

U.S. Customs and Border Protection

19 CFR PART 122

CBP DEC. 22-16

TECHNICAL AMENDMENT TO LIST OF USER FEE AIRPORTS: ADDITION OF FOUR AIRPORTS, REMOVAL OF TWO AIRPORTS

AGENCY: U.S. Customs and Border Protection; DHS.

ACTION: Final rule; technical amendment.

SUMMARY: This document amends U.S. Customs and Border Protection (CBP) regulations by revising the list of user fee airports. User fee airports are airports that have been approved by CBP to receive, for a fee, the customs services of CBP officers for processing aircraft, passengers, and cargo entering the United States, but do not qualify for designation as international or landing rights airports. Specifically, this technical amendment reflects the designation of user fee status for four additional airports: Coeur d'Alene Airport in Hayden, Idaho; Ithaca Tompkins Regional Airport in Ithaca, New York; University of Illinois-Willard Airport in Savoy, Illinois; and Sheboygan County Memorial Airport in Sheboygan Falls, Wisconsin. This document also amends CBP regulations by removing the designation of user fee status for two airports: Ardmore Industrial Airpark, in Ardmore, Oklahoma, and Decatur Airport in Decatur, Illinois.

DATES: Effective July 22, 2022.

FOR FURTHER INFORMATION CONTACT: Ryan Flanagan, Director, Alternative Funding Program, Office of Field Operations, U.S. Customs and Border Protection at *Ryan.H.Flanagan@cbp.dhs.gov* or 202-550-9566.

SUPPLEMENTARY INFORMATION:

Background

Title 19, part 122, of the Code of Federal Regulations (19 CFR part 122) sets forth regulations relating to the entry and clearance of aircraft engaged in international commerce and the transportation of

persons and cargo by aircraft in international commerce.¹ Generally, a civil aircraft arriving from outside the United States must land at an airport designated as an international airport. Alternatively, civil aircraft may request permission to land at a specific airport and, if landing rights are granted, the civil aircraft may land at that landing rights airport.²

Section 236 of the Trade and Tariff Act of 1984 (Pub. L. 98–573, 98 stat. 2948, 2994 (1984)), codified at 19 U.S.C. 58b, created an alternative option for civil aircraft seeking to land at an airport that is neither an international airport nor a landing rights airport. This alternative option allows the Commissioner of U.S. Customs and Border Protection (CBP) to designate an airport, upon request by the airport authority or other sponsoring entity, as a user fee airport.³ Pursuant to 19 U.S.C. 58b, a requesting airport may be designated as a user fee airport only if CBP determines that the volume or value of business at the airport is insufficient to justify the unreimbursed availability of customs services at the airport and the governor of the state in which the airport is located approves the designation. As the volume or value of business cleared through this type of airport is insufficient to justify the availability of customs services at no cost, customs services provided by CBP at the airport are not funded by appropriations from the general treasury of the United States. Instead, the user fee airport pays for the customs services provided by CBP. The user fee airport must pay the fees charged, which must be in an amount equal to the expenses incurred by CBP in providing customs and related services at the user fee airport, including the salary and expenses of CBP employees to provide such services. *See* 19 U.S.C. 58b; *see also* 19 CFR 24.17(a)–(b).

CBP designates airports as user fee airports in accordance with 19 U.S.C. 58b and 19 CFR 122.15 on a case-by-case basis. If CBP decides that the conditions for designation as a user fee airport are satisfied,

¹ For purposes of this technical rule, an “aircraft” is defined as any device used or designed for navigation or flight in air and does not include hovercraft. 19 CFR 122.1(a).

² A landing rights airport is “any airport, other than an international airport or user fee airport, at which flights from a foreign area are given permission by Customs to land.” 19 CFR 122.1(f).

³ Sections 403(1) and 411 of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 stat. 2135, 2178–79 (2002)), codified at 6 U.S.C. 203(1) and 211, transferred certain functions, including the authority to designate user fee facilities, from the U.S. Customs Service of the Department of the Treasury to the U.S. Department of Homeland Security. The Secretary of Homeland Security delegated the authority to designate user fee facilities to the Commissioner of CBP through Department of Homeland Security Delegation, Sec. II.A., No. 7010.3 (May 11, 2006). The Commissioner subsequently delegated this authority to the Executive Assistant Commissioner (EAC) of the Office of Field Operations, on March 23, 2020, to designate new UFFs. On December 23, 2020, the broader authority to withdraw a facility’s designation as a UFF, as well as execute, amend, or terminate Memorandum of Agreements, was also delegated to the EAC of the Office of Field Operations.

a Memorandum of Agreement (MOA) is executed between the Commissioner of CBP and the sponsor of the user fee airport. Pursuant to 19 CFR 122.15(c), the designation of an airport as a user fee airport must be withdrawn if either CBP or the airport authority gives 120 days written notice of termination to the other party or if any amounts due to CBP are not paid on a timely basis.

The list of designated user fee airports is set forth in 19 CFR 122.15(b). Periodically, CBP updates the list to include newly designated airports that were not previously on the list, to reflect any changes in the names of the designated user fee airports, and to remove airports that are no longer designated as user fee airports.

Recent Changes Requiring Updates to the List of User Fee Airports

This document updates the list of user fee airports in 19 CFR 122.15(b) by adding the following four airports: Coeur d'Alene Airport in Hayden, Idaho; Ithaca Tompkins Regional Airport in Ithaca, New York; University of Illinois-Willard Airport in Savoy, Illinois; and Sheboygan County Memorial Airport in Sheboygan Falls, Wisconsin. CBP has signed MOAs with the respective airport authorities designating each of these four airports as a user fee airport.⁴

Additionally, this document updates the list of user fee airports in 19 CFR 122.15(b) by removing two airports: Ardmore Industrial Airpark in Ardmore, Oklahoma and Decatur Airport in Decatur, Illinois. The airport authority of Ardmore Industrial Airpark requested to terminate its user fee status on March 19, 2020, and the airport authority and CBP mutually agreed to terminate the user fee status of Ardmore Industrial Airpark effective on July 17, 2020. The airport authority of Decatur Airport requested to terminate its user fee status on July 17, 2019, and the airport authority and CBP mutually agreed to terminate the user fee status of Decatur Airport effective on November 13, 2019.

Inapplicability of Public Notice and Delayed Effective Date Requirements

Under the Administrative Procedure Act (5 U.S.C. 553(b)), an agency is exempted from the prior public notice and comment procedures if it finds, for good cause, that such procedures are impracticable, unnecessary, or contrary to the public interest. This final rule

⁴ The Executive Assistant Commissioner of the Office of Field Operations Pete Flores signed a MOA designating Coeur d'Alene Airport on May 6, 2022. Then-Acting Commissioner Mark A. Morgan signed a MOA designating University of Illinois-Willard Airport on February 25, 2020. Then-Executive Assistant Commissioner of the Office of Field Operations Todd C. Owen signed MOAs designating Ithaca Tompkins Regional Airport on June 26, 2020 and Sheboygan County Memorial Airport on May 21, 2020.

makes conforming changes by updating the list of user fee airports to add four airports that have already been designated by CBP as user fee airports and by removing two airports for which CBP has withdrawn the user fee airport designation, in accordance with 19 U.S.C. 58b. Because this conforming rule has no substantive impact, is technical in nature, and does not impose additional burdens on or take away any existing rights or privileges from the public, CBP finds for good cause that the prior public notice and comment procedures are impracticable, unnecessary, and contrary to the public interest. For the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

Regulatory Flexibility Act and Executive Order 12866

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. This amendment does not meet the criteria for a “significant regulatory action” as specified in Executive Order 12866.

Paperwork Reduction Act

There is no new collection of information required in this document; therefore, the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) are inapplicable.

Signing Authority

This document is limited to a technical correction of CBP regulations. Accordingly, it is being signed under the authority of 19 CFR 0.1(b). Commissioner Chris Magnus, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects in 19 CFR Part 122

Air carriers, Aircraft, Airports, Customs duties and inspection, Freight.

Amendments to Regulations

Part 122 of title 19 of the Code of Federal Regulations (19 CFR part 122) is amended as set forth below:

PART 122—AIR COMMERCE REGULATIONS

■ 1. The general authority citation for part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1431, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a, 2071 note.

* * * * *

■ 2. In § 122.15, amend the table in paragraph (b) as follows:

■ a. Remove the entries for “Ardmore, Oklahoma” and “Decatur, Illinois”; and

■ b. Add entries in alphabetical order for “Hayden, Idaho”, “Ithaca, New York”, “Savoy, Illinois”, and “Sheboygan Falls, Wisconsin”.

The additions read as follows:

§ 122.15 User fee airports.

* * * * *

(b) * * *

Location	Name
Hayden, Idaho	Coeur d’Alene Airport.
Ithaca, New York	Ithaca Tompkins Regional Airport.
Savoy, Illinois	University of Illinois-Willard Airport.
Sheboygan Falls, Wisconsin	Sheboygan County Memorial Airport.

* * * * *

Dated: July 18, 2022.

ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division,
Regulations & Rulings, Office of Trade, U.S.
Customs and Border Protection.

[Published in the Federal Register, July 22, 2022 (85 FR 43740)]

NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING CERTAIN SURGICAL GOWNS

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 certain surgical gowns. Based upon the facts presented, CBP has concluded in the final determination that the country of origin of the surgical gowns in question is the Dominican Republic for purposes of U.S. Government procurement.

DATES: The final determination was issued on July 21, 2022. 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 August 26, 2022.

FOR FURTHER INFORMATION CONTACT: Marie Durané, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325-0984.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on July 21, 2022, U.S. Customs and Border Protection (CBP) issued a final determination concerning the country of origin of certain surgical gowns (Association for the Advancement of Medical Instrumentation (AAMI) Level 3 and Level 4 sterile disposable surgical gowns) for purposes of Title III of the Trade Agreements Act of 1979. This final determination, HQ H321354, was issued at the request of Global Resources International, Inc. (GRI) and Santé USA, LLC (Santé USA), 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, the country of origin of the surgical gowns is the Dominican Republic 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: July 21, 2022.

Alice A. Kipel,
Executive Director,
Regulations and Rulings, Office of Trade.

HQ H321354

July 21, 2022

OT:RR:CTF:VS H321354 MJD

CATEGORY: Origin

LAWRENCE R. PILON,
ROCK TRADE LAW LLC,
134 NORTH LaSALLE STREET, SUITE 1800,
CHICAGO, IL 60602.

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 Surgical Gowns

DEAR MR. PILON:

This is in response to your request of October 11, 2021, on behalf of your clients, Global Resources International, Inc. (“GRI”) and Santé USA, LLC (“Santé USA”), for a final determination regarding the country of origin of surgical gowns pursuant to Title III of the Trade Agreements Act of 1979 (“TAA”), as amended (19 U.S.C. 2511 *et seq.*), and subpart B of Part 177, U.S. Customs and Border Protection (“CBP”) Regulations (19 CFR 177.21, *et seq.*). GRI and Santé USA are parties-at-interest within the meaning of 19 CFR 177.22(d) and 177.23(a) and are therefore entitled to request this final determination. A meeting was held with counsel for GRI and Santé USA by videoconference on April 12, 2022.

FACTS

GRI and Santé USA are manufacturers, importers, exporters, and distributors of medical devices and supplies for the healthcare industry. The subject merchandise consists of the Association for the Advancement of Medical Instrumentation (“AAMI”) Level 3 and Level 4 disposable surgical gowns for use in hospitals, surgical centers, and similar healthcare settings. The surgical gowns are made from nonwoven synthetic spun-melt-spun (“SMS”) textile material and plastic film made in the United States. The SMS textile material forms the exterior of the gown, while the plastic film material is glued to the interior of the gown as reinforcement for the SMS textile material. According to GRI and Santé USA, the SMS textile material is the most expensive material in the finished product, accounting for 30% of the finished gown’s value, and makes up 100% of the gown’s exterior. The SMS textile material and plastic film are transferred in rolls to the Dominican Republic where they are cut into component parts, which are in turn assembled into two sleeve subassemblies and the gown body subassembly. The sleeve subassemblies and body gown subassemblies are then returned to the United States for final assembly consisting of principally attaching the sleeve subassemblies to the gown body subassembly and attaching the neck binding to the neck opening of the gown. A more detailed account of the manufacturing process of the surgical gowns is as follows:

United States

- Production of the SMS textile material.
- Manufacture of plastic film.

Dominican Republic

- The SMS textile material and plastic film are cut into the main gown body, sleeve, and reinforcement pieces using electric scissors.
- The SMS textile material is converted to waist ties using a tie-making machine.
- The sleeve cut piece is folded and its seam sealed by a bar heat sealer and ultrasonic welder sewing machine.
- The knit cuff is sewn to the formed sleeve piece using a sewing machine.
- The item number, level of performance claim, and brand information are stamped onto the main gown body piece.
- The hook and loop fastener material is sewn to the gown body using a sewing machine.
- The ties are attached to the gown body subassembly by glue and ultrasonic welding.
- Glue is applied evenly to the plastic film reinforcement piece and applied to the inner face of the gown body subassembly.

United States

- The sleeve subassemblies are attached to the main gown body subassembly with an ultrasonic welder sewing machine.
- The neck binding is attached to the neck opening of the gown using a binding machine.
- Each gown is inspected for visible defects and conformity to required dimensions for size.
- The gowns are also tested for conformity to applicable AAMI Level 3 and Level 4 strength and permeability standards.
- Gowns are packaged and sterilized with ethylene oxide.

GR and Santé USA state that the SMS textile material is classified in heading 5603, Harmonized Tariff Schedule of the United States (“HTSUS”), which provides for “[n]onwovens, whether or not impregnated, coated, covered or laminated.” The finished surgical gowns are classified under subheading 6210.10.5010, HTSUSA, which provides for “[g]arments, made up of fabrics of heading 5602, 5603, 5903, 5906 or 5907: Of fabrics of heading 5602 or 5603: Other: Nonwoven disposable apparel designed for use in hospitals, clinics, laboratories or contaminated areas: Surgical or isolation gowns.”

ISSUE

What is the country of origin of the surgical gowns for purposes of U.S. Government procurement?

LAW AND ANALYSIS

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 Acquisition Regulation. *See* 19 CFR 177.21. In this regard, CBP recognizes that the Federal Acquisition Regulation restricts 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 Regulation defines "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.

See 48 CFR 25.003.

The Federal Acquisition Regulation, 48 CFR 25.003 defines "designated country end product" as a:

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.

Section 25.003 provides that 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, the Dominican Republic is an FTA country for purposes of the Federal Acquisition Regulation.

The Secretary of the Treasury'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.

The Secretary of the Treasury's authority mentioned above, along with other customs revenue functions, are delegated to CBP in the Appendix to 19 CFR part 0—Treasury Department Order No. 100–16, 68 FR 28, 322 (May 23, 2003).

With regard to the surgical gowns at issue, GRI and Santé USA's request involves the issue of whether the article is a U.S.-made end product or a product of the Dominican Republic. This determination addresses the latter point, whether the article is a product of the Dominican Republic and not whether the article is a U.S.-made end product. Because the articles at issue are not wholly the growth, product, or manufacture of the Dominican Republic, our analysis must apply the substantial transformation standard, as set forth in 19 U.S.C. 2518(4)(B)(ii).

The information submitted indicates that the surgical gowns are made chiefly from non-woven textile material. GRI and Santé USA also indicate that the goods are classified in subheading 6210.10.50, HTSUS, as an apparel product. The rules of origin for textile and apparel products for purposes of the customs laws and the administration of quantitative restrictions are governed by 19 U.S.C. 3592, unless otherwise provided for by statute. These provisions are implemented in the CBP Regulations at 19 CFR 102.21. Section 3592 has been described as Congress's expression of substantial transformation as it relates to textile and apparel products. Therefore, the country of origin of the surgical gowns for Government procurement purposes is determined by a hierarchy of rules set forth in paragraphs (c)(1) through (c)(5) of Section 102.21.

As the finished surgical gowns are produced by processing in more than one country, their origin cannot be determined by application of the 19 CFR 102.21(c)(1), wholly obtained or produced rule, and resort must be made to 19 CFR 102.21(c)(2). Section 102.21(c)(2) states that the origin of a good is the country "in which each foreign material incorporated in that good underwent an applicable change in tariff classification, and/or met any other requirement, specified for the good in paragraph (e) of [102.21]." Section 102.21(e)(1) provides in pertinent part:

The following rules will apply for purposes of determining the country of origin of a textile or apparel product under paragraph (c)(2) of this section:

6210–6212 (1) If the good consists of two or more component parts, a change to an assembled good of heading 6210 through 6212 from unassembled components, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession.

The subject merchandise is classifiable in heading 6210, HTSUS. Section 102.21(b)(6) defines wholly assembled as: "the term 'wholly assembled' when used with reference to a good means that all components, of which there must be at least two, preexisted in essentially the same condition as found in the finished good and were combined to form the finished good in a single country, territory, or insular possession. Minor attachments and minor embellishments (for example, appliques, beads, spangles, embroidery, buttons) not appreciably affecting the identity of the good, and minor subassemblies (for example, collars, cuffs, plackets, pockets), will not affect the status of a good as "wholly assembled" in a single country, territory, or insular possession."

The surgical gowns at issue are assembled in both the Dominican Republic and the United States. Therefore, the surgical gowns are not "wholly assembled in a single country, territory, or insular possession," and as a result, 19 CFR 102.21(c)(2) is inapplicable.

19 CFR 102.21(c)(3) states in pertinent part,

Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) or (2) of this section:

(i) If the good was knit to shape, the country of origin of the good is the single country, territory, or insular possession in which the good was knit;

(ii) Except for fabrics of chapter 59 and goods of heading 5609, 5807, 5811, 6213, 6214, 6301 through 6306, and 6308, and subheadings 6209.20.5040, 6307.10, 6307.90, and 9404.90, if the good was not knit to shape and the good was wholly assembled in a single country, territory, or insular possession, the country of origin of the good is the country, territory, or insular possession in which the good was wholly assembled.

As the subject surgical gowns are neither knit to shape, nor wholly assembled in a single country, section 102.21(c)(3) is inapplicable.

Section 102.21(c)(4) states, “Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1), (2) or (3) of this section, the country of origin of the good is the single country, territory or insular possession in which the most important assembly or manufacturing process occurred.”

GRI and Santé USA assert that the most important assembly or manufacturing process is the assembly of the sleeves to the main body piece of the gown in the United States. In support of their argument, they assert that the sleeves and the body are the essential components of the gown and provide the protective surfaces that are the purpose of the finished surgical gowns; attaching the sleeves to the main body of the gown gives the gown its finished shape; and attaching the sleeves to the main body of the gown requires a high degree of skill and is the most time consuming step in manufacturing the gowns. Moreover, GRI and Santé USA argue that 19 CFR 102.21(c)(4) only allows for a single assembly or manufacturing process to be the most important assembly or manufacturing process. We disagree.

The most important assembly or manufacturing processes of the surgical gowns consist of cutting the SMS textile material to make the main body and sleeve pieces, the assembly of the sleeves, the assembly of the gown body, and the application of the plastic film to the inner face of the gown body. All these steps combined create the main pieces of the surgical gown, *i.e.*, the sleeves and the body. They are the parts of the surgical gown that make the surgical gown a surgical gown. As a result, when the sleeve subassemblies and the surgical gown body are exported to the United States, they are clearly recognizable as an unfinished surgical gown. All that is left to do in the United States is to attach the sleeves to the gown and the neck binding to the neck opening of the gown to form the finished surgical gown.

In New York Ruling Letter (“NY”) K88449, dated August 17, 2004, CBP found that the most important assembly processes for a woman’s knitted jacket in Version A were sewing the collar to the front of the jacket; assembling the sleeve parts; attaching the cuffs; sewing the side seams; sewing the pockets to the front panels; attaching the bottom band; and sewing the zipper and placket to the garment; all of which occurred in China. The final assembly processes of a woman’s knitted jacket, such as attaching the rib knit collar to the back of the jacket and sewing the sleeves to the jacket, that occurred in the Commonwealth of the Northern Mariana Islands, were not determinative of the country of origin. Consequently, while GRI and Santé USA argue that attaching the sleeve subassemblies to the gown body subassembly requires a high degree of skill and time, we find that, in the aggregate, the

cutting of the SMS textile material for the gown body subassembly and sleeve subassembly, the assembly of the sleeves, the assembly of the gown body, and applying the plastic film to the inner face of the gown body subassembly are the most important assembly or manufacturing processes in the production of the surgical gowns.

Moreover, CBP has a longstanding practice of interpreting 19 CFR 102.21(c)(4) to include more than one assembly or manufacturing process as the most important assembly or manufacturing process for purposes of a country of origin determination, as we have demonstrated above in NY K88449. *See also* Headquarters Ruling Letter (“HQ”) H308753, dated March 11, 2021; NY N308451, dated January 9, 2020; NY N302230, dated February 8, 2019; NY N174035, dated August 5, 2011; NY N091836, dated February 12, 2010; NY N026921, dated May 2, 2008; NY N033021, dated July 14, 2008; NY N019414, dated December 3, 2007; NY L81685, dated January 31, 2005; NY L87413, dated September 1, 2005; NY L81143, dated December 30, 2004; NY C85697, dated April 23, 1998; HQ 960991, dated December 9, 1997; HQ 960884, dated November 10, 1997; HQ 958668, dated May 15, 1996.

Therefore, we find, in accordance with 19 CFR 102.21(c)(4), the country of origin of the surgical gowns is the Dominican Republic.

Accordingly, the instant surgical gowns would be products of a foreign country or instrumentality designated pursuant to 19 U.S.C. 2511(b)(1). As to whether they qualify as “U.S.-made end product,” we encourage GRI and Santé USA to review the 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

Based on the facts and analysis set forth above, the country of origin of the surgical gowns at issue is the Dominican Republic.

GRI and Santé USA should consult with the relevant government procuring agency to determine whether the surgical gowns qualify as “U.S.-made end products” for purposes of the Federal Acquisition Regulation 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 U.S. Court of International Trade.

Sincerely,

ALICE A. KIPPEL,

Executive Director

Regulations and Rulings, Office of Trade

[Published in the Federal Register, July 27, 2022 (85 FR 45120)]

U.S. Court of Appeals for the Federal Circuit

ASPECTS FURNITURE INTERNATIONAL, INC., IMSS, LLC, Plaintiffs-
Appellants v. UNITED STATES, Defendant-Appellee

Appeal No. 2021–2060, 2021–2061

Appeals from the United States Court of International Trade in Nos. 1:18-cv-00222-MAB, 1:19-cv-00029-MAB, Judge Mark A. Barnett.

Decided: July 28, 2022

LAURA ANDREEA MOYA, Law Offices of Robert W. Snyder, Irvine, CA, argued for plaintiffs-appellants. Also represented by ROBERT WAYNE SNYDER.

MARCELLA POWELL, International Trade Field Office, Civil Division, United States Department of Justice, New York, NY, argued for defendant-appellee. Also represented by BRIAN M. BOYNTON, HARDEEP KAUR JOSAN, AIMEE LEE, PATRICIA M. MCCARTHY, JUSTIN REINHART MILLER; PAULA S. SMITH, Office of the Assistant Chief Counsel, Bureau of Customs and Border Protection, United States Department of Homeland Security, New York, NY.

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

REYNA, *Circuit Judge*.

Appellants challenge the timing and procedure by which the United States Customs and Border Protection provided notice to Appellants of the liquidation of eleven entries of wooden bedroom furniture from China. Appellants contend that the United States Court of International Trade erred in determining that Customs timely liquidated or reliquidated ten entries and that Customs' mislabeling of the notice of reliquidation for the remaining entry was harmless. We affirm.

PROCEDURAL BACKGROUND

Appellants Aspects Furniture International, Inc. (“AFI”) and IMSS, LLC (“IMSS”) are importers of wooden bedroom furniture from China. Appellants challenge the procedure by which the United States Customs and Border Protection (“Customs”) liquidated and/or reliquidated certain of Appellants' entries of wooden bedroom furniture. At issue are the following eleven imports entered during 2014:

- (1) nine entries made by AFI on February 18, February 23, July 8, July 27, and December 15, respectively (“AFI's Nine Subject Entries”);

(2) one entry made by AFI on January 31 (“AFI’s Tenth Subject Entry”) (together with AFI’s Nine Subject Entries, “AFI’s Subject Entries”); and

(3) one entry made by IMSS on September 11 (“IMSS’s Subject Entry”).

J.A. 6, 157, 170, 180, 191, 201, 212, 223, 231, 242, 257, 275.

On March 2, 2015, the U.S. Department of Commerce (“Commerce”) initiated the tenth administrative review of the antidumping order covering wooden bedroom furniture imported into the United States from China. *See Initiation of Antidumping & Countervailing Duty Admin. Revs.*, 80 Fed. Reg. 11,166, 11,168 (Dep’t Commerce Mar. 2, 2015). On April 11, 2016, Commerce published the results of the tenth administrative review in the Federal Register, which set a China-wide antidumping duty rate of 216.01 percent *ad valorem*. *See Wooden Bedroom Furniture From the People’s Republic of China: Final Results & Final Determination of No Shipments, In Part: 2014 Admin. Rev.*, 81 Fed. Reg. 21,319 (Dep’t Commerce Apr. 11, 2016) (“Final Admin Results”).

On April 26, 2016, the American Furniture Manufacturers Committee for Legal Trade and Vaughn-Bassett Furniture Company, Inc. (“AFMC”) filed a lawsuit challenging the Final Admin Results before the Court of International Trade. *Am. Furniture Mfrs. Comm. for Legal Trade v. United States*, No. 16-cv-00070 (Ct. Int’l Trade) (“AFMC Litigation”). On April 27, 2016, the Court of International Trade issued an injunction to enjoin the liquidation (“suspension of liquidation”) of the entries involved in the AFMC Litigation, including the entries at issue in this appeal. J.A. 6. On March 13, 2017, the Court of International Trade dismissed the AFMC Litigation for lack of subject-matter jurisdiction. *See Am. Furniture Mfrs. Comm. for Legal Trade v. United States*, No. 16–00070 2017 Ct. Intl. Trade LEXIS 24, at *5–12 (Mar. 13, 2017). On May 12, 2017, the dismissal of the AFMC Litigation became final. *See* J.A. 8. On May 30, 2017, Commerce issued liquidation instructions to Customs for the subject entries, which notified Customs of the end of the injunction. *Id.*

On November 24, 2017, Customs liquidated AFI’s Nine Subject Entries. J.A. 158, 173, 183, 194, 204, 215, 226, 234, 245. On November 30, 2017, AFI’s Tenth Subject Entry was deemed liquidated. J.A. 413. On December 1, 2017, Customs sent a notice of liquidation as to AFI’s Tenth Subject Entry. J.A. 260. AFI’s Subject Entries were assessed a final antidumping duty rate of 216.01 percent. J.A. 9. AFI timely protested the liquidations, and Customs denied the protests. J.A. 286.

On November 30, 2017, IMSS's Subject Entry was deemed liquidated. J.A. 9. On February 16, 2018, Customs sent a notice of liquidation regarding IMSS's Subject Entry. J.A. 278. On February 28, 2018, Customs sent a notice of reliquidation of IMSS's Subject Entry. J.A. 280. As with AFI's Subject Entries, Customs assessed a final antidumping duty rate of 216.01 percent. J.A. 10. IMSS timely protested the reliquidation, and the protest was denied by operation of law. *Id.*

On October 27, 2018, AFI timely filed suit before the Court of International Trade challenging Customs' denial of its protests. *Id.* On March 22, 2019, IMSS filed a similar suit. *Id.* On August 25, 2020, the Court of International Trade consolidated the two actions for purposes of discovery and briefing. J.A. 11.

On November 12, 2020, the Government filed a motion for summary judgment and the parties' joint statements of material facts. *Id.* That same day, IMSS responded to the Government's motion for a protective order and moved to compel discovery regarding the date Customs was served with the Court of International Trade's decision dismissing the AFMC litigation. *Id.* Thereafter, the court deferred ruling on the motion for a protective order and stayed the Government's response to IMSS's motion to compel. *Id.*

On December 17, 2020, Appellants cross-moved for summary judgment in opposition to the Government's motion. J.A. 12. On March 5, 2021, the court ordered additional briefing regarding what, if any, harm Appellants suffered from Customs' alleged error of labeling the notices of reliquidation as notices of liquidation and, if there was an error, whether it was harmless. *Id.* On March 29, 2021, the court heard oral argument regarding the supplemental briefing. *Id.*

On April 9, 2021, the Court of International Trade issued final judgment, granting the government's motion for summary judgment. J.A. 1. The Court of International Trade determined that the applicable date of notice under 19 U.S.C. § 1504(d) was May 30, 2017, the date on which Commerce sent liquidation instructions to Customs. J.A. 23. The Court of International Trade also determined that its March 13, 2017, decision in the AFCM litigation did not provide unambiguous notice that the relevant injunction was lifted. J.A. 17–18. As such, the Court of International Trade denied Appellants' request for discovery concerning when Customs received a copy of the Court of International Trade's decision, reasoning that even if Customs received the decision before May 30, the decision did not provide the requisite notice. J.A. 18–19. The Court of International Trade also concluded that Customs' error in labeling the notice regarding AFI's Tenth Subject Entry as a liquidation instead of a reliquidation was

harmless because that entry was liquidated or reliquidated within the relevant statutory period, and the effect was the same. J.A. 42.

Appellants timely appealed. This court has exclusive jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

STANDARD OF REVIEW

We review a grant of summary judgment by the Court of International Trade de novo. *Kahrs Int'l v. United States*, 713 F.3d 640, 643–44 (Fed. Cir. 2013). Although we apply a de novo standard of review, we give great weight to the informed opinion of the Court of International Trade. *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1341 (Fed. Cir. 2016).

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” U.S. CIT R. 56(a) (2015). A nonmoving party establishes that there is a genuine dispute of material fact only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986).

DISCUSSION

When importing a good into the United States, a U.S. importer of record is required to use reasonable care in providing Customs with true and correct documentation regarding the value it declares for the imported merchandise. 19 U.S.C. §§ 1484, 1485. Should a dispute arise with Customs as to the actual value of the entry, an interested party may challenge the value asserted by Customs by filing a protest. *Allegheny Ludlum Corp. v. United States*, 287 F.3d 1365, 1368 (Fed. Cir. 2002) (citing 19 U.S.C. § 1675b).

When Customs determines that an entry is covered by an anti-dumping order, it suspends liquidation¹ and notifies the importer of “determined or estimated” duties. 19 U.S.C. § 159.58. When the suspension of liquidation is lifted, either by statute or court-order, 19 U.S.C. § 1504(d) establishes that Customs shall liquidate the relevant entry “within 6 months after receiving notice of the removal from [Commerce], [an]other agency, or a court with jurisdiction over the entry.” Otherwise, the entry will be deemed liquidated “at the rate of duty, value, quantity, and amount of duty asserted by the importer of record.” 19 U.S.C. § 1504(d). In order for an entry to be deemed liquidated, the suspension of liquidation must have been removed;

¹ “Liquidation” is defined as “the final computation or ascertainment of duties on entries for consumption or drawback entries.” 19 C.F.R. § 159.1.

Customs must have received notice of the removal of the suspension; and Customs must not have liquidated the entry at issue within six months of receiving notice of the suspension removal. *Cemex, S.A. v. United States*, 384 F.3d 1314, 1321 (Fed. Cir. 2004) (quoting *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002)).

We have interpreted § 1504 to require that a notice of removal of suspension of liquidation must be “unambiguous and public.” See *id.* at 1320. We have also clarified that the suspension of liquidation under 19 U.S.C. § 1516a(c)(2) cannot be lifted until the time for petitioning the Supreme Court for certiorari expires. *Id.* (citing *Fujitsu*, 283 F.3d at 1379).

An entry that has been liquidated, or deemed liquidated by operation of law, may be voluntarily reliquidated by Customs pursuant to 19 U.S.C. § 1501 provided it is undertaken within 90 days from the date of the original liquidation. Section 1501 provides:

A liquidation made in accordance with section 1500 or 1504 of this title or any reliquidation thereof made in accordance with this section may be reliquidated in any respect by U.S. Customs and Border Protection, notwithstanding the filing of a protest, *within ninety days* from the date of the original liquidation. Notice of such reliquidation shall be given or transmitted in the manner prescribed with respect to original liquidations under section 1500(e) of this title.

19 U.S.C. § 1501 (emphasis added).

Notice

Appellants raise two principal arguments on appeal regarding notice. First, Appellants contend that the Court of International Trade erred in determining that there is no genuine dispute of material fact as to the date of notice under § 1504(d). Appellants’ Br. 16–21. Second, Appellants argue that the Court of International Trade erred in denying discovery as to when Customs received a copy of the decision dismissing the AFMC litigation. *Id.*

The date of notice under § 1504(d) is relevant here because if the notice date was before May 24, 2017, then Customs erred with respect to its treatment of AFI’s Subject Entries by stating “liquidation” on the notice, instead of “reliquidation,” because those entries had already liquidated by operation of law. With respect to IMSS’s Subject Entry, if the notice date was before May 24, 2017, then all notices are untimely because each is outside the 6-month [§ 1504(d)] plus 90-day [§ 1501] statutory window.

The core of the dispute regarding notice is whether the March 13 decision in the AMFC litigation gave unambiguous notice of the end of the injunction (which would lift suspension of liquidation). See *Fujitsu*, 283 F.3d at 1376 (holding that there must be “an unambiguous and public starting point for the six-month liquidation period”). We conclude that the Court of International Trade correctly determined that its decision in the AFMC litigation did not provide such unambiguous and public notice, and that there is no genuine dispute of fact as to the notice date.

In its March 13 decision in the AFMC litigation, the Court of International Trade dismissed the case for lack of subject-matter jurisdiction. *Am. Furniture Mfrs. Comm. for Legal Trade*, 2017 Ct. Intl. Trade LEXIS 24, at *5–12. That decision did not discuss or address the injunction in any way and, as such, did not fulfill the statutory requirement that the notice be unambiguous. Accordingly, the Court of International Trade correctly denied discovery as to the date Customs received a copy of its decision because, even if Customs was served a copy, that decision did not constitute adequate notice. Instead, the Court of International Trade correctly determined, the first unambiguous notice of the removal of the suspension of liquidation was the May 30, 2017 liquidation instructions from Commerce to Customs.

Despite Appellants’ arguments to the contrary, this court has never held that liquidation instructions cannot provide the statutorily required unambiguous and public notice. See Appellants’ Br. 19–21 (citing *Int’l Trading Co. v. United States*, 412 F.3d 1303 (Fed. Cir. 2005)). In *International Trading*, this court held that, under the facts of that case, the first public and unambiguous notice of the removal of the suspension of liquidation was when Commerce published the final results of the relevant administrative review in the Federal Register. *Int’l Trading*, 412 F.3d at 1313. In so holding, the court rejected the date on which Commerce sent liquidation instructions to Customs as the operative date of notice because Commerce’s earlier publication in the Federal Register had already provided notice to Customs that the suspension of liquidation had lifted. *Id.* Nothing in that decision, or in our holding today, prevents or requires that notice be provided in the form of liquidation instructions from Commerce to Customs. Instead, the relevant event that triggers the date of notice is the first publication of an unambiguous and public notice that then becomes the starting point for the six-month liquidation period, whatever form that may take. See *Int’l Trading*, 281 F.3d at 1275.

In this case, Commerce issued unambiguous liquidation instructions to Customs ending suspension of liquidation on May 30, 2017,

shortly after suspension lifted on May 12, 2017. No prior publication, including the decision in the AFMC Litigation, provided sufficient notice. *See* J.A. 20. Accordingly, the Court of International Trade did not err in determining that there was no genuine dispute of material fact as to the date of notice.

Liquidation v. Reliquidation

Appellants further challenge the Court of International Trade's determination that Customs' mislabeling of a notice as "liquidation," as opposed to "reliquidation," was harmless error. Appellants' Br. 21–26. We agree with Appellants that the December 1, 2017 notice regarding AFI's Tenth Subject Entry was erroneously labeled "liquidation."² However, Appellants make no cognizable allegation of harm. For example, § 1501 states explicitly that "[n]otice of such reliquidation shall be given or transmitted in the manner prescribed with respect to original liquidations under section 1500(e) of this title." 19 U.S.C. § 1501. Here, there are no allegations that the notice was deficient in any manner, except for the missing "re" in "reliquidation."

Informed importers are aware that, under the established statutory scheme, Customs has six months from the notice of the removal of the suspension [§ 1504(d)] plus an additional 90 days from any liquidation or reliquidation [§ 1501] to notify an importer of the "the final computation or ascertainment of duties on entries for consumption or drawback entries" [19 C.F.R. § 159.1]. Here, notice was provided within that window. Appellants had no expectation of finality at the time of any challenged notice. To be clear, we do not hold that cognizable harm cannot result from Customs mislabeling its key notices. Rather, we hold that, in this case, Appellants have not alleged any such harm. Accordingly, we agree with the Court of International Trade's decision that the labeling error was harmless.

CONCLUSION

We affirm the decision of the Court of International Trade. We have considered the parties' remaining arguments and find them unpersuasive.

² Similarly, it appears that Customs' February 16, 2018 notice regarding IMSS's Subject Entry was also mislabeled as a "liquidation." *See* J.A. 278. However, Appellants' argument regarding mislabeling is limited to the December 1, 2017 notice regarding AFI's Tenth Subject Entry, and we limit our review accordingly.

AFFIRMED

COSTS

No costs.

U.S. Court of International Trade

Slip Op. 22–86

SECOND NATURE DESIGNS, LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 17–00271

[The court grants in part and denies in part the United States’ motion to file an amended answer and supplemental pleading asserting counterclaim.]

Dated: July 25, 2022

John M. Peterson, Neville Peterson LLP, of New York, N.Y., for Plaintiff Second Nature Designs, LTD. With him on the brief was *Patrick B. Klein*.

Brandon A. Kennedy, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Justin R. Miller*, Attorney-In-Charge, International Trade Office. Of counsel on the brief was *Alexandra Khrebtukova*, Senior Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

OPINION AND ORDER

Katzmann, Judge:

Before the court is Defendant the United States’ (“the Government”) motion for leave to file an amended answer and supplemental pleading asserting a counterclaim against Plaintiff Second Nature Designs, Ltd. The Government argues that its motion is permissible, timely, and that the equities favor permitting it to amend and to assert a counterclaim. Plaintiff responds that the Government’s motion must be denied because its proposed counterclaim and amendments are barred by the finality of liquidation, impermissible on statutory and Constitutional grounds, and unreasonably prejudicial to Plaintiff’s ability to participate in the litigation. Except with respect to the proposed counterclaim, which the court redenominates as a defense pursuant to USCIT Rule 8(d)(2), the court is not persuaded by Plaintiff’s arguments and grants the Government’s motion for leave.

BACKGROUND

This action involves the proper tariff classification of “thousands of decorative items” reflecting “at least 852 distinct product styles” imported by Plaintiff. Joint Rule 56.3 Stmt. of Material Facts as to which there are No Genuine Issues to be Tried, Jan. 28, 2022, ECF

No. 91–1 (“56.3 Statement”). In general, the at-issue goods consist of a wide variety of items of botanical home décor. Mot. to File an Am. Ans. and a Suppl. Pleading Asserting a Counterclaim at 2, Jan. 28, 2022, ECF No. 92 (“Def.’s Br.”); Pl.’s Resp. in Opp. to Def.’s Mot. to Am. at 2, Feb. 18, 2022, ECF No. 95 (“Pl.’s Resp.”). The goods were originally liquidated by U.S. Customs and Border Protection (“CBP”) under subheading 0604.90.60¹ of the Harmonized Tariff Schedule of the United States (“HTSUS”); a classification Plaintiff timely protested. Compl. at 4–5, Dec. 21, 2017, ECF No. 7. Following the denial of its protests, Plaintiff timely filed suit on November 17, 2017, contesting CBP’s classification and alleging that the goods are instead properly classified under HTSUS provision 0604.90.3000.² Summons, Nov. 17, 2017, ECF No. 1; Compl. at 4. The Government answered Plaintiff’s complaint on April 12, 2018, defending CBP’s classification. Ans., ECF No. 12.

Discovery commenced thereafter, and was slated to conclude on November 2, 2018. Scheduling Order, May 25, 2018, ECF No. 17. However, following numerous motions for extension by the parties, discovery was ultimately extended until February 14, 2022 — largely to accommodate the parties’ joint efforts to establish the scope of the litigation and prepare an agreed-upon statement of facts. *See* Order, Oct. 27, 2021, ECF No. 80; *see, e.g.*, Joint Status Report at 1–3, Dec. 1, 2021, ECF No. 84 (“JSR 84”) (discussing efforts to produce a joint statement of facts pursuant to Rule 56.3 of the Court of International Trade). Shortly before the close of discovery, on January 28, 2022, the Government filed a motion to amend its answer and assert a counterclaim that the at-issue subject merchandise is, in part, correctly

¹ “Foliage, branches and other parts of plants, without flowers or flower buds, and grasses, mosses and lichens, being goods of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared: Other: Other.”

² “Foliage, branches and other parts of plants, without flowers or flower buds, and grasses, mosses and lichens, being goods of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared: Other: dried or bleached.”

classified under HTSUS 6702.90.65.^{3 4} Def.’s Br. at 8–9. Plaintiff responded in opposition on February 18, 2022, Pl.’s Resp., and the Government replied on March 22, 2022, Def.’s Reply in Supp. of its Mot. to File an Am. Ans. and a Suppl. Pleading Asserting a Counterclaim, ECF No. 99 (“Def.’s Reply”).

JURISDICTION AND STANDARD OF REVIEW

The court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1581(a), which provides that the court “shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.” The court also has jurisdiction over the assertion of counterclaims, as provided in 28 U.S.C. § 1583.

DISCUSSION

I. The Motion to File a Counterclaim

As a threshold matter, the court adopts the conclusions of *Cyber Power Sys. (USA) Inc. v. United States*, 46 CIT __, __, Slip Op. 22–85 (Jul. 20, 2022) and finds that there is no statutory basis for the Government’s proposed counterclaim. Although 28 U.S.C. § 1583 grants the court exclusive jurisdiction over “any counterclaim, cross-claim, or third-party action of any party” involving the same “imported merchandise that is the subject matter” of an ongoing civil action before the court, its jurisdictional grant is not a cause of

³ “Artificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers, foliage or fruit: Of other materials: Other.”

⁴ As explained by the Government:

Based on information provided by plaintiff at the time of importation describing its merchandise, CBP classified the merchandise upon liquidation under subheading 0604.90.60, HTSUS . . . [which] carries a duty rate of 7 percent *ad valorem*. Now, based on our understanding of the facts of the merchandise, the facts of the record show that 97 product styles of the subject entries consist either solely of artificial flowers or fruit, or articles made of artificial flowers or fruit, and should be properly classified under subheading 6702.90.65, HTSUS . . . [which] carries a duty rate of 17 percent *ad valorem*. Examples include articles that are constructed by gluing materials together to resemble flowers, pumpkins, or apples.

Second Nature has paid duties to the Government on these styles at the rate of 7 percent *ad valorem* – which is the rate of the provision in which CBP classified merchandise at the time of liquidation (subheading 0604.90.60, HTSUS) . . . Consequently, to preserve our ability to collect the difference in duties should we prevail on the merits of the question of classification, we must assert a counterclaim to collect the money.”

action.⁵ Accordingly, the Government's motion to file a supplemental pleading asserting a counterclaim is denied.

However, as established by *Jarvis Clark Co. v. United States*, 773 F.2d 873 (Fed. Cir. 1984), the court is permitted to "reach the correct decision" with respect to classification of merchandise on its own initiative, regardless of the classifications asserted by the parties. 733 F.2d at 878. Likewise, USCIT Rule 8(d)(2) provides that "[i]f a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so." Here, in exercise of its authority both to consider the totality of potential classifications and to redenominate a counterclaim as a defense, the court permits the assertion of the Government's alternative classification as a defense within its amended answer.

II. The Motion to Amend

Although USCIT Rule 15 provides that "the court should freely give leave [to amend] when justice so requires, permitting amendment is ultimately within the discretion of the court. Leave to amend may be denied on the basis of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Intrepid v. Pollock*, 907 F.2d 1125, 1128 (Fed. Cir. 1990) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). The Government contends that the court should exercise its discretion to permit amendment here in reflection of the timeliness of its motion and the support of the equitable factors traditionally considered by the court. Def.'s Br. at 14 (citation omitted). Plaintiff argues that the Government's motion is impermissible, and that to the extent it is not impermissible the equitable factors nevertheless require that it be denied. Pl.'s Resp. at 4–9, 20, 25. For the following reasons, the Government prevails.

A. Futility

Plaintiff alleges that the Government's attempt to recover additional duties is futile because the Government "has failed to identify a cause of action against Plaintiff, and because the allowance of [a] counterclaim would violate the equal protection clause of the Consti-

⁵ This is the case even though, as the Government notes, Congress may have intended to permit the assertion of counterclaims through the enactment of 28 U.S.C. § 1583. Def.'s Br. at 11 (quoting H.R. Rep. No. 96–1235 at 35 (1980)). Ultimately, the court is bound by the text of the statute, which provides only that the court has jurisdiction to hear counterclaims properly asserted — and does not separately permit the assertion of such counterclaims where, as here, the Government contests the final classification of disputed merchandise.

tution.” Pl.’s Resp. at 9. Specifically, Plaintiff argues that the assertion of alternative classifications would deprive “those who exercise their fundamental constitutional right to seek judicial review of a Government exaction in this Court” of “the protection of the finality of liquidation set out in 19 U.S.C. § 1514” and would subject them to the risk of “further loss of property” as a result of the exercise of that right. *Id.* at 26.

As the court has declined to find a cause of action permitting the Government to assert counterclaims for re-classification, Plaintiff’s arguments regarding the permissibility of such counterclaims are moot. To the extent that Plaintiff intends those arguments to extend to the assertion of defenses alleging alternative classifications, they are unavailing.

First, although the Government has no cause of action for the assertion of a *counterclaim* for increased duties, it is not barred from otherwise arguing for a different classification at a higher duty rate. *See, e.g., Tomoegawa USA, Inc. v. United States*, 12 CIT 112, 113, 122 (1988), *aff’d in part, vacated in part, per curiam* 861 F.2d 1275 (Fed. Cir. 1988) (mem.), *remanded to* 15 CIT 162 (1991) (adopting the Government’s alternative classifications, proposed in light of new information initially unavailable to CBP); *Schlumberger Tech. Corp. v. United States*, 39 CIT __, __, 91 F. Supp. 3d 1304, 1323 (2015) *aff’d* 845 F.3d 1158 (Fed. Cir. 2017) (acknowledging the Government’s assertion of alternative classifications in addition to CBP’s classification on appeal); *Dollar Trading Corp. v. United States*, 67 Cust. Ct. 308, 315–16 (1971) (noting that the presumption of correctness does not extend to the Government’s assertion of two additional possible classifications for the subject merchandise). Accordingly, its assertion of alternative classifications is permissible here.

Second, Plaintiffs seeking judicial review of CBP’s assessment of duties are indeed barred from enjoying the “protection” of final liquidation — explicitly, by the text of 19 U.S.C. § 1514(a). The law provides that CBP’s liquidation is “final and conclusive” *except* when “a civil action contesting the denial of a protest” is brought before this court. 19 U.S.C. § 1514(a). This exception to the finality of liquidation permits importers seeking judicial review of CBP’s decisions to obtain relief should they prevail. In other words, by providing for a stay of final and conclusive liquidation, § 1514(a) allows the exercise of precisely the “fundamental constitutional right” that Plaintiff claims to defend.

Contrary to Plaintiff's arguments, the entries at issue have not been finally liquidated. As the Government notes, 19 U.S.C. § 1514(a) provides that with respect to any entry, liquidation, reliquidation, or decision by CBP,

[T]he classification and rate and amount of duties chargeable . . . shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade.

Here, it is undisputed that Plaintiff timely contested the denial of the relevant protests by filing the instant action. Summons; Def.'s Reply at 14. Accordingly, the liquidation of the entries contested by Plaintiff is not final. Because the Government's proposed alternative classification relates to the same entries, it is not barred by finality, and is accordingly not futile.

B. Timeliness and Bad Faith

The Government's motion for leave to file an amended answer and supplemental pleading asserting a counterclaim was submitted on January 28, 2022, nearly four years after its answer. *See Ans.* While the elapsed time is substantial, the Government asserts that its motion was nevertheless timely because (1) it was not initially provided with the information underlying its proposed amendments and alternative classifications (characterized as counterclaims), and (2) it timely submitted its motion upon learning that information. Def.'s Br. at 13–14. Plaintiff responds that the Government was aware of the relevant information at least as of November 2018, when it deposed Plaintiff's president regarding the subject merchandise, and that its motion is thus untimely. Pl.'s Resp. at 5.

The court has previously held that the timeliness of the Government's assertion of alternative classifications "depends upon when the Government acquired knowledge of the facts and circumstances that form the basis" of its proposed classifications. *Tomogawa*, 15 CIT at 186. It is the view of the court that, as previously stated in *Tomogawa*, the Government was obliged to submit its alternative classifications within a reasonable time upon acquiring the necessary knowledge. *Id.*

The court finds that the motion was timely filed. Throughout the multi-year discovery process, the Government consistently highlighted its concern that the merchandise was misclassified, and dili-

gently and in good faith attempted to identify the characteristics of specific product styles within the subject merchandise such that they could be liquidated under the appropriate HTSUS provisions. See Def.'s Br. at 13–14; see, e.g. Def.'s Mot. to Compel Pl. to Supplement its Resps. to Def.'s Interrogs. and Reqs. for Produc. at 3, Aug. 7, 2020, ECF No. 38 (“Def.’s Mot. to Compel”) (noting that “[b]ased on the information produced by plaintiff thus far, it is likely that many of the styles covered by the subject entries are properly classifiable in provisions other than the subheading claimed by plaintiff in its complaint . . . [h]owever, as we explain below, plaintiff has not provided the Government with sufficient information to ascertain the specific merchandise at issue in this case, the physical characteristics and composition of that merchandise, and the manufacturing of that merchandise,” and accordingly requesting the court to compel Plaintiff to supplement its discovery responses); Joint Status Report at 2, May 5, 2021, ECF No. 56 (“JSR 56”) (representing that the Government is “in the process of seeking internal government approval to assert counterclaims for underpaid duties on products imported under cover of the subject entries that were previously inaccurately or incompletely described by Plaintiff”); JSR 84 at 2 (indicating that Plaintiff had, since the court’s order of November 10, 2021, “obtained and added additional information” on one of the categories of subject merchandise to the joint statement of facts, and again noting that the Government “is in the process of finalizing its motion to seek leave . . . to assert counterclaims for underpaid duties on products imported under cover of the subject entries that were previously inaccurately or incompletely described by Plaintiff”).

As the court has previously held, even where substantial time has elapsed between the filing of a defendant’s answer and the assertion of proposed alternative classifications by amendment, evidence that the defendant “exercised reasonable diligence” in identifying the appropriate classification supports a determination of timeliness. *Tomogawa*, 15 CIT at 188. Applying this principle in *Tomogawa*, the court found that the Government’s motions to amend were not untimely despite being filed seven and eight years after the original answers and four years after the Government “became aware of the existence of the facts necessary” to assert an alternative classification because (1) the Government’s duty to amend did not arise until after the Federal Circuit affirmed the re-classification of analogous merchandise in a related case, and (2) it diligently pursued its re-classification arguments in the wake of the Federal Circuit’s ruling. *Id.* at 188–89. Here, the parties jointly acknowledged that Plaintiff was still obtaining “additional” information regarding the at-issue

product styles as late as December 2021, only one month before the Government filed the instant motion. JSR 84 at 2. As the Government thus did not “gain full knowledge of the facts forming the basis” of its alternate classifications until at least December 2021, despite diligently and in good faith working to obtain the relevant information, the court concludes that its submission of a motion to amend on January 28, 2022, was timely. Accordingly, the factors of timeliness and good faith favor allowing amendment.⁶

C. Prejudice

Plaintiff’s argument that it will suffer “significant prejudice” if the motion is granted is unavailing. Plaintiff was aware of the Government’s belief that the subject merchandise was properly classifiable in “many tariff provisions other than” those asserted by Plaintiff and CBP at least as of August 7, 2020, when the Government expressed such belief in its motion to compel. Def.’s Mot. to Compel at 3. Likewise, Plaintiff was aware of the Government’s intention to assert alternative classifications at least as of May 5, 2021, when the Government stated that intention in the parties’ Joint Status Report. JSR 56 at 2. The Government’s motion is accordingly “not a surprise to [P]laintiff,” *Tomoe-gawa*, 15 CIT at 188, nor did the Government’s delay deprive Plaintiff of “an adequate opportunity to prepare its case concerning the new issues raised,” Pl.’s Resp. at 8. Plaintiff was amply warned of the possibility that the Government would assert alternative classifications, and is thus not prejudiced by their assertion at this stage.

Likewise, the procedural posture of the case does not support the denial of the Government’s motion. While the motion was submitted near the end of discovery (it was filed on January 28, 2022, with discovery slated to end on February 14, 2022) the discovery period had not yet ended. *See* Order, Oct. 27, 2021, ECF No. 80 (granting parties’ joint motion to amend scheduling order). Furthermore, by the time the Government filed its motion, the discovery period had already been extended nine times from its original end date of November 2, 2018. Had Plaintiff been concerned that it would be deprived of additional necessary discovery despite the four-year-long discovery process it had already undertaken, it had adequate time to file another request for extension following the Government’s motion to amend. It did not, and cannot now claim that resultant non-specific harms require denial of the Government’s motion.

⁶ For the same reasons, the court concludes that there is no evidence that the Government failed to take advantage of prior opportunities to cure deficiencies in its answer.

Accordingly, the court concludes that the factors under consideration favor granting the Government's motion to amend its answer.

CONCLUSION

For the reasons stated, it is hereby

ORDERED that the Government's motion to file a supplemental pleading asserting a counterclaim is denied; it is further

ORDERED that the Government's motion to file an amended answer is granted; it is further

ORDERED that the proposed counterclaim is redennominated a defense pursuant to USCIT Rule 8(d)(2); and it is further

ORDERED that the Government shall file an amended answer incorporating such defense within thirty days of the date of this order.

Dated: July 25, 2022

New York, New York

/s/ Gary S. Katzmann

JUDGE

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