles under heading 6406, HTSUS.

**LAW AND ANALYSIS:**

Classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) is made in accordance with the General Rules of Interpretation (“GRI”). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The 2021 HTSUS provisions under consideration are as follows:

6117	Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: * * *
6117.80	Other accessories: * * *
	Other: * * *
6117.80.95	Other * * *
6406	Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: * * *
6406.90	Other: * * *
	Of other materials:
6406.90.15	Of textile materials

Note 1(n) to Section XI, HTSUS, provides as follows:

1. This section does not cover:

(n) Footwear or parts of footwear, gaiters or leggings or similar articles of chapter 64;

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the “official interpretation of the Harmonized System” at the international level. *See* 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989). While neither legally binding nor dispositive, the ENs “provide a commentary on the scope of each heading” of the HTSUS and are “generally indicative of [the] proper interpretation” of these headings. *See id.*

EN 64.06(II) provides as follows:

**(II) GAITERS, LEGGINGS, AND SIMILAR ARTICLES, AND PARTS THEREOF**

These articles are designed to cover the whole or part of the leg and in some cases part of the foot (e.g., the ankle and instep). They differ from socks and stockings, however, in that they do not cover the entire foot. They may be made of any material (leather, canvas, felt, knitted or crocheted fabrics, etc.) **except** asbestos. They include gaiters, leggings, spats, puttees, “mountain stockings” without feet, leg warmers and similar articles. Certain of these articles may have a retaining strap or elastic

band which fits under the arch of the foot. The heading also covers identifiable parts of the above articles.

In accordance with Note 1(n) to Section XI, HTSUS, Section XI, which consists of Chapters 50–63, HTSUS, does not cover “[f]ootwear or parts of footwear, gaiters or leggings or similar articles of chapter 64.” Therefore, if the leg coverings are classifiable under heading 6406, HTSUS, they are precluded from classification under heading 6117, HTSUS.

Heading 6406, HTSUS, provides for gaiters and leggings. The terms “gaiters” and “leggings” are not defined in the HTSUS.<sup>1</sup> Headquarters Ruling Letter (“HQ”) 088454, dated October 11, 1991, defines a gaiter as “1. A leather or heavy cloth covering for the legs extending from the instep to the ankle or knee. 2. An ankle-high shoe with elastic sides. 3. An overshoe with a cloth top.” *Id.* (citing *The American Heritage Dictionary*, (2nd College Ed. 1982)). HQ 088454 provides two definitions for “legging”: 1) “[a] leg covering of material such as canvas or leather” and 2) a “[c]overing for leg and ankle extending to knee or sometimes secured by stirrup strap under arch of foot. Worn in 19th c. by armed services and by civilian men. See PUTTEE and GAITER. Worn by women in suede, patent, and fabric in late 1960s.” *Id.* (citing *The American Heritage Dictionary*, (2nd College Ed. 1982) and *Fairchild’s Dictionary of Fashion*, (2nd Ed. 1988)). See also HQ 089582, dated November 6, 1991 and NY L81551, dated January 4, 2005.

In addition to gaiters and leggings, heading 6406, HTSUS, provides for “similar articles.” To “determine the scope of [a] general . . . phrase,” the United States Court of International Trade has used the rule of *ejusdem generis*. See *A.D. Sutton & Sons v. United States*, 32 C.I.T. 804, 808 (Ct. Int’l Trade 2008) (citing *Aves. in Leather, Inc. v. United States*, 178 F.3d 1241, 1244 (Fed. Cir. 1999)). Under the rule of *ejusdem generis*, “the general word or phrase is held to refer to things of the same kind as those specified.” *Id.* (citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994)). Therefore, “to fall within the scope of the general term, the imported good ‘must possess the same essential characteristics of purposes that unite the listed examples preceding the general term or phrase.’” *Id.* (citing *Aves. in Leather, Inc.*, 178 F.3d at 1244).

Applying the rule of *ejusdem generis*, we note that the definitions of gaiters and leggings provided in HQ 088454 indicate that the articles are both leg coverings. Similarly, EN 64.06(II) describes gaiters, leggings and similar articles as “designed to cover the whole or part of the leg and in some cases part of the foot....Certain of these articles may have a retaining strap or elastic band which fits under the arch of the foot.” The EN further states that these articles are different from socks because they do not cover the entire foot.

We find that the Robin Hood leg coverings share the same characteristics as leggings and gaiters of heading 6406, HTSUS. Like leggings and gaiters, the leg coverings extend over the ankle and up to the knee. Like some leggings that are secured to the foot with a strap, these leg coverings are

<sup>1</sup> “When...a tariff term is not defined in either the HTSUS or its legislative history”, its correct meaning is its common or commercial meaning. See *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1356 (Fed. Cir. 2001). “To ascertain the common meaning of a term, a court may consult ‘dictionaries, scientific authorities, and other reliable information sources’ and ‘lexicographic and other materials.’” *Id.* at 1356–1357 (quoting *C.J. Tower & Sons v. United States*, 69 C.C.P.A. 128, 673 F.2d 1268, 1271 (CCPA 1982); *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)).

secured to the shoe with a strap. Finally, consistent with EN 64.06(II), the subject leg coverings do not cover the entire foot. Accordingly, the subject leg coverings are classifiable under heading 6406, HTSUS, as articles similar to leggings and gaiters and are therefore precluded from classification in heading 6117, HTSUS, pursuant to Note 1(n) to Section XI, HTSUS. The subject leg coverings are specifically classified in subheading 6406.90.15, HTSUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials.”

**HOLDING:**

By application of GRI 1 and 6, the Robin Hood leg coverings are classified under heading 6406, HTSUS, and specifically, in subheading 6406.90.15, HTSUS, which provides for “Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof: Other: Of other materials: Of textile materials.” The 2021 column one, general rate of duty is 14.9 percent *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at [www.usitc.gov/tata/hts/](http://www.usitc.gov/tata/hts/).

**EFFECT ON OTHER RULINGS:**

NY N086942, dated December 29, 2009, is MODIFIED with regard to the tariff classification of the Style M-1639-00 Robin Hood Costume “boot covers.”

NY N080395, dated November 6, 2009, is MODIFIED with regard to the tariff classification of the French Kiss™ Eskimo Tease Costume “leg covers” Styles 673S1139 XS, 6731140 S, 6731141 M and 6731142 L.

NY N003909, dated December 21, 2006, is MODIFIED with regard to the tariff classification of the Deluxe Pirate Costume (style M-1320-00) “boot tops.”

NY G88706, dated April 18, 2001, is MODIFIED with regard to the tariff classification of the Style #41028 Knight costume “boot covers.”

NY D85843, dated January 8, 1999, is MODIFIED with regard to the tariff classification of the Millennium Woman costume (style numbers 1032 and 1032H) “boot tops.”

NY D83322, dated October 29, 1998, is MODIFIED with regard to the tariff classification of the Cap’n Skulley Costume (style #136) “boot tops.”

*Sincerely,*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

## RECEIPT OF APPLICATION FOR “LEVER-RULE” PROTECTION

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

**ACTION:** Notice of receipt of application for “Lever-Rule” protection.

**SUMMARY:** Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from Monster Energy Company (“Monster”) seeking additional “Lever-Rule” protection for the federally registered and recorded “M & DESIGN,” “MONSTER ENERGY” and “M DESIGN” trademarks.

**FOR FURTHER INFORMATION CONTACT:** Lauren Phillips, Intellectual Property Rights Branch, Regulations & Rulings, (202) 325-0349.

### SUPPLEMENTARY INFORMATION:

#### BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from Monster seeking to expand the scope of goods receiving “Lever-Rule” protection. On August 10, 2020, CBP granted protection against importations of Monster Energy 250ML beverages, intended for sale in the Netherlands that bear the “M & DESIGN” mark, U.S. Trademark Registration No. 3,434,822/ CBP Recordation No. TMK 10-00656; the “MONSTER ENERGY” mark, U.S. Trademark Registration No. 3,044,315, CBP Recordation No. TMK 15-01223; the “M & DESIGN” mark, U.S. Trademark Registration No. 3,434,821, CBP Recordation No. TMK 15-01224; the “M DESIGN” mark, U.S. Trademark Registration No. 5,580,962, CBP Recordation No. TMK 19-00076. Monster now seeks protection against importations of Monster Energy 500ML beverages bottled in Ireland, Netherlands and Poland, intended for sale in Europe and bearing the same trademarks listed above. In the event that CBP determines that these European Monster Energy beverages under consideration are physically and materially different from the Monster Energy beverages for sale in the United States, CBP will publish a notice in the Customs Bulletin, pursuant 19 CFR 133.2 (f), indicating that the above-referenced trademarks are entitled to “Lever-Rule” protection with respect to those physically and materially different beverages.



Dated: March 2, 2021

ALAINA VAN HORN  
*Chief,*  
*Intellectual Property Rights Branch*  
*Regulations and Rulings, Office of Trade*

## **NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING A TRANSCEIVER**

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

**ACTION:** Notice of final determination.

**SUMMARY:** This document provides notice that U.S. Customs and Border Protection (CBP) has issued a final determination concerning the country of origin of a transceiver, identified as the Barrett 4050 HF SDR Transceiver. Based upon the facts presented, CBP has concluded in the final determination that the transceiver, which is assembled in the United States of various imported components, including three Australian-origin printed circuit board assemblies, is not a product of a foreign country or instrumentality designated for purposes of U.S. Government procurement.

**DATES:** The final determination was issued on February 25, 2021. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within April 2, 2021.

**FOR FURTHER INFORMATION CONTACT:** Cynthia Reese, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade (202–325– 0046).

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that on February 25, 2021, CBP issued a final determination concerning the country of origin of the Barrett 4050 HF SDR Transceiver for purposes of Title III of the Trade Agreements Act of 1979. This final determination, HQ H314982, was issued at the request of Barrett Communications USA Corporation, under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP has concluded that, based upon the facts presented, as a result of the assembly of various imported components, including three Australian-origin printed circuit board assemblies, in the United States, the finished transceiver is not a product of a foreign country or instrumentality designated pursuant to 19 U.S.C. 2511(b) for purposes of U.S. Government procurement.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that notice of final determinations shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any

party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: February 25, 2021.

JOANNE R. STUMP,  
*Acting Executive Director,  
Regulations and Rulings, Office of Trade.*

HQ H314982

February 25, 2021

OT:RR:CTF:VS H314982 CMR

CATEGORY: Origin

JON P. YORMICK, Esq.  
FLANNERY GEORGALIS LLC  
1375 EAST NINTH STREET  
ONE CLEVELAND CENTER, FLOOR 30  
CLEVELAND, OHIO 44114

RE: U.S. Government Procurement; Title III, Trade Agreements Act of 1979 (19 U.S.C. 2511); subpart B, Part 177, CBP Regulations; Country of Origin of a Transceiver

DEAR MR. YORMICK:

This is in response to your request of October 22, 2020, on behalf of your client, Barrett Communications USA Corporation, for a final determination concerning the country of origin of a device referred to as a Barrett 4050 HF SDR Transceiver pursuant to Title III of the Trade Agreements Act of 1979 (TAA), as amended (19 U.S.C. 2511 *et seq.*). As the importer of merchandise entered into the United States and further processed in the United States, your client may request a final determination pursuant to 19 CFR 177.23(a).

#### FACTS

The item at issue, the Barrett 4050 HF SDR Transceiver (hereinafter, “transceiver”), is a software-defined based, single-sideband (“SSB”) transceiver with a frequency range of 1.6 to 30 MHz (transmit) and 250 kHz to 30 MHz (receive). You describe the transceiver as “a commercial product that supports features such as Selective Call (Selcall), direct dial telephone connection to base stations fitted with telephone interconnect systems (Telcall), GPS location, 2G and 3G ALE (Automatic Link Establishment), frequency hopping, digital voice, data transmission and remote diagnostics.” You indicate that the transceiver provides “a comprehensive data modem interface port, high speed transmit-to-receive switching, a high stability frequency standard and an efficient cooling system option.”

You indicate that the transceiver’s control head “features a GUI [graphical user interface] on a high definition 24-bit LCD color touchscreen.” You state that “[t]he [c]ontrol [h]ead can be detached from the main body of the [t]ransceiver for remote control. The [t]ransceiver can also be controlled remotely from most mobile and desktop platforms, including iOS, Android, and Windows devices.”

You specify that there are three main assemblies for each transceiver—(1) the control head assembly; (2) the power amplifier (PA) assembly and chassis; and, (3) the microprocessor board and interface board assembly and chassis. Within these three main assemblies are five printed circuit board assemblies (PCBAs). The five PCBAs and the countries in which each PCBA is produced are as follows: the control head board (United States); the interface board (United States); the micro board (Australia); the PA board (Australia); and the volume control board (Australia). You indicate that prior to export to the United States, the only software installed on the boards produced in Australia is for the limited purpose of testing and diagnostics. The Australian produced boards are non-functional at the time of importation into the United States.

In addition to the PCBAs described above, “each transceiver includes, a radio chassis, a speaker, an LCD screen, looms, various molded plastic parts including dials and buttons, and various seals and fasteners.”

The transceiver is assembled in the United States from imported and domestically produced components. You state the transceiver is assembled as a “clamshell.” You state:

The Micro and Interface Boards are mounted on one half of the “clamshell;” the PA Board is on the other half of the “clamshell.” When the “clamshell” is assembled there are cables between the two (2) halves to allow signaling and RF to pass between them. An HD15 pin connector interface on one half of the “clamshell” provides signaling to the Control Head. The Control Head has a color, touch screen display, volume knob, and buttons.

The Control Head Board is mounted to the chassis of the Control Head, using screws and a loom. The loom takes the signaling from the screen and buttons to the Control Head Board, while another loom takes the signaling from the Control Head Board out to the interfacing HD connector. The Volume Control Board fits directly to the Control Head Board, as a daughter board.

With regard to the functions of the boards, you state that the transceiver cannot function without the control head board. In addition, the interface board “allows the [t]ransceiver to connect to antennae and auxiliaries such as modems and audio devices.” Further, you indicate that the interface board enables the micro board to function. You state that the interface board allows the micro board “to interface with all external items.”

With regard to the control head, an integrated circuit (IC) and firmware programming process must be performed prior to assembly. After the IC is provided with its base programming, the control head is partially assembled and the control head board is loaded with base firmware programming. Once the programming is completed, the assembly of the control head (which entails cleaning and inspecting parts, installing the LCD screen and control head board, and assembling the remaining twenty-two control head components) is completed and the control head board is modified to function as part of the main assembly.

After the transceiver is fully assembled, base operating firmware and software, which will control and enable functionality, is installed on the interface board and micro board. This software is developed by a combination of efforts. Source code is written for the transceiver by software developers in Australia. Technicians in the United States convert the source code into executable object code, load it onto the interface board and micro board and test the downloaded object code. Software for optional features, which is obtained from a foreign third-party, may also be installed if required according to a customer’s purchase order specifications. Personnel in the U.S. “install the software and firmware, which takes approximately forty-five (45) minutes, including programming the 2G ALE modem and the [t]ransceiver.”

After the transceivers are assembled and programmed, they are tested. The software and the transceiver operation are tested. The testing occurs at the U.S. facility where the transceivers are assembled and programmed. Testing may also occur at customer sites within and outside the United States. After assembling, programming and testing, the transceivers are packed and shipped to customers located in the United States and throughout the Americas.

## ISSUE

Whether the transceivers at issue, which are assembled and programmed in the United States of domestic and foreign inputs, are eligible under Title III of the TAA, as amended (19 U.S.C. 2511–2518), as products of a foreign country or instrumentality designated pursuant to section 2511(b).

## LAW AND ANALYSIS

U.S. Customs and Border Protection (CBP) issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purpose of granting waivers of certain “Buy American” restrictions in U.S. law or practice for products offered for sale to the U.S. Government, pursuant to subpart B of Part 177, 19 CFR 177.21 *et seq.*, which implements Title III, Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–2518).

The rule of origin set forth in 19 U.S.C. 2518(4)(B) states:

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed. *See also* 19 CFR 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of Part 177 consistent with the Federal Procurement Regulations. *See* 19 CFR 177.21. In this regard, CBP recognizes that the Federal Acquisition Regulations restrict the U.S. Government’s purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 CFR 25.403(c)(1). The Federal Acquisition Regulations define “U.S.-made end product” as:

... an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

The regulations define a “designated country end product” as:

WTO GPA [World Trade Organization Government Procurement Agreement] country end product, an FTA [Free Trade Agreement] country end product, a least developed country end product, or a Caribbean Basin country end product.

A “Free Trade Agreement country end product” means an article that—

(1) Is wholly the growth, product, or manufacture of a Free Trade Agreement (FTA) country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in an FTA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself. “Free Trade Agreement country” means Australia, Bahrain, Canada, Chile, Colombia,

Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Oman, Panama, Peru, or Singapore. See 48 CFR 25.003. Thus, Australia is an FTA country for purposes of the Federal Acquisition Regulations.

CBP's authority to issue advisory rulings and final determinations is set forth in 19 U.S.C. 2515(b)(1), which states:

For the purposes of this subchapter, the Secretary of the Treasury shall provide for the prompt issuance of advisory rulings and final determinations on whether, under section 2518(4)(B) of this title, *an article is or would be a product of a foreign country or instrumentality designated pursuant to section 2511(b) of this title.*

Emphasis added.

In this case, the transceiver contains five separate PCBAs. We are told that three of these are produced by the assembly of the various components onto the PCB in Australia, and two are similarly produced in the United States. CBP has consistently held that the assembly of various components onto a blank printed circuit board to produce a PCBA is a substantial transformation. See Headquarters Ruling Letter (HQ) H311447, dated September 10, 2020, citing HQ 735306, dated December 21, 1993 (“ . . . Customs has ruled that the complete assembly of all the components onto a printed circuit board was a substantial transformation of the printed circuit board . . . ”), and HQ H302801, dated October 3, 2019 (“The SMT [surface-mount technology] operations result in a new and different product with an overall use and function different than any one function of the individual components.”). In this case, the three Australian-produced PCBAs and numerous other components from various countries are imported into the United States for assembly into the finished transceiver. The PCBAs for the control head board and the interface board, PCBAs which CBP considers to be dominant as they are within components which are essential to the functioning of the transceiver, are assembled in the United States. You state that the transceiver cannot function without the control head board. Further, the interface board allows the transceiver to connect to antennae and items such as, modems and audio devices. The interface board enables the micro board to function and interface with external items.

We note the production includes the assembly in the United States of the dominant PCBAs related to the transceiver's function, along with the assembly of all the remaining components of the transceiver to produce the finished good. While CBP does not recognize downloading of firmware or software to constitute a substantial transformation, we note that the conversion of the Australian software into executable code, which occurs in the United States, and programming of the transceiver boards is additional work to be considered in assessing the proper origin of the finished transceiver. See HQ H306349, dated November 26, 2019, (“ . . . CBP has consistently held that the downloading of software or firmware is not a substantial transformation.”).

Noting that CBP is limited by the language of 19 U.S.C. 2515(b)(1) to a determination of whether a good is a product of a foreign country or instrumentality designated pursuant to section 2511(b) of this title, based upon the information presented, the transceiver is not a product of Australia or any other foreign country or instrumentality designated pursuant to section 2511(b) of Title 19. As to whether the transceiver which is assembled in the United States qualifies as a “U.S.-made end product,” we encourage you to

review the recent court decision in *Acetris Health, LLC v. United States*, 949 F.3d 719 (Fed. Cir. 2020), and to consult with the relevant government procuring agency.

### **HOLDING**

The transceiver at issue, the Barrett 4050 HF SDR Transceiver, is not a product of Australia or any other foreign country or instrumentality designated pursuant to section 2511(b) of Title 19.

You should consult with the relevant government procuring agency to determine whether the transceiver qualifies as a “U.S.-made end product” for purposes of the Federal Acquisition Regulations implementing the TAA.

Notice of this final determination will be given in the **Federal Register**, as required by 19 CFR 177.29. Any party-at-interest other than the party which requested this final determination may request pursuant to 19 CFR 177.31 that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 CFR 177.30, any party-at-interest may, within 30 days of publication of the **Federal Register** Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

*Sincerely,*

JOANNE R. STUMP

*Acting Executive Director*

*Regulations and Rulings Office of Trade*

[Published in the Federal Register, March 3, 2021 (85 FR 12487)]



## 19 CFR CHAPTER I

### ARRIVAL RESTRICTIONS APPLICABLE TO FLIGHTS CARRYING PERSONS WHO HAVE RECENTLY TRAVELED FROM OR WERE OTHERWISE PRESENT WITHIN THE DEMOCRATIC REPUBLIC OF THE CONGO OR THE REPUBLIC OF GUINEA

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

**ACTION:** Announcement of arrival restrictions.

**SUMMARY:** This document announces the decision of the Secretary of Homeland Security to direct all flights to the United States carrying persons who have recently traveled from, or were otherwise present within, the Democratic Republic of the Congo or the Republic of Guinea to arrive at one of the U.S. airports where the U.S. government is focusing public health resources to implement enhanced public health measures. For purposes of this document, a person has recently traveled from the Democratic Republic of the Congo or the Republic of Guinea if that person has departed from, or was otherwise present within, the Democratic Republic of the Congo or the Republic of Guinea within 21 days of the date of the person's entry or attempted entry into the United States. Also, for purposes of this document, crew and flights carrying only cargo (*i.e.*, no passengers or non-crew), are excluded from the measures herein.

**DATES:** The arrival restrictions apply to flights departing after 11:59 p.m. Eastern Standard Time on March 4, 2021. Arrival restrictions continue until cancelled or modified by the Secretary of Homeland Security and notice of such cancellation or modification is published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Alyce Modesto, Office of Field Operations, U.S. Customs and Border Protection at 202-286-8995.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

Ebola Virus Disease (EVD), caused by the virus family *Filoviridae*, is a severe and often fatal disease that can affect humans and non-human primates. Disease transmission occurs via direct contact with bodily fluids (*e.g.*, blood, mucus, vomit, urine). The first known EVD outbreak occurred in 1976. From 2013–2016, the largest EVD outbreak occurred in West Africa, primarily affecting Guinea, Liberia,

and Sierra Leone, with cases exported to seven additional countries across three continents. The epidemic demonstrated the potential for EVD to become an international crisis in the absence of early intervention. Further, EVD can have substantial medical, public health, and economic consequences if it spreads to densely populated areas. As such, EVD may present a threat to U.S. health security given the unpredictable nature of outbreaks and the interconnectedness of countries through global travel.

On February 7, 2021, the World Health Organization (WHO) reported the resurgence of EVD, following the laboratory confirmation of one case in North Kivu Province, in the Democratic Republic of the Congo (DRC). As of February 23, 2021, eight confirmed EVD cases, including four deaths, have been reported. Although the source of infection is still under investigation, it is believed this outbreak is linked to the 2018–2020 EVD outbreak in the eastern DRC, the second largest EVD outbreak on record, which was officially declared over on June 25, 2020 by the WHO and the Ministry of Health in the DRC.

On February 14, 2021, the WHO reported a new outbreak of EVD in the southern prefecture of Nzérékoré, Guinea. The prefecture is located near the borders of Liberia and the Ivory Coast. As of February 23, 2021, Guinean officials have reported nine confirmed cases and at least five deaths. The WHO expects additional cases to be confirmed in the coming days and have warned six neighboring countries (Guinea-Bissau, Ivory Coast, Liberia, Mali, Senegal, and Sierra Leone) to be on alert for potential infections.

In order to assist in preventing or limiting the introduction and spread of this communicable disease into the United States, the Departments of Homeland Security and Health and Human Services, including the Centers for Disease Control and Prevention (CDC), and other agencies charged with protecting the homeland and the American public, are currently implementing enhanced public health measures at six U.S. airports that receive the largest number of travelers from the DRC and the Republic of Guinea. To ensure that all travelers with recent presence in the affected countries arrive at one of these airports, DHS is directing all flights to the United States carrying such persons to arrive at the airports where the enhanced public health measures are being implemented. While DHS, in coordination with other applicable federal agencies, anticipates working with the air carriers in an endeavor to identify potential travelers from the affected countries prior to boarding, air carriers will remain obligated to comply with the requirement of this notice, particularly in the

event that travelers who have recently traveled from or were otherwise present within, the affected countries are boarded on flights bound for the United States.

**Notice of Arrival Restrictions Applicable to All Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within the Democratic Republic of the Congo or the Republic of Guinea**

Pursuant to 6 U.S.C. 112(a), 19 U.S.C. 1433(c), and 19 CFR 122.32, DHS has the authority to limit the location where all flights entering the United States from abroad may land. Under this authority and effective for flights departing after 11:59 p.m. Eastern Standard Time on March 4, 2021, I hereby direct all operators of aircraft to ensure that all flights carrying persons who have recently traveled from, or were otherwise present within, the DRC or the Republic of Guinea only land at one of the following airports:

- John F. Kennedy International Airport (JFK), New York;
- Chicago O'Hare International Airport (ORD), Illinois;
- Hartsfield-Jackson Atlanta International Airport (ATL), Georgia;
- Washington-Dulles International Airport (IAD), Virginia;
- Newark Liberty International Airport (EWR), New Jersey; and
- Los Angeles International Airport (LAX), California.

This direction considers a person to have recently traveled from the DRC or the Republic of Guinea if that person departed from, or was otherwise present within, the DRC or the Republic of Guinea within 21 days of the date of the person's entry or attempted entry into the United States. Also, for purposes of this document, crew and flights carrying only cargo (*i.e.*, no passengers or non-crew), are excluded from the applicable measures set forth in this notification. This direction is subject to any changes to the airport landing destination that may be required for aircraft and/or airspace safety as directed by the Federal Aviation Administration.

This list of designated airports may be modified by the Secretary of Homeland Security in consultation with the Secretary of Health and Human Services and the Secretary of Transportation. This list of designated airports may be modified by an updated publication in the **Federal Register** or by posting an advisory to follow at [www.cbp.gov](http://www.cbp.gov). The restrictions will remain in effect until superseded, modified, or revoked by publication in the **Federal Register**.

For purposes of this **Federal Register** document, "United States" means the territory of the several States, the District of Columbia, and Puerto Rico.

ALEJANDRO N. MAYORKAS,  
*Secretary,*  
*U.S. Department of Homeland Security.*

[Published in the Federal Register, March 4, 2021 (85 FR 12537)]

# U.S. Court of International Trade

Slip Op. 21–26

MEYER CORPORATION, U.S., Plaintiff, v. UNITED STATES, Defendant.

Senior Judge Aquilino  
Court No. 13–00154

[Upon trial as to transaction value of imported cookware, judgment for the defendant.]

Dated: March 1, 2021

*Joseph M. Donley and Lisa Carney Eldridge*, Clark Hill PLC, and *John P. Donohue*, Ciardi Ciardi & Astin, of Philadelphia, PA, for the plaintiff.

*Beverly A. Farrell*, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, of Washington, DC, for the defendant along with *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Justin R. Miller*, Attorney-in-Charge, and *Paula S. Smith*, Attorney, Office of Assistant Chief Counsel, International Trade litigation, U.S. Customs and Border Protection, of counsel.

## *Opinion & Order*

### **AQUILINO, Senior Judge:**

This test case considers valuation under 19 U.S.C. §1401a of 125 different sets of cookware (pots and pans) imported from the People’s Republic of China and the Kingdom of Thailand, a beneficiary developing country (“BDC”). Its focus is (1) the “first sale” rule articulated by *Nissho Iwai America Corp. v. United States*, 982 F.2d 505 (Fed.Cir. 1992); (2) preferential treatment of entries from Thailand under the Generalized System of Preferences (“GSP”), 19 U.S.C. §2461 *et seq.*; and (3) whether circular metal “blanks” imported into Thailand from the People’s Republic of China (“PRC”) underwent a “double substantial transformation” as required by Customs and Border Protection (“CBP”) interpretation of the GSP<sup>1</sup> for purposes of both of those valuation issues.

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<sup>1</sup> It requires a “double substantial transformation”, *i.e.*, there first must be substantial transformation of the non-BDC material into a new and different article of commerce, which then becomes “materials produced” that then must be substantially transformed into a new and different article of commerce in order to be GSP-eligible. *See, e.g., The Torrington Company v. United States*, 8 CIT 150 (1984), *aff’d*, 764 F.2d 1563 (Fed.Cir. 1985).

## I

## A

Previously, the court granted in part and denied in part each party's cross-motion for partial summary judgment on the first two of the three issues presented. *Meyer Corp., U.S. v. United States*, 41 CIT \_\_\_, 255 F.Supp.3d 1348 (2017).

The *Nissho Iwai* "first sale" rule requires (1) *bona fide* sales that are (2) clearly destined for the United States (3) transacted at arm's length and (4) absent any distortive nonmarket influences. Whether due to first sale tests being generally applied to transactions from market economy countries, the last consideration has generally been neglected, but it is not irrelevant in the context of this case.

CBP's interpretation of *Nissho Iwai*'s first sale rule led it to the following considerations: In order to establish "entitlement" to first sale valuation, an importer needs to provide (1) a detailed description of the roles of each of the parties involved in a multi-tiered transaction and (2) a complete paper trail relating to the imported merchandise that shows the structure of such transaction. Def. Ex. 12, *Determining Transaction Value in Multi-Tiered Transactions*, T.D. 96-87, 30 Cust.Bull. 52 (Jan. 2, 1997).<sup>2</sup> Thus, the same documentation required to establish a *bona fide* sale and an export destined for the United States are applicable for a multi-tiered transaction, even when the parties to that transaction are related.

The valuation statute applies special rules when the buyer and seller are related parties under 19 U.S.C. §1401a(g). See 19 C.F.R. §152.103(j),(l); Def. Ex. 12; Def. Ex. 15, *Determining the Acceptability of Transaction Value for Related Party Transactions*, p. 6 (April 2007). These rules state that when parties are related, a sale is at "arm's length" only if (i) an examination of the "circumstances of the sale" of the imported merchandise indicates that the relationship between

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<sup>2</sup> Here, it is worth noting that CBP's subsequent attempt to revoke T.D. 96-87, in order to conform the anomaly of the interpretation U.S. import valuation law over the meaning of "when sold for exportation" *vis-à-vis* how every other World Trade Organization signatory interprets that phrase with respect to imports into their own countries, met with vocal opposition and resulted in withdrawal of *Proposed Interpretation of the Expression "Sold for Exportation to the United States" for Purposes of Applying the Transaction Value Method of Valuation in a Series of Sales*, 73 Fed.Reg. 4,254 (CBP Jan. 24, 2008). See *Withdrawal of Notice of Proposed Interpretation of the Expression "Sold For Exportation to the United States" as Used in the Transaction Value Method of Valuation in a Series of Sales Importation Scenario*, 75 Fed.Reg. 60,134 (CBP Sept. 29, 2010) ("Congress also stated in the [Food, Conservation and Energy Act of 2008, Pub. L. 110-246, 122 Stat. 1651 (June 18, 2008)] that, prior to January 1, 2011, CBP should not implement any change to its existing interpretation of the expression 'sold for exportation to the United States' for purposes of applying the transaction value method of valuation . . . and, then, only in accordance with the prescribed terms set forth in th[at] Act..."). See also trial transcript ("T.T.") Vol. V, 881:1-883:20.

the buyer and seller did not influence the price actually paid or payable, or (ii) the transaction value closely approximates a test value. 19 U.S.C. §1401a(b)(2); Def. Ex. 15, p. 7.

These foregoing CBP publications are entitled to a degree of deference. “[T]he well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance . . . and [w]e have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.” *United States v. Mead Corp.*, 533 U.S. 218, 227–28 (2001) (internal quotations and citations omitted).

Under *Nissho Iwai*, 982 F.2d at 509, Meyer must further establish the absence of any market-distortive influences on the price of the cookware, both for that manufactured in the PRC and for the Thai cookware with components from China. The court previously took judicial notice of the fact that the PRC is a non-market economy. 41 CIT at \_\_\_, 255 F.Supp.3d at 1361. One method that could be used to establish the absence of PRC non-market influence are the factors used by entities located there to obtain a duty rate other than the country-wide rate established by the U.S. Department of Commerce in antidumping-duty proceedings involving non-market economy participants. *See, e.g., Advanced Tech. & Materials Co. v. United States*, 36 CIT \_\_\_, 885 F.Supp.2d 1343 (2012).

To obtain a separate rate in that context, an entity must satisfy three *de jure* factors and four *de facto* factors. “The *de jure* factors are (1) an absence of restrictive stipulations associated with an individual exporter’s business and export licenses, (2) any legislative enactments decentralizing control of companies, and (3) other formal measures by the government decentralizing control of companies.” *Id.*, 36 CIT at \_\_\_, 885 F.Supp.2d at 1347. Typically-considered *de facto* factors include “(1) the ability to set export prices independently of the government and without the approval of a government authority, (2) the authority to negotiate and sign contracts and other agreements, (3) the possession of autonomy from the government regarding the “selection” of management, and (4) the ability to retain the proceeds from sales and make independent decisions regarding the disposition of profits or financing of losses.” *Id.*<sup>3</sup>

<sup>3</sup> To the extent such matters could be considered relevant here, do they not relate to the government’s obligations in discovery? That is, is it not the plaintiff’s burden to prove a negative but the government’s to defend by way of an affirmative? It does not appear in this case that the government pursued such lines of inquiry, with one exception: the financial statements of the parent company, Meyer Holdings.

Further, for viable transaction value, there must be sufficient information available with respect to the amounts of the statutory additions, if any, set forth in 19 U.S.C. §1401a(b)(1):

The transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts equal to—

(A) the packing costs incurred by the buyer with respect to the imported merchandise;

(B) any selling commission incurred by the buyer with respect to the imported merchandise;

(C) the value, apportioned as appropriate, of any assist;

(D) any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States; and

(E) the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller.

*See* Def. Ex. 12. “If sufficient information is not available, for any reason, with respect to any amount referred to in the preceding sentence, the transaction value of the imported merchandise concerned shall be treated, for purposes of this section, as one that cannot be determined.” *Id.*

With respect to Meyer’s GSP claims, in order to be eligible, an imported article must satisfy the following conditions:

- (1) the article must be the ‘growth, product or manufacture’ of a beneficiary developing country (BDC);
- (2) the article must be imported directly from a BDC into the customs territory of the United States; and
- (3) the sum of (a) the cost or value of the material produced in the BDC plus (b) the direct costs of processing operations performed in the BDC must not be less than 35% of the appraised value of such article at the time of its entry into the customs territory of the United States.

*See* 19 U.S.C. §2463(a)(2)(A). *See also Dal-Tile Corp. v. United States*, 28 CIT 358, 393 (2004).



In addition, in order to count towards GSP a non-BDC material input as an article that is “produced” in a BDC, the raw material must undergo a double (or dual) substantial transformation. *Torrington Co. v. United States*, 764 F.2d 1563, 1567 (Fed.Cir. 1985). In that case, the appellate court affirmed the trial court’s determination that a dual substantial transformation occurred when wire was first transformed into swages, a separate article of commerce with a “distinctive name, character, or use,” and the second substantial transformation occurred when the swages were transformed into needles, another distinctively named article of commerce. *Id.*

## B

Plaintiff’s papers herein explain that in 2006, having arranged “middleman” procurement by that point to its apparent satisfaction, it sought approval from CBP to appraise the imported sets on the basis of the “first sale” rule between related parties articulated by *Nissho Iwai*. See 19 U.S.C. §1401a. Meyer also sought GSP treatment for sets procured through the Thai supply chain because Thailand is a BDC under the GSP.

Meyer made two presentations for first sale valuation, with the assistance of accountants PwC, to one of CBP’s import specialists at the Port of San Francisco. The first, in September 2006, concerned the Thai supply chain. The import specialist approved the proposed valuation on the basis of the first sale the next month. Accordingly, Meyer began making entry based upon such valuations.

The second presentation, also by PwC on behalf of Meyer, occurred approximately a year later, again to the same import specialist. This concerned the Chinese supply chain. It, too, was approved.

Shortly after approval, the import specialist referred the matter to CBP’s Office of Field Operations at the Port of San Francisco for an audit of those first sale valuations. It concluded with respect to both of the Thai and Chinese supply chains that the first sale transactions met the first two of the *Nissho Iwai* tests (*i.e.*, *bona fide* sales and clearly destined for the United States) but also that they had not been at arm’s length. The audit report additionally concluded that there had not been a double substantial transformation of the circular metal “blanks” imported into Thailand from China, fabricated into the pots and pans, and exported in sets to the United States.

In early 2010, Meyer requested reconsideration, at which point CBP headquarters became involved. Months later, Meyer asked the port for clarification on an additional “point of inconsistency” that it

had raised, namely whether the presence of glass lids would disqualify an entire set from GSP eligibility. That request was duly forwarded to headquarters.

In September 2011, headquarters transmitted an “internal advice response” (“IAR”) to the port. It agreed with the audit findings that Meyer had failed to show its relationship with its suppliers and middlemen had not influenced the prices paid or payable and had been at arm’s length. The IAR further found that the presence of the glass lids disqualified such sets from GSP eligibility and that the clad metal discs imported from China that were worked into the finished pots and pans could not be counted as “Thai originating” material for purposes of the 35% requirement under the GSP.

Upon receipt of that IAR, PwC spoke with its author, defendant’s witness at trial, and PwC also (in a written submission to her) articulated Meyer’s concerns about the conclusions reached in the IAR. No response was forthcoming.

Timely-filed suit following denial of Meyer’s protest(s) invoked jurisdiction herein pursuant to 28 U.S.C. §1581(a), which denial is considered by the court *de novo*. See, e.g., *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 924 (Fed.Cir. 2003).

The court’s decision is on the basis of the record as developed, 28 U.S.C. §2640(a)(1), and that development, in turn, is pursuant to the Federal Rules of Evidence, which “shall apply to all civil actions in the Court of International Trade”. 28 U.S.C. §2641.

## C

As indicated, the parties sought to narrow the issues earlier in this matter by moving for summary judgment on whether the imported cookware sets are to be appraised on the basis of the first sale rule, and whether the sets from Thailand obtain the benefit of GSP preferential treatment. The plaintiff held the issue of double substantial transformation in reserve. The defendant cross-moved to dismiss on the basis that the presence of the glass lids imported into Thailand from China disqualified the sets from GSP preference *per* Treasury Decision 91–7, 25 Cust. B. & Dec. 7 (Jan 8, 1991), and on the basis that Meyer had not satisfied its burden of production or proof that it was entitled to first sale treatment.

On the GSP issue, the court concluded that the sets did not appear to be disqualified from GSP preferential treatment as a matter of law simply by reason of the presence of non-BDC components among the sets. 41 CIT at \_\_\_, 255 F.Supp.3d at 1358. On the first sale issue, the court first noted that the preferred or primary method of appraisal for

imported merchandise is “transaction value”, see 19 U.S.C. §1401a(b)(1), which is “the price actually paid or payable for the merchandise when sold for exportation to the United States.” 41 CIT at \_\_\_, 255 F.Supp.3d at 1359, citing *Luigi Bormioli Corp. v. United States*, 304 F.3d 1362, 1366 (Fed.Cir. 2002).

Also noting that transactions between a related buyer and seller will “normally” be considered acceptable if examination of the circumstances of the sale indicates that the buyer-seller relationship did not influence settling the price actually paid or payable, or, if that price approximates other test values<sup>4</sup> [see 19 U.S.C. §1401a(b)(2)(B); 19 C.F.R. 152.103(l)], the court previously held that CBP had not erred in declining to appraise the sets pursuant to the first sale rule on the basis of the arguments presented. 41 CIT at \_\_\_, 255 F.Supp.3d at 1362.

Observing that *Nissho Iwai* had interpreted §1401a(b)(2)(B) to mean “if the price paid can be determined to have been reached ‘at arm’s length, in the absence of any non-market influences that affect the legitimacy of the sales price’”, *id.*, 41 CIT at \_\_\_, 255 F.Supp.3d at 1358 (quoting *Nissho Iwai*, 982 F.2d at 509), the court concluded that material facts remained in dispute as to both issues, and also (obviously) with respect to the third (unaddressed) issue of whether circular steel “blanks” undergo a double substantial transformation in the manufacture of pots and pans in Thailand, which affects both of the first two issues. The court thus denied both parties’ motions for summary judgment.

With respect to trial of all three issues, to which this opinion applies, the burden remained on the plaintiff to prove its case with respect to each element through a preponderance of the evidence. See, e.g., *Fabil Mfg. Co. v. United States*, 237 F.3d 1335, 1340 (Fed.Cir. 2001), quoting *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 769 (Fed.Cir. 1993) (“[t]he preponderance of the evidence formulation is the general burden assigned in civil cases for factual matters”). Attention was also drawn at the pretrial conference to the law of the case, which generally bars retrial of issues that were previously resolved. See, e.g., *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695, 697 (Fed.Cir. 2001). The applicability of that doctrine is a matter of

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<sup>4</sup> Here, it must also be noted that transaction value includes, if not included in the price actually paid or payable, amounts equal to packing costs and selling commissions “incurred” by the buyer, the proportionate value of any “assist,” royalty or license fees, and the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue to the seller directly or indirectly. “If sufficient information is not available, for any reason, with respect to any amount referred to in the preceding sentence, the transaction value of the imported merchandise concerned shall be treated, for purposes of this section, as one that cannot be determined.” 19 U.S.C. §1401a(b)(1). In that event, resort to another valuation method would become necessary. See generally 19 U.S.C. §1401a

discretion, *see, e.g., Hudson v. Principi*, 260 F.3d 1357, 1363 (Fed.Cir. 2001), but it encompasses issues decided by necessary implication. *E.g., United States v. White*, 846 F.2d 678, 684 (11th Cir. 1988). *See also Ford Motor Co. v. United States*, 38 CIT \_\_\_, \_\_\_, 992 F.Supp.2d 1346, 1355 (2014).

The defendant argues that, in the aftermath of the court's initial opinion, the only GSP issue to be tried, in addition to the first sale issue, is whether the cookware components (pots/pans) of the sets exported from Thailand are entitled to duty-free treatment. Plaintiff's response to that point is ambiguous. But worth noting, perhaps, in light of the relatedness of companies involved in plaintiff's claim of first sale valuation, is that one of the disputes between the parties concerned defendant's attempt at discovery of financial information from Meyer Holdings, the ultimate parent of the Meyer Group.

In accordance with *Nissho Iwai*, the court's initial opinion was that "financial information pertaining to the parent is also relevant to examining whether any non-market influences affect the legitimacy of the sales price." 41 CIT at \_\_\_, 255 F.Supp.3d at 1358. The parent's financial documents could reveal whether "parental support or guidance has a market-distortive effect on the cost of inputs or of financing", thereby resulting in a "'booked' profit" "unrepresentative of sales or merchandise of the same class or kind that have been made without the distortion of non-market influences." *Id.* The court further took "judicial notice of the fact that the United States has yet to recognize that the PRC has attained 'market economy' status under Articles 15(a)(ii) and (d) of the PRC's agreement to the World Trade Organization, and thus it presumptively remains a non-market economy in this and other proceedings." *Id.* Accordingly, Meyer has the burden of demonstrating that inputs from the PRC, as well as with respect to the transactions from its producer/seller to its middleman/buyer, were procured at undistorted prices. *See id.*

## D

The following are pertinent facts upon which the parties have agreed, as summarized by the defendant:

1. Meyer Corporation, U.S. (Meyer) is a Delaware corporation with its principal place of business in Vallejo, California and is the importer of record of the merchandise subject to protest and the plaintiff in this case. Docket No. 148, Schedule C, ¶ 1.
2. Meyer purchases a wide variety of cookware, both in sets and in individual pieces, from overseas affiliates and resells them in the United States for use in the home. It is the exclusive dis-

tributor in the United States for all Meyer cookware products. Docket No. 148, Schedule C, ¶ 1.

3. Meyer Industries, Ltd. (Thai Producer [or MIL]) is located in Laem Chabang, Thailand and is the producer of the Thai origin goods that are the subject of this proceeding. Docket No. 148, Schedule C, ¶ 2.

4. Meyer Zhaoqing Metal Products Co., Ltd. (China Producer [or MZQ]) is located in Zhaoqing, China and is the producer of the Chinese origin goods that are the subject of this proceeding. Docket No. 148, Schedule C, ¶ 3.

5. Meyer Marketing (Macau Commercial Offshore) Co. Ltd. (Meyer Macau or Thai Middleman [or MMC]) is a corporation located in the Chinese Special Administrative Region of Macau and the middleman purchaser of the goods produced by the Thai Producer. Docket No. 148, Schedule C, ¶ 4.

6. Meyer Manufacturing Company Ltd. (Meyer Hong Kong or China Middleman) is a corporation located in the Chinese Special Administrative Region of Hong Kong and the middleman purchaser of certain goods produced by the China Producer. Docket No. 148, Schedule C, ¶ 5.

7. Each of the entities identified in paragraphs 3–6 is a related party to Meyer within the meaning of 19 U.S.C. § 1401a(g)(1)(F). Docket No. 148, Schedule C, ¶ 6.

8. Meyer International Holdings Ltd. (Meyer Holdings [or MIH]) is a corporation organized under the laws of the British Virgin Islands<sup>5</sup>] and is the parent company of Meyer. Docket No. 148, Schedule C, ¶ 7.

9. At all times relevant to this proceeding, the Kingdom of Thailand was designated by the President of the United States as a Beneficiary Developing Country (BDC) within the meaning of 19 U.S.C. § 2462(a)(1), also known as a GSP country, *i.e.*, a country designated for preference under the GSP legislation. Docket No. 148, Schedule C, ¶ 8.

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<sup>5</sup> The court notes that they would seem to be a notable choice of tax haven for Chinese “investors”. *See, e.g.*, “China Leaks: How the BVI Became China’s Foreign Tax Haven of Choice,” available at <https://www.taxjustice.net/2014/01/22/china-leaks-bvi-became-chinas-tax-haven-choice/> or at [web.archive.org](http://web.archive.org); “Found: Offshore Wealth Stashed by Families of China’s Leaders,” available at <https://time.com/1374/offshore-wealth-of-chinas-leaders> or at [web.archive.org](http://web.archive.org) (“Pricewaterhouse-Coopers, UBS and other Western banks and accounting firms play a key role as middlemen in helping Chinese clients set up trusts and companies in the British Virgin Islands, Samoa and other offshore centers usually associated with hidden wealth, the records show”).

10. At all times relevant to this proceeding, certain of the Thai merchandise under review was an “eligible article,” *i.e.*, the merchandise was classified under a provision of the Harmonized Tariff Schedule of the United States (HTSUS), which qualified the article for GSP treatment if it otherwise met the requirements of the GSP statute. Docket No. 148, Schedule C, ¶ 9.

11. The merchandise was classifiable at entry under subheading 7323.93.0045 of the HTSUS, the provision for “table, kitchen or household articles . . . of stainless steel.” Docket No. 148, Schedule C, ¶ 10.

12. Each of the cookware items subject to the set issue was imported as a set of cookware, and the common denominator of each of the sets is that the set includes one or more glass lids made in China, a non-BDC country. Docket No. 148, Schedule C, ¶ 11.

13. All of the pots and pans constituting the cookware sets that are the subject of the [GSP] set issue were manufactured by the Thai Producer. Docket No. 148, Schedule C, ¶ 12.

14. The glass lids in the sets referenced in preceding paragraphs 12 and 13 were produced in China and sold to the Thai Producer, but the glass lids themselves were not substantially transformed in Thailand. Docket No. 148, Schedule C, ¶ 13.

15. The cookware at issue in this case was produced by either the Thai Producer or the China Producer. Docket No. 148, Schedule C, ¶ 14.

16. The PRC is not recognized by the United States as a “market economy” and is, therefore, considered a non-market economy in this proceeding. Docket No. 148, Schedule C, ¶ 16.

17. Meyer Holdings is the only shareholder of Meyer. Docket No. 148, Schedule C, ¶ 17.

18. Meyer, the Thai Producer, the China Producer, Meyer Macau and Meyer Hong Kong are subsidiaries of Meyer Holdings. Docket No. 148, Schedule C, ¶ 18.

19. Other subsidiaries of Meyer Holdings are in the business of cookware, such as Meyer Cookware Australia Pty Ltd. (distributor), Meyer New Zealand (distributor of kitchenware, which includes cookware, *i.e.*, pots and pans), Meyer UK Limited (distributor), Meyer Europe SRL (manufacturer), Meyer Japan, Meyer Canada Housewares, Inc. (distributor), Meyer Taiwan

Limited (distributor), and Meyer Housewares Singapore (distributor). Docket No. 148, Schedule C, ¶ 19.

20. The subsidiaries listed in paragraph 19 consolidate their financial statements with Meyer Holdings. Docket No. 148, Schedule C, ¶ 20.

21. The Thai Producer, the China Producer, Meyer Macau, and Meyer Hong Kong consolidate their financials with Meyer Holdings. Docket No. 148, Schedule C, ¶ 21.

22. Meyer Macau and Meyer Hong Kong occasionally work together. Docket No. 148, Schedule C, ¶ 22.

23. Meyer Macau sells to Meyer UK Limited, Meyer Cookware Australia Pty Ltd., Meyer New Zealand, Meyer Canada Housewares, Inc., QVC, Costco, Walmart, Meyer Japan, Amway, and WMF (a non-Meyer affiliate and competitor cookware company). Docket No. 148, Schedule C, ¶ 23.

24. Meyer Hong Kong also sells to Meyer UK Limited, Meyer Cookware Australia Pty Ltd., Meyer New Zealand, Meyer Canada Housewares, Inc., QVC, Costco, Walmart, and Meyer Japan. Docket No. 148, Schedule C, ¶ 24.

25. The Thai Producer and the China Producer both sell to their domestic markets directly. Docket No. 148, Schedule C, ¶ 25.

26. Meyer Hong Kong owns the Anolon and Circulon brand names. Docket No. 148, Schedule C, ¶ 26.

27. Meyer Macau owns the exclusive right to the brand name Rachel Ray for cookware, bakeware, tabletops (aka dinnerware, serverware and glassware), gadgets and cutlery for the western hemisphere and some Meyer affiliates have the right to sell with the licensor's consent in UK, South Africa, Ireland and Australia. Docket No. 148, Schedule C, ¶ 27.

28. Meyer Macau owns the exclusive license for the brand name Paula Deen for cookware, bakeware, tabletops (aka dinnerware, serverware and glassware), gadgets and cutlery for the western hemisphere. Docket No. 148, Schedule C, ¶ 28.

29. The Rachel Ray and Paula Deen licenses were granted to Meyer Macau plus affiliates, including those like Meyer, that are under the common ownership of Meyer Holdings. Docket No. 148, Schedule C, ¶ 29.

30. Meyer Macau can sell to U.S. Retailers other than Meyer but only in exchange for a commission it pays to Meyer. Docket No. 148, Schedule C, ¶ 30.

31. The commissions paid by the middlemen for sales to U.S. retailers other than Meyer vary based on lines and customers. Docket No. 148, Schedule C, ¶ 31.

32. The Thai Producer and the China Producer purchase some components of their cookware from Meyer affiliates that are direct or indirect subsidiaries of Meyer Holdings. Docket No. 148, Schedule C, ¶ 32.

33. The Thai Producer also sold cookware to a customer in Vietnam. Docket No. 148, Schedule C, ¶ 33.

Def. Proposed Findings of Fact and Conclusions of Law (“Def. PFF&CL”), pp. 4–7.

## II

During trial, the plaintiff did not present witnesses from either Meyer Hong Kong or Meyer Holdings. *See* P. Ex. 152. Its direct testimony was presented by S. Darrin Johnson, a former managing director of Meyer from 2006 to 2019; Siukai Kwok, a financial manager at the Thai producer; Sharon Lau, a sales director at Meyer Macau; Kan Ming Kam, a production manager of the stainless steel department at the China producer; and Craig Pinkerton, a director of customs international trade practice at PricewaterhouseCoopers (“PwC”), who was proffered as an expert witness.

The defendant countered with Monika Brenner, the head of the valuation and special programs branch of CBP.

## A

Mr. Johnson had full responsibility and control of all of Meyer’s departments. T.T. Vol. I, 69:23–112:11 (direct), 113:152:13 (cross). He averred that, despite being related companies within the Meyer Group, they are structured with different “silos” of business that operate independently of and competitively with each other, and that the plaintiff was accountable for its own profitability, independent of any other Meyer group entity. *Id.* at 110:16–111:6.

Describing the process of plaintiff’s procurement of cookware, Mr. Johnson stated that three or four times a year it would conduct a market analysis to keep abreast of the competition, product offerings, retail pricing, and identify potential opportunities to fill a consumer



need. *Id.* at 76:20–79:16, 115:2–116:9. Meyer Macau would procure product for the plaintiff from the Thai Producer or the China Producer, depending on the product order and tooling capability. *See id.* at 122:18–123:23; Vol. T.T. III, 352:18–21. Trial did not explore negotiations between the plaintiff and Meyer Hong Kong except in passing, for in almost all matters the plaintiff negotiated with Ms. Lau, Meyer Macau’s sales director. *See, e.g.*, T.T. Vol. I, 83:12–20, 86:9–17, 109:15–24, 122:9–17.

Regarding the Thai producer, Mr. Kwok testified on how the cookware is manufactured, the producer’s pricing and profit, and how the GSP calculations are performed. *Id.*, 156:16 to Vol. II, 224:4 (direct), 224:22–331:7 (cross). The Thai producer has four divisions of cookware: aluminum, hard anodized, advanced automated production, and stainless steel, employing 2,000 to 3,000 workers. T.T. Vol. I, 159:7–13. Ninety-six percent of its cookware is sold to Meyer Macau. *Id.* at 160:23–24. The Thai producer coordinates with the marketing managers of Meyer Macau in negotiating prices for the cookware, which are never sold at a loss. *Id.* at 161:8–12 & 175:6–177:18.

Mr. Kwok identified plaintiff’s exhibits 294 and 296 as cookware produced by the Thai producer, and he expressed familiarity with the documentation of a sample entry packet, P 190. Mr. Kwok was responsible for preparing GSP calculations for the Thai producer cookware if customers requested them, *id.* at 183:811, and he related specifics from P 154 and 155 on cost, local content, overhead, *et cetera*, with respect to how he makes the GSP calculations thereof, which he tied to the product that is P 296. *Id.* at 183:12–190:7. He acknowledged that he performed similar analyses in the GSP calculations of P 379 that relate to a product represented pictorially as P 375, *id.* at 191:13–194:10, and also with respect to the GSP calculations of P 380 that relate to a ten-piece cookware set, P 376, *id.* at 194:20–197:3, Vol. II, 204:7–23.

Lastly, Mr. Kwok narrated answered questions regarding a video depicting the manufacture of a piece of cookware intended for the ten-piece set P 133. Some 14 manufacturing steps are involved in the transformation of a flat steel disc to the finished pot/pan, and Mr. Kwok confirmed that all of the Thai producer’s cookware undergoes a substantially similar manufacturing process. Vol. II, 205:5–224:2.

Mr. Kam testified regarding production at the China producer. T.T. Vol. III, 412:3–425:11 (direct), 425:18–458:10 (cross). It makes aluminum and stainless steel cookware, and Mr. Kam is responsible for production planning, quality control, and costing issues. He testified that there is trade in work-in-process “shells” of the cookware pots/pans, *e.g.* P 131F, between the China producer, the Thai producer, and

Meyer group's factory in Italy. *Id.* 414:14–415:9. His responsibilities included providing cost and production process information to the China producer's "custom department," such knowledge being conveyed to him via a product's SKU number, from which he can discern the country for which the product is destined. *See id.*, 416:4–417:9; 433:5–15. His understanding is that the China producer does not negotiate directly with the plaintiff, nor does it discuss pricing with its parent company. *Id.* at 417:10–418:3. Lastly, Mr. Kam denied, to his knowledge, that the China producer has ever received any subsidy, grant, assistance, instruction, contribution, concession, input, tax exemption, loan guarantee — in short, anything whatsoever from any PRC governmental organ or the Chinese Communist Party in order to support or "direct" its operations. *Id.* at 421:18–425:6. He stated that the Chinese producer "purchased" and "owns" the land for its factory, *id.* at 424:12–13, but later clarified that meant the Chinese producer "would have the right to use the land for a period of time" and that he was unsure who actually "owns" it, *id.* at 456:6–17. He also clarified that his knowledge extended over the steel department, not to "everything" concerning the aluminum department as well. *Id.* at 430:2–13.

Mr. Kam also clarified that the steel used in the production of cookware comes from a PRC company, also "sometimes" from Japan and Taiwan. *Id.* at 439:2–7. The aluminum bottom of the pots/pans comes from a PRC company; the glass lids come from a PRC company; the knobs and handles come from the PRC and also from a non-Meyer company in Thailand. *Id.* at 439:24–442:23. Further testimony from Mr. Kam examined other incidentals necessary for the production and completion of the pots/pans and completion of the sets from the PRC, including the packaging for the products for shipment, origin of the solder used in welding, rivets, variability in the Chinese manufacturer's profitability (including Mr. Kam's knowledge or lack thereof with respect to the company general manager's authority to attend to matters involving PRC governmental functionaries), how the Chinese producer is managed *et cetera*.<sup>6</sup> *Id.* at 440:3–462:23.

Ms. Lau testified regarding her work experience with Meyer Macau and her dealings with all of the above. T.T. Vol. III, 319:9–355:8 (direct), 356:6:409:6 (cross). Her negotiations with Meyer would lead her to place orders with either the Thai producer or the China producer, depending on the product order, and, if orders were to be

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<sup>6</sup> Defendant's counsel at one point directly asked Mr. Kam if he would have had knowledge of any "assistance" from the PRC government, to which his response, in effect, was that in his position he was on a "need to know" basis with respect to the general manager. T.T. Vol. III, 462:14–23.

undertaken by the China producer, Meyer Macau would “assign” orders to Meyer Hong Kong to act as middleman, either individually or in addition to the plaintiff. *See, e.g., id.* at 320:6–24. She testified that Meyer Macau’s top ten purchasers included both Meyer group and non-Meyer group companies. In dealing with “private label” orders from one such example of a non-Meyer-group company, Meyer Macau would deal with that entity directly, or, if such orders concerned Meyer brands, then Meyer Macau would pay a commission to the plaintiff. Overall, between 80 and 90 percent of the cookware sets Meyer imported into the United States were manufactured by the Thai producer. *Id.* at 353:4–17. The remainder were manufactured by the China producer in the PRC, depending on whether the Thai producer was at full capacity or if the product was labor-intensive. *Id.*, 386:7–16.

Mr. Pinkerton, a licensed customs broker, testified as to his belief regarding errors in CBP’s administrative rulings on the plaintiff’s entries. T.T. Vol. IV, 501:5–648:7 (direct), 651:16–696:17 & Vol. V, 703:18–822:7 (cross). He had no knowledge of the application of the specific entries involved in this case, T.T. Vol. IV, 483:7–484:22, but testified as to his general knowledge of plaintiff’s process of manufacture of the pots/pans at issue, including the process of what the plaintiff claims is the double substantial transformation of them during manufacture.<sup>7</sup> *See id.* at 485:9–496:20. He described the due diligence PwC undertook with regard to the operations of the Thai producer, the China producer, Meyer Macau, and Meyer Hong Kong, to determine whether plaintiff’s transactions satisfied the *Nissho Iwai* factors and CBP’s regulations governing its interpretation thereof, as well as PwC’s presentation of its analyses to CBP, other of his experiences with such presentations to it, and his interpretation of CBP’s ultimate decision(s) on first sale treatment for plaintiff’s imported merchandise. *Id.* at 502:10–648:7.

Ms. Brenner testified for the defendant. T.T. Vol. V, 859:3–885:9 (direct), 885:21–915:18 (cross). She described her experiences in supervising CBP valuation rulings, which process solicits both importers’ and ports’ perspectives, and with respect to first sale rulings in particular. T.T. Vol. V, 858:3–885:8. She also answered questions with respect to CBP’s ruling on plaintiff’s first sale treatment as it related to a proposal CBP published in the Federal Register in response to a certain World Customs Organization case study regarding such treatment, which proposal was later withdrawn in light of comments in

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<sup>7</sup> During *voir dire*, in response to the question of whether the plaintiff’s “cost sheets” clarified the issue of double substantial transformation (“DST”), the witness responded that CBP “sometimes” considers labor in deciding whether there has been a DST. T.T. Vol. V, 493:14:494:7.

opposition to that proposal. *See id.* at 879:18–883:20. Lastly, she testified that, in her experience, most requests for first sale treatment are ultimately granted. *Id.* at 884:5–885:8. Ms. Brenner was then cross-examined as to the process of denying the plaintiff first-sale treatment. *Id.* at 885:13–915:18.

At the conclusion of trial, the court requested the parties to submit proposed findings of fact and conclusions of law. They are restated as follows:

## B

### Thai Supply Chain First Sale

#### 1

Addressing the first of the *Nissho Iwai* factors, plaintiff's witnesses uniformly related the "independent business silos" theme of all the relevant Meyer group entities involved in this matter, each having its own objectives. The plaintiff thus relates the testimonial "proof" that the negotiations among the relevant "silos" involved *bona fide* price establishment as follows:

56. PwC determined that goods sold from MIL to MMC were made pursuant to a bona fide sale. PwC made this determination by examining the following documentation: (i) purchase orders between MUS and MMC; (ii) purchase orders between MMC and MIL; (iii) MIL's invoices to MMC; (vi) MMC's invoices to MUS; and (v) proof of payments, usually through wire payments. (Pinkerton T.T. Vol. IV, 502:21–504:3).

57. In seeking to determine whether the sale from MIL to MMC was a bona fide sale, PwC also examined whether MMC was a legal entity, had employees, had managerial controls, and had financial statements. PwC also looked at the intent of the parties during the transaction, which of the parties bore the risk of loss, and how title of the goods was transferred. (Pinkerton T.T. Vol. IV, 502:21–504:3).

58. The methodology that PwC used to determine whether transactions between MIL to MMC met the bona fide sale test had been accepted by Customs in other first sale presentations and/or submissions handled by Pinkerton. (Pinkerton T.T. Vol. IV, 504:4–10; 529:19–530:13).

59. The FOB terms are also included on the invoices from MIL to MMC. For example, on Entry Packet at Plaintiff's Exhibit 190, the FOB terms indicate that MIL is responsible for the

transportation costs for the goods to the Port in Thailand, Laem Chabang. Title transfers according to the date of the Bill of Lading. (Kwok T.T. Vol. I, 171:6–172:4; P. Ex. 190, Entry Packet, MUS001402).

Pl’s Proposed Findings of Fact and Conclusions of Law (“Pl’s PFF&CL”), pp. 13–14.

The defendant responds that the plaintiff did not present proofs of purchase orders or payments between the various entities in the Meyer supply chains. *See infra*. The court indeed considers such proof probative and relevant, but for the purpose of this question, it is of some moment that at the port level CBP initially agreed that there was a *bona fide* sale of merchandise imported by Meyer through its Thai supply chain, and that its regulatory audit also reached the same conclusion. P. Ex. 20, Office of Field Operations Referral Audit Report, p. 3.

The evidence at bar facially supports finding *bona fide* sales between the Thai producer and Meyer Macau.

## 2

Regarding the second of the *Nissho Iwai* factors, the plaintiff claims that all of Meyer’s purchases sourced from the Thai producer and relevant to this case resulted in shipment of goods “clearly destined” for the United States. Plaintiff’s recital is as follows:

61. At the time the goods are produced at MIL for MMC, they are destined for the United States. (Kwok T.T. Vol. I, 161:20–23).

62. The Entry Packets before the Court contain a Bill of Lading which identifies that the merchandise entered is being shipped directly to the United States. (Kwok T.T. Vol. I, 170:8–22; P. Ex. 190, MUS001430).

63. In its earlier work on demonstrating Meyer’s first sale qualification to Customs, PwC had determined that the goods sold by MIL were clearly destined for the United States. PwC made this determination by analyzing relevant case law and agency guidance documents. Further, PwC examined bills of lading for the products at issue and determined that the products were shipped directly from Laem Chabang, Thailand to either New York or San Francisco. (Pinkerton T.T. Vol. IV. 504:11–505:15).

64. The methodology that PwC used to determine that the goods produced by MIL in Thailand were clearly destined for the

United States had been accepted by Customs in other matters handled by Pinkerton. (Pinkerton T.T. Vol. IV, 505:16–21; 529:19–530:13).

65. The products before the court that were purchased by MUS through MMC and manufactured by MIL were shipped directly from Thailand to the United States as set forth in the bill of lading and detailing either New York or San Francisco as the port of unloading (FOB Laem Chabang). (Johnston T.T. Vol. I, 111:22–112:3; P. Ex. 190, MUS001392).

\* \* \*

15. By way of example, Plaintiff's Exhibit 190 (Entry# 30402149170), was submitted to the San Francisco Port on October 29, 2011 and identifies various products imported by MUS that are eligible for first sale and GSP treatment. (P. Ex. 190, Entry Packet, MUS001384).

16. The invoices related to the three-tiered transaction of these imports are attached and made part of this Entry Packet. This includes the invoice from MIL to MMC that shows the sale of 16 different products manufactured by MIL and the first sale unit price of each. (Kwok T.T. Vol. I, 168:5–169:3; P. Ex. 190, Entry Packet, MUS001404).

17. One of these products, the Paula Deen steamer set (P. Ex. 296) is itemized on this invoice with a first sale unit price of \$14.56. (Kwok T.T. Vol. I, 169:11–170:7; P. Ex. 190, Entry Packet, MUS001423).

18. This Entry Packet also contains a Bill of Lading which declares that the merchandise is being shipped directly from Thailand to the United States. (Kwok T.T. Vol. I, 170:8–22; P. Ex. 190, Entry Packet, MUS001430).

19. The terms of sale and delivery (“FOB”) are also included on the invoice from MIL to MMC. For this Entry Packet, the FOB terms indicate that MIL is responsible for the transportation costs of the goods from the factory to the Laem Chabang Port in Thailand. Conversely, the MUS/MMC Master Distribution Agreement (“Distribution Agreement”) terms indicate that MUS only takes title after the goods have been paid for<sup>8</sup>, which means that MMC assumes title and risk of loss from the port of

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<sup>8</sup> The defendant points out that Section 6.2 of the Master Manufacturing Agreement provides that title in the products passes to Meyer upon delivery irrespective of whether the price for such products had been wholly or partially paid or remains completely unpaid at that time, Def. Br. at 27, referencing T.T., Vol. II at 279–80 and Pl. Ex. 123, but it does not

export in Thailand until payment by MUS. Risk of loss transfers according to the date of the Bill of Lading. (Kwok T.T. Vol. I, 171:6–172:4; P. Ex. 190, Entry Packet, MUS001402; P. Ex. 124, Master Distribution Agreement, Section 9.1).

Pl’s PFF&CL, pp. 14, 4–5.

Defendant’s response again points out that the plaintiff did not present proofs of purchase orders or payments between the various entities in the Meyer supply chains. It further points out that such testimony described Mr. Pinkerton’s work for plaintiff’s 2008 and 2010–12 products, not for the products at bar. *See* P. Exs. 117, 125.

The court concurs with the defendant that proofs of purchase orders and payments are normally and critically necessary to establishing entitlement to first sale dispensation when a claim therefor is challenged by CBP. When requested by CBP to provide reasonable proof, it is not unreasonable to expect importers to provide such proof so CBP can reasonably expect to satisfy a claim. Plaintiff’s case before the court is somewhat cavalier in this regard, focusing on minutiae and essentially asking the court at various points to take plaintiff’s “word” that certain facts were true, without corroborating evidence in support, but at least on this particular point, it is once again of some credence that CBP at the port level, and at its regulatory audit, was satisfied the merchandise imported by Meyer through its Thai supply chain was clearly destined for the United States.

### 3

For the third *Nissho Iwai* factor, *i.e.*, “arm’s length” sales, CBP considers the “circumstances of sale” issue to be met when either of three tests are satisfied under the regulations. Under that issue, to determine whether a relationship influenced the price, relevant aspects of the transaction are analyzed, such as (i) how the buyer and the seller organize their commercial relations; and (ii) how the price was arrived at. Def. Ex. 15 at 7. *See also* 19 C.F.R. §152.103(l)(1)(i). In accordance with the referenced regulation, circumstances such as the following can demonstrate that the relationship did not influence the price:

— The price was settled in a manner consistent with the normal pricing practices of the industry in question;

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elaborate on the significance of that point. Risk of loss transfers according to the date of the bill of lading and testimony at trial indicated that Meyer took title when the Thai producer delivered the goods for shipment from the port in Thailand. Where title actually “stood” when the goods were delivered FOB Laem Chabang Port does not undermine the goods’ clear destination, which was the United States, according to the bill of lading.

— The price was settled in a manner consistent with the way the seller settles prices for sales to buyers who are not related to it; or

— The price is adequate to ensure recovery of all costs plus a profit that is equivalent to the firm’s overall profit realized over a representative period of time in sales of merchandise of the same class or kind.

*See, e.g.*, Def. Ex. 15 at 7. Only the first and third circumstances listed above are at issue here, and it is plaintiff’s burden to establish that one of them is applicable.

In particular, to establish that the price was settled in a manner consistent with the “normal pricing practices” of the industry in question, an importer must have objective evidence of the normal pricing practices of the industry in question and present evidence that the transfer price was settled in accordance with these industry pricing practices. *See id.* at 7–8. The “industry in question” normally includes the industry that produces goods of the same class or kind as the imported merchandise. *See id.* at 8.

To establish that a price is adequate to ensure “recovery of all costs plus a profit” that is equivalent to the firm’s overall profit realized over a representative period of time in sales of merchandise of the same class or kind, an importer should be prepared to provide records and documents of comprehensive product related costs and profit, such as financial statements, accounting records, including general ledger account activity, bills of materials, inventory records, labor and overhead records, relevant selling, general and administrative expense records, and other supporting business records. *See id.* at 9.

CBP’s administrative considerations of such tests are not irrelevant, but they are not dispositive, as this is trial of those matters, *de novo*. *See Park B. Smith, supra*.

**a**

At trial, the plaintiff sought qualification of Mr. Pinkerton, both as a fact witness and as an expert. It offered his opinion(s) on these topics: (i) Meyer’s entitlement to first sale treatment on the entries before the court; (ii) error by CBP’s audit in determining that Meyer was not eligible for first sale or GSP treatment; (iii) error by headquarters during the course of the request for internal advice and flaws in the IAR (Internal Advice Response); and (iv) double substantial transformation for purposes of GSP calculations of the clad products manufactured in Thailand that originated with clad metal discs



imported from China. Pinkerton T.T. Vol. IV, 481:5–7; *See* Joint Pre Trial Order Doc. 148 at Schedule G-1.

After *voir dire*, the court qualified Mr. Pinkerton to provide “his opinion in this matter” as an “expert” at trial. The court did not, however, expand its qualification as to what matters it considered him to be “expert” upon, as opposed to lay opinions on other aspects of the case, in which the court was also interested. *See* Pinkerton T.T. Vol. IV, 500:14–24. Also, as urged by the defendant, that qualification did not fundamentally negate any appearance of potential bias from Mr. Pinkerton’s business relationship with the plaintiff, from which the court might draw conclusions as to what weight his testimony is due, if any.

Further in that regard, the defendant moved, *in limine*, to exclude certain summary documents. *See* Docket No. 145. It renewed its objection to their admission into evidence during trial. *See, e.g.*, Vol. IV at 584:10–585:20. The defendant also moved to exclude Mr. Pinkerton’s testimony based on those documents not provided in discovery. *See, e.g.*, Def. PFF&CL, pp. 7–15.

Rule 1006 of the Federal Rules of Evidence provides:

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

This rule requires that the documents whose information is to be summarized be so voluminous as to make comprehension difficult and examination inconvenient. *E.g.*, *United States v. Bray*, 139 F.3d 1104, 1109 (6th Cir. 1998). When such is the case, the rule requires that the proponent make the documents underlying the summary available for examination or copying. “The purpose of the availability requirement is to give the opposing party an opportunity to verify the reliability and accuracy of the summary prior to trial.” *Amarel v. Connell*, 102 F.3d 1494, 1516 (9th Cir. 1996) (internal quotation and citation omitted). To satisfy this requirement, a party must identify the exhibit as a summary, provide a list or description of the underlying documents, and state when the documents could be reviewed. *Air Safety, Inc. v. Roman Catholic Archbishop of Boston*, 94 F.3d 1, 8 (1st Cir. 1996). “Where a party fails to make available materials underlying a summary exhibit, that summary exhibit is inadmissible.” *Amarel*, 102 F.3d at 1516.

Defendant's position here is that "because FRE 1006 'operates independently of discovery rules,' it is immaterial whether an opponent sought discovery of the documents underlying a summary document: a party has an 'absolute right to subsequent production of material under Rule 1006, should that material become incorporated in a chart, summary or calculation.'" Def. PFF&CL, p. 8, quoting *Air Safety*, 94 F.3d at 8. The defendant thus contests plaintiff's exhibits 119, 125, 154, 155, 156, 379 and 380 reference information and data that were not provided during discovery. Its position is that the very purpose for FRE 1006 is to provide an opportunity to an adversary to verify the accuracy and reliability of a summary, and that purpose was thwarted here, *i.e.*, that admission of these summary documents is prejudicial because neither the court nor the defendant are able to test the accuracy and reliability of these exhibits.

The court conditionally accepted those exhibits into evidence but took defendant's objection under advisement. *See, e.g., Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 782 (3d Cir. 1996) ("[t]he Federal Rules of Evidence are meant to instruct [trial] courts in the sound exercise of their discretion in making admissibility determinations and should not be interpreted as exclusionary rules"). The concern over those documents and testimony is with respect to their credibility rather than their admissibility.

Hence, defendant's objection to inclusion of the referenced documents, as well as Mr. Pinkerton's testimony, is hereby denied, and they will be accorded whatever weight they deserve in the final analysis herein.

## b

As for the "arm's length" factor, plaintiff's proposed findings are first with respect to CBP's "normal pricing practices" test, followed by its proposed findings on the "all costs plus profit" test:

68. Pinkerton testified that PwC determined that the sale of goods between MIL and MMC were made at arm's length. PwC made this determination by applying the "normal pricing practices" test set forth in interpretative note two and the "all costs plus profit" test set forth in interpretative note three of 19 C.F.R. § 152.103(1)(1)(ii-iii). (Pinkerton T.T. Vol. IV, 505:22–508:22).

\* \* \*

69. For purposes of the "normal pricing practices" test, set out in 19 C.F.R. § 152.103(1)(1)(ii), PwC compared MIL's overall profits to other manufacturers of cookware in Thailand to examine whether MIL's pricing practices are consistent with the normal

pricing practices in the industry. (Pinkerton T.T. Vol. IV, 517:3–518:6; P. Ex. 117, 2008 MIL Assessment).

70. PwC calculated the rate of profit for MIL and “tested companies” (competing companies PwC used to compare to MIL) by using a profit level indicator. The profit level indicator used by PwC is the full-cost markup and the operating-cost markup, which are consistent with the guidance issued by Customs. (Pinkerton T.T. Vol. IV, 518:17–519:4; P. Ex. 119, 2010–2012 Benchmarking Study).

71. MIL compared favorably, and was within the interquartile range, with the tested companies. (Pinkerton T.T. Vol. IV, 519:5–8; P. Ex. 119, 2010–2012 Benchmarking Study).

72. The interquartile range for the three-year average (2010–2012) for full cost markup for all of the companies tested by PwC was between -2.0% and 3.8%. MIL’s full cost markup for this time period was 2.77%. (P. Ex. 119, 2010–2012 Benchmarking Study).

73. The interquartile range for the three-year average (2010–2012) for the operating profit margin for all of the companies tested by PwC was between -2.0% and 4.4%. MIL’s operating profit margin for this period was 2.72%. (P. Ex. 119, 2010–2012 Benchmarking Study).

74. The methodology used by PwC to determine whether Meyer satisfied the “normal pricing practices” test was accepted by Customs in other matters. This test is also considered standard within the accounting profession. (Pinkerton T.T. Vol. IV, 517:3–24; 519:9–21; 529:19–530:13).

75. PwC’s findings regarding “normal pricing practices” is bolstered by evidence presented by MUS at trial in which MMC’s business practices and price negotiations were described in detail by Sharon Lau (“Lau”) (See Lau Testimony, Findings of Fact at ¶¶ 76–104), Siukai Kwok (“Kwok”) testimony, Findings of Fact at ¶¶ 105–131; and Darrin Johnston testimony, Findings of Fact at ¶¶ 133–170).

\* \* \*

76. Lau is the sales director at MMC and has been employed with the company for almost twenty years. Through her employment, Lau has gained experience and knowledge about the manufacturing capacities of MIL and MZQ. (Lau T.T. Vol. III, 319:10–14; 322:7–323:2).

77. MMC primarily acts as a middleman between MUS and MIL (Thai supply chain). Lau accepts pricing requests from MUS for certain products. Based on Lau's experience and knowledge of the products and manufacturing sites, including tooling capacity, she decides whether the order should be placed through the Thai supply chain or the China supply chain. (Lau T.T. Vol. III, 320:6–321:19; 322:22–323:6; 361:17–362:24).

78. MMC operates as an individual entity in its pricing negotiations. (Lau T.T. Vol. III, 324:21–325:6).

79. MMC did not have the ability to dictate to MIL what pricing terms it should accept, nor did MMC ever require that a price be accepted. Similarly, MUS cannot require MMC to accept its pricing terms. (Lau T.T. Vol. III, 325:7–24; 326:14–16).

80. No other Meyer Group entity has attempted to influence MMC to accept a certain price. In particular, MMC's parent, MIH, does not influence, persuade or direct MMC to accept a price with MIL or MUS. (Lau. T.T. Vol. III, 328:4–8;328:12–15).

81. MMC was free to negotiate at arm's length with MIL and MUS and did so. (Lau T.T. Vol. III, 328:16–19).

82. A typical transaction consists of MUS forwarding a target price to MMC. If MMC could not meet the target price that would still render MMC a profit, Lau would engage in pricing negotiations. In doing so, Lau would negotiate using an alternative product that may be less expensive. For example, Lau would propose a different product with a lighter gauge such as stainless steel or aluminum, or a product alteration such as changing the handle. (Lau T.T. Vol. III, 326:19–328:3).

83. Once a final price is negotiated between MMC and MUS, MUS will issue a final purchase order to MMC. (Lau T.T. Vol. III, 367:17–21).

84. The process that MMC engages in — accepting an order, filling the order, billing the client, and collecting the money — did not change in any significant way between 2008 and 2015. At present, the process remains the same although there are often less hard copy papers because of advancing Electronic Data Interchange systems. (Lau T.T. Vol. III, 342:9–19).

85. Once MUS submits its price request to MMC, Lau begins price negotiations with MIL. (Lau. T.T. Vol. III, 323:16–18).

86. By way of an example, on October 29, 2011, MIL issued an invoice to MMC for products that MMC negotiated to purchase from MIL. (Lau T.T. Vol. III, 334:20- 335:2; P. Ex. 190, Entry Packet, MUS001401).

87. Payment is accepted as an electronic wire or graphic transfer. (Lau T.T. Vol. III, 407:12–17).

88. The payment terms as to MIL and MMC are an open account for 60 days. (P. Ex. 190, Entry Packet, MUS001404).

89. The payment terms as to MMC and MUS indicate an open account for 20 days. (Lau T.T. Vol. III, 406:13–24; P. Ex. 190, Entry Packet MUS001392).

90. MUS paid for the goods covered by the invoice. (Lau T.T. Vol. III, 339:17–21; P. Ex. 190, Entry Packet).

91. Every payment is reflected in MMC's accounting system. (Lau T.T. Vol. III, 407:18–21).

92. Both MMC and MUS have separate accounting departments that monitor and confirm the invoices and purchase orders to ensure there are no discrepancies or clerical errors. If there are any issues, these would be reported directly to Lau. (Lau T.T. Vol. III, 365:17367:16).

93. Approximately 80–90% of MUS's production is ordered through the Thai supply chain. (Lau T.T. Vol. III, 353:4–17). Lau may direct orders to MHK/MZQ (the China Supply Chain) if MIL is at full capacity or if the product is labor-intensive. (Lau T.T. Vol. III, 386:7–16).

94. Lau requests a price quote from either the Thai Producer or the Chinese Producer based on the assignment and the price negotiations are similar no matter the Producer with which she deals. (Lau T.T. Vol. III, 320:11–18; 342:4–8).

95. MMC retains accounting records reflecting its profitability to MUS. It also retains accounting records reflecting its profitability when it sells directly to non-Meyer entities such as Costco. (Lau T.T. Vol. III, 403:12–24).

96. MMC maintains a profit in its business with MIL and MZQ and retains documentation reflecting such. (Lau T.T. Vol. III, 404:21–405:9).

97. MMC's business is not exclusive to Meyer-related entities. MMC also sells to various companies for product delivery in the United States, *e.g.*, HyCite, Costco, . . . Amway, Element, Canadian, QVC U.S.A., Sears, Wal-Mart, MYREX International and Target. (Lau T.T. Vol. III, 340:14–341:5; 370:12–371:11).

98. MMC collects information independently and also from MUS with respect to the business and competitor landscape in the United States. MMC's major competitors for business in the United States include: Calphalon, T-Fal, Tramotina, Cuisinart, Pioneer Woman at Wal-Mart and Chrissy Teigen at Target. (Lau T.T. Vol. III, 342:20–343:4; 343:9–25).

99. Consumer insight regarding major competitors helps MMC engage in negotiations at the right price for the right product. MMC has to consider the competition in the market for risk of business going to another competitor. (Lau T.T. Vol. III, 344:3–17; 345:3–18).

100. To ensure that MMC stays competitive, Lau often attends trade shows with MUS. There, she is able to evaluate competitor products and new product launches. This type of market survey is vital for MMC in its ability to stay competitive with price, design, service and development of new products. (Lau T.T. Vol. III, 345:19–346:21).

101. MMC negotiates pricing from non-Meyer related entities, such as Costco, using the same arm's length strategy and approach as its negotiations with MIL or MZQ when an order is placed by MUS. For example, Lau considers the same factors in assigning the order from Costco to either MIL or MZQ as she does when the order is placed by MUS. (Lau T.T. Vol. III, 341:12–352:17).

102. Rollback pricing is one of the ways that Meyer entities stay competitive in the United States market. For example, if Wal-Mart issues a rollback price on a product distributed by MUS, MUS will in turn talk with MMC to try and negotiate a better price and essentially rollback MMC pricing indirectly. (Lau T.T. Vol. III, 346:22–347:13).

103. MMC will gauge MUS's projected volume and then determine whether it is a sound financial decision to match the rollback. (Lau T.T. Vol. III, 347:14–23). In making this decision, MMC considers the pricing from MIL and determines whether there is any leeway in the financials. If there is an impasse or

financial restrictions, Lau will either decline to participate in the rollback or she will directly negotiate pricing with MUS and forgo a rollback price with MIL. (Lau T.T. Vol. III, 348:3–349:20).

104. MMC’s approach to negotiating prices with its manufacturers when a non-Meyer company issues a rollback, such as Wal-Mart or Costco, is the same approach that MMC takes with MUS. (Lau T.T. Vol. III, 350:14–22).

\* \* \*

105. Similarly, MIL (Thai Producer) negotiates its pricing with MMC in an arm’s length manner consistent with normal pricing practices in the industry. (See Findings of Fact at ¶¶ 105–131 below).

106. MIL primarily manufactures pots and pans. In addition, MIL also manufactures boxes, glass lids, handles, knobs and kitchen tools. (Kwok T.T. Vol. I, 166:21- 167:4).

107. Siukai Kwok (“Kwok”) has been employed with MIL for twenty-seven years, first as the costing manager and now as the finance manager. (Kwok T.T. Vol. I, 157:7–9)

108. Kwok was MIL’s finance manager in the fourth quarter of 2011 at the time the products at issue in this case were imported. (Kwok T.T. Vol. I, 157:23–158:3).

109. In his position as the finance manager, Kwok prepares price quotes and coordinates with the banks. He also compiles the monthly financial statements and records all of the manufacturing costs and manages inventory control. (Kwok T.T. Vol. I, 158:4–11).

110. MIL sells primarily to MMC, MHK and Myrex Thailand Limited (“MTL”), a Meyer Group distributor of cookware located in Thailand. (Kwok T.T. Vol. I, 159:23–160:16).

111. MIL sells about 96% of its goods to MMC and about 2% of its goods to MHK (China Middleman) and MTL (Thailand Distributor). (Kwok T.T. Vol. I, 160:20–25).

112. Both MMC and MUS conduct site visits at MIL where they may bring their respective clients to visit the MIL factory. (Kwok T.T. Vol. I, 162:17–163:5).

113. MMC and MIL negotiate prices for pots and pans. In general, MMC requires a specific number of items from MIL. If MIL’s price does not meet MMC’s requirement MIL will review

the price again in order to try to make the sale. However, if adjusting the price will result in a loss of profit for MIL, then MIL will reject MMC's offer. MIL does not have to accept MMC's price. (Kwok T.T. Vol. II, 238:18–25).

114. As between MIL and MMC, there is a Master Manufacturing Agreement (“Manufacturing Agreement”) between the parties entered into on February 14, 2003 that formalized the payment terms for the production of products and remains in force to date. (Kwok T.T. Vol. I, 177:19–178:11; Lau T.T. Vol. III, 328:23–329:7; P. Ex. 123, Master Manufacturing Agreement, MUS010359).

115. Under the terms of the Manufacturing Agreement, MMC (“the Company”), is required to place a minimum order to MIL (“the Supplier”). Specifically, MMC provides MIL with \$100,000,000 dollars in business, per year, but there are no minimum quantity requirements. (Lau T.T. Vol. III, 332:24–333:22; P. Ex. 123, Section 3.5).

116. This contractual minimum was negotiated to create a stable business between the companies. (Lau T.T. Vol. III, 394:11–17).

117. The Manufacturing Agreement provides for negotiation between the parties. Section 5.3 of the payment terms indicate that MMC, the Company, “shall pay the total price in relation to any invoice prepared in respect of a Purchase Order at such times and such manner as the Company and the Supplier may from time to time agree and in the absence of such agreement at such times and in such manner as the Supplier shall reasonably demand...” (Lau T.T. Vol. III, 337:11–20; P. Ex. 123, Section 5.3).

118. MIL and MMC operate under the Manufacturing Agreement with a FOB Thailand term. (Lau T.T. Vol. III, 337:24–338:25; P. Ex. 123, Section 6; P. Ex. 190, Entry Packet MUS001392).

119. Kwok negotiates product sales price with four to five different marketing managers at MMC. (Kwok T.T. Vol. I, 161:2–15).

120. MIL ships products direct to MUS but there are no direct discussions with MUS regarding pricing or sale. (Kwok T.T. Vol. I, 162:4–12).



121. Kwok is responsible for setting pricing of the pots and pans that MIL sells to MMC. (Kwok T.T. Vol. I, 175:23–176:2).

122. Pricing negotiations between MIL and MMC are typically conducted through email, with MIL setting the initial price for the products it sells based on its costs incurred making those products. (Kwok T.T. Vol. I, 178:13–25).

123. Once an order was agreed to through MMC, MIL would direct its invoice to MMC stating the merchandise and price for purchase, which MMC would pay. (Lau T.T. Vol. III, 332:23–334:6; 335:8–9).

124. Kwok manages and tracks the MIL production costs. This includes both material and production costs. (Kwok T.T. Vol. I, 175:6–13).

125. MIL production costs include: labor, water, electricity, gas, and overhead costs of the factory, which includes depreciation costs. (Kwok T.T. Vol. I. 175:14–22).

126. In setting the price, MIL considers the cost of production plus the profit margin, with a goal of maintaining an average profit margin of three percent. Profit can range below and above three percent. (Kwok T.T. Vol. I, 176:3–18).

127. MIL engages in internal discussions based on competitor pricing to differentiate itself and stay competitive in the market. These competitors include other companies in the market of cookware and kitchenware including pots and pans. (Kwok T.T. Vol. I, 176:19–177:3).

128. MIL's profit as compared to its competitors is more than average. (Kwok T.T. Vol. I, 177:4–8).

129. The MIL price to MMC is not accepted automatically. At times MMC has rejected MIL prices. Moreover, MIL does not sell its goods to MMC at a loss. (Kwok T.T. Vol. I, 177:16–18; 179:2–4).

130. In the event pricing is rejected, the parties will work together in negotiations. MIL would be able to concede a lower price while still insuring marginal profit at MIL. (Kwok T.T. Vol. I, 179:9–18).

131. Meyer Group has a company-wide philosophy that each individual company within the Meyer Group should maximize its own profit. (Kwok T.T. Vol. I, 180:8–12).

132. MIL's parent, MIH, does not participate in any day-to-day business of MIL, nor does it direct any of the production schedules at the factory. Nor does MIH direct any of MIL's pricing or provide any assists in the form of loans or subsidies. (Kwok T.T. Vol. I 163:19–164:10).

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133. In a typical transaction involving MUS's purchase of products through its Thai supply chain, an entry packet accompanies a shipment of goods from MIL in Thailand to MUS. (Johnston T.T. Vol. I, 104:2–6; P. Ex. 190, Entry Packet).

134. The entry packet contains an invoice from MIL to MMC, commonly referred to as the "first sale price." (Johnston T.T. Vol. I, 105:12–23; 106:13–19).

135. The entry packet also contains an invoice from MMC to MUS reflecting the price that MUS would pay to MMC, commonly referred to as the "second sale price." (Johnston T.T. Vol. I, 104:11–23).

136. The MMC invoice includes the credit terms which were negotiated between MMC and MUS. (Johnston T.T. Vol. I, 107:23–108:9).

137. Johnston was not aware of any instance where MUS received an invoice from MMC and the purchase order price did not match the invoice price. (Johnston T.T. Vol. I, 137:15–21).

138. Johnston was not aware of any instance where MUS received an invoice from MHK and the purchase order price did not match the invoice price. (Johnston T.T. Vol. I, 137:15–21).

139. Each purchase order is considered the contract for each delivery of cookware and is guided by an overarching Master Distribution Agreement. (Johnston T.T. Vol. I, 138:8–14).

140. The Master Distribution Agreement ("Distribution Agreement") between MUS and MMC formalized the process for purchasing products from MMC by MUS. (P. Ex. 124, Master Distribution Agreement).

141. The Distribution Agreement was effective as of May 16, 2003 and was in effect at the time of the entries at issue in this case. (Johnston T.T. Vol. I, 85:7–19; P. Ex. 124, Master Distribution Agreement).

142. Under the terms of the Distribution Agreement, MUS was required to pay MMC for products in cash within twenty-one days of invoice. (Johnston T.T. Vol. I, 127:5–12; 130:16–22).

143. An order placed by MUS under the Distribution Agreement was done by way of a purchase order and contained details such as how many products were going to be purchased, the SKU number, pricing time, date and delivery for each product. (Johnston, T.T. Vol. I, 117:24–118:24).

144. There is underlying accounting documentation as part of MUS's normal accounting practice that confirms the final payment figures for all of MUS's purchases of product. (Johnston T.T. Vol. I, 131:20–132:14).

145. MUS was not beholden to any approval or accommodations from MIH in the negotiation of the Distribution Agreement between MUS and MMC, nor did MIH have any influence over negotiations despite the parties having the same parent company. (Johnston, T.T., Vol. I, 87:8–11; 96:5–98:3).

146. Johnston's point of contact on behalf of both MMC and MHK was Lau, who was in charge of all pricing on products purchased by MUS and coordinated the target supply chain best suited to fulfill the purchase and overflow for product development. (Johnston T.T. Vol. I, 86:9–17; Lau T.T. Vol. III, 320:6–321:19; 322:22–323:6; 361:17–362:24).

147. MUS and MMC commonly engaged in pricing negotiations and in a typical transaction, pricing for products was not fixed nor guaranteed. As part of a common practice, MUS would submit a pricing request for a product, and MMC would submit a counteroffer. (Johnston T.T. Vol. I, 87:12–24).

148. MUS would submit a document to MMC that gives specifications from the business development team requesting product pricing accompanied by an estimated required retail target price. (Johnston T.T. Vol. I, 83:24–84:14).

149. When negotiating price with Lau on behalf of MMC or MHK, MUS would consider factors such as its targeted retail price and margin structure in the U.S. (Johnston T.T. Vol. I, 88:4–17).

150. Often times MUS would use competitive market information to negotiate pricing with MMC to provide a clearer under-

standing of the price requests based on the market for similar products. (Johnston T.T. Vol. I, 88:18–89:9; 92:17–22; 120:15–20).

151. MUS gauges market competition by conducting a competitive market analysis three to four times a year, which allows it to stay abreast of competitors' operations and understand how competitors are operating in the marketplace. (Johnston T.T. Vol. I, 76:14–78:5; 115:2–15).

152. For example, MUS would assess competitors' new product launches and price adjustments. (Johnston T.T. Vol. I, 115:16–22).

153. If MUS assessed a major adjustment of price by a competitor that could be a disadvantage to its business, MUS would use the price adjustment to retroactively try and negotiate a better price on its business with MMC. (Johnston T.T. Vol. I, 116:10–19).

154. MUS's primary competitors in the U.S. market are Newell Corporation[ and Group[e] SEB[,] who sell products available in department stores like Costco, and additional competitors include Tramontina and The Cookware Company. (Johnston T.T. Vol.1, 90:19- 92:3).

155. These companies hold the most significant amount of additional market share in the United States, specifically in the cookware business. (Johnston T.T. Vol.1, 92:10- 16).

156. During negotiations, MUS did not know ultimately which supply chain would manufacture the products, because Lau would independently assess whether the order should be through the Thai supply chain or China supply chain. (Johnston T.T. Vol. I, 122:9- 123:10).

157. Accordingly, Johnston's negotiation strategy with Lau was the same for both the Thai supply chain and the China supply chain. (Johnston T.T. Vol. I, 122:9–123:4).

158. Communications regarding price negotiations were sent from the MUS business development team, who handled all communications for MUS with MMC. Price negotiations, however, were not a simple sign and send. Johnston would typically submit a request based on a new product being developed. Lau would then come back to Johnston with a work up of price that could be offered. (Johnston T.T. Vol. I, 119:10–22; 120:3–9).

159. MUS requests to MMC on pricing w[ere] not automatically accepted as a matter of course; at times Lau would negotiate with Johnston on pricing that was different from the initial MUS pricing request. (Johnston, T.T. Vol. I, 120:21–121:2).

160. In determining price, MUS operated with MMC at arm's length by operating as two completely independent and separate entities. (Johnston T.T. Vol. I, 89:19- 90:10).

161. MUS's business negotiations with MMC were at arm's length and were consistent with Mr. Johnston's experience negotiating on behalf of other entities outside of the Meyer Organization. (Johnston T.T. Vol. I, 90:6–14).

162. MUS understood that an order placed with MMC, if accepted, was produced by MIL or MZQ, but MUS did not negotiate the price directly with either factory and never tried to influence either factory's pricing negotiations with MMC. (Johnston T.T. Vol. I, 93:7–14; 94:8–12).

163. During the time of Mr. Johnston's employment at MUS as managing director, he was not aware of any instance where MUS assisted MIL in the production of any goods ordered by MUS. (Johnston T.T. Vol. I, 98:8–22).

164. On behalf of MUS, Johnston also dealt with global Meyer distributors in the United Kingdom, Canada, Australia and Japan that sometimes contract with MUS for cookware. (Johnston T.T. Vol. I, 142:7–15).

165. In preparing pricing to other Meyer distributors, Johnston considered overhead and costs such as warehousing operational costs and profit. MUS sought to make the same rate of profitability on these sales to Meyer distributors as it would when selling to a United States retailer. (Johnston T.T. Vol. I, 143:10–144:5).

166. These pricing negotiations that MUS engaged with MMC and related distributors were the same tactics MUS used with unrelated parties. (Johnston, T.T. Vol. I, 89:14–18).

167. If, for example, a Meyer Group entity had a shortage or market need, MUS would sell and distribute its products to those entities on the condition that MUS had inventory in the warehouse. (Johnston T.T. Vol. I, 99:13–25). However, MUS would always mark up the cost of those products to cover its own overhead and profit. (Johnston T.T. Vol. I, 100:12–21).

168. MIH's ownership of MMC and MUS did not influence pricing negotiations between the companies. (Johnston T.T. Vol. I, 90:15–18).

169. MUS sold to retail clients directly and, on occasion[,] it facilitated an independent sale from MMC to one of its clients, such as Costco, in which case MUS would receive a commission from MMC. (Johnston T.T. Vol. I, 101:17–102:16; 146:11–22).

170. Although Johnston was not operating as managing director of MUS at the time of the products before the court being imported, he believes that the pricing negotiations were done in the same or similar way. (Johnston T.T. Vol. I, 123:18–23; 125:12–21).

Pl's PFF&CL, pp. 15–30, in support of finding CBP's "normal pricing practices" test satisfied for the Thai supply chain.

Proposing that the Thai distribution channel also satisfies CBP's "all costs plus profit" test, the plaintiff argues trial showed as follows:

171. In Customs' view, the "all costs plus profit" test requires that the related-party price cover the seller's costs in a profit that is equal to the firm's overall profit of sales of the same class or kind over a representative period of time. (Brenner T.T. Vol. V, 873:12–19).

172. However, aside from Treasury Decision 96–87, there are no statutes or regulations that require an importer to provide specific and exact documentation to Customs in order to be eligible for first sale treatment. (Brenner T.T. Vol. V, 896:18–897:6).

173. Although Customs usually interprets the word "firm" to mean the parent company of the importer, Brenner admitted that "firm" is not defined as the parent company in any statute or regulation. (Brenner T.T. Vol. V, 875:15–876:3; 905:22–906:3; D. Ex. 15, ICP, Determining the Transaction Value of Imported Merchandise for Related Party Transactions).

174. Customs does not have a position with respect to what entity would be the firm in the event that the parent did not meet the definitional test for "parent" for purposes of the "all costs plus profit" test. (Brenner T.T., Vol. V, 906:9–907:11).

175. In fact, in the event there is no parent or the parent company is not a producer of the same class or kind of goods as the manufacturer, Customs takes a flexible approach and con-

siders both tests as a whole and whether there is a qualified related party against which to measure profit:

Q: So does [sic] customs tied to only the firm being a parent?

A: I mean, that's usually what we think is the best, but we have issued decisions that – where the firm was not the parent.

Q: And how were you able to issue a decision when the firm was not the parent and use that cost-plus prong under the circumstances of sale?

A: Well, in those situations, we kind of – they have given us sort of information on the other tests as well. So I mean, I think they have satisfied some aspects . . . of the other tests to show that price was set without influence.

Q: So they can still use cost-plus-profit; is that fair?

\* \* \*

A: . . . They have some other good comparison, so it might not be the parent, but maybe there's another subsidiary that is a good comparison . . . they might show, oh and we also do this in the industry. And then so taking that together, we would say that they operate in an arms-length fashion.

(Brenner T.T. Vol. V, 877:2–878:12).

176. PwC determined that Meyer's products were sold at arm's length under the "all costs plus profit test" by examining the following: (i) the cost sheets of products at issue; (ii) the cost of materials and allocation of labor, overhead, expenses, and materials; and (iii) the sales price or FOB price. PwC would then calculate a profit to determine whether MIL was selling at cost plus a profit. (Pinkerton T.T. Vol. IV, 508:22–509:23).

177. For purposes of the "all costs plus profit" test, PwC considered the "firm" to be the overall producer, MIL. PwC did not consider MIL's parent, MIH, to be the appropriate "firm" because MIH is purely a holding company for many different entities. MIH's profits are derived from capital gains and investments in real estate, not the sale of cookware. Therefore, PwC found it inappropriate and inconsistent with the regulation to compare MIL's profit with MIH's profit. (Pinkerton T.T. Vol. IV, 511:4–513:11).

178. Instead, PwC compared the rate of profit of MIL's products exported to the United States compared against the overall profit of MIL. PwC determined that MIL was the appropriate tested party here because the profit at the manufacturing level meets the statutory criteria, which is to ascertain whether the price of the product is adequate to ensure "recover of all costs plus a profit" as compared with the "firm's" overall profit. The reason that the profit of individual items shipped from MIL to MUS should be compared to MIL's overall profit (i.e., Operating Profit Margin) is to demonstrate that the profitability of items shipped to the US is not being manipulated (e.g., disproportionately lowered) solely to take advantage of first sale. There is the expectation that the profit levels should be in line with rest of world. PwC determined that the rate of profit for MIL's goods exported to the United States and goods MIL sold worldwide were equivalent or within a normal range. (Pinkerton T.T. Vol. IV, 510:22–514:10; 516:21- 517:2).

179. There are no Customs regulations that require that the "firm" mentioned in 19 C.F.R. §152.103(l)(1)(iii) must be the parent of the importing party. (Pinkerton T.T. Vol. IV, 511:15–512:2).

Pl's PFF&CL, pp. 30–32.

## C

### China Supply Chain First Sale

The plaintiff argues that the transactions involving the PRC supply chain satisfy the first sale rule of *Nissho Iwai* in addition to the Thai supply chain.<sup>9</sup>

#### 1

Regarding the first *Nissho Iwai* factor, when preparing the China Producer's Assessment for 2010–2012, PwC confirmed that the transactions to Meyer Macau and/or Meyer Hong Kong were *bona fide* sales. Pinkerton T.T. IV, 599:11–601:21; P. Ex. 125, 2016 China Producer Assessment covering 2010–2012. As it had with respect to the

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<sup>9</sup> For merchandise procured from the Chinese producer, plaintiff's witness described the China producer's place in the transaction flow relevant to this case as receiving orders for merchandise "from Meyer Hong Kong," purchasing raw materials for production of merchandise, manufacturing cookware imported by Meyer, selling merchandise "to Meyer Hong Kong," acting as exporter to foreign markets including the United States, and receiving payment from Meyer Hong Kong for merchandise. The China producer exports its products not only to Meyer through Meyer Hong Kong but also to other Meyer affiliates worldwide.



Thai supply chain, at the port level CBP agreed that there was a *bona fide* sale of merchandise imported by Meyer through its PRC supply chain, and regulatory audit did not challenge this conclusion. See P. Ex. 5, First Sale Letter of Understanding for China Supply Chain; P. Ex. 20, Office of Field Operations Referral Audit Report.

Regarding the second factor, Mr. Kam testified that the SKU numbers of the products manufactured by the China producer sold to Meyer Hong Kong or Meyer Macau indicate that those products are ultimately destined for the United States. Kam T.T. Vol. III, 416:25–417:9. Further, when preparing the China Producer Assessment for 2010–2012, PwC confirmed that the transactions were clearly destined for the United States for that period of time. Pinkerton T.T. Vol. IV, 599:11–601:2; P. Ex. 125, 2016 China Producer Assessment covering 2010–2012. To confirm that the goods purchased by Meyer Hong Kong from the China producer were clearly destined for the United States at the time they were sold to Meyer Hong Kong by the China producer, PwC examined purchase orders from Meyer to Meyer Hong Kong and Meyer Hong Kong to the China producer, commercial invoices, and bills of lading. P. Ex. 125, 2016 China Producer Assessment covering 2010–2012.

## 2

Here, the court defers to its rationale on the first two *Nissho Iwai* factors with respect to the Thai supply chain, as well as CBP’s earlier consideration thereof, in finding those satisfied on this point.

## 3

Regarding the third *Nissho Iwai* “arm’s length” factor applied to sales from the China producer, plaintiff’s restatement is muddled, but it calls attention to the following in support of the “normal pricing practices” test:

185. MZQ is the manufacturer in the China Supply Chain. (P. Ex. 152a, Relevant Meyer Entities Demonstrative).

186. MZQ primarily manufactures aluminum and stainless steel cookware and is organized by two main assembly lines. (Kam T.T. Vol. III, 413:25–414:5; 429:14–19).

187. The two departments are universally kept separate with respect to pricing, employment and management. In some instances the departments may share employees if there is a need. The costing department will account for associated labor costs from one department to the other. (Kam T.T. Vol. III, 430:2–431:7).

188. The MZQ stainless steel department uses material imported from China (Tisco), Japan (Hanwa) and Taiwan. The majority of steel is imported from Japan. (Kam T.T. Vol. III, 439:2–23).

189. MZQ generally sells its cookware products to MHK, MMC, Meyer Europe SRL (Ltd.) (“MES”) and Meyer China Limited (“MCN”). MCN is the Meyer sales department in China. (Kam T.T. Vol. III, 415:10–16).

190. Kan Ming Kam (“Kam”) has been the production manager for the stainless steel department at MZQ since 1999. He holds one of the top five to seven management positions at MZQ and reports to the general manager. (Kam T.T. Vol. III, 412:12–19; 413:17–21; 458:18–459:2).

191. As production manager at MZQ, Kam is responsible for the planning and production process. This includes tracking the purchase orders, solving any difficulties or issues with production such as technical, quality or costing issues. Kam also controls production costs for new products and provides preliminary costing estimates and quotes. (Kam T.T. Vol. III, 412:24–413:11).

192. MZQ does not directly negotiate pricing with MUS. (Kam T.T. Vol. III, 417:10–13).

193. MZQ does not consult with MIH before it can present a new product price to its customers. (Kam T.T. Vol. III, 417:20–23).

194. MZQ does not receive any assistance from MIH in the pricing of new products. (Kam T.T. Vol. III, 417:24–418:3).

195. MZQ often hosts site visits with either MHK clients or MHK business personnel who want to better understand the production process. (Kam T.T. Vol. III, 418:7–12).

196. MZQ also provides site tours for MMC clients and business associates. This also includes MMC project teams regarding issues as to production of materials. (Kam T.T. Vol. III, 418:18–419:12).

197. Kam oversees the production in the stainless steel department which also includes clad metal. (Kam T.T. Vol. III, 429:10–13).

198. MZQ retains purchase orders evidencing the merchandise purchase, including the lids, knobs, handles. (Kam T.T. Vol. III, 442:17–23).

199. MZQ creates WIP shells as part of the manufacturing process of its pots and pans and, at times, sells the WIP shells to either MIL, MMC, MZQ or MES, a Meyer Group producer in Italy. (Kam T.T. Vol. III, 414:14–415:13; P. Ex. 131f).

200. MZQ costing department sets the price for the sale of the WIP shells. (Kam T.T. Vol. III, 426:8–24).

201. MZQ maintains the purchase orders when the WIP shells are sold to distributors such as MIL, MES, MHK, and MCN. (Kam T.T. Vol. III, 426:25–427:14).

202. In the event MMC determines that an order is better filled through the China supply chain, it directs MUS to issue the order to MHK instead of MMC. However, MHK does not engage MUS with any pricing negotiations or agreements. All of the pricing and finalizing of the order is through MMC. (Lau T.T. Vol. III, 390:9–22).

203. MHK is not obligated to accept an assigned order through MMC. At times an order will be rejected if MHK does not have manufacturing capacity. (Lau T.T. Vol. III, 395:3–12).

204. When determining new product pricing, MZQ considers various factors such as level of difficulty in production, whether the design of the production process is reasonable, the amount of scrap incurred for the material and whether it is feasible to make the product based on the material chosen. (Kam T.T. Vol. III, 419:13–23).

205. As part of the pricing of new products for MZQ, Kam provides information to the custom department such as dimensions of the materials, type of materials, number of steps involved in the production process, and estimate for budget on the scrap materials. Scrap materials include materials that were not manufactured properly so they could not be recycled or reused. (Kam T.T. Vol. III, 415:25–416:13; 434:10–14).

206. For example, a pot with clad metal could have an external layer of stainless steel that may crack from production, which could not be salvaged. (Kam T.T. Vol. III, 435:2–12).

207. Certain steps in the process may range in difficulty, and this may affect the cost and sale of the product. The cost of production will increase based on the difficulty in the manufacturing steps. (Kam T.T. Vol. III, 416:14–24).

208. In addition, MZQ also considers the cost of labor and of overhead (including depreciation of the machinery, cost for water and electricity). These costs are tracked by the MZQ costing department. (Kam T.T. Vol. III, 419:24–420:11; 437:18–24).

209. Every week the MZQ IT department automatically compiles this information with respect to performance and manpower. Essentially the manpower is tracked each week by the amount of products produced each week. (Kam T.T. Vol. III, 436:17–438:2).

210. As to water and electric expenses, MZQ keeps a copy of the bills and proof of payment. (Kam T.T. Vol. III, 438:6–21).

211. MZQ also considers profit in determining new product pricing. It retains a general profit margin goal and its corporate policy requires that the MZQ products be sold at around a three to five percent profit. The most important factors in keeping the profit range is the amount of scrap and whether the manufacturing stages are easy or difficult. (Kam T.T. Vol. III, 420:12–421:5).

212. The costing department and accounting department maintain documents evidencing MZQ's profit. (Kam T.T. Vol. III, 447:23–10).

213. The corporate policy of maintaining a profit from three to five percent was initiated by the MZQ general manager and communicated to all managers. (Kam T.T. Vol. III, 448:17–24).

214. For products ultimately purchased by MUS from MZQ, MUS coordinated and negotiated pricing with Lau. (Johnston T.T. Vol. I, 109:15–24).

215. In 2016, PwC conducted an additional Benchmarking Study for the China supply chain for the periods of 2010, 2011, and 2012, which takes into account the merchandise before this Honorable Court. (Pinkerton T.T. Vol. IV, 583:5–15; P. Ex. 119, 2010–2012 Benchmarking Study).

216. The 2016 Benchmarking Study was prepared in the same manner and using the same methodology as the Benchmarking Study used for the 2008 audit. (Pinkerton T.T. Vol. IV, 583:16–584:9; 598:14–599:2).

217. The interquartile range of profit between 2010 and 2012 for comparable Chinese companies was between  $-8\%$  and  $4.6\%$ . MZQ's average operating profit margin during this time was

2.09%, which is within the interquartile range. (Pinkerton T.T. Vol. IV, 597:16- 598:6; P. Ex. 119, 2010–2012 Benchmarking Study).

218. The interquartile range of profit between 2010 and 2012 for comparable Chinese companies was between 1.8% and 5.6%. MZQ’s average full cost markup during this time was 2.05%, which is within the interquartile range. (Pinkerton T.T. Vol. IV, 597:16–598:6; P. Ex. 119, 2010–2012 Benchmarking Study).

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220. PwC’s findings regarding “normal pricing practices” was bolstered by evidence presented by MUS at trial in which business practices and price negotiations in the China supply chain were described in detail by Kam (See Findings of Fact ¶¶ 184–212 above).

221. PwC conducted a study dated May 13, 2016 which was designed to assess the transaction value for purposes of first sale treatment for MZQ. PwC did an analysis under the three-part test set forth in *Nissho Iwai*. (Pinkerton T.T. Vol. IV, 603:14–604:24; P. Ex. 125, 2016 MZQ Assessment covering 2010–2012).

222. PwC analyzed inter-company transactions on a product-by-product basis to verify recovery of all costs plus an appropriate profit equivalent to the firm’s overall profit during the 2010–2012 calendar years as required by 19 C.F.R. § 152.103(1)(1)(iii). (P. Ex. 125, 2016 MZQ Assessment covering 2010–2012). PwC provided the following analysis of two sample transactions per year to confirm that the product price between MZQ and MHK was sufficient to cover all productions costs plus a profit for 2010–2012:

Year	Part Number	Average First Sale Price	Average Total Cost	Profit Margin
2010	71246-C	\$28.51	\$20.90	26.7%
2010	71892-C	\$ 5.91	\$ 4.18	29.3%
2011	71892-C	\$ 6.44	\$ 4.57	29.0%
2011	82365-C	\$12.52	\$ 9.01	28.0%
2012	71892-C	\$ 6.51	\$ 4.83	25.8%
2012	82796-C	\$15.56	\$ 9.71	37.6%

(P. Ex. 125, 2016 China Producer Assessment covering 2010–2012).

223. As MIH is an investment holding company that does not have operations, is not a party to any of the transactions between MHK and MZQ and does not engage in the sale of merchandise of the same class or kind as MZQ, MZQ is the appropriate “firm” to analyze under the “all costs plus profit test.” (P. Ex. 125, 2016 MZQ Assessment covering 2010–2012).

Pl’s PFF&CL, pp. 34–39.

4

With regard to the last requirement of *Nissho Iwai* that prices not bear any nonmarket distortions, the plaintiff contends that no variables of China’s nonmarket economy affected the transaction value of the items before the court. Its position is as follows.

219. In PwC’s analysis of MUS’s China supply chain it did not find any evidence of government assistance or subsidies. (Pinkerton T.T. Vol. IV, 601:6–16; P. Ex. 117, 2008 MIL Assessment; P. Ex. 125, 2016 MZQ Assessment covering 2010–2012).

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225. As part of MZQ’s management team, Kam participates in group meetings with the general manager and the other department managers about various issues. During these meetings, Kam was never informed of any assists by the Chinese government. (Kam T.T. Vol. III, 462:21–23).

226. Additionally, MZQ has never received a reduction or exemption from taxes, either direct or indirect from China, nor has the Chinese government ever provided services or goods to MZQ at no cost. (Kam T.T. Vol. III, 422:17–423:2).

227. MZQ has not received a deduction or redemption from the Chinese local provincial or national government and has not been paid any money to increase its export plan capacity. (Kam T.T. Vol. III, 423:3–11).

228. MZQ owns its own land, and its power and water companies are privately operated. (Kam T.T. Vol. III, 424:14–21).

229. MZQ has not been given any concession to export goods that MZQ would not have received had the goods been sold locally. (Kam T.T. Vol. III, 423:12–16).

230. MZQ has not been directed to hire a particular employee, or put particular persons in management positions at MZQ, by the Chinese government or Communist Party. (Kam T.T. Vol. III, 423:17–424:6).

231. MZQ has not been required to meet any quota on its production by the local or national Chinese government and is not mandated to use a specific company as its raw material suppliers. (Kam T.T. Vol. III, 424:7–425:2).

232. MZQ does not receive any contributions from either the Communist Party or the local or national government of China to defray labor costs. (Kam T.T. Vol. III, 425:3–6).

233. If the United States Government made a finding that either aluminum cookware or stainless steel cookware was either being dumped into the United States or was being subsidized in violation of United States' countervailing duty laws there would be a designation of a case number on the entry documents, specifically the Customs Form 7501. There was no evidence in any of the entry packets before the court that aluminum cookware or stainless steel from Thailand or China was subject to an anti-dumping or countervailing duties order. (Pinkerton T.T. Vol. V, 817:16–822:5; P. Exs. 157–196; 377–378, Entry Packets).

234. If there were, in fact, an anti-dumping or countervailing duty order in place, but it was overlooked in the preparation of an entry, the entry would still be flagged or rejected by the Customs Automated Broker Interface (ABI) system. The broker uses a software system known as the ABI system that automatically generates a reading to the broker that the broker must declare the anti-dumping or countervailing duty with Customs. (Pinkerton T.T. Vol. V, 819:4–22).

Pl's PFF&CL, ¶¶ 219, 225–234.

### III

The plaintiff contends that the evidence shows clad products manufactured by the Thai producer in Thailand from discs imported from China undergo a double substantial transformation in Thailand and are properly considered Thai-originating content for purposes of GSP calculation, and that CBP incorrectly denied its GSP claims.

### A

Plaintiff's witnesses testified as follows:

241. A typical GSP calculation prepared by a corporation would consist of sections for raw materials, expenses, labor, and overhead, and also includes the selling price to calculate whether the product met the 35% foreign-content threshold requirement for GSP treatment. Meyer's GSP Calculations of the products before the Court were prepared in a manner consistent with calculations Pinkerton has seen in other companies and accepted by Customs. (Pinkerton T.T. Vol. IV, 632:5–12; 632:25–633:8).

...

243. PwC performed due diligence to ensure that MUS's costing sheets were accurate. It requested and reviewed manufacturer affidavits, invoices for materials, and proofs of payment to ensure accuracy. (Pinkerton T.T. Vol. IV, 495:7–496:20).

244. MIL is the largest producer of pots and pans in Thailand in terms of production volume. (Kwok T.T. Vol. I, 181:4–11).

245. Kwok was responsible for preparing the GSP calculations to determine whether products would be eligible for GSP treatment. Kwok prepares the GSP calculations at the request of a customer. (Kwok T.T. Vol. I, 181:15–183:25; P. Exs. 154–156, GSP Calculations).

246. GSP calculations are performed at the time the goods are being manufactured. (Kwok T.T. Vol. II, 304:24–305:2; P. Exs. 154–156, GSP Calculations).

247. The costs associated with manufacturing a product would not be any different if the product was ultimately shipped to the United States as opposed to being shipped to another country. (Kwok T.T. Vol. II, 311:23–312:9).

248. The GSP calculations contain eleven sections. The first section states the name of the manufacturer and the second section describes the product by SKU number. (P. Exs. 154–156, GSP Calculations).

249. The third section of the GSP calculations lists the raw materials not originating in Thailand. This includes information about the types of non-Thai originating materials used, the quantity of the non-Thai material used, and the price of non-Thai material. For SKU 71935-T, the non-Thai originating materials cost was \$4.279 which was 29.4% of the first sale price. (Kwok T.T. Vol. I, 184:24–185:14; P. Ex. 155, GSP Calculations).



250. Lids manufactured in China are included in the non-Thai originating materials section of a GSP calculation. (Kwok T.T. Vol. I, 185:15–25; P. Ex. 155, GSP Calculations).

251. The fourth section of the GSP calculations lists the raw materials originating in Thailand. This information is calculated based on bills of materials and suppliers invoices. For SKU 71935-T, the Thai originating material cost \$5.406 which was 37.1% of the first sale price. (Kwok T.T. Vol. I, 186:7–19; P. Ex. 155, GSP Calculations).

252. The fifth section of the GSP calculations is for direct expenses. This information is calculated by taking the factory's expenses for electricity, gas, and water and dividing it by the total number of items produced to get the average price per pan. For SKU 71935-T the price was \$0.6261, which was 4.3% of the first sale price. (Kwok T.T. Vol. I, 186:20–187:12; P. Ex. 155, GSP Calculations).

253. The sixth section of the GSP calculations is for labor costs. This information is calculated by taking the total cost of labor for an entire year divided by the number of items produced for that year to get the average cost of labor per item. For SKU 71935-T, the price was \$0.7717, which was 5.3% of the first sale price. (Kwok T.T. Vol. I, 187:13–20; P. Ex. 155, GSP Calculations).

254. The seventh section of the GSP calculation is manufacturing overhead. The costs associated with manufacturing overhead include the salaries of indirect production staff, depreciation, repair costs, loading tubes costs, local transportation costs. The manufacturing overhead price for SKU 71935-T was \$1.6307 which was 11.2% of the first sale price. (Kwok T.T. Vol. I, 187:21–188:13; P. Ex. 155, GSP Calculations).

255. The eighth section of the GSP calculation is the sale price. The sale price is the first sale price which is the price MMC pays to MIL for a product. The sale price for SKU 71935-T is \$14.56. (Kwok T.T. Vol. I, 188:14–189:7; P. Exs. 155, GSP Calculations and . . . Ex. 190, Entry Packet).

256. The ninth section of the GSP calculation is the qualified local content. This is calculated by adding the local materials cost, the direct expenses, direct labor costs, and manufacturing overhead. The qualified local content for SKU 71935-T was

\$8.434 which was 57.9% of the first sale price. (Kwok T.T. Vol. I, 189:8–190:4; P. Ex. 155, GSP Calculations).

257. The qualified local content for SKU 71935-T was above the 35% threshold required to be GSP eligible. (Kwok T.T. Vol. I, 190:5–7; P. Ex. 155, GSP Calculations).

258. The qualified local content for SKU 30575-T was 37.7% of the first sale price. Therefore, the qualified local content was above the 35% threshold required to be GSP eligible. (Kwok T.T. Vol. I, 191:13–193:14; P. Ex. 375, Product Catalogue SKU No. 30375-T and P. Ex. 379, Calculations SKU No. 30375-T).

Pl’s PFF&CL, pp. 43–46.

## B

Regarding the issue of double substantial transformation, the plaintiff contends it proved the following:

235. MIL has one factory, which is located in Laem Chabang, Thailand. There are four division departments within the factory: (i) aluminum; (ii) hard anodized; (iii) advanced automated production; and (iv) stainless steel. (Kwok T.T. Vol. I, 158:18–159:10).

236. The MIL factory employs 2,000 to 3,000 people. (Kwok T.T. Vol. I, 159:11–13).

237. In 2018, MIL produced about 75,000 pots per day. At times, MIL has produced more than 100,000 pots a day for a given year. (Kwok T.T. Vol. II, 240:12–16; 240:23–241:8).

238. MIL engages in a complex multi-step manufacturing process in order to manufacture its goods. MIL utilizes complex machinery that requires specialized skill and training. (See *infra* Findings of Fact at ¶ 272). For example, SKU 30382-T requires fourteen steps and thirty-four employees in order to manufacture just one pan. . . .

\* \* \*

239. MIL manufactures certain clad products in Thailand that were disqualified from GSP treatment because the materials from which the products are developed originated as metal discs from China. Customs determined during the audit of MUS and the IAR that there was no “double substantial transformation” of those discs sufficient to make the metal become “Thai-originating” material for purposes of GSP calculations. (P. Ex.

20, Office of Field Operations Referral Audit Report; P. Ex. 81, Letter re: Statement of Fact contained in Internal Advice Response with attachments).

240. If clad metal input materials are not subject to a double substantial transformation, they are treated as non-qualifying materials for purposes of a GSP calculation. However, if the manufacturing processes constitute a double substantial transformation, then the cost of clad metal materials would be moved from the non-Thai originating bucket into the Thai originating bucket. Therefore, these products would meet or exceed the 35% requirement threshold and would be entitled to GSP treatment. This would apply to the following products currently before the court: SKU Nos. 30503-T, 30504-T, 30510-T, 30511-T, 30522-T, 30382-T. (Pinkerton T.T. Vol. IV, 493:11–21; P. Exs. 370–374; 376).

\* \* \*

259. When a product is substantially transformed at least twice (“double substantial transformation”) raw materials that did not originate from Thailand may be treated as local materials for the purposes of a GSP calculation. For example, the clad metal product used to manufacture SKU 30382-T is currently listed as non-Thai originating material in the GSP calculations. However, if it is determined the clad metal is doubly substantially transformed then the costs associated with the clad metal would be treated as Thai-originating material. (Kwok T.T. Vol. I, 193:25–194:10; 194:20–197:2; P. Ex. 376, Product Catalogue SKU No. 30382-T and P. Ex. 380, Calculations SKU No. 30382-T).

260. In its analysis, PwC determined that there was a double substantial transformation for the clad material that came in discs. PwC made this determination by analyzing the flowchart describing each stage of the production, reviewing and analyzing case law and customs rulings relating to double substantial transformation. (Pinkerton T.T. Vol. IV, 620:17–621:23).

261. SKU 30382-T is a Food Network, ten-piece clad cookware set. (Kwok T.T. Vol. II, 204:7–10; P. Ex. 376, Product Catalogue SKU No. 30382-T).

262. The GSP calculations prepared by Kwok for SKU 30382-T identified the clad metal in the non-Thai originating material. (Kwok T.T. Vol. II, 204:11–19; P. Ex. 380, GSP Calculations SKU No. 30382-T).

263. SKU 30382-T was manufactured by MIL in Thailand. (P. Ex. 133, Production video of manufacturing process SKU 30382-T).

264. There are fourteen steps required for manufacturing the clad frying pan that is part of the SKU 30382-T Food Network ten-piece set. (P. Ex. 369, SKU 30382-T Details of Process Flow & No. of Workers; P. Ex. 133(a)-(n), frying pan demonstrative of manufacturing steps).

265. The first step in manufacturing the frying pan is known as lubricating. During this step grease is put on the clad disc to prevent the disc from forming cracks, scratches or dents during the manufacturing process. One worker is used for this step. (Kwok T.T. Vol. II, 205:11–23; P. Ex. 133a; P. Ex. 369).

266. The disc used for manufacturing the frying pan is imported from China. (Kwok T.T. Vol. II, 206:16–18; P. Ex. 380, GSP Calculation SKU No. 30382-T).

267. The second step in manufacturing the frying pan is known as deep drawing. During this step the circular disc is transformed into a WIP shell. One worker is used for this step. (Kwok T.T. Vol. II, 206:21–207:11; P. Ex. 133b; P. Ex. 369).

268. The Government concedes that after the deep drawing stage a substantial transformation has occurred. (Kwok T.T. Vol. II, 207:16–24; Government Opening Statement/Judicial Admission Vol. I, 66:22–67:5).

269. The third step in manufacturing the frying pan is known as edge cutting. The purpose of this step is to make the height of the pot even so that a lid can be placed on the pan. One worker is used for this step. (Kwok T.T. Vol. II, 208:7–21; P. Ex. 133c; P. Ex. 369).

270. The fourth step in manufacturing the frying pan is known as degreasing. The purpose of this step is to remove the grease and clean the WIP shell. One worker is used for this step. (Kwok T.T. Vol. II, 209:9–18; P. Ex. 133d; P. Ex. 369).

271. The fifth step in manufacturing the frying pan is known as bottom flattening. The purpose of this step is to flatten the

bottom to facilitate the production of the pan in the subsequent steps. One worker is used for this step. (Kwok T.T. Vol. II, 210:13–211:5; P. Ex. 133e; P. Ex. 369).

272. The sixth step in manufacturing the frying pan is known as rim sunray. The purpose of this step is to remove burr (sharp edges) from the WIP shell. One worker, who requires special training, is used for this step. (Kwok T.T. Vol. II, 211:8–212:15; P. Ex. 133f; P. Ex. 369).

273. After the sixth step, known as the rim sunray, the WIP shell is able to be commercially sold by MIL to other producers of cookware as a WIP shell – an item of commerce different than the finished pot or pan. In fact, other companies that manufacture pots and pans have bought the WIP shells following step six. (Kwok T.T. Vol. II, 212:19–213:9; 231:4–6; Pinkerton T.T. Vol. IV, 621:24–622:25; P. Ex. 133, Production video of manufacturing process for SKU 30382-T; P. Ex. 369; P. Ex. 376).

274. MIL can sell its product for a higher price when the product is completed than after it goes through the deep drawing stage. In other words, each product increases in value as it goes through each manufacturing stage. (Kwok T.T. Vol. II, 312:10–19; P. Exs. 133, 133b, and 133n)

275. The seventh step in manufacturing the frying pan is known as exterior bottom sunray. The purpose of this step is to remove the scratches and dents on the bottom of the WIP shell. One worker is used for this step. (Kwok T.T. Vol. II, 213:18–214:7; P. Ex. 133g; P. Ex. 369).

276. The eighth step in manufacturing the frying pan is known as interior embury “u”. The purpose of this step is to make the pan shiny, but also to help improve food release while cooking. Seven workers are used for this step. (Kwok T.T. Vol. II, 214:8–215:3; P. Ex. 133h; P. Ex. 369).

277. The ninth step in manufacturing the frying pan is known as exterior mirror polishing. The purpose of this step is to polish the pan for aesthetic purposes to entice more consumers to purchase the pan. Six workers are used for this step. (Kwok T.T. Vol. II, 215:6–25; P. Ex. 133i; P. Ex. 369).

278. The tenth step for manufacturing the frying pan is known as cleaning. The purpose of this step is to cleanse the stains from the wax. Six workers are used for this step. (Kwok T.T. Vol. II, 216:2–9; P. Ex. 133j; P. Ex. 369).

279. The eleventh step for manufacturing the frying pan is known as re- flattening. The purpose of flattening the pan for a second time is help make the cooking oil distribute evenly and to prevent the pan from spinning when placed on a flat surface. Two workers are used for this step. (Kwok T.T. Vol. II, 217:6–218:3; P. Ex. 133k; P. Ex. 369).

280. The twelfth step for manufacturing the frying pan is known as laser marking. The purpose of this step is to mark the volume and diameter of the pan with a laser machine. One worker is used for this step. (Kwok T.T. Vol. II, 218:6–19; (P. Ex. 133l; P. Ex. 369).

281. The thirteenth step for manufacturing the frying pan is known as handle hole punching. The purpose of this step is to prepare the pan for the addition of the handle. One worker is used for this step. (Kwok T.T. Vol. II, 218:22–219:12; (P. Ex. 133m; P. Ex. 369).

282. The fourteenth step for manufacturing the frying pan is known as handle riveting. The purpose of this step is to add the handle to the pan. The addition of the handle is necessary in order to safely use this item as cookware and increases the value of the pan. Four workers are used for this step. (Kwok T.T. Vol. II, 219:15–25 (P. Ex. 133n; P. Ex. 369).

283. After the fourteenth step the frying pan is a finished product. (Kwok T.T. Vol. II, 220:2–6).

284. In total thirty-four workers worked on this one finished product. (Kwok T.T. Vol. II, 221:8–11; P. Ex. 369).

285. The other clad pans that MIL manufactures go through a substantially similar manufacturing process at MIL. This would include the clad metal open skillet pan, clad saucier, clad chef’s pan, clad covered braiser, and clad butter warmer. (Kwok T.T. Vol. II, 221:12–16; 221:25–223:23; P. Exs. 371–375, Product Catalogues).

286. The Government failed to challenge that the clad products underwent double substantial transformation or offer any evidence that Meyer is not entitled to consider the imported clad metal discs to be “Thai-originating” material for purposes of its GSP calculations.

## C

Lastly, plaintiff's papers relate a lengthy narrative contesting CBP's audit findings, and recounting how, in its view, CBP made numerous errors in its consideration of Meyer's first sale and GSP claims (Pl's PFF&CL, pp. 51–64) — none of which influence consideration of this matter at this point, *de novo*, and need not, therefore, be related here. However, the plaintiff also contends CBP was wrong in denying GSP treatment to products imported by Meyer through the Thai supply chain by virtue of the inclusion of glass lids from China, noting that CBP headquarters, in its response to Meyer's internal advice request, denied GSP treatment to products imported by Meyer through Thailand that included glass lids from China even if the total percentage of Thai-originating product was above 35%. Pl's PFF&CL, p. 63, referencing Pl's Ex. 81 (Letter re: Statement of Fact contained in Internal Advice Response with attachments). The plaintiff also calls attention to the fact that this court determined by way of partial summary judgment that it was improper to disqualify an entire product or set just because it had glass lids imported from China if the product otherwise had 35% or more Thai-originating content. *Id.* at 63 (citation omitted).

## IV

### A

Regarding its renewed objection to consideration of plaintiff's exhibits 119, 125, 154, 155, 156, 379, and 380 and trial testimony based thereon on the ground that the plaintiff failed to comply with Rule 1006 of the Federal Rules of Evidence, the defendant points out:

1. Plaintiff's Exhibit 119 is a 3-year weighted average benchmarking study prepared by the transfer pricing team at PWC. Vol. 4 at 583:5–16.
2. In providing his expert opinion, Mr. Pinkerton considered Plaintiff's Exhibit 119. Vol. 5 at 718:14–18.
3. In connection with preparing Plaintiff's Exhibit 119, screening criteria is used to select comparable companies, financial statements and other financial reports are reviewed. Vol. 4 at 599:3–10.
4. In connection with the preparation of Plaintiff's Exhibit 119, the PWC transfer pricing team extracted data from certain databases and placed it into an Excel file. Vol. 5 at 715:11–20.

5. Mr. Pinkerton did not provide a copy of the Excel file, which was used to generate the benchmarking study, to the Government in response to the deposition and document subpoena. Vol. 5 at 715:21–715:2, 718:14–719:4.

6. Mr. Pinkerton did not provide to the Government any of the financial statements, screening criteria, or work files of PWC used in preparing Plaintiff's Exhibit 119. Vol. 5 at 772:7–773:14.

7. Meyer did not provide to the Government or the Court a list and copies of the documents used in preparing Plaintiff's Exhibit 119. See Pl. Exs. moved into evidence.

8. Plaintiff's Exhibit 125 is a study prepared by PWC on behalf of Meyer assessing transaction value under the first sale method for related parties for which Plaintiff's Exhibit 119 was a part. Vol. 4 at 603:14–23.

9. Plaintiff's Exhibit 125 is intended for Meyer's use and benefit and "is not intended for, nor may it be relied upon by, any other party." Pl. Ex. 125 at MUS044865.

10. Plaintiff's Exhibit 125 is dated May 13, 2016 and was prepared during the pendency of this litigation. Pl. Ex. 125 at MUS044863.

11. In preparing Plaintiff's Exhibit 125, PWC used financial data and sample transactions for the fiscal years 2010, 2011, and 2012. Pl. Ex. 125 at MUS044866.

12. In preparing Plaintiff's Exhibit 125, PWC's transfer pricing team:

- (i) prepared its benchmarking study (Plaintiff's Exhibit 119) relying on databases and applying data screens (Pl. Ex. 125 at MUS044882–885);
- (ii) reviewed underlying agreements, payment procedures and other documentation between the China Producer and Meyer Hong Kong (Pl. Ex. 125 at MUS044888);
- (iii) compared profit margins of Meyer Hong Kong and Meyer Trading Company based on financial information (Pl. Ex. 125 at MUS044889);
- (iv) analyzed two sample transactions by using detailed cost breakdown spreadsheets containing costed bills of materials



and allocated amounts for labor expense, and manufacturing overhead, and direct expense (Pl. Ex. 125 at MUS044890);

(v) reviewed purchase orders and commercial invoices through all steps of the two-tiered transaction (Pl. Ex. 125 at MUS044891–92); and

(vi) reviewed financial statements of the China Producer (Pl. Ex. 125 at MUS044892).

13. In Plaintiff's Exhibit 125, PWC states: "After agreeing on all contractual terms such as product specifications, prices and quantities with the distribution arms, Meyer Hong Kong will place a manufacturing order to the China Producer." Pl. Ex. 125 at MUS044867.

\* \* \*

18. Meyer did not provide to the Government or the Court a list and copies of the documents and information underlying Plaintiff's Exhibit 125. See Pl.'s Exs. moved into evidence.

19. Plaintiff's Exhibits 154 (sku 76744-T), 155 (sku 50003-T), 156 (sku 74930-T), 379 (sku 30575-T), and 380 (sku 30382-T) are calculations prepared by Mr. Kwok, of the Thai Producer, to satisfy the third requirement for GSP eligibility under 19 U.S.C. § 2463(a)(2)(A) (i.e., "the sum of (a) the cost or value of the material produced in the BDC plus (b) the direct costs of processing operations performed in the BDC must not be less than 35% of the appraised value of such article at the time of its entry into the customs territory of the United States"). Vol. 1 at 181:15–182:22, 191:23–192:17, 194:11–195:21.

20. Mr. Kwok only prepares GSP calculations if the customer requests them. Vol. 1 at 183:4–11.

21. The GSP calculations are based on bills of materials, suppliers' invoices, expenses for gas, electricity, water, labor costs, and overhead (salaries of indirect production staff, depreciation, costs for repairs, loading tubes, local transportation, and percentage of raw materials) and the selling price noted on the calculation is the first sale price reflected on the invoice from the Thai Producer to Meyer Macau. Vol. 1 at 185–189.

22. Meyer did not provide to the Government or the court a list and copies of the documents backing up the GSP calculations

reflected in Plaintiff's Exhibits 154, 155, 156, 379, and 380. See Pl.'s Exs. moved into evidence.

Def. PFF&CL, pp. 9–11.

As previously alluded to, the defendant proposes the following conclusions: Plaintiff's Exhibits 119 (3-year weighted average benchmarking study), 125 (2016 Assessment of Transaction Value between the China Producer and Meyer Hong Kong), 154 (GSP calculation for sku 76744-T), 155 (GSP calculation for sku 50003-T), 156 (GSP calculation for sku 74930-T), 379 (GSP calculation for sku 30575-T), and 380 (GSP calculation for sku 30382-T) constitute summary documents and are subject to FRE 1006. As such, Meyer was required to (i) establish that the volume of the underlying documents could not be conveniently examined by the court; (ii) provide the Government with a list or description of the underlying documents; and (iii) make the underlying documents available to the Government. *Id.* at 11.

"The purpose of the availability requirement is to give the opposing party an opportunity to verify the reliability and accuracy of the summary prior to trial." *Amarel, supra*, 102 F.3d at 1516. Plaintiff's Exhibit 125 claims that Meyer Hong Kong set the prices with the China producer when the evidence adduced at trial established otherwise. The facts in the paragraphs above illustrate why compliance with FRE 1006 is required. Meyer did not satisfy any of the prerequisites of FRE 1006. Therefore, Plaintiff's Exhibits 119, 125, 154, 155, 156, 379 and 380 must be excluded as inadmissible. *Id.*, Def. PFF&CL, pp. 11–12 (citation omitted). Similarly, testimony reciting information from these inadmissible documents should be disregarded. See *Thompson v. United States*, 342 F.2d 137,140 (5th Cir. 1965) (counsel should not be permitted to elicit testimony under the guise of refreshing recollection through use of a prepared document to obviate the necessity of introducing original records). Accepting testimony based on inadmissible summaries would undermine the very reason for FRE 1006 and should be rejected. *Id.* at 12.

## B

The defendant also argues that testimony based on documents that were not produced in discovery should be disregarded, and that the testimony of a biased witness should be accorded the appropriate weight. It points out that the rules of the court require a party to supplement disclosures and responses. USCIT Rule 26(e). Specifically, with respect to "an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during

the expert's deposition." See CIT Rule 37(c)(1); see also *Ortiz-Lopez v. Sociedad Espanola de Auxilio Mutuo Y Beneficiencia de Puerto Rico*, 248 F.3d 29, 34 (1st Cir. 2001).

During trial, the plaintiff elicited testimony from Mr. Pinkerton, as both a fact witness and an expert witness, that was based, in part, on documents he relied upon in forming his expert opinion and issuing his expert report, such as:

- the PWC benchmarking analysis (Pl. Ex. 119);
- the PWC Assessment of Transaction Value (Pl. Ex. 125) prepared in connection with this litigation;
- the PWC Assessment of Transaction Value (Pl. Ex. 117) for transactions between the Thai Producer and Meyer Macau;
- the documentation representing the document flow between the three entities in the two-tiered transactions; and
- samples, costs sheets, videos, and interim steps that the Chinese steel blank undergoes in Thailand.

However, the defendant continues, not all of the underlying documents upon which Mr. Pinkerton relied in offering his expert opinion were produced to the government during discovery, notwithstanding that such documents were the subject of a subpoena to Mr. Pinkerton. Therefore, the defendant argues for findings of fact as follows:

1. At the time of his deposition, Mr. Pinkerton, as an expert, was required to provide the Government with all the documents he considered in forming his expert opinion. Vol. 4 at 489:11–16.
2. In connection with the deposition of Mr. Pinkerton as an expert, the government served a subpoena with an attached Schedule A, which sought certain documents. Vol. 5 at 716:3–13, 25.
3. Among the documents sought of Mr. Pinkerton were documents referenced in his expert report, documents considered in forming the opinions in his expert report, documents relied upon in forming the opinions in his report, databases or other information repositories from which he obtained information for his report. Vol. 5 at 717:17–718:13.
4. The benchmarking study that is Plaintiff's Exhibit 119 is one of the documents Mr. Pinkerton relied upon in forming his expert opinions. Vol. 5 at 718:14–18.
5. Plaintiff's Exhibit 119 was developed in or about 2016, during the pendency of this litigation. Vol. 4 at 583:5–16.

6. In connection with the preparation of the benchmarking study that is Plaintiff's Exhibit 119, the PWC transfer pricing team extracted data from certain databases and placed it into an Excel file. Vol. 5 at 715:11–20.

7. In connection with preparing Plaintiff's Exhibit 119, the PWC transfer pricing team used screening criteria and reviewed financial statements to select comparable companies. Vol. 5 at 737:25–740:6.

8. In obtaining comparables for the China Producer for the benchmarking study, Mr. Pinkerton relied on information provided by the China Producer to exclude certain manufacturers. Vol. 4 at 595:12–597:4.

9. Mr. Pinkerton did not provide a copy of the Excel file prepared by the PWC transfer pricing team, which was used to generate the benchmarking report, to the Government in response to the deposition and document subpoena. Vol. 5 at 715:21–715:2, 718:14–719:4.

10. Mr. Pinkerton did not search any of the databases used by the PWC transfer pricing team to gather information for the benchmarking study to determine whether they contained data from any of the Meyer entities involved in the transactions at issue. Vol. 5 at 719:12–18.

11. Mr. Pinkerton testified that in many cases when PWC does a court presentation part of the documentation binder is the financials of the entity, so they can actually do the comps themselves to verify that PWC's calculations match what the financials state. Vol. 5 at 726:14–727:11.

12. Mr. Pinkerton's expert opinion on first sale considered the information in the port binder. Vol. 5 at 727:24–728:9.

13. Mr. Pinkerton did not provide the documents in the port binder, and testified that there's thousands of documents, such as general ledgers, charts of accounts, debit/credit memos that he might have considered in forming his expert opinion that were not produced in response to the Government's subpoena. Vol. 5 at 728:10–729:9.

14. In connection with providing an opinion concerning the double substantial transformation issue, Mr. Pinkerton viewed

physical samples but could not confirm that the samples submitted by Meyer at trial were the samples he viewed. Vol. 4 at 488:4–9.

15. Mr. Pinkerton did not provide the samples to the Government in connection with his expert report. Vol. 4 at 488:18–20.

16. Mr. Pinkerton was unable to recall which samples he looked at that were included in his expert report. Vol. 4 at 489:2–7.

17. Mr. Pinkerton has been representing Meyer since approximately 2006 when he was engaged to assist Meyer in conducting a review as to whether Meyer could use first sale appraisalment on its transactions from the Thai Producer through Meyer Macau and unrelated China vendors through Meyer Trading Company. Vol. 4 at 501:11–15.

18. Mr. Pinkerton was retained to serve as an expert for Meyer during this litigation.

Def. PFF&CL, pp. 13–14.

The defendant proposes the following conclusions of law: Mr. Pinkerton’s dual role as an advisor to Meyer and as an expert witness renders him a biased witness at trial and his testimony should only be afforded an appropriate amount of weight, if any at all. Mr. Pinkerton’s failure to provide subpoenaed documents to the government, and Meyer’s failure to place such documents before the court at trial, should render inadmissible the information recalled about them by Mr. Pinkerton. However, if the court determines to consider such information, it should be afforded an appropriate amount of weight, if any at all. *Id.* at 15.

## C

The defendant also contends the plaintiff failed to establish that certain pots and pans made in Thailand from Chinese steel blanks are entitled to duty-free treatment under the GSP.

In order to be GSP-eligible, an imported article must satisfy the following conditions:

- (1) the article must be the “growth, product or manufacture” of a beneficiary developing country (BDC);
- (2) the article must be imported directly from a BDC into the customs territory of the United States; and
- (3) the sum of (a) the cost or value of the material produced in the BDC plus (b) the direct costs of processing operations per-

formed in the BDC must not be less than 35% of the appraised value of such article at the time of its entry into the customs territory of the United States.

19 U.S.C. § 2463(a)(2)(A). See *Dal-Tile Corp. v. United States*, 28 CIT 358, 393 (2004). In order to change a non-BDC raw material into an article produced in a BDC, the raw material must undergo a double or dual substantial transformation. *E.g.*, *Torrington Co. v. United States*, 764 F.2d 1563, 1567 (Fed.Cir. 1985).

The defendant contends the facts of this case as applied to such requirements are clear:

1. At trial, Meyer provided the Court with Plaintiff's Exhibits 133A-N depicting the steel blank (Pl. Ex. 133A) and the steps it undergoes until it becomes a finished pan (Pl. Ex. 133N).
2. Meyer presented testimony from Mr. Kwok, a manager for the Thai Producer. Mr. Kwok explained that the blank is lubricated with oil then deep drawn into a shell. Vol. 2 at 205:11–20, 206:5–12, 206:22–207:7.
3. After the deep drawing, the shell undergoes edge cutting, which makes the height of the pot “even,” degreasing to “cleanse” the pot, bottom flattening to facilitate the next steps, and several rounds of polishing with sand paper. Vol. 2 at 208:7–210:6, 210:16–211:23.
4. At step six, Mr. Kwok testified that the shell can be sold to sister companies that are engaged in the production of pots and pans. Vol. 2 at 212:19–213:9.
5. Specifically, Mr. Kwok testified that “Right now we do that. We sell it to a company called Meyer Italy,” but he could not remember selling a stage six clad article to any company other than a Meyer-related entity. Vol. 2 at 231:4–20.
6. Mr. Kwok estimated these sales to be less than one percent of the Thai Producer's business. Vol. 2 at 231:25–232:8
7. Mr. Kwok testified that step seven removes scratches and dents from the bottom of the shell, step eight consists of interior polishing to “make the pot shiny,” step nine is exterior polishing to make the pot “shinier and prettier,” step ten is quality control and wrapping in plastic to prevent scratches in transport to the next processing step, step eleven is a second flattening of the bottom of the shell, step twelve is to mark the pan with its volume and diameter, step thirteen punches a hold in the shell

to allow for the attachment of a handle, and step fourteen is the insertion of the handle. Vol. 2 at 213:18–219:18.

8. The manufacturing process described as steps one through fourteen is similar for the other clad pots and pans made by the Thai Producer from the Chinese steel blanks, although an additional step to add a spout to a pot may occur. Vol. 2 at 221:12–223:23.

9. Mr. Kwok also testified that approximately 70 to 80 percent of the Thai Producer's cookware was exported to the United States and, of that cookware, approximately 80 percent is aluminum cookware that is not eligible for GSP. Vol. 2 at 302:8–303:11; *see also* subheading 7615.19.30, HTSUS.

10. Meyer received GSP benefits for some [o]f its merchandise from the Thai Producer. See Pl. Ex. 81, Attachment HQ H088815 at 11 (CBP determined that pots and pans produced in Thailand from foreign steel coil undergo a double-substantial transformation).

11. The summaries referenced by Mr. Kwok during his testimony and objected to by the Government (see section [VI A,] above), did not segregate its costs, number of workers, etc. to indicate which portion relates to merchandise eligible for GSP but for which GSP treatment was not granted. *See* Pl. Exs. 154, 155, 156, 379, and 380.

Def. PFF&CL, pp. 16–17.

In light of the forgoing, the defendant contends only one transformation of the PRC steel blank occurs: when a flat blank is deep drawn into a shell that is an unfinished pot or pan. As described above and witnessed by the court, none of the steps after the deep drawing step constitute a second substantial transformation because none produces a separate article of commerce with a distinctive name, character, or use. *See Torrington*, 764 F.2d at 1567. Specifically, there is no change in name in that step 2 begins with an unfinished *pot or pan* and step 14 ends with a finished *pot or pan* (defendant's emphasis). There is no change in character in that there is no annealing or galvanizing performed or any change in chemical composition or mechanical properties from step 2 to step 14 that may effect a change in character. *See Ferrostaal Metals Corp. v. United States*, 11 CIT 470 (1987). Nor was there any significant change in shape or form - the drawing process gives the article its final form, not the subsequent finishing operations. *See National Hand Tool Corp. v. United States*,

16 CIT 308 (1992), *aff'd per curiam*, 989 F. 2d 1201 (Fed.Cir. 1993). There is no change in use in that the use of the articles from step 2 to step 14 is predetermined; they will be finished and used as a specific pot or pan. *See id.*, 16 CIT at 311–12.

Further, the plaintiff has not established that the product at step six is an intermediate, distinct article of commerce, or that it is “readily susceptible to trade, and an item that persons might well wish to buy and acquire for their own purposes of consumption or production.” *Torrington*, 764 F.2d at 1570. The record here shows that a *de minimis* level of sales of products at step six were made solely to a related party for the same purpose: the production of a pot or pan. Vol. II at 212:19–213:19, 231:4–20, 231:25–232:8; Vol. III at 414:3–415:6. Ergo, the plaintiff has failed to establish that there is a commercially viable market for step six products. *See Azteca Milling Co. v. United States*, 12 CIT 1153, 703 F.Supp.949 (1998), *aff'd*, 890 F.2d 1150 (Fed.Cir. 1989). Accordingly, the plaintiff has failed to establish, as it must, that a double-substantial transformation has occurred.

Thus, the steel blanks may not count towards the 35 percent value added requirement for GSP, and the pots and pans produced by the Thai producer that are derived from the PRC steel blanks are ineligible for GSP treatment.

Additionally, given that the bulk of the Thai producer’s cookware exported to the United States is made of aluminum and not eligible for GSP treatment, the number of employees and costs associated with the Thai factory must be segregated to understand any GSP calculations. Def. PFF&CL, pp. 17–18.

## D

Additionally, the defendant argues that the plaintiff has failed to establish that its merchandise should be valued at the price between the manufacturer and the middleman. The applicable law is that imported merchandise must be appraised so that the final amount of duty can be fixed, and by law, Customs is required to appraise imported merchandise in the manner set forth in 19 U.S.C. §1401a. *VWP of Am., Inc. v. United States*, 175 F.3d 1327, 1330 (Fed.Cir. 1999). In a civil action commenced in the Court of International Trade to challenge a CBP appraisal, the agency decision is “presumed to be correct” and the “burden of proving otherwise shall rest upon the party challenging such decision.” *VWP* at 1342.

The primary method of valuation is the “transaction value” of the merchandise provided for under 19 U.S.C. § 1401a(b). Section 1401a(b) provides that the transaction value of imported merchan-



dise “is the price actually paid or payable for the merchandise when sold for exportation to the United States,” plus specified additions.

In a multi-tiered transaction, like that at issue in this case, when an importer seeks to use the transaction price paid between a manufacturer/producer and a middleman as the value for appraisement, it must prove through credible and admissible evidence that: (i) a bona fide sale occurred; (ii) the sale was for export to the United States; (iii) the transaction was at arm’s length; and (iv) all other criteria for the transaction value were met. *See* 19 U.S.C. § 1401a(b)(1).

Under the *de novo* standard of review applicable here, Meyer must establish every element of its claim. Meyer must prove that “[t]he manufacturer’s price constitutes a viable transaction value when the goods are clearly destined for export to the United States and when the manufacturer and middleman deal with each other at arm’s length, in the absence of any non-market influences that affect the legitimacy of the sale price.” *Nissho Iwai*, 982 F. 2d at 509. This standard assumes that the use of transaction value is not otherwise precluded by valuation law. For example, that there are no restrictions on the disposition or use of the merchandise; there are no conditions or considerations for which a value cannot be determined; or there is insufficient information concerning an enumerated statutory addition to the price actually paid or payable.

The defendant points out, as reflected in its Exhibit 12 (T.D. 96–87), *supra*, the presumption is that transaction value is based on the price actually paid or payable by the *importer* for the imported merchandise, and the burden is on an importer to rebut this presumption. Def. Ex. 12 at \*1 (court’s highlighting). This exhibit also sets forth the documents and information necessary to support a request that transaction value should be based on a first sale transaction. *See also* Def. Ex. 14; Def. Ex. 15 (providing guidance as to the types of documents and information needed for an importer to show that it is entitled to use the transaction value of the sale between the producer and middleman, even where that transaction is between related parties). Recounting the statutory and regulatory framework, as well as defendant’s exhibits 12, 14 and 15, the defendant explains that in addition to bona fide sales and sale for export to the United States, the plaintiff at trial was required to establish arm’s length transactions per its following proposed findings of fact and conclusions of law:

***i. Normal pricing practices of the industry in question***

1. The industry in question is the manufacture and sale of cookware. Vol. 1 at 18:18–20.

2. In purchasing cookware, Meyer primarily dealt directly with Meyer Macau as a middleman. Vol. 1 at 83.
3. Meyer rarely dealt with Meyer Hong Kong when purchasing cookware. Vol. 1 at 83.
4. Meyer entered into a written Master Distribution Agreement with Meyer Macau. Vol. 1 at 83; Pl. Ex. 124.
5. Meyer did not enter into a written Master Distribution Agreement with Meyer Hong Kong. Vol. 1 at 117 -118.
6. Meyer's Master Distribution Agreement requires Meyer Macau to accept orders from Meyer if Meyer is not in breach of the Master Distribution Agreement at the time the order is placed. Pl. Ex. 124 at MUS010378 (Section 5.1).
7. Meyer Macau must charge Meyer the price negotiated and agreed upon by the parties prior to the placement of orders for the products; and Meyer must pay Meyer Macau in cash for the products delivered by Meyer Macau within 21 days of the invoice. Pl. Ex. 124 at MUS010379 (Section 6).
8. If the Master Distribution Agreement between Meyer and Meyer Macau is inconsistent with any other document or agreement between them the Master Distribution Agreement prevails to the extent of the inconsistency. Pl. Ex. 124 at MUS010391 (Section 22.5).
9. Meyer's primary competitors in the United States are Newell Corporation (Calphalon); Group SEB (T-Fal and All Clad); Tramontina; and the Cookware Company (Green Pan). Vol. 1 at 90:19–91:15.
10. Newell Corporation (Calphalon) sourced some of its cookware products from manufacturers in the PRC. Vol. 1 at 139.
11. Group SEB owned manufacturing capabilities around the world. Vol. 1 at 139:16–19.
12. The Cookware Company sourced the majority of their products from the PRC. Vol. 1 at 140:13–24.
13. Meyer negotiated with Ms. Sharon Lau of Meyer Macau for both the Thai Producer and the China Producer when seeking to purchase cookware. Vol. 1 at 118:25–119:9.

14. Meyer did not know whether Ms. Lau was negotiating for production by the Thai Producer or the China Producer. Vol. 1 at 122:9–17.
15. Meyer only sourced its cookware from Meyer-related entities, and never attempted to source its cookware from anyone else. Vol. 1 at 116:20–117:2.
16. Meyer was required to pay the middleman in cash within 21 days according to the master agreement. Vol. 1 at 127.
17. The invoice between Meyer and Meyer Macau called for payment in 20 days. Vol. 1 at 128; Pl. Ex. 190
18. The purchase order is the contract between the middleman and Meyer. Vol. 1 at 138:8–19.
19. Meyer monitored its profit level through its profit and loss statement annually, quarterly and monthly. Vol. 1 at 145:2–21.
20. The Thai Producer sells to Meyer Macau, Meyer Hong Kong, and Myrex Thailand Limited, each of which is a subsidiary of Meyer Holdings, and no one else. Vol. 1 at 159; Vol. 2 at 225, Pl. Ex. 152.
21. Myrex Thailand Limited is a middleman that sells to local customers in Thailand and nearby “AEC” countries like Vietnam, Cambodia, Laos and Burma. Vol. 1 at 226.
22. Approximately 96 percent of the Thai Producer’s cookware is sold to Meyer Macau, 2 percent to Meyer Hong Kong, and 2 percent to Myrex Thailand Limited. Vol. 1 at 160.
23. Of the 96 percent of sales to Meyer Macau, approximately 70 to 80 percent of the goods go to the United States. Vol. 2 at 229.
24. Mr. Kwok was responsible for negotiating sales prices on behalf of the Thai Producers with four or five of Meyer Macau’s marketing managers. Vol. 1 at 161.
25. Products sold by the Thai Producer to Meyer Macau are for import into the United States and are shipped by the Thai Producers directly to the United States. Vol. 1 at 161–62.
26. The Thai Producer makes stainless steel, aluminum and clad pots and pans and also produces boxes, glass lids, handles and knobs and kitchen tools. Vol. 1 at 166–67

27. The Thai Producer seeks a profit margin on average of 3 percent and determines its prices to Meyer Macau by using the costs of the cookware plus the 3 percent margin. Vol. 1 at 176:11–14.

28. The Thai Producer and Meyer Macau entered into a Master Manufacturing Agreement. Vol. 1 at 178, Pl. Ex. 123

29. The Master Manufacturing Agreement requires Meyer Macau to purchase \$100 million of cookware from the Thai Producer with \$20 million allocated to the first and second quarters of the year and \$30 million for the third and fourth quarters. Vol. 2 at 276–77; Pl. Ex. 123.

30. Section 6.2 of the Master Manufacturing Agreement provides that title in the products passes to Meyer Macau upon delivery irrespective of whether the price for such products had been wholly or partially paid or remains completely unpaid at that time. Vol. 2 at 279–80; Pl. Ex. 123.

31. The Thai Producer sets the price for products it sells to Meyer Macau, and, at times, will lower the price but will still make a profit. Vol. 1 at 179.

32. With respect to production volume, the Thai Producer is the largest producer of pots and pans in Thailand. Vol. 1 at 181.

33. The Thai Producer does not engage in the manufacturing of cookware without first having a purchase order. Vol. 2 at 230.

34. Approximately 85 percent of the Thai Producer's cookware is made of aluminum, which it purchased from Meyer Aluminum Thailand Limited in Thailand and Alann in the PRC. Approximately thirty percent of the aluminum purchased from Thailand. Vol. 2 at 234–35, 281.

35. With respect to steel cookware, the Thai Producer purchased the steel from non-Meyer-related companies in Thailand and Japan. Vol. 2 at 281–82

36. The Thai Producer's factory has produced between 75,000 and 100,000 pots a day, and is the largest cookware manufacturer in Thailand. Vol. 2 at 234–35.

37. In addition to cookware, the Thai Producer also produces boxes, knobs, handles, and other non-cookware items, which go with the cookware or are sold to Meyer Thailand Limited. These

items are purchased from non-Meyer-related companies in Thailand, the United States, Taiwan, the PRC, and Australia. Vol. 2 at 243–255.

38. The general manager of the Thai Producer is Joseph Lau. Vol. 2 at 267.

39. Joseph Lau is also the general manager at Meyer Macau and Meyer Hong Kong. Vol. 3 at 384:4–25.

40. During the years 2010 and 2011, the Thai Producer sold approximately \$5,000,000 worth of cookware to Myrex Thailand Limited, which constituted about 2 percent of its sales. Vol. 2 at [270:18–271:6.]

41. Myrex Thailand Limited is a related party to Meyer, the Thai Producer, Meyer Macau, and within the meaning of 19 U.S.C. § 1401a(g)(1)(F). Pl. Ex. 152.

42. Meyer Macau solicits business as a trading interface between customers and factories with respect to cookware, including pots and pans. Vol. 3 at 319–20.

43. Meyer Macau acts as a middleman for the China Producer. Vol. 3 at 320:6–14.

44. When a customer requests a cookware product, Ms. Lau of Meyer Macau determines whether the Thai Producer or the China Producer has the tooling to manufacture the items. Vol. 3 at 320:15–24.

45. If only the China Producer has the tooling, Ms. Lau assigns the order to Meyer Hong Kong, which has all the order for the China Producer. Vol. 3 at 320:22–24.

46. Meyer Macau, not Meyer Hong Kong, negotiates prices with the China Producer. Vol. 3 at 324:, 342:

47. Ms. Lau of Meyer Macau negotiates prices with the China Producer and takes customers to it. Vol. 3 at 323, 324, 342, 351.

48. Ms. Lau has no employment relationship with Meyer Hong Kong. Vol. 3 at 357.

49. Ms. Lau of Meyer Macau negotiates with Meyer for orders placed with the China Producer. Vol. 3 at 341, 352, 391.

50. Ms. Lau of Meyer Macau decides whether the Thai Producer or the China Producer is more capable of fulfilling a cookware order. Vol. 3 at 321:6–23.

51. For business sent to the United States, Ms. Lau testified that Meyer Macau's major competitors are Calphalon, T-Fal, Tramontina, Cuisinart, Pioneer Woman at Wal-Mart and Chrissy Teigen at Target. Vol. 3 at 342:20–343:4.

52. Ms. Lau testified that in negotiating prices with the Thai Producer and with Meyer, Meyer Macau must take into consideration what its competitors are doing in the marketplace, i.e., the United States, in order not to lose business. Vol. 3 at 344:8–17.

53. Meyer Macau goes to the factories to obtain price quotes. Vol. 3 at 350–351.

54. The China Producer and Meyer Hong Kong do not reach a price independently for cookware. Vol. 3 at 390:9–24; 391:17–392:9.

55. Meyer Hong Kong does not do pricing agreements with Meyer. Vol. 3 at 390:20–22.

56. Ms. Lau does not know what Meyer Hong Kong's role is in the process but, historically, it has operated as described above. Vol. 3 at 391:12–392:14.

57. Ms. Lau believes documents reflecting the payment of royalties exist and that the percentage of a price associated with a royalty is disclosed by Meyer Macau if requested. Vol. 3 at 392:15–393:19.

58. Ms. Lau is unaware of any agreement between Meyer Macau and Meyer Hong Kong or Meyer Macau and the China Producer. Vol. 3 at 393:20–394:2.

59. Meyer Macau committed to contract requiring \$100 million of orders to the Thai Producer because Meyer Macau is confident that it can obtain the business and it does not want the Thai Producer selling to everyone. Vol. 3 at 394:11–23.

60. Ms. Lau is unaware of a volume arrangement with the China Producer similar to the one in place with the Thai Producer. Vol. 3 at 394:24–395:2.

61. The China Producer does not often reject an order from Meyer Macau that the Thai Producer is unable to produce, although a very few times they raise an objection asking why can't the Thai Producer do the job. Vol. 3 at 395:3–12.

62. Mr. Kam testified that the China Producer sells “work in progress” shells such as that reflected in Pl. Ex. 131F to Meyer Italy and from the Thai Producer. Vol. 3 at 414:3–415:6.

63. The China Producer sells to Meyer Hong Kong, Meyer Macau, Meyer Italy and MCN, the sales department of Meyer in China. Vol. 3 at 415:10–19.

64. Mr. Kam testified that he provides tours to Meyer Macau customers but recalls only Christina who handles Meyer Japan and Matthew from Meyer UK. Vol. 3 at 418:4–21; 433:16–21.

65. Mr. Kam did not know who did the marketing for the China Producer. Vol. 3 at 454: 11–18.

66. Mr. Kam testified that in his job responsibilities or at attendance in management meetings he gained knowledge of assistance from the Chinese government to the China Producer. Vol. 3 at 461:4–13.

67. The databases used by PWC to obtain information in order to select comparable companies for its benchmarking study are limited to information from publically-traded companies. Vol. 4 at 682:10–18.

68. Meyer, Meyer Macau, Meyer Hong Kong, the Thai Producer and the China Producer are not publicly-traded companies. Vol. 4 at 683:5–10.

69. The entries at issue in this action, submitted by Meyer at trial, contain some or all of: entry summary (CBP Form 7501); entry/immediate delivery (CBP Form 3461); shipping documentation (arrival notice/invoice); tooling invoice; merchandise invoices between the middleman and Meyer, and the Thai or China producer and the middleman; packing lists from the middleman to Meyer, and the Thai or China producers to the middlemen; and bill of lading. Pl. Exs. 157–196, 377, 378.

70. Plaintiff’s Exhibit 157 contains a revised invoice from the Thai Producer to Meyer Macau reducing the unit price for sku no. 10417-T. Pl. Ex. 157.

71. Meyer Macau had 60 days to make payment to the Thai Producer. *See, e.g.*, Pl. Ex. 157 at MUS000953.

72. Meyer had 20 days to make payment to Meyer Macau. *See, e.g.*, Pl. Ex. 157 at MUS000948.

73. At trial, Meyer did not provide the Court with any purchase orders or any proofs of payment for any of the entries at issue. *See, e.g.*, Pl. Exs. 157–196, 377, 378 (entries at issue in this action).

74. None of the documents submitted by Meyer at trial contain any purchase orders between the Thai Producer or the China Producer and Meyer Macau or Meyer Hong Kong. *See* Pl. Exs. moved into evidence.

75. None of the documents submitted by Meyer at trial contain any purchase orders between Meyer and Meyer Macau or Meyer Hong Kong. *See* Pl. Exs. moved into evidence.

76. None of the documents submitted by Meyer at trial contain proof of payment by Meyer of any invoices from Meyer Macau or Meyer Hong Kong. *See* Pl. Exs. moved into evidence.

77. None of the documents submitted by Meyer at trial contain proof of payment by Meyer Macau or Meyer Hong Kong of any invoices from the Thai Producer or the China Producer. *See* Pl. Exs. moved into evidence.

78. Mr. Pinkerton “believe[d]” that the screening criteria for comparables to the Thai Producer provided in the benchmarking study (Pl. Ex. 119) was over 100 million baht. Vol. 5 at 741:18–21.

79. In the fourth quarter of 2011, the exchange rate between U.S. dollars and Thai baht was \$1 equals 30 Thai baht. *See* <https://www.poundsterlinglive.com/bank-of-england-spot/historical-spot-exchange-rates/usd/USD-to-THB-2011>.

80. Converting 100 million Thai baht to U.S. dollars results in an amount of approximately \$3,333,333. *See* <https://www.poundsterlinglive.com/bank-of-england-spot/historical-spot-exchange-rates/usd/USD-to-THB-2011>.

81. The Thai Producer had a contract in place with Meyer Macau that guaranteed a minimum of \$10,000,000 worth of business each year. Pl. Ex. 123 at MUS010361–362.

82. Whether a company sold pots and pans to the United States was not a part of the screening criteria for benchmarking comparables. Vol. 5 at 742:9–13.



83. Mr. Pinkerton did not know whether one of the screening criteria for benchmarking comparables was whether a company sold pots and pans globally, but he did not think so. Vol. 5 at 742:14–20.

84. Mr. Pinkerton did not believe that the volume of production was considered in the quantitative screening for benchmarking study. Vol. 5 at 740:7–9.

85. In selecting comparable companies, PWC does not consider the volume of production. Vol. 5 at 740.

86. In selecting comparable companies, PWC does not know if the databases it uses contain audited financial information. Vol. 5 at 733.

87. In selecting comparable companies, PWC does not consider whether those companies sell to the United States. Vol. 5 at 742.

88. In selecting comparable companies, PWC does not consider whether those companies sell globally. Vol. 5 at 742.

89. In selecting comparable companies, PWC did not consider whether the companies are transacting in a three-tier structure, nor did PWC do any research to obtain that information. Vol. 5 at 743.

90. PWC did not know whether any of the companies it identified as comparable are subject to volume contracts similar to those in place for [the Thai producer] and [the China producer]. Vol. 5 at 745–746.

91. Mr. Pinkerton testified that for Chinese companies the information in the databases is not detailed or accurate. Vol.4 at 690.

92. The databases used by PWC to locate comparable companies contain public companies. Vol. 4 at 682.

93. Mr. Pinkerton testified that he did not believe the Meyer companies are publicly traded. Vol. 4 at 683.

94. When asked to identify the Thai Producer's competitors, Mr. Kwok identified the companies that manufacture Zebra and Seagull brand cookware. Vol. 1 at 180.

95. Mr. Kwok testified that he did not believe the Thai Producer's competitors' market share in the United States would be much. Vol. 2 at 270.

96. Mr. Kwok testified that he did not know from where these competitors purchased raw materials. Vol. 2 at 271.

97. Mr. Kwok testified that he did not know if the Thai Producer's competitors were part of an organizational structure similar to that of Meyer. Vol. 2 at 271–272.

98. Zebra does not sell to the U.S. Vol. 3 at 405.

99. PWC does not have information about any potential non-market economy effect for comparable companies. Vol. 5 at 786.

100. The PWC studies did not factor in statutory additions. Vol. 4 at 662–663.

101. The PWC benchmarking study for manufacturers in Thailand states that the “markup on total services cost (operating income/total cost)” ranged from -9.4 percent to 12.9 percent in 2011 and from -14.7 percent to 14 percent in 2012. Pl. Ex. 119 at MUS045253.

102. The PWC benchmarking study for manufacturers in China indicated that the “markup on total services cost (operating income/total cost)” ranged from -10.5% to 10.5% in 2011 and from -17.3% to 3.2% in 2012. Pl. Ex. 125 at MUS045255.

***ii. “All costs plus a profit equivalent to the firm’s overall profit”***

1. “To substantiate an all costs plus profit claim, the importer should be prepared to provide records and documents of comprehensive product related costs and profit, such as financial statements, accounting records including general ledger account activity, bills of materials, inventory records, labor and overhead records, relevant selling, general and administrative expense records, and other supporting business records.” Def. Ex. 15 at 9.

2. At trial, Meyer presented no financial statements of Meyer Holdings. *See* Pl.’s Exs. moved into evidence.

3. Over half of the first-line, non-dormant entities for which Meyer Holdings owns all or a large portion of shares are in the cookware industry. *See* Pl. Ex. 152; Section IV at ¶19.

4. At trial, Meyer presented no financial statements of any of its related companies (*see* Pl. Ex. 152) that manufacture or sell cookware, including the Thai Producer, the China Producer, Meyer Macau or Meyer Hong Kong. *See* Pl.’s Exs. moved into evidence.

5. At trial, Meyer did not present its financial statements. *See* Pl.’s Exs. moved into evidence.
6. Meyer Hong Kong is a parent company of the China Producer. Pl. Ex. 152.
7. Mr. Kwok testified that the Thai Producer attempts to achieve a profit of 3 percent. Vol. 1 at 176:
8. Mr. Kam testified that the China Producer attempts to achieve a profit of 3 to 5 percent. Vol. 3 at 420.
9. The benchmarking analysis of comparable manufacturers prepared by PWC (the benchmarking analysis), objected to by the Government . . . , states that the China Producer’s profit for 2011 was 1.65 percent (OPM or operating profit margin) or 1.60 percent (FCM or full cost markup). Pl. Ex. 119 at MUS045255.
10. Mr. Kam testified that he did not know the China Producer’s profit for 2011. Vol. 3 at 454:
11. The benchmarking analysis, objected to by the Government . . . , states that the Thai Producer’s profit for 2011 was 2.95 percent (OPM) or 3.01 percent (FCM). Pl. Ex. 119 at MUS045253.
12. The Thai Producer does not sell to unrelated companies. Vol. 1 at 159, Vol. 2 at 225.
13. The China Producer does not sell to unrelated companies. Vol. 2 at 415.
14. There are over 100 products at issue in this action that are imported from Thailand. *See* Pl. Exs. 157–196, 377, 378.
15. There are over 32 products at issue in this action that are imported from the PRC. *See* Pl. Exs. 157–196.
16. Meyer has not provided any cost or profit information or cost or profit analysis for the products in this case imported from the PRC, other than the two products identified in the PWC report (71892-C and 82365-C). Pl. Ex. 125 at 26.
17. Meyer has not provided any profit information or analysis for the products in this case imported from Thailand other than that contained in GSP summaries. *See* Pl. Exs. 154, 155, 156, 379, and 380, to which the Government has objected.
18. Both the Thai Producer and the China Producer are “limited risk manufacturers.” Vol. 5 at 753:16–18.

19. Limited risk means that the Thai Producer and the China Producer “don’t have risk, they don’t carry capital risk, they don’t carry exchange risk, which is why they get compensated on the low profit margin.” Vol. 5 at 753:20–23.

20. Ms. Brenner testified that Customs has issued an Informed Compliance Publication (Def. Ex. 15) that provides information to importers concerning using transaction value for related party transactions. Vol. 5 at 873:20–874:16.

21. Ms. Brenner testified that for the “costs plus” test Customs considers the “firm” to usually be the parent. Vol. 5 at 875:9–876:3.

22. If a parent does not satisfy the terms of the “costs plus” test, Customs has on occasion used other information, such as another subsidiary in a company that really dominant and selling a lot that provides a good comparison and could be considered the “firm.” Vol. 5 at 876:10–878:12.

Def. PFF&CL, pp. 18–35.

In addition, the defendant proposes findings of fact with respect to two critical aspects of this case as follows:

*. . . Absence of non-market influence on price*

1. The PRC is a non-market economy. 255 F.Supp.3d at 1361.
2. PWC has provided no information addressing the absence of a non-market influence on price in any of the studies it prepared. *See* Pl. Exs. 1, 4, 117, 119, 125.
3. PWC does not have information about any potential non-market economy effect for comparable companies. Vol. 5 at 786.
4. The Thai Producer receives some raw materials for the manufacture of its cookware from companies in the PRC. Vol. 1 at 167:12–15; Vol. 2 at 206:16–18, 220:14:17, 253:20–24; 281:2–10; Pl. Exs. 154–156, 379, 380.
5. The China Producer is located in the PRC. *See, e.g.*, Pl. Ex. 162 at MUS001036.
6. Although Mr. Kam testified initially that, as one of the top five managers at the China Producer, he would have knowledge about local, provincial, or national PRC governmental subsidies, he acknowledged that Ken Chan, the general manager of the China Producer, not he, would know whether there was any type of subsidy from the PRC. Vol. 3 at 449:11–451:11

7. The China Producer does not own the land on which the factory sits but has a right to use the land for a certain period of time. Vol. 3 at 455:23–456:14.

8. Mr. Kam testified that he does not know whether any of the Chinese companies that provide water, electricity or other materials used in the production of the China Producer’s goods receive subsidies from China at the national, regional, or local levels. Vol. 3 at 451:12–21.

. . . *Statutory additions*

1. The transaction value for merchandise exported to the United States includes certain statutory additions. 19 U.S.C. § 1401a(b).

2. One of the statutory additions is the value of assists. 19 U.S.C. § 1401a(b)(1)(c).

3. For the entries in this case, Mr. Pinkerton does not know whether there were any assists. Vol. 5 at 800.

4. The PWC studies did not factor in statutory additions. Vol. 4 at 662–663.

Def. PFF&CL, pp. 25–36.

Based on the foregoing, the defendant proposes the following conclusions of law:

. . . *Arm’s length transaction*

. . . *Normal Pricing Practices of the Industry in Question*

. . . *Meyer Hong Kong and the China Producer*

Meyer has not established that the price from the China Producer to Meyer Hong Kong was “settled in a manner consistent with the normal pricing practices of the industry” as provided in 19 C.F.R. § 152.103(l)(1)(ii) because the companies selected by PWC for its benchmarking study were not shown to sell to the United States market.

Meyer has not established that the price from the China Producer to Meyer Hong Kong was “settled in a manner consistent with the normal pricing practices of the industry” as provided in 19 C.F.R. § 152.103(l)(1)(ii) because PWC does not have information about any potential non-market economy effect of the PRC for comparable companies.

Meyer has not established that the price from the China Producer to Meyer Hong Kong was “settled in a manner consistent with the normal pricing practices of the industry” as provided in 19 C.F.R. § 152.103(l)(1)(ii) because, in selecting comparable companies, neither Meyer nor PWC provided sufficient information on the China companies to demonstrate that they manufacture merchandise of the same class or kind as the China Producer.

Meyer has not established that the price from the China Producer to Meyer Hong Kong was “settled in a manner consistent with the normal pricing practices of the industry” as provided in 19 C.F.R. § 152.103(l)(1)(ii) because Meyer has not established that there are “normal pricing practices of the industry” in China where the operating income/total cost figures vary widely from 1.2 percent to 19.8 percent in 2010, -10.5 percent to 10.5 percent in 2011, and -17.3 percent to 3.2 percent in 2012.

Meyer has not established that the price from the China Producer to Meyer Hong Kong was “settled in a manner consistent with the normal pricing practices of the industry” as provided in 19 C.F.R. § 152.103(l)(1)(ii) because the databases used by PWC in selecting comparable companies were limited to publicly traded companies.

Meyer has not established that transactions between Meyer Hong Kong and the China Producer constitute viable first sale transaction values because Meyer Macau, not Meyer Hong Kong, acts as the middleman for the China Producer.

Meyer has not established that transactions between Meyer Hong Kong and the China Producer are at arm’s length because there is no evidence of arm’s length negotiations between Meyer Hong Kong and the China Producer, or between Meyer Hong Kong and Meyer. Instead, the testimony adduced at trial shows that the negotiations are between Meyer Macau and the China Producer and Meyer Macau and Meyer.

Meyer has not established that transactions between Meyer Hong Kong and the China Producer are at arm’s length because Meyer Hong Kong and the China Producer do not reach prices independently. Instead, Meyer Macau fulfills the function of reaching prices for the China Producer.

Meyer has not established that transactions between Meyer Hong Kong and the China Producer are at arm’s length because

Meyer Macau “assigns” orders to the China Producer and Meyer Macau, not Meyer Hong Kong, confers with the China Producer to obtain price quotes.

Meyer has not established through the PWC study, Pl. Ex. 125, that transactions between Meyer Hong Kong and the China Producer constitute viable, arm’s length transaction values because that study is based on incorrect information. For example, the study:

- (i) does not acknowledge that Meyer Macau, not Meyer Hong Kong, serves as the middleman for merchandise ordered by Meyer and manufactured by the China Producer[;]
- (ii) states that Meyer Hong Kong receives orders from Meyer when, in fact, Meyer Macau “assigns” orders to Meyer Hong Kong based on Meyer Macau’s assessment of whether the China Producer or the Thai Producer is the most capable factory for the order[;]
- (iii) states that Meyer Hong Kong and the China Producer agree on all contractual terms, when, in fact, the testimony presented at trial established that Meyer Macau negotiates with the China Producer[;].
- (iv) makes no mention of Meyer Macau’s role in transactions between Meyer Hong Kong and the China Producer[; and]
- (v) does not reveal that Meyer Hong Kong, Meyer Macau, and the Thai Producer have the same general manager: Joseph Lau.

Meyer has not established that prices between the China Producer and Meyer Hong Kong are “settled in a manner consistent with the normal pricing practices of the industry” because it has not demonstrated that the cookware industry in the PRC normally works off prices that are set by entities other than the buyer and seller, or that the cookware industry in the PRC normally has orders assigned to it by an entity that is neither the buyer or seller.

Further, Meyer has not shown that the price negotiated for the cookware manufactured by the China Producer has not been influenced by the non-market status of the PRC, which, as this Court observed, has not been recognized by the United States as a “market economy.” Mr. Kam, a manager of the China Producer, testified that he does not know if the local, regional, or national government of the PRC subsidizes the China Producer or any of

the companies that provide the China Producer with production materials. However, Mr. Kam stated that he did gain knowledge about assistance from the Chinese government.

*. . . Meyer Macau and the Thai Producer*

Meyer has not established that prices between the Thai Producer and Meyer Macau are “settled in a manner consistent with the normal pricing practices of the industry” as provided in 19 C.F.R. § 152.103(l)(1)(ii) because it has not demonstrated specifically what the normal pricing practices are for Thai manufacturers of cookware, i.e., pots and pans, that are exported to the United States.

Meyer has not established that the price from the Thai Producer to Meyer Macau was “settled in a manner consistent with the normal pricing practices of the industry” as provided in 19 C.F.R. § 152.103(l)(1)(ii) because the companies selected by PWC for its benchmarking study were not shown to be comparable to the Thai Producer, which is the largest cookware manufacturer in Thailand.

Meyer has not established that the Thai manufacturers of pots and pans used in the benchmarking study are, in fact, comparable to the Thai Producer. For example, Meyer provided no evidence that any of the Thai Producer comparables sell pots and pans to the United States.

Nor did Meyer establish that the comparables are “limited risk” manufacturers whose profit margins are reduced because they have entered into a “minimum order” contract.

Meyer has not established that the price from the Thai Producer to Meyer Macau was “settled in a manner consistent with the normal pricing practices of the industry” as provided in 19 C.F.R. § 152.103(l)(1)(ii) because the databases used by PWC in selecting comparable companies were limited to publically-traded companies.

Meyer has not established that the price from the Thai Producer to Meyer Macau was “settled in a manner consistent with the normal pricing practices of the industry” as provided in 19 C.F.R. § 152.103(l)(1)(ii) because, in selecting comparable companies, PWC did not provide sufficient information on the comparable companies to show that the profit figures involved merchandise of the same class or kind.



Meyer has not established that the price from the Thai Producer to Meyer Macau was “settled in a manner consistent with the normal pricing practices of the industry” as provided in 19 C.F.R. 152.103(l)(1)(ii) because Meyer has not established that there are “normal pricing practices of the industry” in Thailand where the operating income/total cost figures vary widely from -4.8 percent to 29.9 percent in 2010, -9.4 percent to 12.9 percent in 2011, and -14.7 percent to 14 percent in 2012.

*. . . All Costs Plus a Profit Equivalent  
to the Firm’s Overall Profit*

The meaning of the term “the firm,” set forth in 19 C.F.R. § 152.103(i)(1)(iii), is not provided by 19 U.S.C. § 1401a, the value statute, or by CBP Regulations. In other sections of 19 C.F.R. Part 152, the terms “seller,” and “producer,” are used. However, for section 152.103(i)(1)(iii), CBP used the term “firm,” rather than “seller” or “producer” indicating that the “firm” is not necessarily the seller or producer. CBP normally considers the term “firm” referenced in 19 C.F.R. §152.103(l), interpretive note 3, to mean the parent company. Def. Ex. 15 at 9. Courts “defer even more broadly to an agency’s interpretations of its own regulations than to its interpretation of statutes, because the agency, as the promulgator of the regulation, is particularly well suited to speak to its original intent in adopting the regulation.” *Gose v. United States*, 451 F.3d 831, 837 (Fed.Cir. 2006) (citing to *Cathedral Candle Co. v. U.S. Int’l Trade Comm’n*[,] 400 F.3d 1352, 1363–64 (Fed.Cir. 2005)[,] and *Am. Express Co. v. United States*, 262 F.3d 1376, 1383–83 (Fed.Cir. 2001)).

Accordingly, for the “all costs plus a profit” test, financial statements from the parent company are needed to determine the parent’s overall profit, which is one of the variables in the formula. To satisfy this test, the sale price between the related producer and middleman must be adequate to ensure recovery of all the seller’s costs plus a profit equivalent to the parent company’s overall profit. Def. Ex. 15 at 9.

Meyer has not met the requirements of 19 C.F.R. § 152.103(i)(1)(iii) because it has not provided the financial statements of its parent company, Meyer Holdings, to evaluate whether the relationship or any non-market influences affected the sales price or to evaluate whether the profits of the China Producer and the Thai Producer are equivalent to the costs and profit of the Meyer group overall. See *Meyer*, 255 F.Supp.3d at 1361.

Meyer has not met the requirements of 19 C.F.R. § 152.103(i)(1)(iii) because it has not provided the financial statements of any of the companies in the Meyer group that manufacture or sell cookware to evaluate whether the relationship or any non-market influences affected the sales price, or to evaluate whether the profits of the China Producer or the Thai Producer are equivalent to the costs and profit of the Meyer group overall.

The Thai Producer may not constitute “the firm” for the purposes of 19 C.F.R. § 152.103(i)(1)(iii) because it does not sell to unrelated parties and, therefore, all of its sales are potentially affected by a relationship.

The Thai Producer may not constitute “the firm” for the purposes of 19 C.F.R. § 152.103(i)(1)(iii) because the majority of its sales are to the United States and, thus, are potentially affected by the same relationship. Comparing one sale to a set of sales that involve the same relationship provides no way of disaggregating the effect that the relationship may have had on the sales price or determining whether it is “arm’s length.”

The China Producer may not constitute “the firm” for the purposes of 19 C.F.R. § 152.103(i)(1)(iii) because all of its sales are to related parties and, thus, are potentially affected by the relationship. Comparing one sale to a set of sales that involve the same relationship provides no way of disaggregating the effect that the relationship may have had on the sales price or determining whether it is “arm’s length.”

For the purposes of 19 C.F.R. § 152.103(i)(1)(iii), Meyer has not established that the price from the Thai Producer to Meyer Macau was “adequate to ensure recovery of all costs plus a profit which is equivalent to the firm’s overall profit realized over a representative period of time (e.g., on an annual basis), in sales of merchandise of the same class or kind” because, even if the court were to conclude that the Thai Producer may be considered “the firm” for the purposes of this regulation, Meyer has not produced evidence at trial to establish the costs and profit of any of the products manufactured by the Thai Producer to evaluate whether they are equivalent to the Thai Producer’s overall profit.

For the purposes of 19 C.F.R. § 152.103(i)(1)(iii), Meyer has not established that the price from the Thai Producer to Meyer Macau was “adequate to ensure recovery of all costs plus a profit which is equivalent to the firm’s overall profit realized over a

representative period of time (e.g., on an annual basis), in sales of merchandise of the same class or kind” because, even if the court were to conclude that the Thai Producer may be considered “the firm” for the purposes of this regulation, Meyer has not produced evidence during trial to establish the Thai Producer’s overall costs and profit during the relevant time period.

For the purposes of 19 C.F.R. § 152.103(i)(1)(iii), Meyer has not established that the price from the China Producer to Meyer Hong Kong was “adequate to ensure recovery of all costs plus a profit which is equivalent to the firm’s overall profit realized over a representative period of time (e.g., on an annual basis), in sales of merchandise of the same class or kind” because, even if the Court concludes that the China Producer may be considered “the firm” for the purposes of this regulation, Meyer has not produced evidence at trial to establish the costs and profit of 24 of the 26 products manufactured by the China Producer in this case to evaluate whether they are equivalent to the China Producer’s overall profit. For the two sample transactions for the years 2010–2012, identified in the PWC study (Pl. Ex. 125 at MUS044890), the profit margins identified are not “equivalent to” the China Producer’s stated profit in the benchmarking study (Pl. Ex. 119 at MUS045254).

For the purposes of 19 C.F.R. § 152.103(i)(1)(iii), Meyer has not established that the price from the China Producer to Meyer Hong Kong was “adequate to ensure recovery of all costs plus a profit which is equivalent to the firm’s overall profit realized over a representative period of time (e.g., on an annual basis), in sales of merchandise of the same class or kind” because, even if the Court concludes that the China Producer may be considered “the firm” for the purposes of this regulation, Meyer has not produced evidence to establish the China Producer’s overall costs and profit during the relevant time period.

*. . . Absence of non-market influence on price*

Meyer has not established that the prices from the China Producer or the Thai Producer to Meyer Hong Kong and Meyer Macau were not influenced by the non-market economy effect of the PRC. Meyer attempted to elicit testimony from Mr. Kam that, although the China Producer is located in the PRC and obtains raw materials from other entities located in the PRC,

there is no influence on the China Producer's prices. However, Mr. Kam lacked knowledge to establish such an absence of influence.

Although the Thai Producer receives some raw materials from entities located in the PRC, Meyer did not attempt to establish that the Thai Producer's price was not influenced by prices for materials that themselves were influenced by the non-market economy effect of the PRC.

Finally, Meyer provided no financial information from its parent company, Meyer Holdings, notwithstanding that this court observed, due to the relatedness of the parties to the transaction, that "financial information pertaining to the parent is also relevant to examining whether any non-market influences affect the legitimacy of the sales price." *Meyer*, 255 F.Supp.3d at 1361. This court further noted that the parent's financial documents could reveal whether "parental support or guidance has a market-distortive effect on the cost of inputs or of financing" thereby resulting in a "booked' profit" "unrepresentative of sales or merchandise of the same class or kind that have been made without the distortion of non-market influences." *Id.*

. . . *Statutory Additions*

Meyer has not established that the transaction prices between the Thai Producer and Meyer Macau and the China Producer and Meyer Hong Kong present viable transaction values because it failed to provide sufficient evidence regarding the amounts of any statutory additions as set forth in 19 U.S.C. § 1401a(b)(1). Specifically, at trial, Meyer provided no information about the value of assists, and Mr. Pinkerton did not know the value of any assists

Meyer has not established that the price from the Thai Producer to Meyer Macau is an acceptable first sale value because 19 U.S.C. § 1401a(b)(1) provides that if sufficient information about statutory additions is not available, transaction value may not be used. At trial, Meyer has provided no information about the value of assists, and Mr. Pinkerton did not know the value of any assists.

## V

Upon due and lengthy deliberation, the court finds defendant's recital of the facts from trial, above, accurate, and they are hereby adopted as the findings of the court. Plaintiff's proposed findings of fact are not inaccurate, but they do not provide a complete picture of what is necessary to its case for establishing entitlement to first sale valuation.

Furthermore, based on the applicable law and the evidence adduced at trial, the plaintiff has failed to meet its burden of establishing its entitlement to GSP dispensation of duty-free treatment for cookware manufactured by the Thai producer from steel discs obtained from the PRC, because the manufacturing process did not result in a double substantial transformation of them.

Based on the applicable law and the evidence adduced at trial, the plaintiff has also failed to establish that it should be entitled to use the transaction value between the China producer and Meyer Hong Kong or the Thai producer and Meyer Macau ("first sale") for the appraisalment of the imported cookware.

Regarding plaintiff's arguments that because Meyer Holdings is an investment holding company without cookware operations, is not a party to any of the transactions between Meyer Hong Kong and the China producer and does not engage in the sale of merchandise of the same class or kind as the China producer, and that the China producer is the appropriate "firm" to analyze under the "all costs plus profit test" (*see* P. Ex. 125, 2016 China Producer Assessment covering 2010–2012), whether it is true that for the "all costs plus profit" test no CBP regulation requires that the "firm" mentioned in 19 C.F.R. §152.103(l)(1)(iii) be the "parent" of the importing party (*see* Pinkerton T.T. Vol. IV, 511:15–512:2), costs are obviously critical to that determination, and the real costs of inputs from the PRC are suspect, given its status as a nonmarket economy country.

Even if "true" costs of such inputs could be determined, Meyer Holding presumptively has had the ability to influence the price paid or payable for them, for example by providing its subsidiaries access to credit and capital on terms that are not available to competitors without the same level of bargaining power with creditors, or even at "below market" rates. Without financial statements, the court has no concept of the extent to which the finances of the Meyer group units are truly independent "silos" of one another, or the extent to which there might have been state influence or assistance to some degree. Statutory assists do not encompass financial assistance, of course, but

the broader concern here is over market-distortive influence, either with respect to the plaintiff directly or the provision of inputs generally.

The most that plaintiffs' witnesses could testify to was that they were unaware of any such assistance, and to a person they flatly denied that the PRC government provided any assistance or influence whatsoever, arguably a dubious proposition. At trial, the defendant only lightly explored the extent to which such considerations might be considered market-distortive. But then again, the defendant never had the ability to probe deeper, in part because it was never provided the financial information it requested in discovery in order to be able to ask or answer probing questions.

The court understands that the Meyer parent is not subject to this litigation and that the plaintiff, as its "independent" subsidiary, can claim an inability to obtain such information from it. However, given that the parent has an interest in seeing these types of matters resolved favorably, it is therefore presumed to be forthcoming, even unprompted, to provide whatever CBP deems necessary to assist in their resolution, and the fact that in that regard there has apparently been considerable "resistance" throughout this case to that not-unreasonable discovery request and the "assistance" that the parent could have provided its subsidiary to address necessary questions with respect to concerns over non-market influences, speaks volumes.

All of the foregoing leads the court to doubt that accurate ascertainment of the "true" value of the "price paid or payable" at the first sale level in the customs duty sense has been demonstrated in this case. Whether the same can be said with respect to the second-level "price paid or payable", *i.e.*, by Meyer itself as importer, the court need not opine, for no party has proposed an alternative method of appraisal in any event. Such matters are best left to the parties in any further negotiations as a result of this opinion.

Second, and more broadly, as a result of its consideration of the issues presented here, this court has doubts over the extent to which, if any, the "first sale" test of *Nissho Iwai* was intended to be applied to transactions involving non-market economy participants or inputs. In that regard, the Court of Appeals for the Federal Circuit could provide clarification.

Judgment for the defendant will enter accordingly. So ordered.

Dated: New York, New York  
March 1, 2021

*/s Thomas J. Aquilino, Jr.*  
SENIOR JUDGE

## Slip Op. 21–27

FINE FURNITURE (SHANGHAI) LIMITED, et al., Plaintiffs, and ARMSTRONG WOOD PRODUCTS (KUNSHAN) CO., LTD., GUANGDONG YIHUA TIMBER INDUSTRY CO., LTD., OLD MASTER PRODUCTS, INC., LUMBER LIQUIDATORS SERVICES, LLC, SHANGHAI LAIRUNDE WOOD CO., LTD., CHANGZHOU HAWD FLOORING CO., LTD., DALIAN HUILONG WOODEN PRODUCTS CO., LTD., DUNHUA CITY JISEN WOOD INDUSTRY CO., LTD., DUNHUA CITY DEXIN WOOD INDUSTRY CO., LTD., DUNHUA CITY HONGYUAN WOOD INDUSTRY CO., LTD., JIAXING HENGTONG WOOD CO., LTD., KARLY WOOD PRODUCT LIMITED, YINGYI-NATURE (KUNSHAN) WOOD INDUSTRY CO., LTD., XIAMEN YUNG DE ORNAMENT CO., LTD., ZHEJIANG SHUIMOJIANGNAN NEW MATERIAL TECHNOLOGY CO., LTD., Plaintiff-Intervenors, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge  
Consol. Court No. 16–00145

## JUDGMENT

Before the court is the United States Department of Commerce’s (“Commerce” or the “Department”) corrected remand redetermination (“Remand Results”), ECF No. 183, issued pursuant to the court’s order dated August 25, 2020, ECF No. 174.

Because individually examined respondent and Plaintiff Fine Furniture (Shanghai) Limited is no longer subject to the antidumping duty order on multilayered wood flooring from China,<sup>1</sup> it was necessary for Commerce to recalculate its separate rate. *See Fine Furniture (Shanghai) Ltd. v. United States*, No. 2019–1499, 2020 WL 8254416, at \*1 (Fed. Cir. Aug. 4, 2020) (citing *Changzhou Hawd Flooring Co. v. United States*, 947 F.3d 781, 793–94 (Fed. Cir. 2020)).

In its August 25, 2020 order, the court directed Commerce to reconsider its calculation of the rate applicable to separate rate respondents, and dismissed Plaintiff-Intervenor Armstrong Wood Products (Kunshan) Co., Ltd. from the case.

In response, Commerce issued the Remand Results, stating that

Commerce has revised the separate rate for those companies which were granted a separate rate in the *Final Results* and were party to this litigation. The revised separate rate is 0.00 percent, based solely on [Dalian Penghong Floor Products Co., Ltd./Dalian Shumaike Floor Manufacturing Co., Ltd.’s] weighted-average dumping margin.

<sup>1</sup> See *Multilayered Wood Flooring From the People’s Rep. of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 76 Fed. Reg. 76,690 (Dep’t Commerce Dec. 8, 2011), as amended in *Multilayered Wood Flooring From the People’s Rep. of China: Amended Antidumping and Countervailing Duty Orders*, 77 Fed. Reg. 5484 (Dep’t Commerce Feb. 3, 2012).

Remand Results at 6.

The court finds that Commerce has complied with its instructions because the Department recalculated the rate applicable to separate rate respondents based on the sole remaining individually examined respondent's weighted-average dumping margin.

No party contests the Remand Results. *See* Certain Consol. Pls.' Comments on Corrected Remand Redetermination, ECF No. 185; Certain Consol. Pls.' Comments on Remand Results, ECF No. 186; Pl.-Intervenor Guangdong Yihua Timber Industry Co.'s Comments on Remand Results, ECF No. 187; Def.'s Comments on Remand Results, ECF No. 188. There being no further dispute in this matter, it is hereby

**ORDERED** that the Remand Results are sustained.

Dated: March 3, 2021  
New York, New York

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



# Index

*Customs Bulletin and Decisions*  
*Vol. 55, No. 10, March 17, 2021*

## *U.S. Customs and Border Protection*

### *General Notices*

	<i>Page</i>
Proposed Revocation of One Ruling Letter and Proposed Revocation of Treatment Relating to the TARIFF Classification of Dietary Supplement Products . . . . .	1
Proposed Revocation of One Ruling Letter and Proposed Revocation of Treatment Relating to the Tariff Classification of the Activpanel Version 7 . . . . .	16
Revocation of Two Ruling Letters and Revocation of Treatment Relating to the Tariff Classification of Empty Cosmetic Container with Brush . . . . .	38
Modification of One Ruling Letter and Revocation of Treatment Relating to the Tariff Classification of Refinery Modules . . . . .	45
Proposed Modification of Six Ruling Letters and Proposed Revocation of Treatment Relating to the Tariff Classification of Textile Leg Coverings . . . . .	57
Receipt of Application for “Lever-Rule” Protection . . . . .	64
Notice of Issuance of Final Determination Concerning a Transceiver . . . . .	66
Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within the Democratic Republic of the Congo or the Republic of Guinea . . . . .	73

## *U.S. Court of International Trade*

### *Slip Opinions*

	<i>Slip Op. No.</i>	<i>Page</i>
Meyer Corporation, U.S., Plaintiff, v. United States, Defendant. . . . .	21–26	79

Fine Furniture (Shanghai) Limited, et al., Plaintiffs, and Armstrong Wood Products (Kunshan) Co., Ltd., Guangdong Yihua Timber Industry Co., Ltd., Old Master Products, Inc., Lumber Liquidators Services, LLC, Shanghai Lairunde Wood Co., Ltd., Changzhou Hawd Flooring Co., Ltd., Dalian Huilong Wooden Products Co., Ltd., Dunhua City Jisen Wood Industry Co., Ltd., Dunhua City Dexin Wood Industry Co., Ltd., Dunhua City Hongyuan Wood Industry Co., Ltd., Jiaxing Hengtong Wood Co., Ltd., Karly Wood Product Limited, Yingyi-Nature (Kunshan) Wood Industry Co., Ltd., Xiamen Yung De Ornament Co., Ltd., Zhejiang Shuimojiangnan New Material Technology Co., Ltd., Plaintiff-Intervenors, v. United States, Defendant. . . . .	21–27	161
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