

U.S. Customs and Border Protection

Slip Op. 09–100

KAHRS INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant

Court No. 07–00343
Before: Gregory W. Carman, Judge

[Held: Plaintiff's motion to file a reply brief is denied. Plaintiff's motion to exclude and to strike are denied.]

September 18, 2009

Law Offices of George R. Tuttle, A.P.C. (Carl D. Cammarata, George R. Tuttle, and Stephen P. Spraitzar) for Plaintiff.

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OPINION & ORDER

CARMAN, JUDGE:

I.

Introduction¹

Pending before the Court are several motions and cross-motions for summary judgment and a motion to dismiss/strike.² Plaintiff,

¹ The background of this case, brought by the Plaintiff pursuant to 19 U.S.C. § 1581(a), is set forth in slip opinion of the court numbered 09–12, 33 CIT __, 602 F. Supp.2d 1352 (February 19, 2009), familiarity with which is presumed.

² These pending motions are: (1) Defendant United States' motion to dismiss the Seventh Cause of Action, pursuant to USCIT R.12(b)(1) and 12(b)(5), and motion to strike certain allegations contained in Plaintiff's complaint, pursuant to USCIT R.12(f); (2) Plaintiff's motion for summary judgment on its First Cause of Action in its complaint, pursuant to USCIT R.56; (3) Defendant's cross-motion for summary judgment on the First Cause of Action in Plaintiff's complaint, and for summary judgment on the Third, Fourth and Sixth Causes of Action in Plaintiff's complaint, pursuant to USCIT R.56; (4) Plaintiff's motion for summary judgement on the Second Cause of Action, pursuant to USCIT R.56; and (5) Defendant's cross-motion for summary judgment on the Second Cause of Action, pursuant to USCIT R.56.

through its present motion, challenges, in part, some of the evidence submitted³ particularly two declarations, upon which Defendant moves for summary judgment.

The Court convened a status conference with the parties on June 16, 2009. Pursuant to the Court's directive, with the consent of both parties, a joint stipulation of uncontested facts was submitted ("Stipulation of Facts") (Docket #102) for incorporation in the Court's decision on the summary judgment motions. It was also agreed that each party would be permitted to file separate "proposed findings of facts as to those alleged facts to which the parties could not stipulate." See Defendant's Proposed Findings of Fact ("Def.'s PFF") (Docket #103) and Plaintiff's Concise Statement of Material Facts Pertaining To The First, Second, Third, Fourth, And Sixth Causes Of Action In The Complaint (Docket #104).

This latest motion by Plaintiff Kährs International, Inc. ("Kahrs"), is stylized as an Objection And Motion To Exclude Statements, Evidence, And Testimony From Defendant's Proposed Findings Of Fact ("Pl.'s Mot."). Specifically, Kahrs moves this Court pursuant to USCIT Rules 7(b), 30(d)(3), 32(b), 37(c) and 56(e)(2) for an order

sustaining Plaintiff's objections to Defendant's utilization of the statements made by both Ms. [Laurel] Duvall⁴ and Mr. [Paul] Garretto⁵ that are cited by Defendant in support of its claimed facts and granting Plaintiff's motion to exclude all of the facts set forth in Defendant's Proposed Finding of Facts, dated July 7, 2009 — Docket #103, that are disputed by Plaintiff, and are based upon the statements made by both Ms. Duvall and Mr. Garretto in support of those facts,⁶ as their statements are inadmissible evidence.

³ In determining the outcome of a motion for summary judgment, the court must examine whether there remains "any genuine issue as to any material fact" in dispute on the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The inquiry into factual matters is only to the extent they are established under the standards articulated in the Federal Rules of Evidence ("Fed. R. Evid."). The court will then examine whether those facts constitute the essential elements of a claim, and whether either party is entitled to a judgment as a matter of law. Summary judgment may be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." USCIT R.56(c).

⁴ Ms. Laurel Duvall is Senior Import Specialist, U.S. Customs and Border Patrol ("CBP")

⁵ Mr. Paul Garretto is National Import Specialist, CBP.

⁶ Plaintiff obliquely is referring to the separate declarations of Laurel Duvall and Paul Garretto, both of the CBP, which were submitted by Defendant as part of its cross-motion for summary judgment on the First and Second Causes of Action to the Plaintiff's Complaint and motion for summary judgment on the Third, Fourth, and Sixth Causes of Action to the Plaintiff's Complaint in this case. See Declaration of Laurel Duvall (Def.'s X-Mot. SJ, Ex. D) ("Duvall Decl."); Declaration of Paul Garretto (Def.'s X-Mot. SJ, Ex. E) ("Garretto Decl.").

(Pl.'s Mot. 5.) Essentially, Plaintiffs move *in limine* seeking an order to exclude certain paragraphs contained within the Duvall and Garretto Declarations, as well as the exclusion of any Proposed Findings of Facts proffered by the Defendant that are based upon the objectionable Duvall and Garretto Declaration statements. (*Id.*) Separately, Plaintiff also moves for an order to strike certain "false and misleading statements" and "[facts] unsupported by citation to admissible evidence and/or are legal argument" contained within Defendant's Proposed Findings of Facts. (*Id.* at 9, 23.)

The Defendant (or "Government") opposes this motion as "frivolous" and asks that it be denied in its entirety. (Response To Plaintiff's Motion To Exclude Statements, Evidence, And Testimony From Defendant's Proposed Findings Of Fact ("Def.'s Resp.") 1.) In addition, Defendant, without expressly moving this Court for specific relief, calls into question portions of two of Plaintiff's witness declarations. Namely, Defendant argues that the declaration of Mr. Sean Brennan, Senior Vice President, Finance & Operations, Kahrs Int'l Inc.⁷ and the declaration of Ms. Megan E. McBurney, Kahrs' Customs Broker,⁸ are inadmissible evidence because portions of their declarations are not based upon either "personal knowledge," or "competence" as to the particular subject matter, or are simply "argument." (Def.'s Resp. 21–32.)

The Court recently held another status conference with the parties on September 10, 2009 to discuss the present motion. During that conference, the Court requested that Plaintiff identify the specific paragraphs contained within the Duvall Decl. that it believed were unsupported by any evidence in this case. Plaintiff identified paragraphs 23–41 of the Duvall Decl. See Defendant's Opposition To Plaintiff's Motion For Leave To File A Reply To Defendant's Response To Plaintiff's Objection And Motion To Exclude Statements, Evidence, And Testimony From Defendant's Proposed Findings Of Fact ("Def's Opp. Pl.'s Mot. File Reply") 1–10 (Docket #112).

Finally, Plaintiff has filed a Motion For Leave To File Reply To Defendant's Response To Plaintiff's Objection And Motion To Exclude Statements, Evidence, And Testimony From Defendant's Proposed Findings Of Fact ("Pl.'s Mot. File Reply") (Docket #111).

For the reasons set forth below, the Court (i) denies Plaintiff's motion for leave to file a reply; and (ii) denies Plaintiff's motion to exclude and to strike.

⁷ Three separate Brennan declarations were submitted by Plaintiff: (1) Declaration of Sean Brennan (Docket #82) ("Brennan Decl. 1"); (2) Second Declaration of Sean Brennan (Docket #59) ("Brennan Decl. 2"); and (3) Declaration of Sean Brennan 2d Cause of Action (Docket #57) ("Brennan 2d COA Decl. ").

⁸ Declaration of Meghan E. McBurney (Docket #15) ("McBurney Decl. ").

II. Discussion

I. Standard of Review

A decision concerning evidentiary matters is within the sound discretion of the trial court. *See North American Processing Co. v. United States*, 22 CIT 701, 703, 15 F. Supp.2d 934, 936 (1998) (citing *Curtin v. Office of Personnel Mgmt.*, 846 F.2d 1373, 1378 (Fed. Cir. 1988).) “When appropriate, a motion *in limine* to exclude certain evidence is a favored procedural device granted to prevent a party from encumbering the record with irrelevant, immaterial, or cumulative matters before trial.” *Id.*; see also *Baskett v. United States*, 2 Cl. Ct. 356, 367–68 (1983).

II. Plaintiff’s Objection Is Overruled — Ms. Duvall and Mr. Garretto Are Fact Witnesses And Not Expert Witnesses And May Give Opinion Testimony

Plaintiff challenges certain statements within Def.’s PFF that are alleged to be based upon “opinion testimony attributed to the inadmissible evidence of either Ms. Duvall and/or Mr. Garretto.” (Pl.’s Mem. Of Points And Auth. In Supp. Of Pl.’s Obj. And Mot. To Exclude Statements, Evid., And Testimony From Def.’s PFF (“Pl.’s Br.”) 7.) Specifically, Plaintiff disputes ¶¶29–36, 38–40, 75–86, and 105 of Def.’s PFF, as based upon the “opinions” of Ms. Duvall and Mr. Garretto. (*Id.*) Plaintiff contends that neither Ms. Duvall nor Mr. Garretto are entitled to furnish their opinions on these matters because such opinions were “based upon [their] purported specialized knowledge, as well as upon certain unidentified information available to [Ms. Duvall] that was not disclosed to Plaintiff.” (*Id.* at 8.) Essentially, Plaintiff argues that Ms. Duvall’s and Mr. Garretto’s “opinions and inferences” contained within their declarations and depositions concern “very technical or other specialized knowledge.” (*Id.* at 3.) Accordingly, because these witnesses testified (and offered opinions and drew inferences) as to matters that were technical or pertained to specialized knowledge, Defendant was required to disclose these witnesses as “experts” in conformity with FED. R. EVID. 702. (*Id.*) Plaintiff argues that Defendant neither identified these witnesses as *experts*, nor prepared and produced any expert witness reports to Plaintiff. (Pl.’s Mot. 1–2.) Because Defendant failed to follow this rule of evidence with respect to these “expert” witnesses, Plaintiff alleges that it was prejudiced. (*Id.* at 5.) Therefore, Plaintiff urges that the identified statements in Def.’s PFF that are based upon the respective declarations of each witness must be excluded. (*Id.*)

Defendant responds that the challenged statements contained in its proposed findings of fact are not only supported by admissible record evidence, but the statements contained in ¶¶29–36, 38–40, 75–86, and 105 are also admissible because they are based upon the “personal knowledge” of Ms. Duvall and Mr. Garretto “and not any specialized, scientific, or technical knowledge within the scope of FED. R. EVID. 702.” (Def.’s Resp. 2–3, 4–8.)

Any affidavit or declaration submitted in support of a summary judgment motion must be based upon “personal knowledge.” USCIT R.56; see *Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568, 1572 (7th Cir. 1989). Personal knowledge may be established by evidence consisting of the witness’ own testimony. FED. R. EVID. 602. A fact witness (as distinguished from an “expert” witness) may provide testimony in the form of opinions or inferences, so long as those opinions or inferences are “(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge” that would qualify as expert witness testimony under FED. R. EVID. 702.⁹ FED. R. EVID. 701.

Upon reviewing the rules and case law concerning lay witnesses, the Court finds that section (c) to FED. R. EVID. 701 is the key element that distinguishes testimony based upon personal knowledge from testimony subject to FED. R. EVID. 702’s proscriptions for expert testimony. See, e.g., FED. R. EVID. 701 & 702, advisory committee’s notes. To be sure, “the line between expert testimony under FED. R. EVID. 702 ... and lay opinion testimony under FED. R. EVID. 701 ... is not easy to draw.” *United States v. Ayala-Pizarro*, 407 F.3d 25, 28 (1 Cir. 2005). However, many Courts have permitted specialized opinion testimony, without first qualifying the witness as an expert, because “the particularized knowledge that the witness has [is derived] by virtue of his or her position in the business.” FED. R. EVID. 701, advisory committee’s notes.; see *United States v. Santiago*, 560 F.3d 62, 66 (1st Cir. 2009) (“Rule 701 is meant to admit testimony based on the lay expertise a witness personally acquires through experience, often on the job.”) (citation and quotations omitted); *Donlin v. Philips Lighting N.A. Corp.*, 564 F.3d 207, 215 (3d Cir. 2009) (“When a lay witness has particularized knowledge by virtue of her experience, she may testify

⁹ Federal Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

— even if the subject matter is specialized or technical — because the testimony is based upon the layperson’s personal knowledge rather than on specialized knowledge within the scope of Rule 702.”); *United States v. Rigas*, 490 F.3d 208, 224 (2d Cir. 2007) (“A witness’s specialized knowledge, or the fact that he was chosen to carry out an investigation because of this knowledge, does not render his testimony “expert” as long as it was based on his investigation and reflected his investigatory findings and conclusions, and was not rooted exclusively in his expertise.”) (citation and quotations omitted); see also *Union Pacific Res. Co. v. Chesapeake Energy Corp.*, 236 F.3d 684, 693 (Fed. Cir. 2001) (acknowledging and applying 5th Circuit law that permitted lay witnesses to express opinions that required specialized knowledge); *Medforms, Inc. v. Healthcare Mgmt. Solutions, Inc.*, 290 F.3d 98, 111 (2d Cir. 2002) (allowing the lay testimony of a computer programmer based on his everyday experience with two types of software).

Accordingly, within the bounds of FED. R. EVID. 701, this Court will allow testimony by lay witnesses that have particularized knowledge by virtue of their experience — even if specialized or technical — so long as the testimony is based upon the lay witnesses’ personal knowledge, rather than on scientific, technical, or other specialized knowledge within the scope of FED. R. EVID. 702. See *Donlin*, 564 F.3d at 215.

In this regard, Defendant argues that “Ms. Duvall has not received any specialized or technical training or education in connection with the manufacture, construction, or uses of wood or wood products and has never been in the business of buying or selling such goods.” (Def.’s Resp. 3.) That said, Ms. Duvall, as a Senior Import Specialist (“SIS”) for CBP concentrating in wood and wood products, has become conversant with importers, examined “numerous samples of wood and wood products, studied the Harmonized Tariff Schedule of the United States (“HTSUS”) and associated *Explanatory Notes*, read CBP rulings and decisions related to wood and wood products,” and reviewed the public internet pages of retail outlets, importers, wholesalers, and trade associations related to wood and wood products. (*Id.* at 4.) Accordingly, it is clear that Ms. Duvall has acquired personal knowledge of wood and wood products.

Defendant also explains that Mr. Garretto, as National Import Specialist for CBP, has acquired his personal knowledge regarding wood and wood products via

- (1) discussing wood products with importers, sellers, manufacturers, and experts, such as forest products technologists, botanists, and others;
- (2) examining samples and/or having samples of wood and wood products examined by others;
- (3) observing

the manufacturing processes of certain wood products; including plywood; (4) visiting wholesalers of a variety of plywood products; (5) reviewing catalogs from manufacturers and the marketing and/or sales catalogues, brochures, and other publications from trade associations and wood trade publications; and, (6) regularly visiting the official Internet web or online retail sites of importers and wholesalers in order to ascertain how goods are identified, marketed and sold in the United States.

(*Id.* (citing Garretto Decl. ¶¶12, 14, IS, 16; Garretto Depo. Tr. 31–36.) Mr. Garretto does not have a specialized degree in wood products nor has ever been in the business of buying or selling of these products. (*Id.*) In addition, Defendant offers that Mr. Garretto has personally observed plywood flooring being sold in commercial retail stores as engineered wood flooring panels and has even made purchases of plywood. (*Id.* at 5.) He has seen and examined samples of the merchandise in this case as well as samples of the merchandise at issue in the case *Boen Harwood Flooring, Inc. v. United States*, 357 F.3d 1262 (Fed. Cir. 2004). (*Id.*) Based on the foregoing, it is clear that Mr. Garretto also has acquired personal knowledge of a variety of wood products including, but not limited to plywood, engineered wood flooring panels, and other types products at issue in this case. Accordingly, this Court holds that the testimony and declarations of Ms. Duvall and Mr. Garretto were properly offered in support of its motions for summary judgment in conformity with FED. R. EVID. 701, because Defendant has demonstrated that their overall testimony was based upon personal knowledge rather than scientific, technical, or other specialized knowledge. Indeed, the manner in which both Ms. Duvall and Mr. Garretto acquired their knowledge of the subject merchandise mirrors that of any informed consumer of the products.

In addition to reviewing the declarations by Ms. Duvall and Mr. Garretto, the Court has also reviewed the statements contained in Def.'s PFF ¶¶29–36, 38–40, 75–86, and 105, and finds that they are also admissible since they are derived from the respective declarations, which are based upon the personal knowledge of Ms. Duvall and Mr. Garretto. Additionally, any claims of prejudice are severely muted because Plaintiff had the opportunity to thoroughly examine both Ms. Duvall and Mr. Garretto during their respective depositions. *See, e.g., United States v. Paiva*, 892 F.2d 148, 157 (1st Cir. 1989) (“The modern trend favors the admission of opinion testimony provided it is well founded on personal knowledge and susceptible to cross-examination.”). Having already determined that both Ms. Duvall and Mr. Garretto are proper fact witnesses, the Court need not

address, paragraph-by-paragraph in their declarations, the Court's reasoning here as it would be repetitive of the previous analysis.

III. Plaintiff's Objections Are Overruled; Motion To Strike Is Denied — ¶¶12, 32, 36, 69, 71, 72, 84, 85, 86, 89, 96, 99, 100, 105, 106, & 108 Of Defendant's Proposed Findings Of Fact Are Accurate, Complete And/Or Based Upon Reasonable Inferences

Separate and apart from the above challenge to the Duvall and Garretto declarations based on the lay status of the deponents/declarants, Plaintiff also calls into question certain proposed findings of fact that Plaintiff characterizes as "false or misleading." (Pl.'s Mot. 2; Pl.'s Br. 9-23.) Defendant counters that Plaintiff's contentions in this regard are false. (Def.'s Resp. 9.) Moreover, Defendant argues that many of Plaintiff's objections are themselves unsupported by admissible record evidence. (*Id.*)

The Court sets out below (i) each paragraph that Plaintiff identifies from Def.'s PFF which it has a beef with, (ii) the essence of Plaintiff's stated objection, (iii) Defendant's response, and (iv) concludes with the Court's ruling on each.

Proposed Findings of Fact ¶12

12. Despite the instruction provided by Customs in the August 16, 2006 Notice of Action, Kahrs entered the merchandise it imported in the four entries identified in paragraph 12, above, under Heading 4418, subheading 4418.30.00, HTSUS, the duty-free provision for "assembled parquet panels." See Parties' Uncontested Facts, ¶4.

Plaintiff's Objection: Kahrs contends that this statement is either false or misleading because it fails to point out that the referenced notice of action was "not a Notice of Action, but was only a Proposed Notice of Action." (Pl.'s Br. 10 (emphasis in original).) Kahrs argues that ¶12 is designed to suggest that it "willfully violated Customs' orders when in fact none existed." (*Id.*)

Defendant's Response: Defendant argues that first, there is no such CBP document as a "Proposed Notice of Action." (Def.'s Resp. 10.) The form, "Customs Form 29," is entitled "Notice of Action." (*Id.*) Next, Defendant points out that, in the August 16, 2006 Notice of Action (*see* Compl., Ex. 2) "box 12" was checked on the form, which states that "[t]he following action which will result in an increase in duties is proposed[.]" (*Id.*) The Notice of Action also included a "specific classification instruction" regarding the classification of Kahrs' future entries. (*Id.*) Kahrs responded to CBP by letter stating that it disagreed and would "continue to classify this product under 4418.30.0000 unless instructed otherwise for particular reasons." (*Id.*

(citing Ex. N, Def.'s Cross-Mot. for SJ.) Therefore, Defendant argues that it is a reasonable inference to draw that "Kahrs' refusal to abide by CBP's classification instruction" in the Notice of Action was "deliberate, i.e., 'willful.'" (*Id.* at 10–11.)

Court's Ruling: Plaintiff's objection is overruled as frivolous. However, in fashioning its findings of facts for the Slip Opinion on the various pending motions for summary judgment, the Court will, on its own accord, select those material facts that are: (1) undisputed based upon the stipulation of the parties (Docket #102); (2) undisputed based upon admissible record evidence; and (3) drawn from reasonable inferences based on both (1) and (2), *supra*. The Court also disregards any inappropriate argument in the guise of or characterized as a proposed objection.

Proposed Findings of Fact ¶32

32. *The face ply of engineered wood flooring panels may be constructed of a single strip or multiple strips of wood; however, this strip construction does not constitute a pattern. Exh. D, Duvall Declaration, ¶42.*

Plaintiff's Objection: Kahrs contends that this statement is "erroneous and misleading" because it omits the phrase "geometric or mosaic" before the word "pattern" from ¶42 of Ms. Duvall's declaration. (P1.'s Br. 10.) Kahrs argues that there is a "significant difference" between describing the "strip construction" as not forming a "pattern" versus not forming a "geometric or mosaic pattern." (*Id.*)

Defendant's Response: Defendant argues that its omission of the phrase "geometric or mosaic" from the paragraph "does not render the statement either 'false or misleading.'" (Def.'s Resp. 11.) Indeed, had Defendant referenced the Explanatory Notes to Heading 4418 or Ms. Duvall's deposition transcript the additional evidence would show that there is support for this assertion. (*Id.* at 11–12.)

Court's Ruling: Plaintiff's objection is overruled as frivolous. However, in fashioning its findings of facts for the Slip Opinion on the various pending motions for summary judgment, the Court will, on its own accord, select those material facts that are: (1) undisputed based upon the stipulation of the parties (Docket #102); (2) undisputed based upon admissible record evidence; and (3) drawn from reasonable inferences based on both (1) and (2), *supra*. The Court also disregards any inappropriate argument in the guise of or characterized as a proposed objection.

Proposed Findings of Fact ¶36

36. *The 14mm and 15mm engineered wood flooring panels are not "assembled parquet panels" upon importation.*

Plaintiff's Objection: Kahrs contends that this statement is "false." (Pl.'s Br. 11.) Kahrs contends that "[d]uring Mr. Brennan's deposition, he understood that the question pertained to assembly on a floor, not the construction of the panel itself." (*Id.*) Indeed, Kahrs argues, the "panels [themselves] are assembled prior to importation." (*Id.*)

Defendant's Response: Defendant argues that "Kahrs' attempt to recharacterize the admission it made by and through Mr. Brennan ... should be flatly rejected by the Court." (Def.'s Resp. 13.) Defendant contends that Mr. Brennan evidently understood the questions posed to him during his deposition and though advised, he chose not to correct or amend his responses within the deposition transcript. (*Id.*) In short, Defendant advances that "at no time did Mr. Brennan state that the imported engineered wood flooring panels were 'assembled parquet panels' upon entry into the United States which is required for classification in Heading 4418." (*Id.* at 13–14.)

Court's Ruling: Plaintiff's objection is overruled. Mr. Brennan's statement stands on its own and need not be re-characterized by Plaintiff's Counsel. However, in fashioning its findings of facts for the Slip Opinion on the various pending motions for summary judgment, the Court will, on its own accord, select those material facts that are: (1) undisputed based upon the stipulation of the parties (Docket #102); (2) undisputed based upon admissible record evidence; and (3) drawn from reasonable inferences based on both (1) and (2), *supra*. The Court also disregards any inappropriate argument in the guise of or characterized as a proposed objection.

Proposed Findings of Fact ¶¶69, 71 & 72

69. Kahrs filed nine summonses during the period from September 27, 1996 through February 10, 2000.

71. The nine civil actions set forth in ¶¶69 and 70, above, were suspended under Boen, which was designated as a test case.

72. In those nine civil actions (¶¶69 and 70, above) Kahrs was represented by the same counsel which represented the plaintiff in Boen and subsequent to the decision in Boen, each of those nine actions was voluntarily dismissed or dismissed by stipulation of the parties.

Plaintiff's Objection: Kahrs contends that these statements are "misleading." (Pl.'s Br. 12.) Kahrs argues that Defendant is "trying to leave the Court with the impression that Plaintiff knew of the Boen [Harwood] decision and intentionally refused to comply with it." (*Id.*) Plaintiff also contends that "Kahrs was not aware of the Boen decision's applicability to its products during the relevant time period." (*Id.*) Kahrs then proffers four "significant facts" in this regard claiming that (1) during the initiation of all nine cases, CBP's position was

that the “correct classification” of its products, was subheading 4418.30.00, HTSUS. (2) Kahrs’ counsel at the time these cases were filed was different than its present counsel. (3) Kahrs’ previous counsel was retained prior to 2000 by the Kahrs’ former management team. And (4) Kahrs’ previous counsel dismissed the nine actions in 2006 [*sic*], “confirm[ing] ... Customs’ specified classification under subheading 4418.30.00, HTSUS.” (*Id.* at 13.)

Defendant’s Response: Defendant argues that because Kahrs cannot argue about the factual content of these statements, it chooses to challenge the “potential inference” that the Court may draw from them. (Def.’s Resp. 16.) Defendant also argues that even if Kahrs’ “four significant facts” were true, they are irrelevant. (*Id.*) Finally, the Defendant cites to authority standing for the proposition that “ignorance of the law is no excuse.” (*Id.*)

Court’s Ruling: Plaintiff’s objection is overruled, because the Court does not find the statements misleading. The Court also disregards any inappropriate argument in the guise of or characterized as a proposed objection. As to the four “significant facts” posed by Kahrs, this Court finds them irrelevant. Finally, the Court finds little sympathy with the Plaintiff’s pleas of ignorance. This court has instructed that

ignorance of our customs laws does not serve as an excuse for a failure to comply with the requirements thereof The principle of law announced in the maxim *ignorantia legis neminem excusat* ... is sanctioned by centuries of experience. Anyone dealing with the United States customs authorities is presumed to have full knowledge of all laws and regulations applicable thereto.

Pac. Customs Brokerage Co. v. United States, 28 Cust. Ct. 385, 388 (1952) (citation omitted). While ignorance may serve as an explanation, it is not sufficient to overcome this burden.

Proposed Findings of Fact ¶¶84, 85 & 86

84. *With the exception of the entries identified in ¶81 above, no import specialist reviewed an entry summary for any of the entries made by Kahrs on or after July 29, 2001 and liquidated before August 16, 2006.*

85. *No import specialist requested a sample or additional information, or effected a change liquidation for any of Kahrs’ entries made on or after July 29, 2001 and liquidated before August 16, 2006.*

86. *With the exception, of the entries identified in ¶81, above, all of the Kahrs’ [*sic*] entries liquidated without any kind of review by an import specialist.*

Plaintiff's Objection: Kahrs contends that ¶84 is either “false,” “misleading,” or that the Government failed to produce the information upon which the statement is based.¹⁰ (Pl.’s Br. 13–14.) Kahrs argues, *inter alia*, that “two of the six entries required the submission of the commercial invoices at the time these entries [Entry Nos. 3990802301–1 and 3990803895–1] were filed by the words on the CF 7501 ‘indctr invreq’ [Accordingly.] [t]his evidence further confirms the review by an import specialist.” (*Id.* at 15.)¹¹ Moreover, Kahrs proffers that the data in the attachment to the Duvall Declaration for these two entries shows that “an electronic invoice *was* provided to the Import Specialist who reviewed the commercial invoice and made his or her remarks in the ACS system of compliance.” (*Id.* (emphasis in original).) Next, Kahrs argues that this statement is false because the CBP Importer Trade Activity (“ITRAC”) Report (Pl.’s Ex. 12, Docket #60) for Kahrs lists the six conducted cargo exams during the relevant time period, which show “there are comments made in the Import Specialist Comments column that state each entry was in compliance.” (*Id.* at 16.) Next, Kahrs notes that the “records” show that for Entry No. 399–0808440–1, CBP determined that it was mismarked as to country-of-origin, and that the “record shows an import specialist approved the remarking.” (*Id.*) The ITRAC Report notation “confirms” that the import specialist made the comment “after examining the entry and a sample of the merchandise and approved it, including the classification under 4418.30.0000, HT-SUS.” (*Id.*) Finally, as to ¶85, the ITRAC Report “shows that an import specialist must have requested a sample or additional information” because of the remarks contained within the “Import Specialist Comments column” indicate compliance. (*Id.* at 17.) Plaintiff also points to certain redactions that are indicated within the ITRAC Report, which this Court should order that Defendant is precluded from using in support of its motions until it is provided in total to the Plaintiff. (*Id.*)

Defendant's Response: Defendant argues that it is Plaintiff's inferences that are incorrect and unsupported by record evidence. As to ¶84, first, Defendant argues that the term on the CF 7501 “indctr invreq.” was not created by an import specialist but generated automatically by the Customs' Automated Commercial System (“ACS”). (Def.'s Resp. 18.) Further, an import specialist is not required to review any data that is filed by the importer in response to this

¹⁰ To the extent that Plaintiff challenges these statements based on the allegation that the Government failed to produce the information upon which the statement is based, this Court will address that particular objection in the following section.

¹¹ The term “indctr invreq” means that the commercial invoice was requested. *See* Swanson Depo. Tr. 102:3–104:3.

message.¹² (*Id.*) Next, the Government argues that even if electronic invoices for the questioned entries had been submitted, the information included therein would have been insufficient to identify the imported merchandise. (*Id.*) Next, Defendant argues that though Entry No. 399-0808440-1 was reviewed by an import specialist, “it was **not** reviewed by an import specialist for classification” and no sample of the merchandise was included. (*Id.* at 18-19.) Moreover, the evidence — the entry documents and the CF 4647 — shows that the marking violation was discovered by the cargo exam officer and not an import specialist. (*Id.* at 19.) The proof of country-of-origin marking was submitted to the import specialist who indicated, as recorded in the ITRAC Report, that “Summary Line Compliant Marking Certification Accepted.” (*Id.*) Finally, as to ¶¶84, 85, and 86, the evidence shows that no samples were taken. (*Id.* at 20.) The ITRAC Report has a field that would contain data as to whether any samples were reviewed by import specialists. (*Id.*) These fields indicate that no samples for Entry No. 399-0808440-1 or any other entry subject to a cargo examination were requested or examined. (*Id.*) Accordingly, Kahrs has no basis for arguing that such samples were taken. (*Id.* at 21.)

Court’s Ruling: Plaintiff’s objections are overruled as baseless given that the supporting facts underlying each statement speak for themselves. However, in fashioning its findings of facts for the Slip Opinion on the various pending motions for summary judgment, the Court will, on its own accord, select those material facts that are: (1) undisputed based upon the stipulation of the parties (Docket #102); (2) undisputed based upon admissible record evidence; and (3) drawn from reasonable inferences based on both (1) and (2), *supra*. The Court also disregards any inappropriate argument in the guise of or characterized as a proposed objection. Finally, the Court notes Plaintiff’s generalized objections as to certain redacted information within “the Remarks column” of CBP’s ITRAC Report. The Court finds that Kahrs’ objections without particularized focus are improper.

Proposed Findings of Fact ¶89

89. Because of the security devices or techniques employed, cargo examinations are not public events and Customs’ records of these examinations are not made on the entry documents or otherwise reported to an importer. Exh. C, Transcript of the deposition taken on August 28, 2008 of CBP’s designated agent James

¹² The Government acknowledges that an additional declaration can be submitted to the Court in support of this proffer if necessary. For the time being, such declaration is not necessary.

Swanson, Chief Cargo Release Branch and Conveyance Security Areas of the CBP Office of Field Operations (Swanson Deposition).

Plaintiffs Objection: Kahrs contends that ¶89 is a false or misleading statement because “Customs records do indicate the results of the Customs examination, and in fact, those results are conveyed by Customs back to the importer’s Customs Broker” and are included within its entry papers. (Pl.’s Br. 18.) In support, Kahrs cites to the declaration of its Customs Broker, Ms. Megan E. McBurney (“McBurney Decl.”) and in two declarations of Kahrs’ designated agent, Mr. Sean Brennan (“Brennan Decl. 1” and “Brennan Decl. 2”). (*Id.* at 18–19.)

Defendant’s Response: Defendant argues that it is Plaintiff’s inferences that are “baseless.” (Def.’s Resp. 21.) The Government claims that Plaintiff’s assertion that the results of the cargo examinations are conveyed by CBP to the importer’s broker who in turn conveys that information to the importer, are conclusory and based upon inadmissible evidence. (*Id.*) Particularly, the Government contends that portions of the McBurney declaration and the two Brennan declarations are “sham” affidavits because they are (i) not based on personal knowledge; (ii) not based on admissible facts; and/or (iii) the declarant is not competent as to the subject matter. (*Id.* at 22.)

The Government argues that in ¶¶13–18 of Brennan Decl. 1, Mr. Brennan discusses information pertaining to certain entries that were the subject of cargo exams as contained on the ITRAC Report. (*Id.* at 23.) Defendant argues that Mr. Brennan is not competent to testify as to the information contained within the ITRAC Report. Mr. Brennan “lacks both personal knowledge and competence to discuss what occurred during CBP’s cargo examinations of Kahrs’ entries.” (*Id.*) The Government also asserts that ¶¶16–17 of Brennan Decl. 1 consist of conclusions of law or legal argument. (*Id.* at n.4.)

The Government also challenges portions of the McBurney declaration for the same three reasons noted above. (*Id.* at 24–25.) The Government argues that, because Ms. McBurney was not present during any of the cargo examinations, she has no personal knowledge of what transpired during those exams, nor has Ms. McBurney admitted to having any personal knowledge. (*Id.* at 25.) Ms. McBurney has also not attested to having any independent knowledge of the facts contained within the ITRAC Report or explained how she might have acquired her knowledge. (*Id.* at 27.) Moreover, the Government contends, the entry papers that are attached to Ms. McBurney’s declaration do not support many of her statements (*see, e.g.*, ¶7 McBurney Decl.) including that CBP confirmed the propriety of each entry’s classification, and contain emails (Ex. 2, McBurney Decl.),

which themselves contain inadmissible hearsay as they were drafted by someone other than the declarant, not sent to the declarant, and were offered to prove the truth of the assertion contained within. (*Id.* at 28–30.) Finally, many of Ms. McBurney’s comments (*see, e.g.*, ¶7 McBurney Decl.) are “bald assertions, presumptions, unsupported conclusory statements or argument which are not themselves admissible evidence.” (*Id.* at 31.)

Court’s Ruling: Plaintiff’s objections are overruled as baseless. Additionally, though Defendant did not overtly move for an order to exclude the declarations of Ms. McBurney and Mr. Brennan (though Defendant suggests that they “should be stricken” (Def.’s Resp. 31)), to the extent that the statements contained within the declarations of Ms. McBurney and Mr. Brennan are not based upon personal knowledge, this Court shall disregard them. *See Coleman v. Blue Cross Blue Shield of Kansas*, 487 F. Supp.2d 1225, 1237 (D. Kan. 2007). Further, to the extent that the statements contained within the declarations of Ms. McBurney and Mr. Brennan are based upon inadmissible hearsay, they too shall be disregarded by this Court. Finally, to the extent that particular statements are actually legal argument, unsubstantiated conclusions, or unsupported characterizations, these statements too shall be disregarded by the Court.

Notwithstanding the above rulings, in fashioning its findings of facts for the Slip Opinion on the various pending motions for summary judgment, the Court will, on its own accord, select those material facts that are: (1) undisputed based upon the stipulation of the parties (Docket #102); (2) undisputed based upon admissible record evidence; and (3) drawn from reasonable inferences based on both (1) and (2), *supra*.

Proposed Findings of Fact ¶96

96. *Kahrs has no knowledge of what Customs did during the cargo examinations.*

Plaintiff’s Objection: Kahrs contends that ¶96 is a misleading statement. (Pl.’s Br. 19.) Kahrs maintains that, though the importer does not know what CBP does during the cargo examination, it is “fully aware” that an exam is to take place and it is “fully aware” of the “results of the examination.” (*Id.*)

Defendant’s Response: Defendant argues that this statement is based upon Plaintiff’s admission by its designated agent, Mr. Sean Brennan. (*See* Def.’s Resp. 32 (*citing* Brennan Depo. Tr. 155–166).) Therefore it is not misleading. (*Id.*)

Court’s Ruling: Plaintiff’s objections are overruled as baseless. However, in fashioning its findings of facts for the Slip Opinion on the various pending motions for summary judgment, the Court will, on its own accord, select those material facts that are: (1) undisputed based

upon the stipulation of the parties (Docket #102); (2) undisputed based upon admissible record evidence; and (3) drawn from reasonable inferences based on both (1) and (2), *supra*.

Proposed Findings of Facts ¶¶99–100

99. *The ITRAC Report contains no record that an import specialist requested or examined a sample of the merchandise covered by Entry No. 201–3042459–9.*

100. *The ITRAC Report contains no record that an import specialist was involved in the cargo examination of Entry No. 399–0801291–5.*

Plaintiff’s Objection: Kahrs contends that ¶99 is “inaccurate” and ¶100 is “very misleading and a blatant attempt to mislead the Court.” (Pl.’s Br. 20, 21). Regarding ¶100, Plaintiff argues that “the ITRAC Report clearly shows that an import specialist did in fact later become involved and did perform an examination and found no discrepancies.” (*Id.* at 21.)

Defendant’s Response: Defendant contends that Plaintiff’s objection regarding ¶99 is baseless. Concerning Plaintiff’s objection as to ¶100, Defendant argues that this statement is in fact accurate because there is no record that an import specialist was involved in the cargo examination of Entry No. 399–0801291–5.

Court’s Ruling: Plaintiff’s objections are overruled. The ITRAC Report speaks for itself. In fashioning its findings of facts for the Slip Opinion on the various pending motions for summary judgment, the Court will, on its own accord, select those material facts that are: (1) undisputed based upon the stipulation of the parties (Docket #102); (2) undisputed based upon admissible record evidence; and (3) drawn from reasonable inferences based on both (1) and (2), *supra*. Finally, the Court need not credit any party’s characterizations of the facts and will make its findings of material facts at the appropriate time.

Proposed Findings of Facts ¶105

105. *No import specialist participated in the cargo examinations of Entry Nos. 701–5112456–0, 399–0802301–1 and 399–0803895–1.*

Plaintiff’s Objection: Kahrs contends that ¶105 is “misleading” because “[i]mport specialists were not involved in the actual cargo examination but were in fact intimately involved with the entries.” (Pl.’s Br. 21.)

Defendant’s Response: Defendant contends that Plaintiff’s objection regarding ¶105 is “frivolous because it admits the statement is true!” (Def.’s Resp. 33.)

Court’s Ruling: Plaintiff’s objection is indeed frivolous and is overruled.

Proposed Findings of Facts ¶106

106. The only information Kahrs received regarding the five cargo examinations was from its broker or freight forwarder and Kahrs can not state whether its brokers or the freight forwarders ever received any letters from Customs regarding any of the cargo examinations.

Plaintiff's Objection: Kahrs contends that ¶106 is "misleading" because "[i]t is an attempt by the Defendant to suggest that Kahrs was not misled by Customs in connection with the six Customs Examinations." (Pl.'s Br. 22.)

Defendant's Response: Defendant contends that Plaintiff's objection regarding ¶106 is "frivolous because it admits the statement is true!" (Def.'s Resp. 33.)

Court's Ruling: Plaintiff's objection is indeed frivolous and is overruled.

Proposed Findings of Facts ¶108

108. Customs did not advise Kahrs that its entered classifications of any of the engineered wood flooring panels it imported during the period 2001 to 2006 were correct.

Plaintiff's Objection: Kahrs contends that "Customs may not have formally or specifically advised Kahrs that the entered classification was correct ..." (Pl.'s Br. 23.)

Defendant's Response: Defendant contends that Plaintiff's objection regarding ¶108 is "frivolous because it admits the statement is true!" (Def.'s Resp. 33.)

Court's Ruling: Plaintiff's objection is indeed frivolous and is overruled. The Court also disregards any inappropriate argument in the guise of or characterized as an objection.

For the foregoing reasons, Plaintiff's motion to strike is denied.

IV. Plaintiff's Objections Are Overruled — ¶¶57–59, 65, 67, and 75–86 Of Defendant's Proposed Findings Of Fact Are Supported By Record Evidence And ¶¶23–41 Of The Duvall Declaration Are Supported By Record Evidence

The Court now addresses the class of Plaintiff's objections where it argues that Def.'s PFF are unsupported by record evidence, or "unidentified records" not provided to the Plaintiff. (Pl.'s Br. 9, 23–24.)

Proposed Findings of Facts ¶57

57. Since the effective date of the Revocation Ruling stating Customs' position that engineered wood flooring panels are classifiable in Heading 4412, the Secretary of the Treasury has not found the existence of an established and uniform practice of classifying and/or liquidating engineered wood flooring panels

as “parquet panels” under Heading 4418, subheading 4418.30.00, HTSUS.

Plaintiff’s Objection: Kahrs contends that CJIS7 is not supported by any admissible evidence and in fact, CBP’s actions have “established the existence of an established and uniform practice of classifying and/or liquidating engineered wood flooring panels as ‘parquet panels’ under Heading 4418, subheading 4418.30.00, HTSUS.” (Pl.’s Br. 23.)

Defendant’s Response: Defendant contends that while “this is true,” that it cannot point to any evidence in support, it equally cannot point to any evidence that “does not exist.” (Def.’s Resp. 14.)

Court’s Ruling: To the extent that Plaintiff’s objection is legal argument, the objection is overruled. To the extent that this statement calls for the Court to render a conclusion of law based on undisputed facts, the Court reserves judgment until such appropriate time as it issues an opinion on the pending motions for summary judgment.

Proposed Findings of Facts ¶¶58–59

58. *Customs’ position that engineered wood flooring panels are classifiable as “plywood” in Heading 4412 was affirmed by the Court of Appeals for the Federal Circuit. See Boen Hardwood Flooring, Inc. v. United States, 27 CIT 40 (2003), rev’d, 357 F.3d 1262, panel rehearing and rehearing en banc denied (Fed. Cir. 2004) (“Boen”).*

59. *The merchandise at issue in Boen was described as follows:*

The panels are composed of three layers. The top layer is constructed of two hardwood strips measuring 1/8 inch thick and 2 3/4 inches wide. The center layer, or core, is constructed of spruce slats, which are 5/16 inch thick, 11/16 inches wide and 5 9/16 inches long, laid lengthwise so that the grain runs perpendicular to the top and bottom layers. According to the trial court, there is “minor but visible spacing between each piece” of the core. 254 F. Supp. 2d at 1353. The bottom layer consists of two spruce strips measuring 1/8 inch thick and 2 1/4 to 2 3/4 inches wide.

Boen, 357 F.3d at 1263.

Plaintiff’s Objection: Kahrs contends that ¶¶58–59 are “purely legal argument” and therefore do not belong in the Findings of Fact. (Pl.’s Br. 23.)

Defendant’s Response: Defendant contends these paragraphs “merely state facts.” (Def.’s Resp. 15.)

Court’s Ruling: To the extent that Defendants are stating facts, Plaintiff’s objection is overruled. However, in fashioning its findings of facts for the Slip Opinion on the various pending motions for

summary judgment, the Court will, on its own accord, select those material facts that are: (1) undisputed based upon the stipulation of the parties (Docket #102); (2) undisputed based upon admissible record evidence; and (3) drawn from reasonable inferences based on both (1) and (2), *supra*. Finally, the Court need not credit any party's characterizations of the facts and will make its findings of material facts and conclusions of law at the appropriate time.

Proposed Findings of Facts ¶¶65 and 67

65. *The imported 15 mm, 2-strip, 3-ply engineered wood flooring panels are virtually identical to the merchandise at issue in Boen.*

67. *The imported 14 mm and 15 mm 3-strip engineered wood flooring panels are substantially similar to the merchandise at issue in Boen.*

Plaintiff's Objection: Kahrs contends that ¶¶65 and 67 "are not supported by any admissible evidence" and "denies" the statements because Kahrs maintains the products are different. (Pl.'s Br. 23–24.)

Defendant's Response: Defendant contends that the statements are supported by the evidentiary record, particularly the description of Kahrs' own products by its agent Mr. Thomas J. Colgan. (Def.'s Resp. 15–16.)

Court's Ruling: To the extent that Defendant is stating facts, Plaintiff's objection is overruled. However, in fashioning its findings of facts for the Slip Opinion on the various pending motions for summary judgment, the Court will, on its own accord, select those material facts that are: (1) undisputed based upon the stipulation of the parties (Docket #102); (2) undisputed based upon admissible record evidence; and (3) drawn from reasonable inferences based on both (1) and (2), *supra*. Finally, the Court need not credit any party's characterizations of the facts and will make its findings of material facts and conclusions of law at the appropriate time.

Finally, Plaintiff has also, as noted above, specifically identified ¶¶23–41 of the Duvall Decl. that contain statements based on evidence that was allegedly not produced. (*See also* Pl.'s Br. at 9 (objecting to Def.'s PFF ¶¶75–83, which invoke Duvall Decl. ¶¶29–37, 39.) Plaintiff argues that these alleged "unidentified records," upon which Ms. Duvall based her opinion, were requested by Plaintiff during discovery, but which "Defendant refused to provide claiming confidentiality." (*Id.*) This same objection was re-iterated during the status conference held by this Court on September 10, 2009.

The Government in response argues that Plaintiff's contentions are specious. (*See* Def.'s Resp. 17–21; Def.'s Resp. Pl.'s Mot. To File Reply 5–10). The Government proffered and explained, to the satisfaction of the Court, that (i) all evidence upon which Ms. Duvall based the

statements in her declaration was produced to Plaintiff; and (ii) data that was entered into the ACS computer system, the Automated Broker Interface (“ABI”), along with other data contained within other computer databases at Customs, excepting confidential national security materials, was produced to Plaintiff, under the Freedom of Information Act, in the form of the ITRAC Report. (See Def.’s Resp. Pl.’s Mot. To File Reply 5–10.) Accordingly, Plaintiff’s objection in this regard is overruled.

Finally, this Court finds the reasons set forth by Plaintiff justifying a motion to file a reply to this non-dispositive motion unavailing. *Cf Saha Thai Steel Pipe Co., Ltd. v. United States*, 661F. Supp. 1198, 1201 n.5 (Ct. Int’l Trade 1987) (“The court cannot allow the pre-trial ... process to become needlessly protracted by endless [reply briefs.]”)

Conclusion

Based on the discussion set forth above, the Court is entering an Order denying (1) Plaintiff’s motion to exclude and to strike and (2) Plaintiff’s motion to file a reply.

Order

Upon consideration of Plaintiff’s motion for leave to file a reply, and its motion to exclude and to strike, and upon all other papers and proceedings in this case, for the foregoing reasons, it is hereby

ORDERED that Plaintiff’s motion for leave to file a reply is DENIED; it is further

ORDERED that Plaintiff’s motion to exclude and to strike is DENIED.

Dated: September 18, 2009

New York, New York

/s/ Gregory W. Carman

GREGORY W. CARMAN

Slip Op. 09–101

KAHRS INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant

Court No. 07–00343

Before: Gregory W. Carman, Judge

[Held: Plaintiff’s motion for leave to file a sur-reply is denied; Defendant’s motion to dismiss Plaintiff’s Seventh Cause of Action and all “reasonable care” claims in Plaintiff’s Complaint is granted; Defendant’s motion to strike certain allegations in Plaintiff’s complaint is denied; Defendant’s cross-motions for summary judgment on the First and Second Causes of Action are granted; Defendant’s motion for summary judgment on the Third, Fourth, and Sixth Causes of Action is granted; and Plaintiff’s motions for summary judgment on the First and Second Causes of Action are denied. Request for oral argument is denied.]

September 18, 2009

Law Offices of George R. Tuttle, A.P.C. (Carl D. Cammarata, George R. Tuttle, and Stephen P. Spraitzar) for Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Mikki Cottet*), for Defendant.

OPINION & ORDER

Carman, Judge:

I.

Introduction

In this omnibus Slip Opinion, the Court entertains and decides the following motions: (1) Defendant United States' ("Government") motion to dismiss the Seventh Cause of Action and all "reasonable care" claims in Plaintiff's complaint, pursuant to USCIT R.12(b)(1) and R.12(b)(5); (2) motion to strike certain allegations contained in Plaintiff's complaint, pursuant to USCIT R.12(f); (3) Plaintiff's motion for leave to file a sur-reply to Defendant's motion to dismiss; (4) Plaintiff's motion for summary judgment on the First Cause of Action in its complaint, pursuant to USCIT R.56; (5) Defendant's cross-motion for summary judgment on the First Cause of Action in Plaintiff's complaint, and motion for summary judgment on the Third, Fourth and Sixth Causes of Action in Plaintiff's complaint, pursuant to USCIT R.56; (6) Plaintiff's motion for summary judgement on the Second Cause of Action, pursuant to USCIT R.56; and (7) Defendant's cross-motion for summary judgment on the Second Cause of Action, pursuant to USCIT R.56.

The Court exercises jurisdiction pursuant to 28 U.S.C. § 1581(a) (2000). For the reasons set forth below, the Court (i) denies Plaintiff's motion for leave to file a sur-reply; (ii) grants Defendant's motion to dismiss Plaintiff's Seventh Cause of Action; (iii) denies Defendant's motion to strike; (iv) grants Defendant's cross-motion for summary judgment on Plaintiff's First and Second Causes of Action; (v) grants Defendant's motion for summary judgment on Plaintiff's Third, Fourth and Sixth Causes of Action; (vi) denies Plaintiff's motions for summary judgment on the First Cause of Action; and (vii) denies Plaintiff's motions for summary judgment on the Second Cause of Action.

II.

Procedure & Background

Plaintiff Kährs International, Inc. ("Kährs") is the U.S. division of AB Gustaf Kähr the Swedish parent company founded in 1857 and

Europe's largest wood flooring manufacturer.¹ Kahrs is a Pennsylvania corporation with its principal place of business located in Florida. (See Complaint ("Compl.") ¶ 2; *see also* n.1, *supra*.) Kahrs is the owner and importer of record of the six entries² of merchandise that are the subject of this action (the "subject merchandise"), alternatively described as "engineered wood flooring panels" or "pre-finished flooring strips."³ Kahrs' six entries were imported via the Port of Los Angeles/Long Beach and classified by the importer under subheading 4418.30.00 of the Harmonized Tariff Schedule of the United States ("HTSUS") (Compl. Exhibits ("Ex.") 2–7). This duty-free provision is for "Builders' joinery and carpentry of wood, including cellular wood panels and assembled parquet panels; shingles and shakes: parquet panels." 4418.30.00 HTSUS (2006). Following importation and entry of Kahrs' merchandise, the United States Customs and Border Protection ("CBP" or "Customs") issued successive notices of action ("CF-29s") on each entry and subsequently liquidated them under Heading 4412 ("Plywood"), at the duty rate of 8% *ad valorem*, on or between October 27, 2006 and February 16, 2007.⁴ Kahrs subsequently filed a protest with CBP, Protest Number 270407–101011, which was denied on August 15, 2007 (Compl. Ex. 1A).

On September 12, 2007, Kahrs commenced its lawsuit against the United States challenging the denial of its protest over the "liquidation, classification, duties, and fees assessed on the pre-finished, veneered, hardwood, flooring strips," imported by Kahrs. (Compl. p.1.) The Government filed its Answer to the Complaint on February 14, 2008. Kahrs' Complaint sets forth seven causes of action.

In the First Cause of Action, Plaintiff alleges that certain "prior rulings and decisions," which it claims permitted Kahrs to classify "imported shipments of similar or substantially identical [engineered wood flooring]" as "parquet panels under 4418.30.0000, HTSUS," were unlawfully revoked by CBP's issuance of certain CF-29's, because such revocation violated the notice and comment provisions of 19 U.S.C. § 1625(c) (2006). (Compl. ¶¶ 1–29.)

The Second Cause of Action in Plaintiff's Complaint alleges that CBP's act of imposing a higher duty for the "imported [engineered

¹ Website AB Gustaf Kähr available at <http://www.kahrs.com/global/Consumer/AboutKahrs/history> (last visited Sept. 8, 2009).

² Entry # 701–5216140–5 (9/14/06); Entry # 701–5216149–6 (9/20/06); Entry # 701–5216163–7 (9/20/06); Entry # 399–0411896–3 (9/26/06); Entry # 399–0808699–2 (2/24/06); and Entry # 399–0807626–6 (11/05/05).

³ For consistency, this Court will adopt the term "engineered wood flooring" for the products at issue in this action.

⁴ Notices of Action issued to Kahrs regarding: Entry # 399–0808699–2 on 8/16/06 and liquidated on 11/03/06; Entry # 701–5216140–5 on 10/3/06 and liquidated on 10/27/06; Entry # 701–5216163–7 on 10/11/06 and liquidated on 10/27/06; Entry # 701–5216149–6 on 10/11/06 and liquidated on 10/27/06; Entry # 399–0411896–3 on 10/17/06 and liquidated on 11/3/06; Entry # 399–0807626–6 on 11/27/06 and liquidated on 2/16/07. (*See* Compl.)

wood flooring]” contravened an “established and uniform practice” whereby, as a result of “hundreds of entries of these similar or identical” products made each year for several years prior to August 16, 2006, the agency permitted Kahrs and other importers throughout the U.S. to import “similar or identical [engineered wood flooring] under subheading 4418.30.0000, HTSUS, as parquet flooring panels.” (Compl. ¶¶ 30–39.) This imposition of a higher duty by CBP is alleged to have violated the publication requirement of 19 U.S.C. § 1315(d) (2006). (*Id.* at ¶¶ 36–39.)

Plaintiff’s Third, Fourth and Sixth Causes of Action allege Kahrs’ preferred and alternative classifications of the imported “[engineered wood flooring]” under 4418.30.00 HTSUS (“[p]arquet panels”), 4418.90.20 HTSUS (“edge-glued lumber”), and 4418.90.4590 HTSUS (“builders’ joinery and carpentry of wood, including cellular wood panels and assembled parquet panels; other, other”), respectively. (Compl. ¶¶ 40–41 (3d Cause of Action); ¶¶ 42–47 (4th Cause of Action); ¶¶ 63–65 (6th Cause of Action).)

Plaintiff’s Fifth Cause of Action, the “Commercial Designation” claim, alleges that “[i]n the wholesale wood flooring trade, the scope of the commercial designation of the term ‘plywood’ does not include pre-finished multilayer flooring strips.” (Compl. ¶ 59.) As a result, Plaintiff contends that its imported products are properly classifiable duty-free under 4412.29.56 HTSUS (“veneered panels and similar laminated wood.”) (*Id.* ¶ 62.) Resolution of this claim on the merits has been stayed⁵ pending the decision on the balance of the case.

Finally, in Plaintiff’s Seventh Cause of Action, Kahrs alleges jurisdiction under 28 U.S.C. § 1581(i) and presents a potpourri of allegations in support of its request for declaratory relief. (Compl. ¶¶ 66–75.) Specifically, Kahrs requests, *inter alia*, that this Court declare as erroneous the denial of its protest by CBP; declare its preferred classification — 4418.30.00 HTSUS — as the correct one; and declare that Kahrs “exercised reasonable care as required by 19 U.S.C. § 1484 when classifying the subject [engineered wood flooring] covered by” its protest. (Compl., Prayer for Relief, pp. 26–28, and ¶¶ 66–75.)

The Government moved (1) to dismiss Kahrs’ Seventh Cause of Action for lack of subject matter jurisdiction, pursuant to USCIT R. 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to USCIT R.12(b)(5); and (2) to strike, *inter alia*, certain allegations throughout the Complaint that Kahrs “exercised reasonable care” in its classification of the imported merchandise. (*See* Defendant’s Motion To Dismiss Part Of This Action And To Strike (“Mot. Dismiss”).) Plaintiff opposed these motions. Both Kahrs and the Government additionally filed separate cross-motions for sum-

⁵ See Stay Order, dated 6/23/09 (Docket #101).

mary judgment,⁶ pursuant to USCIT R.56, regarding Plaintiff's First and Second Causes of Action in its complaint. Defendant also pursued summary judgment on the Third, Fourth, and Sixth Causes of Action to Plaintiff's complaint.⁷ This Court will first address the Government's motion to dismiss and motion to strike.

III.

Discussion

I. Defendant's Motion to Dismiss and Motion to Strike

A. Plaintiff's Sur-Reply Motion

As a preliminary matter, the Court must entertain Plaintiff's Motion For Leave To File Sur-Reply To Defendant's Reply To Plaintiff's Opposition To Defendant's Motion To Dismiss ("Sur-Reply Mot."). Kahrs requests the Court's indulgence and moves to file a sur-reply "in order to bring to the Court's attention certain facts that are omitted from Defendant's Reply [to its motion to dismiss] but that are relevant to the issues raised by Defendant and were not previously presented to the Court." (Sur-Reply Mot. 1.) In "the interests of time and ease of administration," Plaintiff filed its proposed Sur-Reply along with its motion. (*Id.*)

The Government objected to Kahrs' motion for a sur-reply and filed opposition papers. ("Def.'s Sur-Reply Op.") Defendant contends that it "did not omit any 'facts' from [its] reply brief which could be pertinent or relevant to the Court's determination" on the Government's motion to dismiss. (Def.'s Sur-Reply Op. 2.) Additionally, Defendant argues that Kahrs has failed to demonstrate a basis for "the extraordinary privilege of filing a sur-reply brief here." (*Id.* at 3.)

The Rules of the U.S. Court of International Trade do not provide for the filing sur-replies to motion papers. *Cf. C.J. Tower & Sons of Buffalo, Inc. v. United States*, 343 F. Supp. 1387, 1394 (Cust. Ct. 1972)

⁶ Unfortunately for the Court and the parties involved, Plaintiff chose to litigate its claims one-by-one, in a piecemeal fashion by filing motions for summary judgment separately on each cause of action. Whether by design or by accident, this tactic unnecessarily led to burdensome filings with the Court in the form of unduly large repetitive submissions. While not technically violative of any rule of the court, this method certainly does not keep faith with the provisions of USCIT R. 1 that litigation before this Court be "administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Moreover, piecemeal litigation of this sort is generally disfavored. *See Cuoco v. Moritsugu*, 222 F.3d 99, 110 (2d Cir. 2000). This Court recommends that Plaintiff's counsel review the prescripts of USCIT Rules 1, 81, and the USCIT's Standard Chambers Procedures.

⁷ Defendant stylized its motion for summary judgment as a "cross-motion" for summary judgment on Plaintiff's First, Third, Fourth and Sixth Causes of Action. In fact, the Defendants motion for summary judgment on Plaintiff's Third, Fourth and Sixth Causes of Action is a motion for summary judgment in the first instance. Plaintiff has made no objection. For ease of reference, the Court will, where appropriate, cite to the single joint motion paper as Defendant's cross-motion for summary judgment.

(striking sur-reply and noting that sur-replies are “not provided for in the rules”); *see also* U.S. COURT OF INT’L TRADE, RULES AND ANNOTATIONS. Generally, the “decision to permit the filing of a sur reply is purely discretionary and should generally only be allowed when ‘a valid reason for such additional briefing exists, such as where the movant raises new arguments in its reply brief.’” *First Specialty Ins. Corp. v. 633 Partners, Ltd.*, 300 Fed. App’x 777, 788 (11th Cir. 2008) (*quoting Fedrick v. Mercedes-Benz USA, LLC*, 366 F. Supp. 2d 1190, 1197 (N.D. Ga. 2005)). Moreover, as this court has once noted “after [the] issue is properly joined . . . succeeding rebuttal or supplementary briefs normally serve more to relieve the anxieties of counsel than to help the court.” *The Newman Co. v. United States*, 57 Cust. Ct. 117, 119 (1966).

This Court finds that, upon on the papers presented, there appears to be no valid basis to grant Kahrs’ request for supplementary briefing. Moreover, Plaintiff has had sufficient opportunity via its response papers to respond to the legal issues raised by the Government in its motion to dismiss. Plaintiff’s proffered reason for seeking to bring “certain facts” to “the Court’s attention” that were allegedly ignored by the Government, is not singularly in accord with this Court’s understanding of the case law and this court’s rules of practice.

Accordingly, Plaintiff’s motion to file a sur-reply is DENIED. *Cf. Saha Thai Steel Pipe Co., Ltd. v. United States*, 661 F. Supp. 1198, 1201 n.5 (Ct. Int’l Trade 1987) (“The court cannot allow the pre-trial . . . process to become needlessly protracted by endless sur-reply briefs.”); *see also* USCIT R. 1.

The Court now addresses Defendant’s motion to dismiss and to strike.

B. Motion to Dismiss

The Government moved separately, under USCIT Rules 12(b)(1) and 12(b)(5), to dismiss the Seventh Cause of Action in the complaint (Compl. ¶¶ 66–75) in its entirety for lack of jurisdiction under 28 U.S.C. § 1581(i) and/or failure to state a claim upon which relief may be granted. (Mot. Dismiss 1.) The Government also moved to dismiss, under USCIT Rules 12(b)(1) and 12(b)(5), Plaintiff’s “reasonable care” “claims” alleged in paragraphs 20, 22, 36, 68, and 72 of the complaint for lack of jurisdiction under 28 U.S.C. § 1581(i) and/or failure to state a claim upon which relief may be granted. (*Id.*) Finally, the Government moved to dismiss, under USCIT Rule 12(b)(1), Plaintiff’s “reasonable care” claims alleged in paragraphs 20, 22, and 36 of the complaint for lack of jurisdiction under 28 U.S.C. § 1581(a). (*Id.*)

1. Standards of Review

In deciding a USCIT Rule 12(b)(1) motion to dismiss that does not challenge the factual basis for the complainant's allegations, and when deciding a USCIT Rule 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted, the Court assumes that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the plaintiff's favor. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995); *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 & n.13 (Fed. Cir. 1993); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

When a defendant challenges the court's jurisdiction, the plaintiff has the burden of demonstrating jurisdiction exists. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006); *see also Len-Ron Mfg. Co., Inc. v. United States*, 24 CIT 948, 959, 118 F. Supp.2d 1266, 1277 (2000). "It is elementary that [t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (internal quotation omitted). The threshold inquiry before the Court is whether subject matter jurisdiction exists over the claims presented. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94–95 (1998) (quoting *Ex parte McCordle*, 74 U.S. 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").)

Finally, assuming that all of the factual allegations are true, "a complaint must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (quotations omitted). Even assuming that all of the factual allegations in the complaint are true, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

2. Parties' Contentions

In Plaintiff's Seventh Cause of Action, Complaint ¶¶ 66–75, titled "Declaratory Relief," Kahrs alleges that this Court has jurisdiction pursuant to 28 U.S.C. §§ 1581(i), 1585, 2201 and 2643(c) "as it pertains to administration and enforcement [by CBP] with respect to the matters specified in the six causes of action set forth [in the

complaint].”⁸ (Compl. ¶67.) The essence of Kahrs’ Seventh Cause of Action is an application for a “determination” by the Court that

Kahrs exercised reasonable care, as specified in 19 U.S.C. §1484, when it classified the [engineered wood flooring] under 4418.30.0000, HTSUS...and that CBP’s actions in changing the classification, assessing [higher] duties, threatening penalties, and causing actual, immediate and irreparable harm to Kahrs by failing to comply with the provisions of both 19 U.S.C. §§ 1315(d) and 1625(c), is inconsistent with the plain meaning of these controlling provisions and is arbitrary, capricious, an abuse of discretion, and not otherwise in accordance with law causing Kahrs extraordinary hardship and unusual injury.

(Compl. ¶69.) Kahrs describes with specificity the variety of declaratory relief it seeks in the Prayer for Relief. (Compl., Prayer For Relief, pp. 26–28.)

The Government argues that this Court lacks jurisdiction under 28 U.S.C. § 1581(i) over *any* entry of imported merchandise that are the subject of Protest No. 2704–07–101011 “or any other unidentified entries made between January 2001 and January 2006.” (Mot. Dismiss Mem. 14, 20–25.) Moreover, the Court lacks jurisdiction to entertain Plaintiff’s “reasonable care claims” under § 1581(i). (*Id.* at 20–25.)

Kahrs “strenuously opposes” Defendant’s motion to dismiss. (Pl.’s Response To Def.’s Mot. To Dismiss Part of This Action And To Strike (“Pl.’s Resp. MTD”) 1.) While not a model of clarity, the Court was able to extract from Kahrs’ response papers the foundation of its opposition. Kahrs contends that § 1581(i) is appropriate as to its Seventh Cause of Action because “jurisdiction under another subsection of Section 1581 is either unavailable or manifestly inadequate.” (Pl.’s Resp. MTD Br. 14 (*citing Int’l Customs Products v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006).) Kahrs argues, *inter alia*, that § 1581(a) is jurisdictionally unavailable “to confirm the correctness of its actions,” that is, to confirm the propriety of its preferred classification in at least six earlier entries of imports (not the subject imports of *this* action), which it contends established a “prior treatment” or an “established and uniform practice” under 19 U.S.C. §§ 1625(c) or 1315(d) respectively. (Pl.’s Resp. MTD Br. 16–17.) In other words, Kahrs states that its motivation in procuring a declaratory

⁸ As Defendant correctly point out, §§ 1585, 2201 and 2643(c), invoked by Kahrs as a basis for this Court’s jurisdiction, are not actually jurisdictional provisions and cannot create jurisdiction. Only § 1581(i), when properly invoked, provides an appropriate basis for this Court to exercise jurisdiction. *See Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir.1987) (The shorthand rule provides that the Court’s residual jurisdiction under § 1581(i) attaches only if a remedy under another section of 1581 is unavailable or “manifestly inadequate.”).

judgment from the court is to confirm that it exercised “reasonable care,” thus blunting any future action by CBP that it violated 19 U.S.C. § 1592 (2006) — *i.e.*, as a “defense to an alleged violation of . . . [s]ection 1592.” (Pl.’s Resp. MTD Br. 8, 18–19.)

3. Analysis

First, Kahrs concedes that this Court has no jurisdiction under § 1581(a) over any pending or suspended protests (to the extent that there are any) and any entries not covered by the protest identified in the summons in this action. (See Pl.’s Resp. MTD Mem. 4; Def.’s Reply To Opp. To Def’s Mot. To Dismiss (“Def’s MTD Reply Br.”) 4.) Put another way, this Court has jurisdiction *only* over the entries that are the subject of this challenge to a denied protest, pursuant to § 1581(a), as indicated in the summons filed with this action.⁹ Therefore, to the extent that the Seventh Cause of Action asserts a claim that this Court has § 1581(a) jurisdiction over pending or suspended protests, or any other entries not identified in the summons of this case, such claims are unreviewable and accordingly dismissed pursuant to USCIT R.12(b)(1). See *Dexter v. United States*, 78 Cust. Ct. 179, 181 (1977) (“[T]his court has no jurisdiction” over any entries “[u]ntil the entries are liquidated and [the] protests [are] denied[.]”); see also 28 U.S.C. § 2637(a).¹⁰

Next, the Court notes that § 1581(i) — the residual jurisdiction provision — may only be invoked when another subsection of § 1581 is unavailable or the remedy provided by another subsection is “manifestly inadequate.”¹¹ See *Nat’l Corn Growers Ass’n v. Baker*, 840 F.2d 1547, 1557 (Fed. Cir. 1988); see also *Miller & Co. v. United*

⁹ As noted above, those entries are: Entry # 701–5216140–5 (9/14/06); Entry # 701–5216149–6 (9/20/06); Entry # 701–5216163–7 (9/20/06); Entry # 399–0411896–3 (9/26/06); Entry # 399–0808699–2 (2/24/06); and Entry # 399–0807626–6 (11/05/05).

¹⁰ “[T]he statutory requirements that a protest must be filed . . . or that duties must be paid before commencing a civil action involving the protest [may not be waived].” *Am. Air Parcel Forwarding Co., Ltd. v. United States*, 6 CIT 146, 150, 573 F. Supp. 117, 120 (1983), *aff’d* 718 F.2d 1546, 1550 (Fed. Cir. 1983).

¹¹ 28 U.S.C. § 1581(i) provides:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section . . . the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage; (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section

States, 824 F.2d 961, 963 (Fed. Cir.1987), *cert. denied*, 484 U.S. 1041 (1988). Here, the Court agrees with the Government that Plaintiff has failed to demonstrate that the Court has jurisdiction over the Seventh Cause of Action and the “reasonable care” “claims.” (Mot. Dismiss 20–25; Def’s MTD Reply Br. 5.) Reviewing this court’s central jurisdictional statute, 28 U.S.C. §§ 1581(a)–(i), it is apparent that the court has no jurisdiction to review a “reasonable care” claim by an importer, a claim arising from penalty investigations, or a pre-enforcement claim. Indeed, 28 U.S.C. § 1582 provides jurisdiction for issues arising from a penalty enforcement action; that is, any claims arising under 19 U.S.C. § 1592.¹² See *Tikal Distrib. Corp. v. United States*, 21 CIT 715, 720, 970 F. Supp. 1056, 1061 (1997) (Section 1582 “provide[s] a complete judicial remedy for those who believe that Customs has wrongfully assessed a penalty. Specifically, the statute allows a party to obtain *de novo* review of a government claim from the Court of International Trade before paying any penalty.”). Plaintiff’s unsubstantiated assertion that the Court has jurisdiction under § 1581(i) because “no other subsection of § 1581 is available or the remedies afforded by other subsections would be manifestly inadequate,” Pl.’s MTD Resp. 25, is insufficient *ipse dixit*. Accordingly, this Court holds that the Government’s motion to dismiss Plaintiff’s Seventh Cause of Action is GRANTED and Kahrs’ “reasonable care” claims are dismissed pursuant to USCIT R.12(b)(1) for want of jurisdiction.

Furthermore, because the Court dismisses in its entirety Plaintiff’s Seventh Cause of Action and the “reasonable care” claims for the reasons stated above, the Court need not address the Government’s 12(b)(5) issues.

C. Motion to Strike

The Government also moves this Court, presumably¹³ under USCIT R.12(f), for an order striking various and sundry statements, allegations, and claims contained in Kahrs’ Complaint.¹⁴ (Mot. Dis-

¹² Section 1592 gives Customs the authority to impose penalties upon any person who enters merchandise into the United States “by fraud, gross negligence, or negligence . . .” 19 U.S.C § 1592(a)(1).

¹³ The government did not identify USCIT Rule 12(f) as a basis to move this Court to strike the requested sections of Kahrs’ complaint.

¹⁴ Specifically the Government seeks an order “striking: (1) the part of line three in the first full paragraph of the Introduction on p. 2 of the complaint which states “and other substantially identical transactions”; (2) the first two bullet points of the Introduction on p. 3 of the complaint in their entirety; (3) the part of the last full paragraph of the Introduction on p. 3 of the complaint which provides “as well as all other similar or identical merchandise imported by Kahrs from at least January 2001 through 2006”; (4) the part of ¶2 of the

miss 1–2, 3 n.1.) Plaintiff opposes this motion and contends that the particular phrases Defendant seeks to strike relate to or parrot various statutory or regulatory language upon which Plaintiff based its Complaint. (Pl.’s MTD Resp. 25–26.)

1. Standards of Review

USCIT Rule 12(f) provides that the Court “*may* strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Rule 12(f) also provides that a party may move the court to strike, but such motion must be brought *before* responding to a pleading, or if no response is permitted no later than 20 days after being served with the pleading. USCIT R.12(f)(2).

Here, Kahrs filed its Complaint on September 12, 2007. The Government filed its Answer on February 14, 2008 and filed its motion to strike on September 19, 2008. Mindful of these dates, the Government’s motion is not timely and must be rejected. USCIT R.12(f)(2); *see also First Nat’l City Bank v. Burton M. Saks Constr. Corp.*, 70 F.R.D. 417, 419 (D. V.I. 1976) (rejecting as untimely motion to strike filed six months after receipt the pleading).

Furthermore, it is axiomatic that “motions to strike are not favored by the courts and are infrequently granted.” *Jimlar Corp. v. United States*, 10 CIT 671, 673, 647 F. Supp. 932, 934 (1986); 5C CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & CIVIL PROCEDURE § 1380 (2009). The Court will grant a motion to strike only when there is a “flagrant disregard of the rules of court.” *Jimlar Corp.*, 647 F. Supp. at 934. The Government’s motion to strike is therefore DENIED.

II. Motions for Summary Judgment

The Court now turns to the Parties’ various motions and cross-motions for summary judgment. To summarize the pending motions, Kahrs filed a Motion For Summary Judgment On First Cause of Action (Docket #15) (“Pl.’s Mot. SJ”), pursuant to USCIT R.56(a). The Government responded in opposition and filed a Cross-Motion For Summary Judgment (Docket # 68) on the First Cause of Action as well as a Motion for Summary Judgment on the Third, Fourth, and Sixth Causes of Action (Docket #68) (“Def.’s X-Mot. SJ”). During the pendency of these motions, Plaintiff filed a Motion for Summary

prayer for relief in the complaint which requests relief as to “all similar Protests that are pending or suspended hereunder and reliquidate the entries [covered by the pending or suspended protests]”; (5) the part of ¶4 of the prayer for relief in the complaint which requests a judgment from the Court classifying entries which are not encompassed by Protest No. 2704–07–101011 under Heading 4418, HTSUS; (6) ¶10 of the prayer for relief in the complaint in its entirety; and, (7) ¶11 of the prayer for relief in the complaint in its entirety.”(Mot. Dismiss 1–2.)

Judgment On Second Cause of Action (Docket #57) (“Pl.’s Mot. SJ 2d”) pursuant to USCIT R.56(a). The Government responded in opposition and filed a Cross-Motion For Summary Judgment on the Second Cause of Action (Docket #80) (“Def.’s X-Mot. SJ 2d”).

At the heart of the matter, this action is a classification case. Therefore, the Court will first address the proper classification of the subject merchandise as raised in the Defendant’s motion for summary judgment on the Third, Fourth, and Sixth Causes of Action. Thereafter, the Court will take up the Parties’ cross-motions for summary judgment on the First and Second Causes of Action.

A. Standards of Review

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (protest denial jurisdiction). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” USCIT R.56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248. The court must view the evidence, draw all reasonable inferences in favor of the non-moving party, and determine “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at 259 (internal citation omitted). Accordingly, “a court has an independent obligation to determine, on the basis of parties’ submissions, whether a movant is entitled to judgment as a matter of law.” *United States v. T.J. Manalo, Inc.*, 26 CIT 1117, 1119, 240 F. Supp.2d 1255, 1257 (2002).

In ruling on cross-motions for summary judgment, if no genuine issue of material fact exists, the Court must determine whether either party “is entitled to judgment as a matter of law.” USCIT Rule 56(c); see also *Sea-Land Service, Inc. v. United States*, 23 CIT 679, 684 (CIT 1999), *aff’d*, 239 F.3d 1366 (Fed. Cir. 2001).

In classification cases, “summary judgment is appropriate when there is no genuine dispute as to . . . what the merchandise is . . . or as to its use.” *Ero Indus., Inc. v. United States*, 24 CIT 1175, 1179, 118 F. Supp. 2d. 1356, 1359–60 (2000).

The parties claim there are no genuine issues as to any material facts; therefore summary judgment is appropriate in this matter. This

Court agrees. Where, as here, “the nature of the merchandise is undisputed, . . . the classification issue collapses entirely into a question of law,”¹⁵ and the court reviews Customs’ classification decisions *de novo*. *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006); 28 U.S.C. § 2640(a)(1) (2000). In making its determination as to the proper classification under the HTSUS, the Court must consider whether “the government’s classification is correct, both independently and in comparison with the importer’s alternative.” *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

B. Summary Judgment — Undisputed Material Facts

The following are the undisputed material facts as stipulated by the Parties¹⁶ and additional undisputed material facts gleaned from the evidentiary record¹⁷ on all motions and cross-motions for summary judgment before the Court.

Jurisdiction & Background

1. This is a civil action which contests the denial of a protest under § 515 of the Tariff Act of 1930, 19 U.S.C. §1515. (Parties’ Uncontested Facts (“UF”) ¶1 (Docket #102).)

¹⁵ Customs’ decisions are entitled to a presumption of correctness under 28 U.S.C. § 2639(a)(1) (2000); however, where “a question of law is before the Court on a motion for summary judgment, the statutory presumption of correctness is irrelevant.” *Blakley Corp. v. United States*, 15 F. Supp. 2d 865, 869 (CIT 1998) (citing *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997)).

¹⁶ Parties Stipulation of Facts Not in Controversy (Docket #102) (Parties’ Uncontested Facts).

¹⁷ The record assembled on the motions before the Court comprises, *inter alia*:

1. The protest (Compl., Exs. 1A & 1B);
2. The six CF-29s regarding the subject merchandise (Compl., Exs. 2-7);
3. Letter from CBP to Kahrs regarding classification investigation, dated Sept. 29, 2006 (Compl., Ex. 8);
4. Copies of entry documents for the subject merchandise (Pl.’s Mot. SJ, Exs. 2A–2F) (Docket #15);
5. Certain representative samples of the subject imports (Def.’s X-Mot. SJ, Ex. H) (Docket #68) and Pl.’s Mem. In Opp, to Def.’s X-Mot. SJ, Enclosures E–1, E–2, and E–3 (Docket #82) (together “the Representative Samples”)
6. Depositions of Senior Import Specialist Laurel Duvall (Def.’s X-Mot. SJ, Ex. A), Nat’l Import Specialist Paul Garretto (Def.’s X-Mot. SJ, Ex. B), Chief, Cargo Release Branch James Swanson (Def.’s X-Mot. SJ, Ex. C), Senior Vice President, Finance & Operations, Kahrs Int’l Inc., Sean Brennan (Def.’s X-Mot. SJ 2d, Ex. O), Vice President, Sales, Kahrs Int’l Inc., Thomas J. Colgan (Pl.’s Reply to Def.’s X-Mot. SJ 2d, Ex. 1 (Docket #93));
7. Declaration of Sean Brennan (Docket #15) (“Brennan Decl. 1”);
8. Second Declaration of Sean Brennan (Docket #59) (“Brennan Decl. 2”);
9. Declaration of Sean Brennan 2d Cause of Action (Docket #57) (“Brennan 2d COA Decl.”);
10. Declaration of Meghan E. McBurney, Customs Broker for Kahrs (Docket #15) (“McBurney Decl.”);

2. Kahrs, is the owner and importer of record of the merchandise involved in this action and is the party which caused the protest herein to be filed; therefore, pursuant to 28 U.S.C. § 2631(a), Kahrs has standing to bring this action. (UF ¶2.)
3. Kahrs made the following entries through the Port of Los Angeles/Long Beach and subsequent CF-29s were issued by CBP:

Entry Number	Entry Date	CF-29 Issue Date
399-0808699-2	2/24/06	8/16/06
701-5216140-5	9/14/06	10/3/06
701-5216149-6	9/20/06	10/11/06
701-5216163-7	9/20/06	10/11/06
399-0411896-3	9/26/06	10/17/06
399-0807626-6	11/05/05	11/27/06

(UF ¶¶3, 6.¹⁸)

4. Kahrs entered all of the merchandise it imported in the entries identified in paragraph 3, above, under Heading 4418, subheading 4418.30.00 HTSUS, a duty-free provision for “assembled parquet panels.” (UF ¶4.)
5. The imported subject merchandise is identified on the entry summaries (CF-7501) for all six entries as “PARQUET PANELS BUILDERS’ JOINE[RY].” See CF-7501, Entry Papers, USCIT Court File (Ct. No. 07-000343).
6. The imported subject merchandise is identified on the commercial invoices as either “Parquet flooring” or “LINEAL

11. Declaration of Laurel Duvall (Def.’s X-Mot. SJ, Ex. D) (Docket #68) (“Duvall Decl.”);
12. Declaration of Thomas J. Colgan (Docket #81) (“Colgan Decl. 1”);
13. Second Declaration of Thomas J. Colgan (Docket #81) (“Colgan Decl. 2”);
14. Declaration of Paul Garretto (Def.’s X-Mot. SJ, Ex. E) (“Garretto Decl.”) (Docket #68);
15. CBP ITRAC Report (Pl.’s Mot. SJ, Ex. 12) (Docket #60) (CD-ROM);
16. Kahrs Int’l, Inc., 2005-2006 Guide Specifications (Def.’s X-Mot. SJ, Ex. I);
17. Kahrs Int’l, Inc., Technical Manual 3d (Def.’s X-Mot. SJ, Ex. J);
18. Def.’s Response to Pl.’s Interrogatories, etc. (Def.’s X-Mot. SJ, Ex. K-1) (Docket #71);
19. Def.’s Amd./Suppl. Response to Pl.’s Interrogatories, etc. (Def.’s X-Mot. SJ, Ex. K-2 (Docket #72));
20. Def.’s Resp. to Pl.’s Req. for Admissions, Interrog., and for Production of Docs. Pertaining to 2d Cause of Action, Ex. S, Def.’s X-Mot SJ;
21. Letter from Sean Brennan to Don Dorsett, CBP Import Specialist, dated Sept. 1, 2006, and Letter from Sean Brennan to Laurel Duvall, dated Sept. 1, 2006 (Def.’s X-Mot. SJ, Ex. N).

¹⁸ *Sic.* The Parties’ Uncontested Facts are mis-numbered and skips paragraph number 5.

FLOOR[ING].” See Commercial Invoices, Entry Papers, USCIT Court File.

7. The commercial invoices also describe other aspects of the imported subject merchandise including product thickness, type of wood on the face ply, finish, number of wood strips, length, quantity, unit value and total value. For example, the invoice for Entry #399-0807626-6 describes one article of merchandise as “LINNEA[L] REDOAK STYLE 3-STRIP; Glazed Woodloc.” See Commercial Invoice for Entry #399-0807626-6, Entry Papers, USCIT Court File.
8. On August 16, 2006, Customs issued a CF-29 to Kahrs for Entry Number 399-0808699-2 proposing to rate advance the imported “Lineal Floor, plyw — Mat Satin, entered under 4418.30.0000/free” to subheading 4412.14.3170, HTSUS, at an 8% duty rate because the “product is not parquet panels by tariff standards, but is specifically engineered flooring (flooring of plywood construction), with a nonconiferous face ply and no ply exceeding 6mm in thickness.” Pl.’s Mot. SJ, Ex. 3, Brennan Decl. 1. The CF-29 also stated to Kahrs that it should “classify future shipments of this merchandise accordingly.” See Ex. 3, Brennan Decl. 1.
9. Kahrs responded to CBP’s August 16, 2006 CF-29, by letter dated September 1, 2006, explaining that it “disagree[d]” with CBP’s classification change and noted that it “will continue to classify these products under 4418.30.0000.” Def.’s X-Mot. SJ, Ex. N.”
10. Customs issued additional CF-29s to Kahrs on October 3, 2006, October 11, 2006, October 17, 2006, and November 27, 2006 in connection with the remaining five entries at issue in this action (Entry Nos. 701-5216140-5, 701-5216163-7, 701-5216149-6, 399-0411896-3, 399-0807626-6). Brennan Decl. 1, Exs. 4-8. The CF-29s for all six entries indicated that they were liquidated by Customs under Heading 4412, in either subheading 4412.14.3170, 4412.22.3170, 4412.29.3620, or 4412.29.3670, HTSUS, at the duty rate of 8%, *ad valorem*, on or between October 27, 2006 and February 16, 2007. (UF ¶7.)
11. On October 31, 1997, Customs denied two protests of Kahrs and announced its intention to liquidate their engineered wood flooring products under subheading 4418.30.00 HTSUS. See Protest No. 1001 97-105319, Brennan Decl. 1, Ex 1A; Protest No. 1001 97-105320, Brennan Decl. 1, Ex. 1B; Brennan Decl. 1, ¶¶12 & 18.

12. Protest No. 2704-07-101011 was timely filed within 180 days of the liquidation of the six entries in this suit that were made through the Port of Los Angeles/Long Beach. (UF ¶8.)
13. On August 15, 2007, Customs denied Protest No. 2704-07-101011 pursuant to 19 U.S.C. § 1515(a). (UF ¶9.)
14. This action, filed September 12, 2007, was timely commenced within 180 days of the date of denial of the protest which is the subject of this action. (UF ¶10.)
15. All duties, charges and exactions assessed at liquidation pertaining to the protested entries referred to herein were paid prior to the commencement of this action. (UF ¶11.)
16. This Court has jurisdiction over the First, Second, Third, Fourth and Sixth Causes of Action in the complaint pursuant to 28 U.S.C. §1581(a). (UF ¶12.)

The Imported Subject Merchandise

17. Kahrs describes the imported subject merchandise as “Engineered Wood Strip Flooring.” See Kahrs Int’l, Inc., Technical Manual 3d (Def.’s X-Mot. SJ, Ex. J).
18. Kahrs also describes the imported subject merchandise as “engineered wood flooring panels.” See Summons, Attach. 1.
19. “Engineered wood flooring” panels are composed of multiple laminated layers of varying thicknesses, with the grain of each layer running perpendicular to that of the contiguous layer. Engineered wood flooring panels are “imported in . . . strips or planks (*i.e.*, rectangular panels) with a face ply of, generally, a hardwood species.” The face ply may be constructed of single or multiple strips of wood veneers simulating a “strip” or “plank” flooring. Duvall Decl. ¶42; see also Kahrs Int’l, Inc., Technical Manual 3d (Def.’s X-Mot. SJ, Ex. J); Kahrs Int’l, Inc., 2005–2006 Guide Specifications (Def.’s X-Mot. SJ, Ex. I).
20. There are three categories of engineered wood flooring at issue in this case:
 - (a) 1-strip engineered wood flooring panels that are 14 millimeters (“mm”) thick;
 - (b) 2-strip engineered wood flooring panels flooring that are 15 mm thick; and
 - (c) 3-strip engineered wood flooring panels flooring products that are 15 mm thick. (UF ¶13.)
21. The 14 mm thick engineered wood flooring panels consist of 7-ply with the face plies made of varying wood species. These panels are imported in random lengths from 16 ⅓ inches, 26

- inches, 35½ inches, and 52 inches, are approximately 5 inches wide and no ply exceeds 6mm in thickness. (UF ¶14.)
22. The imported 15 mm, 2-strip, 3-ply engineered wood flooring panels consist of three layers (“plies”) of wood glued and pressed one on the other and disposed so that the grains of successive layers are perpendicular to each other. The top layer is a 3.6 mm (slightly less than 1/8 of an inch) thick hardwood or tropical wood with the grain running “vertical” along the length of the board. The middle layer (the “core” ply) consists of pine “fingers” which run horizontally across the board. This core ply exceeds 6 mm in thickness. They are 9.4 mm (approximately 6/16 of an inch) thick, with the grain running at right angles to the grain of the top layer. There is spacing between the pine fingers, which may be up to 2 mm (approximately 1/14 of an inch). The bottom layer is made from spruce and is 2 mm (approximately 1/14 of an inch) thick, with the grain running “vertical” along the length of the board and the grain is running at right angles to the grain of the middle layer. (UF ¶25.)
 23. The 14 mm and 15 mm engineered wood flooring panels are laminated. (UF ¶16.)
 24. Kahrs’ 14 mm and 15 mm engineered wood flooring panels were designed to simulate solid wood strip or plank flooring, are competitive with solid wood strip or plank flooring, and have advantages that solid wood strip or plank flooring does not have. (See UF ¶17.)
 25. The Kahrs 14 mm flooring products in the Protest consist of pre-finished multi-layered hardwood or tropical wood planks. There is a top or wear layer of hardwood or tropical wood, a core layer of five layers of poplar wood, and a bottom layer of spruce. The top layer is a single face strip that is assembled on a support of the core and bottom layers that are laminated together with adhesive to form a flooring panel 5 inches wide that simulates a solid wood “plank” when assembled after importation into flooring. During manufacture of the 14mm panels, tongue and groove edges are cut into the core so that other panels can be joined together after importation to form a complete floor covering. See Colgan Decl. 1, Encl. B.
 26. The 15 mm flooring is imported in lengths of 82½ to 95 3/8 inches and the majority are approximately 8 inches wide. See UF ¶15; Colgan Depo. Tr. 27:22–25.
 27. The face of the 15 mm flooring product is constructed of two or three narrow strips of wood measuring 4 inches wide for the 2-strip and 2e inches wide for the 3-strip, 3.6 mm thick and 8 inches, 10½ inches or 13 inches in length to simulate solid

- wood “strip” flooring at the time of importation, and when subsequently assembled into finished flooring. *See* Representative Samples; Colgan Decl. 1, ¶¶16, 35, 50; Colgan Decl. 2, ¶11; Colgan Depo. Tr. 80:18–25–81:1–6.
28. During the manufacture of the 15 mm panels, the patented “Woodloc” interlocking system is cut into the core so that other panels can be joined together after importation to form a complete floor covering. *See* Colgan Decl. 1, Encl. B.
29. All of the imported 14 mm and 15 mm three-strip engineered wood flooring panels consist of an odd number of veneers of wood disposed so that the grains of successive layers are at a right angle to layers above and below. The veneers of wood are glued and pressed one on the other and, thereby, bonded together using adhesive and pressure. *See* Colgan Decl. 1, Encl. B, at 5–6.

Classification History of Kahrs’ Engineered Wood Flooring Products

30. In November 1997, the World Customs Organization amended the Explanatory Notes to both headings 4412 and 4418 to clarify that panels with a face ply composed of multiple parallel strips are properly classifiable as “plywood” and not as “parquet panels.” *See* Explanatory Notes to Headings 4412 and 4418, as amended; Annex IJ/14 to Doc. 41.600 E (HSC/20/Nov. 97).
31. Prior to May 30, 2001, Customs classified engineered wood flooring in Heading 4418 when the panel had a face ply consisting of multiple veneer strips of wood. (UF ¶18.)
32. Prior to May 30, 2001, Customs classified engineered wood flooring with a face veneer consisting of a single strip of wood in Heading 4412. (UF ¶19.)
33. In light of the clarifying amendments to the Explanatory Notes, Customs changed its position and concluded that engineered wood flooring, whether of multiple veneer strips or a single veneer strip, are properly classified in Heading 4412. (UF ¶20.)
34. As required by 19 U.S.C. § 1625(c), Customs published notice of its proposal to revoke HQ 962031¹⁹ and three other rulings (NY 806603, NY 806462, and NY 832721) and its treatment of engineered wood flooring in the Customs Bulletin on December 20, 2000. This notice provided a full copy of each of the

¹⁹ CBP’s HQ 962031 provided that strip flooring, similar to the Kahrs’ subject merchandise here, may be classified under heading 4418 HTSUS as “parquet panels” and not under heading 4412 HTSUS as “plywood.” *Id.* at 2.

- relevant rulings which Customs proposed to revoke or modify and a ruling providing its current position. (UF ¶21.)
35. Customs revoked its prior rulings and treatment which found that engineered wood flooring is classifiable as “[p]arquet panels.” See *Notice of Revocation and Modification of Ruling Letters and Treatment Relating to Tariff Classification of Laminated Flooring*, 35 Cust. Bull. 22 (May 30, 2001) (“Revocation Ruling”). (UF ¶22.)
 36. The classification position set forth in the Revocation Ruling became effective 60 days after the date of its publication, *i.e.*, on July 29, 2001. (UF ¶23.)
 37. Between July 29, 2001 and August 16, 2006, Kahrs made 1867 entries of engineered wood flooring panels at 28 ports that were liquidated as entered under subheading 4418.30.00, HTSUS or under Heading 4409, HTSUS. (UF ¶24; Duval Decl., ¶28.)
 38. Customs did not advise Kahrs that its entered classifications of any of the engineered wood flooring panels it imported during the period 2001 to 2006 were correct. See Brennan Depo. Tr. 128:5–129:3.
 39. Of the 1867 entries which were liquidated under subheading 4418.30.00 during the period between July 29, 2001 and August 16, 2006, 1776 entries (approximately 95%) were “paperless” and 91 entries were paper (approximately 5%). See Duvall Decl., ¶29.
 40. Of the 1776 “paperless” entries liquidated during the period between July 29, 2001 and August 16, 2006, six entries (approximately 0.3% of the total number of entries) were filed as paperless “informal,” 933 (approximately 50% of the total number of entries) were filed as paperless electronic invoice entries, and 837 (approximately 45% of the total number of entries) were filed as paperless bypass entries. Duvall Decl., ¶30.
 41. “Bypass” means that an entry is not reviewed by an import specialist (the review of the entry is bypassed) and the entry is liquidated “as entered,” *i.e.*, with no change to the entry data originally submitted to Customs. Duvall Decl., ¶31.
 42. Of the 933 paperless electronic invoice entries liquidated during the period between July 29, 2001 and August 16, 2006, 236 (approximately 25% of the total number of the paperless electronic invoice entries) were filed with electronic invoice data. Duvall Decl., ¶32.
 43. No paper copy of an entry summary (CF-7501) was filed with Customs for any of the paperless entries liquidated during the period between July 29, 2001 and August 16, 2006, and with

the exception of Entry No. 399–0800233–8, none of the paperless entries were reviewed by an import specialist. Duvall Decl., ¶33.

44. Where paper entries were made, 73 of the 91 paper entries (approximately 4% of the total number of entries) liquidated during the period between July 29, 2001 and August 16, 2006 were filed as “paper bypass,” which means that the entries were liquidated automatically without review by an import specialist. Duvall Decl., ¶34.
45. Eighteen of the 91 paper entries (less than 1% of the total number of entries) liquidated during the period between July 29, 2001 and August 16, 2006 were filed as paper for import specialist review; however, 11 of the 18 entries were “manually bypassed,” which means that the entries were liquidated without review by an import specialist. Duvall Decl., ¶35.
46. The paper entry summaries for Entry Nos. 399–0800233–8, 201–3042459–9, F23–0114325–1, F23–0114725–2, F23–1145004–3, F23–0115067–8, and F23–0115182–5, which represent less than 0.4% of the total number of entries made by Kahrs from July 29, 2001 and liquidated before August 16, 2006, were reviewed by an import specialist. Duvall Decl., ¶36.
47. With the exception of the entries identified in ¶46, above, no import specialist reviewed an entry summary for any of the entries made by Kahrs on or after July 29, 2001 and liquidated before August 16, 2006. Duvall Decl., ¶37.
48. No import specialist requested a sample or additional information, or effected a change liquidation for any of Kahrs’ entries made on or after July 29, 2001 and liquidated before August 16, 2006. Duvall Decl., ¶¶37, 39.
49. With the exception of the entries identified in ¶46, above, all of the Kahrs’ entries liquidated without a confirmed review by an import specialist. *See* Duvall Decl., ¶39.
50. Customs selects entries for intensive cargo examinations for a variety of purposes including national security, in order to ensure that prohibited goods do not enter into the territory of the United States. *See* Ex. S, Def.’s Resp. to Pl.’s Req. for Admissions, Interrog., and for Production of Docs. Pertaining to 2d Cause of Action, ¶13(c).
51. Cargo examinations may also be conducted to validate the information provided with the entry, including, country of origin marking, other marking issues, classification to the six-digit international tariff level, quantity verification and documentation review. *See id.*

52. Because of the security devices or techniques employed, cargo examinations are not public events and Customs' records of these examinations are not made on the entry documents or otherwise reported to an importer. *See generally* Swanson Depo. Tr.
53. Kahrs admits that, aside from the CF-29s at issue in this case, all communications regarding the status of its entries during importation came from its freight forwarder and/or customs broker, and not directly from Customs. *See* Brennan Depo. Tr. 160-165.
54. The only record in this case containing information regarding the results of the cargo examinations is contained in the CBP Importer Trade Activity ("ITRAC") Report for Kahrs, which contains data that was initially recorded in the ACS database. *See* ITRAC Report; Duval Depo. Tr. 19; *see generally* Swanson Depo. Tr.
55. The ITRAC report was provided to Kahrs in response to its Freedom of Information Act request in November 2006, several years after the cargo examinations of Entry Nos. 399-0801291-5, 399-0802301-1 and 399-0803895-1 and after the entries at issue in this action were made. (UF ¶26.)
56. Customs conducted cargo examinations and certain information was recorded by CBP personnel in CBP databases and produced in the ITRAC Report regarding the following entries:

Entry Number	Entry Date	Port of Entry/Cargo Exam Site	Import Specialist Comments	Remarks
701-5112456-0	7/2/2002	San Francisco, CA	OK COMPLIANT	INV. 591662, INVAL:72476, ISNI, PARQUET FLOORING (SC:MS)
399-0801291-5	9/3/2003	San Francisco, CA	OK COMPLIANT	INV:629915, INVAL:60223, C/O SWEDEN, LINNEA CHERRY LIFE 3-STRIP. OAK GRANDA WOOD. XND.

Entry Number	Entry Date	Port of Entry/Cargo Exam Site	Import Specialist Comments	Remarks
399-0803895-1	9/22/2004	Newark, NJ	203 MB 12/15/04 -EXAM PER- FORMED NO DIS- CREPANCIES FOUND	<> :1:PG:INV #036576, INVAL \$31738, PAN- ELS, COMPLIANT, ISNI. <> = redacted as per 5 USC 552(b)(2) & (7)
399-0802301-1	3/15/2004	Houston, TX	COMPLIANT <> = redacted as per 5 USC 552(b)(2)&(7)	INV# PROFORMA, IN- VAL \$54673, ISNG <> COMMODITY VERI- FIED PER INVOICE/EXM IN- STRUCTIONS C/O SWEDEN. NO ANOMA- LIES PRESENT. <> = redacted as per 5 USC 552(b)(2) [sic]
399-0808440-1	1/31/2006	Chicago, IL	SUMMARY LINE COMPLIANT MARKING CERTI- FICATION AC- CEPTED	CM, INV #1207741, IN- VAL: 35861, WP: NC, PARQUET PANELS, NLM CF 4647 ISSUED,<>-NG- SE,<>-EQUIP, ET, I129 <> = redacted as per 5 USC 552(b)(2) & (7)

See Entry Summary Review Table and Cargo Exams Table, ITRAC Report.

57. Kahrs admits to having no knowledge of either Customs' procedures or personnel involved with its or any cargo examinations. See Brennan Depo. Tr. 155-166.
58. The cargo examinations of Entry Nos. 399-0803895-1 (Sept. 2004), 399-0802301-1 (March 2004) and 399-0808440-1 (Jan. 2006) were conducted by CBP after the entry of judgment by the U.S. Court of Appeals for the Federal Circuit in *Boen Hardwood Flooring, Inc. v. United States*, 357 F.3d 1262 (Fed. Cir. Feb. 2, 2004). See ITRAC Report.

59. The cargo examination of Entry No 399-0808440-1 was a random examination (not based on suspicion of an illegal activity) where both a security and trade exam were conducted. Swanson Depo Tr. 74:12-78:13; *see also* ITRAC Report.
60. As a result of a trade exam, CBP determined that Entry No 399-0808440-1 was noncompliant for country-of-origin marking purposes. *See* ITRAC Report; Swanson Depo Tr. 78:16-79:4.
61. The following entry, which was claimed by Kahrs to be one of the “six intensive examinations,” was not the subject of a Customs cargo examination; however, the entry summary form (CF-7501) associated with the entry was reviewed by an import specialist:

Entry Number	Entry Date	Port of Entry/Cargo Exam Site	Import Specialist Comments	Remarks
201-3042459-9	7/16/03	JFK Int'l Airport (NY)	253:PARQUET PANELS:C/O=CH: EV= \$7,524: COM- PLIANT:MM	None

See ITRAC Report; Swanson Depo. Tr. 137-38; Duvall Decl., ¶36.

62. The ITRAC Report contains no record that an import specialist requested or examined a sample of the merchandise covered by Entry No. 201-3042459-9. *See* ITRAC Report.
63. The ITRAC Report contains no record that an import specialist was involved in the cargo examination of Entry No. 399-0801291-5. Comments were entered by unknown personnel in the data field “Import Specialist Comments” as reported within the ITRAC Report. *See* ITRAC Report.
64. The acronyms “ISNI” and “ISNG” are contained in the remarks column corresponding to Entry Nos. 701-5112456-0, 399-0802301-1 and 399-0803895-1, which were the subject of Customs cargo examinations as provided on the ITRAC Report. *See* ITRAC Report.
65. “ISNI” means “Import Specialist Not Involved.” “ISNG” means “Import Specialist Not Involved Due to Geography.” *See* Swanson Depo. Tr. 105-107, 126; Duvall Decl., ¶41.
66. No import specialist participated in the cargo examinations of Entry Nos. 701-5112456-0, 399-0802301-1 and

- 399-0803895-1. See ITRAC Report; Swanson Depo. Tr. 105-107, 126; Duvall Decl., ¶41; Ex. K1, Def.'s Resp. to Pl.'s Interrog., served on June 27, 2008.
67. The only information Kahrs received regarding the five cargo examinations was from its broker or freight forwarder. See Brennan Depo. Tr. 148, 151-152, 161-162.

USCIT Suspended Cases

68. Kahrs filed nine summonses during the period from September 27, 1996 through February 10, 2000. See Court's Case Management/Electronic Case Files ("CM/ECF") System, CIT DOCKET FOR CASE #: 1:96-cv-02282-DCP; CM/ECF, CIT DOCKET FOR CASE #: 1:97-cv-00948-DCP; CM/ECF, CIT DOCKET FOR CASE #: 1:97-cv-00949-DCP; CM/ECF, CIT DOCKET FOR CASE #: 1:97-cv-01215-DCP; CM/ECF, CIT DOCKET FOR CASE #: 1:97-cv-02019-DCP; CM/ECF, CIT DOCKET FOR CASE #: 1:98-cv-00946-DCP; CM/ECF, CIT DOCKET FOR CASE #: 1:99-cv-00224-DCP; CM/ECF, CIT DOCKET FOR CASE #: 1:99-cv-00292-DCP; CM/ECF, CIT DOCKET FOR CASE #: 1:00-cv-00075-DCP.
69. The consent motion for test case designation and suspension identifies the merchandise as consisting of "laminated hardwood flooring." See *id.*
70. The nine civil actions set forth in ¶¶68-69, above, were suspended under *Boen Hardwood*, which was designated as a test case. See *id.*
71. In those nine civil actions (¶¶68-69, above), Kahrs was represented by the same counsel (John J. Galvin, Esq., Galvin & Mlawski, New York, NY) that represented the plaintiff-appellee in *Boen Hardwood* and, subsequent to the decision in *Boen Hardwood*, each of those nine actions was voluntarily dismissed or dismissed by stipulation of the parties. See *id.* and *Boen Hardwood*, 357 F.3d at 1263.

C. Summary Judgment — Third, Fourth, & Sixth Causes of Action

Before the Court is the Government's motion for summary judgment regarding Plaintiff's Third, Fourth, and Sixth Causes of Action. The issue common to all is the correct tariff classification of Plaintiff's imported engineered wood flooring panels.²⁰

²⁰ The Court, in classification cases, has an independent obligation to ascertain the proper classification of merchandise in dispute. See *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984); *Simon Mktg., Inc. v. United States*, 29 CIT __, __, 395 F. Supp. 2d 1280, 1286 (2005). "[T]he Court must determine 'whether the government's classification is correct, both independently and in comparison with the [broker's] alternative.'" *Cargill*,

Customs refused to classify the subject merchandise as assembled parquet panels under HTSUS heading 4418, treating it as plywood under heading 4412. Kahrs challenges²¹ the classification on the grounds that the merchandise, as imported, are “assembled parquet panel[]” flooring and should therefore be classified under heading 4418. (Pl.’s Mem. in Opp. to Def.’s X-Mot. for SJ (“Pl.’s Opp. Br.”) 18.) In the alternative, Kahrs contends that the engineered wood flooring constitutes “Edged-glued lumber” classifiable as “Other” under subheading 4418.90.4590. (Pl.’s Opp. Br. 28–29.) Finally, in yet another alternative, Kahrs argues that the imported merchandise is classifiable as “builders’ joinery” under subheading 4418.90.4590 because “the provision for builders’ joinery is clearly narrower and includes a smaller number of products than the provision for plywood, which involves multiple applications.” (Pl.’s Opp. Br. 29–30.)

Classification consists of a two-step analysis—first, construing the relevant tariff headings, then second, determining under which of those headings the merchandise at issue is properly classified. *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citing *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997)). Determining the proper meaning of the relevant tariff headings is a question of law, while application of the terms to the particular merchandise is a question of fact. *Id.*

When construing tariff terms, the Court may look to common and commercial meanings if such construction would not contravene legislative intent. *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1352 (Fed. Cir. 2000). To ascertain the common meaning of a tariff term, the Court may refer to dictionaries, scientific authorities, and similarly reliable resources. *Mead Corp. v. United States*, 283 F.3d 1342, 1346 (Fed. Cir. 2002).

“The HTSUS scheme is organized by headings, each of which has one or more subheadings; the headings set forth general categories of merchandise, and the subheadings provide a more particularized segregation of the goods within each category.” *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). “A classification

Inc. v. United States, 28 CIT 401, 408, 318 F. Supp. 2d 1279, 1287 (2004) (quoting *Jarvis Clark*, 733 F.2d. at 878).

²¹ Kahrs also claimed in Count 1 of its Complaint that Customs’ classification and liquidation of the entries under heading 4412 “modified or revoked prior interpretive classification rulings or decisions which had been in effect for at least 60 days and/or modified the classification treatment previously accorded Kahrs by CBP to substantially identical transactions without first publishing notice in the customs Bulletin as specified in 19 U.S.C. § 1625(c).” (Compl. p. 2; ¶¶ 1–29.) In Count 2, Kahrs alleges that there “existed an ‘established and uniform practice’ . . . of classifying the [merchandise] under 4418.30.0000” and Customs’ failure to comply with the notice and comment provisions of 19 U.S.C. § 1315(d) was a violation of its rights. (*Id.* at 2.) The Court will take up these issues in its analysis *infra*.

analysis begins, as it must, with the language of the headings.” *Id.* at 1440.

In pertinent part, the HTSUS General Rule of Interpretation (“GRI”) 1 states that “classification shall be determined according to the terms of the headings and any relative section or chapter notes.” GRI 1, HTSUS (2000). In fact, “Section and Chapter Notes are not optional interpretive rules, but are statutory law, codified at 19 U.S.C. § 1202.” *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 926 (Fed. Cir. 2003) (*citing Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999)). The GRIs are applied in numerical order. *See ABB, Inc. v. United States*, 421 F.3d 1274, 1276 n.4 (Fed. Cir. 2005) (*citing Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999)).

To apply GRI 1, the Court must construe “the language of the heading, and any section or chapter notes in question, to determine whether the product at issue is classifiable under the heading.” *Orlando Food*, 140 F.3d at 1440. The Court must identify the proper heading or headings in which an article is classifiable before it can determine the subheading that provides the classification for the item. *Id.* Accordingly, in this case, the Court must consider whether the subject merchandise is classifiable under HTSUS heading 4412 or 4418.

1. Third Cause of Action — The Subject Merchandise is Classifiable Under Heading 4412 and Not Classifiable Under Heading 4418

Customs liquidated the entries of engineered wood flooring panels as follows:

Entry No.	CBP Classification Subheading
701-52161405	4412.29.3670
701-52161637	4412.29.3670
701-52161496	4412.29.3670
399-04118963	4412.29.3670
399-08076266	4412.29.3670
399-08086992	4412.14.3170

Subheading 4412.29²² HTSUS is the appropriate classification for “[p]lywood, veneered panels and similar laminated wood,” made of plies that exceed 6 mm, and has “at least one outer ply of nonconiferous wood.” 4412.29 HTSUS. Whereas subheading 4412.14²³ HTSUS is the appropriate classification for “[p]lywood, veneered panels and similar laminated wood,” “consisting solely of sheets of wood, each ply *not exceeding* 6 mm in thickness,” and that has “at least one outer ply of nonconiferous wood.” 4412.14 HTSUS (emphasis added.) The plain language of the HTSUS differentiates the various types of plywood as between “[p]lywood consisting solely of sheets of wood, each ply not exceeding 6 mm in thickness” and “[o]ther, with at least one outer ply of nonconiferous wood.” *Compare* 4412.13–4412.19 HTSUS *with* 4412.22–4412.92, HTSUS. The

²² The relevant portion of the HTSUS Chapter 44 reads as follows:

4412	Plywood, veneered panels and similar laminated wood:
	Plywood consisting solely of sheets of wood, each ply not exceeding 6 mm in thickness:
	...
	Other, with at least one outer ply of nonconiferous wood:
4412.29	Other:
	Plywood:
	Not surface covered, or surface covered with a clear or transparent material which does not obscure the grain, texture or markings of the face ply:
4412.29.15	With a face ply of birch (<i>Betula</i> spp.)
	...
4412.29.36	Other

²³ The relevant portion of the HTSUS Chapter 44 reads as follows:

4412	Plywood, veneered panels and similar laminated wood:
	Plywood consisting solely of sheets of wood, each ply not exceeding 6 mm in thickness:
	...
	[With at least one outer ply of Tropical Wood]
4412.14	Other, with at least one outer ply of nonconiferous wood:
	Not surface covered, or surface covered with a clear or transparent material which does not obscure the grain, texture or markings of the face ply:
4412.14.05	With a face ply of birch (<i>Betula</i> spp.)
	...
4412.14.31	Other
	...
	[Other:]
4412.14.3160	Not surface covered

terms “plywood,” “veneered,” and “laminated” are not defined by the tariff heading and so the Court resorts to their common definitions.

“Plywood” is “a structural material consisting of sheets of wood glued or cemented together with the grains of adjacent layers arranged at right angles or at a wide angle and being made up (1) wholly of uniformly thin veneer sheets [all-veneer plywood] or (2) of usually equal numbers of veneer sheets on either side of a thicker central layer [lumber-core plywood].” WEBSTER’S THIRD NEW INT’L DICTIONARY 1746 (1986).

“Veneer” is “a thin sheet of wood cut or sawed from a log and adapted for adherence to a smooth surface . . . as (1): a layer of wood of superior value or excellent grain for overlaying an inferior wood . . . usually by gluing.” *Id.* at 2540.

“Laminate” is “to make by uniting superposed layers of one or more materials . . . as by means of an adhesive . . .” *Id.* at 1267.

The Explanatory Notes for heading 4412 provides that plywood “is usually formed of an odd number of plies.” World Customs Organization, *Harmonized Commodity Description & Coding System Explanatory Notes*, Explanatory Note 44.12, 814–16 (3d ed. 2002) (“Explanatory Note(s)”).²⁴ Moreover, the Explanatory Note details that heading 4412 “covers plywood panels or veneered panels, used as flooring panels, and sometimes referred to as ‘parquet flooring.’ These panels have a thin veneer of wood affixed to the surface, so as to simulate a flooring panel made up of parquet strips.” Explanatory Note 44.12 at 815.

The Parties agree that the 14 mm and 15 mm engineered wood flooring panels are “laminated” and have certain physical dimensions and characteristics. *See* Undisputed Material Facts, II.B., *supra*, ¶¶ 17–29. The National Wood Flooring Association (“NWFA”), a trade association, defines “engineered flooring” as a “flooring product [that] consists of layers of wood pressed together, with the grains running in different directions. It is available in 3 and 5 ply.” *See* www.woodfloors.org/consumer/whyTypesStyles.aspx (*last visited* Sept. 11, 2009.)

Having examined the Representative Samples submitted by the Parties, *see* Def.’s X-Mot. SJ, Ex. H and Pl.’s Mem. In Opp, to Def.’s X-Mot. SJ, Enclosures E–1, E–2, and E–3 (Docket #82), the Court finds that the manufacture and characteristics of the 15 mm, 2-strip engineered wood flooring panels and the 15 mm, 3-strip engineered wood flooring panels are described by the terms of subheading 4412.29 HTSUS, and are properly classified under that subheading.

²⁴ The Court may consult the explanatory notes for guidance in classifying merchandise. *Motorola, Inc. v. United States*, 436 F.3d 1357, 1361 (Fed. Cir. 2006) (noting that explanatory notes are “instructive, but not binding”).

See Boen Hardwood Flooring, Inc. v. United States, 357 F.3d 1262 (Fed. Cir. 2004) (finding substantially similar engineered wood flooring panels properly classifiable as “plywood” under heading 4412 HTSUS); *see also* Undisputed Material Facts, II.B., *supra*, ¶¶17–29. The Court also finds that the 14 mm, 1-strip engineered wood flooring panels conform with the defined terms of subheading 4412.29 HTSUS and are properly classified under that subheading. *See Boen Hardwood*, 357 F.3d at 1262; Undisputed Facts, II.B., *supra*, ¶¶21, 23–25. The Court’s analysis does not stop here, however, because Plaintiff alternatively suggests that the subject merchandise is also described by the terms of heading 4418. *See* GRI 3(a) (Requiring that — where merchandise is *prima facie* classifiable under two or more headings — “[t]he heading which provides the most specific description shall be preferred to headings providing a more general description.”).

Kahrs asserts that its engineered wood flooring products at issue here are classified under heading 4418 HTSUS as “parquet panels” for several reasons. First, according to Kahrs, the “*Explanatory Note* definition to subheading 4418.30 applies to the ... engineered hardwood flooring.” (Pl.’s Opp. Br. 21.) Second, Kahrs argues that the imported merchandise conforms to the article description under subheading 4418.30 in that the products are both “assembled” and “parquet panels.” (*Id.*) Finally, Kahrs asserts that the imported merchandise is more specifically classified under “assembled parquet panels” (4418.30) than under “plywood” pursuant to the “Rule of Relative Specificity,” *i.e.*, GRI 3. (*Id.* at 26.)

Heading 4418²⁵ covers “[b]uilders’ joinery and carpentry of wood, including cellular wood panels and *assembled parquet panels . . .*” 4418 HTSUS (emphasis added.) The terms “assembled” and “parquet” are not defined in the tariff code and so the Court may resort to the common meaning of these terms.

²⁵ The relevant portion of the HTSUS Chapter 44 reads as follows:

4418	Builder’s joinery and carpentry of wood, including cellular wood panels and assembled parquet panels; shingles and shakes:
...	
4418.30.00	Parquet panels
...	
4418.90	Other:
44.18.90.2000	Edge-glued lumber
4418.90.45	Other:
...	
4418.90.4590	Other

The term “parquet” is “a patterned flooring; especially: one made of parquetry.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1644 (2002). “Parquetry” is “joinery or cabinetwork consisting of an inlay of geometric or other patterns usually of different colors and used especially for furniture and floors.” *Id.* The *American Heritage Dictionary* similarly defines “parquetry” as “inlay of wood, often of different colors, that is worked into a geometric pattern or mosaic and is used especially for floors.” The *Am. Heritage Dictionary* 1318 (3d ed. 1996). The *Oxford English Dictionary* defines “parquetage” (a variant of the word “parquet”) as “flooring, wooden mosaic.” XI THE OXFORD ENGLISH DICTIONARY 251 (2d. ed. 1989). Finally, the wood flooring trade defines “parquet flooring” as “a series of wood flooring pieces that create a geometric design.” See NWFA website *available at* www.woodfloors.org/consumer/whyTypesStyles.aspx (*last visited* Sept. 11, 2009.)

This Court finds that the *sine qua non* of “parquet” or “parquetry” is that the inlaid wood strips of the parquetry themselves form a *geometric pattern or mosaic*. The Parties agree that Kahrs’ imported flooring products “were designed to simulate *solid wood strip or plank flooring*, are competitive with solid wood strip or plank flooring, and have advantages that solid wood strip or plank flooring does not have.” See Undisputed Material Facts, ¶24. It is evident to the Court that, in their imported condition,²⁶ Kahrs’ 14 mm 1-strip, 15 mm 2-strip, and 15 mm 3-strip flooring products do not form a geometric or mosaic pattern. See Representative Samples. Therefore, this Court holds that Kahrs’ engineered wood flooring panels of the 14 mm 1-strip, 15 mm 2-strip, and 15 mm 3-strip variety, in their imported condition, are not assembled parquet panels and consequently are not classifiable under subheading 4418.30 HTSUS.

Plaintiff advances an interesting argument that, as imported, “the face strips on multi-strip engineered flooring panels [*i.e.*, 15 mm 2-strip and 15 mm 3-strip flooring products] form a pattern because they simulate the patterns of solid wood plank and strip flooring.” (Pl.’s Opp. Br. 18.) The Court, however, finds this argument unavailing.²⁷ The tariff text of heading 4418 HTSUS does not require that the subject merchandise contain mere patterns or simulations of patterns in its construction, but that the strips of inlaid wood forming

²⁶ See *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (“It is well settled law that merchandise is classified according to its condition when imported.”).

²⁷ Plaintiff’s arguments that hang on the modifier “usually” in that various dictionary definitions do not *require* “parquet” to be of a geometric design (*e.g.*, “parquet” is made of “[s]urfaces formed of small pieces of varied colored woods, and *usually* in geometrical designs”) strain credulity. (Pl. Opp. Br. 22 (citation omitted and emphasis added).) Kahrs’ products that simulate the patterns of solid wood plank and strip flooring could not be confused with true “parquet” flooring.

the patterns must be genuine “parquet” (not simulated) — *i.e.*, wood strips inlaid forming a geometric or mosaic design. In other words, in order for a particular product to be classified as “parquet panels” under heading 4418 they must inherently be “parquet” as that term is commonly understood. The Explanatory Notes, which Kahrs’ erroneously invokes to support its own reasoning, in fact, supports this view instead. Explanatory Note 44.18 provides that heading 4418 covers “**parquet strips, etc., assembled into panels or tiles**, with or without borders, including parquet panels or tiles consisting of parquet strips assembled on a support of one or more layers of wood. These panels or tiles may be tongued and grooved at the edges to facilitate assembly.” Explanatory Note 44.18 (emphasis in original).

The problem with Kahrs’ argument is that its products are not comprised of genuine “parquet strips” in the first instance, but are merely wood strips, made to simulate the patterns of solid wood plank and strip flooring. Moreover, the Explanatory Notes specifically *exclude* “[p]lywood panels or veneered panels, used as flooring panels, which have a thin veneer of wood affixed to the surface, so as to simulate a flooring panel made up of parquet strips.” *Id.* Thus even if Plaintiff’s products were *simulated* parquet flooring, which they are not, they could not be classified under heading 4418. Therefore, Kahrs’ subject merchandise, which simulates the patterns of solid wood plank and strip flooring, are clearly not wood flooring that is “parquet,” or “parquetry,” and cannot be classified under 4418 HT-SUS.

Plaintiff has also alleged that the merchandise constitutes “‘parquet panels’ because they have a face of multiple veneer strips which are assembled on a support of multiple layers of wood. They are multi-layered pre-finished hardwood parquet flooring panels that form a pattern or geometrical design when installed and fall within the common meaning of ‘parquet’” (Compl. ¶41; *see also* Answer ¶41.) This argument, too, is unavailing. As indicated above, “merchandise is classified according to its condition when imported,” *Mita Copystar Am.*, 21 F.3d at 1082, thus even if Kahrs’ subject merchandise arguably could form a “pattern or geometrical design when installed,” this Court need not credit such a contention. (*See* Compl. ¶41.)

Plaintiff also cites to the Explanatory Notes for subheading 4418.30²⁸ for the proposition that, within the criteria of those subheading Explanatory Notes, “parquet” flooring may consist of a

²⁸ The Explanatory Notes for subheading 4418.30 states: “For the purposes of classification in this subheading, the term “parquet panels” includes pre-assembled flooring panels made from two or more rows of narrow and generally short pieces of wooden boards (strips) that have been joined edge-to-edge. The surface of this type of panel may display a striped pattern which may vary according to the grain and color of the individual strips.”

“striped pattern,” similar to its subject merchandise, particularly the 15 mm 2-strip and 3-strip products. (Pl.’s Opp. Br. 18, 23.) The Court agrees with the Government, that such a reading of the tariff code is “strained.” (Def.’s Reply Mot. Summ. J On First Third, Fourth, and Sixth Causes of Action 3 (“Def.’s SJ Reply Br.”).) The subject merchandise here is unambiguously described and excluded from heading 4418 and described and provided for in heading 4412. See Explanatory Notes 44.12 and 44.18. As a result, to the extent that Explanatory Notes for subheading 4418.30 are inconsistent with the plain and unambiguous language of subheading 4418.30 HTSUS, this Court will give the contradictory text no weight. See *Archer Daniels Midland Co. v. United States*, 561 F.3d 1308, 1315 (Fed. Cir. 2009).

Plaintiff also contends that its imported products here are “assembled parquet panels” under heading 4418 HTSUS (emphasis added). (Pl.’s Opp. Br. 21; Compl. ¶41.) *Webster’s Third New International Dictionary* defines “assemble” as “to bring together: as . . . to fit together various parts of so to make into an operative whole.” WEBSTER’S THIRD NEW INT’L DICTIONARY 131 (1986). In a metaphysical sense, Kahrs’ subject merchandise may well be individually “assembled” components of a “prefinished” (pre-installation) hardwood floor that would cover an inferior substrate floor in a home or office. See Ex. O, Transcript (“Tr.”) of Deposition of Sean Brennan (“Brennan”), Kahrs Int’l, Inc., at pp. 140:7–145:10. However, for tariff purposes, since neither the 14 mm 1-strip, nor 15 mm 2-strip, nor 15 mm 3-strip are parquet per se, they cannot be “assembled parquet panels.” See 4418 HTSUS.

Plaintiff advances one final point and assumes, *arguendo*, that its engineered wood flooring can be classified under both headings 4412 and 4418 and asserts that this Court should resort to the Rule of Relative Specificity (GRI 3(a)) in order to find that heading 4418 more specifically provides the classification of its merchandise. (Pl. Opp. Br. 26–28.) This argument simply lacks merit. As demonstrated above, the subject merchandise is not *prima facie* classifiable under both headings 4418 and 4412, but is classifiable under heading 4412 pursuant to GRI 1. Accordingly, where merchandise is not *prima facie* classifiable under two or more headings, GRI 3 is inapplicable. See *Orlando*, 140 F.3d at 1440. Moreover, where GRI 1 dictates the appropriate classification of merchandise, resort to the remaining GRIs would be inappropriate. See *Mita Copystar Am. v. U.S.*, 160 F.3d 710, 713 (Fed. Cir. 1998).

Accordingly, for the foregoing reasons, the Government’s motion for summary judgment as to Plaintiff’s Third Cause of Action is GRANTED.

2. Fourth Cause of Action — Imported 15 mm Engineered Wood Flooring Is Not Classifiable Under 4418 As “Edge-Glued Lumber”

Kahrs advanced a claim in its Fourth Cause of Action that its imported 15 mm engineered wood flooring (both the 2-strip and 3-strip varieties) is classifiable under heading 4418 HTSUS, particularly subheading 4418.90.2000 HTSUS as “edge-glued lumber.” (Compl. ¶¶42–47.) The Government moved for summary judgment on this claim. The Government cited to this court’s reversed decision in *Boen Hardwood* as instructive authority regarding the common commercial terms for “lumber,” etc. (Def.’s Mot. SJ Br. 15–17.) In *Boen Hardwood*, the court found that

Lumber is defined as “timber sawed into standardized structural members, as boards or planks,” [708 Webster’s II New Riverside University Dictionary (1998) (Webster’s)]; “a wood product manufactured from logs by sawing, resawing and, usually, planing, with all four sides sawn. . . [Random Lengths Publications, Terms of the Trade 205 (4th Ed. 2000)]; “logs that have been sawed and prepared for market,” [1177 McGraw-Hill Dictionary of Scientific and Technical Terms (Sybil P. Parker ed., 5th ed. 1994)]; “a collective term for wood that has been sawed into appropriate sizes for building and other uses,” Harcourt Academic Press Dictionary of Science and Technology, available at <http://www.harcourt.com/dictionary> (Harcourt”); “an American term for converted wood; also for felled trees prepared for the sawmill. Timber split or sawn for use in building.” Thomas Corkhill, *The Complete Dictionary of Wood*, 317 (1979).

Boen Hardwood Flooring, Inc. v. United States, 27 CIT 40, 46, n.7 (2003) (original brackets omitted). The Court of International Trade concluded that this definition

strongly suggest[s] that the[] terms refer to relatively unprocessed single-layer wood pieces, cut and shaped by the sawmill for use in carpentry and construction, rather than to composite panels. The subject merchandise is distinct from such wood products, as it has been not only sawn and shaped, but layered, laminated, and finished into a final product.

Id.

Kahrs claims in its Complaint that the imported 15 mm panels are “edge-glued lumber.” (Compl. ¶45). However, the undisputed evidence demonstrates that, far from being single layers of wood, cut and shaped by the sawmill and glued only on the edges, *i.e.*, edge-glued lumber, these articles are layered, laminated and finished into flooring panels and classified as “plywood” under 4412 HTSUS.

Kahrs proffered no evidence or argument in opposition, but merely “desires to preserve this claim for any appellate review that may be pursued.” (Pl. Opp. Br. 29.) Therefore, in light of the foregoing analysis, the Government’s motion for summary judgment as to Plaintiff’s Fourth Cause of Action is GRANTED.

3. Sixth Cause of Action — Engineered Wood Flooring is Not Classifiable Under Subheading 4418.90.45 HTSUS As “Builders’ Joinery”

Kahrs alleges in its Sixth Cause of Action that the imported subject merchandise is alternatively classifiable under subheading 4418.90.4590 HTSUS as “other,” “builders’ joinery,” which is dutiable at 3.2% *ad valorem*. (Compl. ¶¶63–65.)

Plaintiff relies on this court’s decision in *Faus Group, Inc. v. United States* for the proposition that the fiberboard flooring at issue in that case, which was held to be classifiable as “builders’ joinery” under subheading 4418.90.45 HTSUS, is analogous to Kahrs’ own subject merchandise here. (Pl. Opp. Br. 29–30 (*citing Faus Group, Inc. v. United States*, 358 F. Supp. 2d 1244 (2004).))

Similar to the Court’s analysis on Plaintiff’s Third Cause of Action, the Explanatory Notes to heading 4418 specifically exclude Kahrs’ subject merchandise as “builders’ joinery.” (Def.’s Mot. SJ Br. 17–18.) Additionally, Plaintiff’s reliance on *Faus Group* is misplaced as that case is inapposite. *Faus Group* concerned the classification of fiberboard flooring panels. *Faus Group*, 358 F. Supp.2d at 1258 n.28. Though the court found that the fiberboard was *prima facie* classifiable under heading 4418 as “builders’ joinery,” it declined to accept *Faus Group*’s argument that its product was classifiable in heading 4418 HTSUS. *Id.* at n.3. Instead, the court held that *Faus Group*’s products were classifiable under the *eo nomine* provision for “fiberboard” under heading 4411. *Id.* at 1269. The *Faus Group* merchandise is decidedly different from Kahrs’ subject merchandise. Kahrs’ products are made of wood and *Faus Group*’s products are made of fiberboard. “Wood” is not the same as “fiberboard.” *Id.* at 1250.

As was discussed by the Court above in its discussion on the Third Cause of Action, *supra*, Kahrs’ subject merchandise is classifiable under heading 4412 as “plywood” per GRI 1. Accordingly, in light of the foregoing analysis, the Government’s motion for summary judgment as to Plaintiff’s Sixth Cause of Action is GRANTED.

D. Summary Judgment — First Cause of Action

The main thrust of Plaintiff’s challenge to its denied protest arises under CBP’s alleged violations of 19 U.S.C. § 1625(c). (Compl. ¶¶ 1-29; Pl.’s Mot. SJ 9-26.) Kahrs contends that in August 2006, CBP

impermissibly revoked certain “rulings and decisions” from 2001 through 2006, which had allowed Kahrs to classify substantially similar imports of engineered wood flooring panels duty free under 4418.30.00 HTSUS as “parquet panels.” (Compl. ¶¶ 14–18, 25–29.) Customs’ revocation of these “prior rulings and decisions” was unlawful, Kahrs argues, because such action violated the § 1625(c) notice and comment provisions. (*Id.*) Following extensive and protracted discovery,²⁹ the Government filed its response to Kahrs’ First Cause of Action in the form of a cross-motion for summary judgment. The Government contends that Plaintiff’s arguments on this count is meritless and nothing more than a red herring.

Title 19, section 1625(c) provides that:

A proposed interpretive ruling or decision which would—

(1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or

(2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;

shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

19 U.S.C. § 1625(c).

1. Plaintiff’s Contentions

Kahrs essentially argues under § 1625(c)(1) that Customs’ denial of its two protests from October 1997³⁰ (which declared that Kahrs’

²⁹ Initially, Plaintiff filed its first motion for summary judgment (Docket #12) on this cause of action very early in this case prior to any formal discovery. The Government requested the opportunity for discovery before responding to Kahrs’ renewed motion for summary judgment, and by order of this Court, dated May 1, 2008, the request was granted. (Docket #18). Following a period of discovery-related impasse and difficulty between the parties, as well as several filing extensions, the Government was able to respond to Kahrs’ motion on March 19, 2009 (Docket #68).

³⁰ See Undisputed Material Facts, II.B., *supra*, ¶11 (Protest Nos. 1001 97–105319 and 1001 97–105320).

engineered wood flooring was classifiable at that time as “parquet panels”) constitute prior decisions or rulings, which were improperly revoked by Customs when it issued the CF-29s starting in August 2006³¹ proposing to liquidate the entries of the subject merchandise under heading 4412 HTSUS. *See* Brennan Decl. 1, Exs. 1A & 1B. (Pl.’s Mot. SJ 10–11; Pl.’s Opp. Br. 12–13; Pl.’s Reply to Def.’s Amd. Resp. To Pl.’s Statement of Mat. Facts and Opp. To Pl.’s Mot. For SJ on the First COA (“Pl.’s Reply”) 2–5.) Adding an additional layer of confusion to its arguments, Kahrs also contends that certain merchandise examinations by Customs—what Kahrs’ calls the “six intensive examinations” — as well as the “hundreds of liquidation decisions” made from 2001 through 2006 on its flooring products under 4418.30.00 HTSUS are also “interpretive rulings or decisions” under § 1625(c)(1). (Pl.’s Mot. SJ 11–13, 15–17; Pl.’s Opp. Br. 1–2, 13–15; Pl.’s Reply 2-5, 7–11.)

Alternatively, Kahrs argues that the “six intensive examinations” of its imported merchandise and the hundreds of liquidations made by Customs from 2001 to 2006 under 4418.30.00 HTSUS established a prior “treatment” under § 1625(c)(2). (Pl.’s Mot. SJ 17–22; Pl.’s Opp. Br. 9–10, 16–18; Pl.’s Reply 5–9.) Thus, according to Plaintiff, when Customs issued the CF-29s starting in August 2006 for the subject merchandise, this “decision” effectively revoked the prior treatment accorded to Kahrs’ substantially identical transactions. (*Id.*)

2. Defendant’s Contentions

The Government argues that Kahrs’ legal theories in support of its First Cause of Action are meritless. (Def.’s X-Mot. for SJ 18–30; Def.’s SJ Reply Br. 8–15.)

First, with respect to Kahrs’ § 1625(c)(1) challenge, the Government argues that the species of decisions at issue here — the denied protests from 1997, the hundreds of liquidations under 4418.30.00, and the CF-29s — are not the kinds of agency “interpretive ruling or decision” contemplated by the text of § 1625. (Def.’s X-Mot. for SJ 20–27; Def.’s SJ Reply Br. 9, 11.) In other words, the Government argues that based upon a close reading of the statute, “only precedential interpretive rulings or precedential protest review decisions” are covered by § 1625. (Def.’s X-Mot. for SJ 22.) Therefore, the Government evinces that none of the types of “decisions” advanced by Plaintiff here meet this statutory criteria. (*Id.*)

Second, the Government advocates that even if the 1997 denied protests could be construed as “interpretive rulings or decisions,” Customs had revoked any such prior rulings and treatment that would have derived from that “decision” as of July 29, 2001. *See*

³¹ *See* Undisputed Material Facts ¶3, *supra*.

Revocation Ruling; Undisputed Material Facts, II.B., *supra*, ¶¶34–35. Moreover, the two 1997 denied protests are irrelevant because they “did not involve the issue of whether the merchandise was properly classifiable in subheading 4418.30.00 and none of the subheadings of Heading 4412 were implicated in either the protest or its denial.” (Def.’s X-Mot. for SJ 25.)

Finally, the Government argues that the CF–29s themselves do not trigger the notice and comment provisions of § 1625(c) because the notices of action here were issued *after* the U.S. Court of Appeals for the Federal Circuit issued its 2004 decision in *Boen Hardwood Flooring, Inc.*, 357 F.3d 1262, which held that imported engineered wood flooring was properly classified as “plywood” under heading 4412 HTSUS, and were consistent with that decision. (*Id.* at 25–26 (*citing Sea-Land Serv., Inc. v. United States*, 239 F.3d 1366 (Fed. Cir. 2001) (finding that the interested public was notified of Customs’ tariff modification by way of the agency’s implementation of the court’s decision; thus solicitation of comments under § 1625(c) was not required).) The Government attaches great weight to the Federal Circuit’s decision in *Boen Hardwood* because that case “involved the classification of virtually identical merchandise to that at issue here.” (*Id.* at 27.) And since Customs has not attempted to modify or limit the *Boen Hardwood* decision under § 1625(d),³² the agency was constrained to follow this precedent. (*Id.*)

With respect to Kahrs’ § 1625(c)(2) challenge, the Government similarly argues that, as with § 1625(c)(1), no proposed interpretive ruling or decision exists here that would trigger the statute’s notice and comment provisions. (*Id.*) Additionally, Kahrs has failed to proffer evidence to support its claim that a “treatment” by Customs actually existed. (*Id.*) On this second point, the Government asserts that neither the six cargo examinations (“intensive examinations”) conducted by Customs, nor the hundreds of liquidations of Kahrs’ merchandise under 4418.30.00, nor any entry summary review conducted by Customs, constitutes the establishment of a prior “treatment” that would obligate the agency to adhere to the protections encompassed by § 1625(c). (*Id.* at 28–30.)

3. Analysis — Plaintiff’s Motion For Summary Judgment on the First Cause of Action is Denied.

a. Section 1625(c)(1)

The Court now turns to the first element of § 1625(c)(1). Kahrs

³² Section 1625(d) provides that “[a] decision that proposes to limit the application of a court decision shall be published in the Customs Bulletin together with notice of opportunity for public comment thereon prior to a final decision.” 19 U.S.C. § 1625(d) (2006).

needs to show that it obtained “a prior interpretive ruling or decision which has been effect for at least 60 days.” 19 U.S.C. § 1625(c)(1); see *Int’l Custom Products, Inc.*, 2009 WL 205860, at *5. Section 1625(c) does not define the term “interpretive ruling or decision.” However, § 1625(a) does define “interpretive ruling” to “includ[e] any ruling letter, or internal advice memorandum.” 19 U.S.C. § 1625(a). This section further includes “protest review decision[s]” as the types of additional determinations that trigger the statute’s publication requirements.³³ See *id.* § 1625(a). The Federal Circuit, in analyzing the plain language of the statute, concluded that the terms of § 1625(c) should read consistently with the terms of § 1625(a). See *California Indus. Prod., Inc. v. United States*, 436 F.3d 1341, 1351 (Fed. Cir. 2006) (citing *Timex V.I., Inc. v. U.S.*, 157 F.3d 879, 884 (Fed. Cir. 1998) (“It is well-settled that words appearing in a statute should be read consistently: a particular word appearing multiple times in a statutory provision should be given the same reading, unless there is a clear Congressional intent to the contrary.”)). *The California Industrial Products* court therefore held that “‘decision’ in the phrase ‘ruling or decision’ . . . includes a ‘protest review decision.’” *Id.*

Customs promulgated regulations that define “interpretive rulings” to “include[] an internal advice decision . . . or a holding or principle covered by a protest review decision.” 19 C.F.R. § 177.12(a) (2006). The regulations further provide that a “ruling” is a written statement that interprets and applies the provisions of the Customs’ laws to a specific set of facts. See 19 C.F.R. § 177.1(d)(1). Finally, an “internal advice memorandum” is defined as “[a]dvice or guidance as to the interpretation or proper application of the Customs and related laws . . . regarding a specific Customs transaction . . . [that] is either prospective, current, or completed. 19 C.F.R. § 177.11(a).”

The Government argues that, based on *California Industrial Products*, § 1625(c) “covers *only* ‘interpretive rulings’ and ‘protest review decisions.’” (Def.’s X-Mot. for SJ 21.) However, as was rejected by this Court in another case, this reading is too restrictive and not supported by the statutory text. See *International Custom Products, Inc. v. U.S.*, 32 CIT __, __, 549 F. Supp. 2d 1384, 1393 (2008). In fact, the Federal Circuit clearly notes that “‘decision’ in the phrase ‘ruling or decision’ . . . includes a ‘protest review decision.’” *California Indus. Prod., Inc.*, 436 F.3d at 1351 (emphasis added). Thus, based on Congress’ use of the word “includes” in the statutory language of § 1625(c), a “protest review decision” is to be included among the larger category of otherwise generic Customs’ “decision[s].” See *International Custom Products, Inc.*, 549 F. Supp. 2d at 1393. Accordingly,

³³ A “protest review decision” is a decision by Customs that follows from a second review of decided protest, akin to a reconsideration decision. See 19 C.F.R. § 174.27 (2006); 12 Cust. Bull. 1109 (1978).

this Court finds for purposes of deciding this case, the text of § 1625 covers interpretive rulings, ruling letters, internal advice memoranda, protest review decisions, or decisions that are the functional equivalent of interpretive rulings or decisions. *Id.*; § 1625(c); § 177.12.

Addressing the first part of Kahrs' argument, that the two 1997 denied protests constitute prior decisions or rulings, this Court agrees with the Government, and holds that the 1997 denied protest decisions plainly do not fall within the ambit of the covered rulings or decisions of § 1625. Kahrs' 1997 denied protest decisions simply stated in Box 17, on Customs Form 19, that the protest was "Denied in full" because the "[m]erchandise is precluded from the requested provision [either 4409.20.25, 4409.20.90, or 4418.90.20 HTSUS/duty free] by definition and chapter notes." See Protest Nos. 1001 97-105319 and 1001 97-105320, Brennan Decl. 1, Exs 1A & 1B. While arguably, these determinations could be construed as "rulings," the denied protests here merely exclude the subject merchandise from certain tariff provisions and do not require that they be classified henceforth under a particular tariff heading. (*Id.*) That is, there is no directive set out by these denied protests that require Kahrs classify its merchandise under 4418.30.00 HTSUS.

Similarly, Kahrs' contention that the "six intensive examinations" and the "hundreds of liquidation decisions" made from 2001 through 2006 also constitute "interpretive rulings or decisions" are belied by the plain language of the statute. Neither the results of Customs cargo examinations (intensive or otherwise) nor the mere liquidation of merchandise at the declared bypass rate are "interpretive" rulings or decisions under § 1625(c). See *California Indus. Prod., Inc.*, 436 F.3d at 1351 ("Section 1625(c) only applies where Customs *has issued* an interpretive rule or decision.") (emphasis added").

But even more convincing is the fact that if one were to assume that the pair of 1997 denied protests, the hundreds of so-called liquidation decisions, and the six intensive examinations were classified as §1625(c)(1) "interpretive rulings or decisions," to the extent these actions occurred after July 29, 2001, they are made invalid by the Revocation Ruling, effective on that date.³⁴ Therefore, Plaintiff's argument that the 1997 protest decisions, liquidation decisions, and six intensive examinations trigger the provisions and protections of the

³⁴ To summarize, Customs altered its position with respect to the classification of certain engineered floor panels with a face ply containing multiple strips from "parquet panels" under heading 4418 HTSUS to "plywood" under 4412 HTSUS. In order to revoke certain established treatment and ruling letters (*e.g.*, HQ 962031, NY 806603, NY 806462, and NY 832721), Customs complied with § 1625(c) and published notice of its intention in the *Customs Bulletin* on December 20, 2000. See 34 Cust. Bull. 51. Thereafter, Customs finalized its revocation and it became effective on July 29, 2001. See 35 Cust. Bull. 22. See also Undisputed Material Facts ¶¶33-36, *supra*. Kahrs' agent Sean Brennan denied any knowledge of the Revocation Ruling. See Brennan Depo. Tr. 129-130.

statute are meritless. Accordingly, the Court need not reach the issue of whether Kahrs has demonstrated the other two elements of § 1625(c)(1) because Plaintiff cannot meet the first element as a matter of law.

b. Section 1625(c)(2)

Kahrs fails to achieve success on its 19 U.S.C. § 1625(c)(2) claims as well. In order to prevail, Kahrs must establish at least four things. First, it must demonstrate there was a “treatment previously accorded by the Customs Service.” *Id.* § 1625(c)(2). That is, it must show what specific entries of Kahrs’ hardwood flooring products were previously classified under the desired tariff subheading for “parquet panels.” Second, Plaintiff must prove that the subject entries at issue here are “substantially identical transaction[s]” to the previous treatment. *Id.* Third, Plaintiff must prove that Customs has made a “proposed interpretive ruling or decision” that would have the effect of modifying the previous treatment with respect to the entries in question. *Id.* Fourth, Plaintiff must demonstrate that the proposed interpretive ruling or decision violated the notice and comment requirements of this statute. *See id. see also Int’l Custom Products, Inc.*, 2009 WL 205860, at *6.

The phrase “treatment previously accorded” is not defined in the statute. *See* 19 U.S.C. § 1625(c)(2). Customs, however, promulgated regulations specifying the definition of “treatment,” which provides that

(i) There must be evidence to establish that:

- (A) There was an actual determination by a Customs officer regarding the facts and issues involved in the claimed treatment;
- (B) The Customs officer making the actual determination was responsible for the subject matter on which the determination was made; and
- (C) Over a 2-year period immediately preceding the claim of treatment, Customs consistently applied that determination on a national basis as reflected in liquidations of entries or reconciliations or other Customs actions with respect to all or substantially all of that person’s Customs transactions involving materially identical facts and issues.

See 19 CFR § 177.12(c)(1)(i). Customs explicitly states that in rendering its determination of whether a prior “treatment” existed, it “will give no weight whatsoever to informal entries and to other entries or transactions which Customs, in the interest of commercial facilitation and accommodation, processes expeditiously and without examination or Customs officer review.” *Id.* at § 177.12(c)(1)(ii). Finally, Customs makes clear that the evidentiary burden lies on the

party seeking to establish the existence of a treatment. *See id.* § 177.12(c)(1)(iv).

Honing in on the first statutory requirement, Kahrs argues that Customs made “hundreds of liquidations” each year from “September 2001 to August 2006” of its hardwood flooring products and classified them under 4418.30.00 HTSUS. (Pl.’s Mot. SJ 17–22.) Though conceding that many of the “hundreds” of the entries were entered under “by-pass” procedures³⁵ and therefore ineligible for § 1625(c)(2) treatment per the Federal Circuit’s holding in *Motorola, Inc. v. US*, Kahrs argued that Customs did in fact examine a “sampling” of its entries and did determine that the goods were properly classified and entered under 4418.30.00 HTSUS. (*Id.* (citing *Motorola, Inc. v. U.S.*, 509 F.3d 1368 (Fed. Cir. 2007).)

The Federal Circuit in *Motorola* held that Customs’ rule, which excludes entries not examined or reviewed by a Customs official for purposes of § 1625(c)(2) “treatment” — bypass entries — was “‘a permissible construction of the statute’ and warrants deference.” *Motorola*, 436 F.3d at 1366 (quoting *Chevron USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984)). Following an analysis of the evidence presented, the Court holds that of Kahrs’ 1867 entries at issue here, all but the 12 entries described below were properly excluded from consideration here because they were bypass entries and not subject to an examination or review by an import specialist sufficient to constitute § 1625(c)(2) “treatment.” *See id.* 19 C.F.R. § 177.12(c)(1)(ii). *See also* Undisputed Material Facts, II.B., *supra*, ¶¶39–49, 56, 61. The party claiming treatment must demonstrate that it has occurred, and Plaintiff has failed to do so here.

Beyond these excluded 1855 bypass entries, Kahrs specifically cites to 12 entries that were allegedly examined by Customs and found to be compliant as to its classification. (Pl.’s Mot. SJ 18–19; Pl.’s Opp. Br. 3–5.) Based on the record evidence, however, the Court has determined that of these 12 entries,

- 6 entries³⁶ were solely identified as “paper” entries (the “paper entries”) and had their “entry summary” data (CF–7501) reviewed by a Customs import specialist (Undisputed Material Facts, II.B., *supra*, ¶46);

³⁵ An entry that was liquidated under “by-pass” procedures means that Customs liquidated the merchandise as entered without specific physical inspection of the goods or a review of the entry paperwork by an import specialist or inspector. Due to the enormous volume of goods that are imported each year, and as an incentive to importers that are believed to maintain a high-level of compliance with the Customs laws, CBP employs such procedures in order to conform with the informed compliance concepts enshrined in the Mod Act. *See* Duvall Dec’l. ¶31; Customs Law & Administration § 5.1 (3d ed. 2007).

³⁶ Entry Nos. 201–3042459–9, F23–0114325–1, F23–0114725–2, F23–1145004–3, F23–0115067–8, and F23–0115182–5.

- 1 entry,³⁷ identified as “paperless bypass” (the “paperless bypass entry”), had its “entry summary” data reviewed by a Customs import specialist (*Id.*); and
- 5 entries³⁸ underwent a cargo examination (the “cargo examination entries”) of one kind or another (Undisputed Material Facts, II.B., *supra*, ¶56).

First, regarding the 6 “paper entries” and the single “paperless bypass entry,” the evidence shows that a Customs import specialist reviewed the “entry summary data” — information provided to CBP on a Customs Form 7501 by the importer. *See* Undisputed Material Facts II.B., *supra*, ¶¶46, 61. This type of “review” by the CBP import specialist in large measure consists of a “comparison of the invoice description to the entered classification, without an actual physical review of samples or any other information . . .” Duvall Decl. ¶¶37, 36, 38–40; CBP ITRAC Report (Pl.’s Mot. SJ, Ex. 12). Because CBP did not sample the merchandise of these 6 entries and specifically ascertain their correct classification, there was no “actual determination by a Customs officer regarding the facts and issues involved in the claimed treatment” within the meaning of 19 CFR § 177.12(c)(1)(i). Accordingly, these particular entries cannot bind CBP as to a particular classification and be considered a treatment for § 1625(c)(2) purposes.

Plaintiff cites to a Treasury Department directive regarding the 2002 amendments of part 177, stating “the mere fact that Customs does not examine the merchandise does not mean that an action leading to a treatment cannot occur, because other actions by Customs, such as a review of the entry documentation . . . can constitute adequate evidence of the existence of a treatment.” T.D. 02–49, 67 Fed. Reg. 53,483, 53,492 (2002); *see* (Pl.’s Mot. SJ 19; *see also* Pl.’s Opp. Br. 9). Kahrs, however, is over-relying on CBP’s response to a commenter’s query. Indeed, in the preceding lines to the above quote, CBP notes that “the key issue in determining whether a treatment exists is whether, and if so *the manner in which, Customs has taken action on past transactions.*” 67 Fed. Reg. at 53,492 (emphasis added). The evidence that Plaintiff has marshaled is woefully inadequate to demonstrate that CBP “made an actual determination” with respect to Kahrs’ preferred classification of its hardwood floor panels. *See* 19 CFR § 177.12(c)(1)(i). Customs performed no such act. Mere perusal

³⁷ Entry No. 399–0800233–8.

³⁸ Interestingly, regarding the 5 entries and entry no. 201–3042459–9 — which Kahrs maintains were subject to “intensive examination” and the Government concedes underwent some form of cargo examination—are listed in the spreadsheet attachment to the Duvall Declaration as “Paper bypass” (Entry Nos. 701–5112456–0 and 399–0801291–5), “Paperless electronic invoice” (Entry Nos. 399–0803895–1 and 399–0802301–1), and “Paper” (Entry No. 201–3042459–9). Entry number 399–0808440–1 is inexplicably missing from the spreadsheet attachment. *See* Duvall Decl. p.7 and Attach.

of entry summary data is hardly the type of entry-specific classification analysis that a Customs import specialist undertakes, nor is it the type of act contemplated by the plain language of § 177.12(c)(1)(i). Again, Kahrs shoulders the burden to summon evidence that treatment upon which it relies actually exists. *See* 19 CFR § 177.12(c)(1)(iv). On these 6 entries, it has failed to do so.

Now turning to the 5 cargo examination entries, Plaintiff has referenced CBP's ITRAC Report as demonstrable proof that Customs intensively examined the merchandise in these 5 entries and confirmed their proper classification under 4418.30.00 HTSUS. The evidentiary basis for Plaintiff's assertion is the column labeled "Import Specialist Comments" data field from the ITRAC Report. Kahrs relies on this data to show that its imports were found by an import specialist to be "OK" or compliant. As such, Plaintiff contends the entries were found to be properly classified and Customs' subsequent liquidation confirms this assumption. (*See* Pl.'s Opp. Br. 2–9; Pl.'s Reply 5–6, 11–15.) Thus, according to Plaintiff's theory, this official act by Customs forms the "treatment" upon which Kahrs may rely.

First, regarding the cargo exams or intensive exams generally, CBP's James Swanson, Chief, Cargo Release Branch, testified that some of Kahrs' entries were randomly selected for examination by CBP's computer system for what is known as a "stratified compliance exam" or a "supply chain measurement." Swanson Depo. Tr. 33, 43–44, 75, 91.³⁹ These entries are random computer-system selections of goods for examination and are not based upon any suspicion of illegality. *Id.* at 75. When these random cargo exams are generated, they are "usually . . . limited to one entry line," of merchandise. *Id.* at 75, 84–85. Next, the full physical inspection or exam of the entry may include both a security exam as well as a general trade exam. *Id.* at 76. The physical exams may also be a "non-intrusive" type of exam in which the container or merchandise is subjected to an x-ray or scanner. *See id.* at 120–21. A general trade exam would typically include a review of the entry compared with the commercial invoice and other import documents. *Id.* at 76, 92–93. During a trade exam, the inspection team reviews the particular classification of the merchandise in order to ensure themselves that the physical goods "match the description provided on the documents." *Id.* at 120–21, 93. A Customs import specialist *may or may not* be part of the team that conducts these types of inspections. *Id.* at 123. The Customs inspectors may look at the classification of the merchandise, in order to determine the accuracy of the product description, but "[t]hey're not classification experts." *Id.* at 120. The inspectors' job is to look at the freight

³⁹ *See also* CBP Website: *Compliance Measurement (CM) Program Overview* at http://www.cbp.gov/xp/cgov/trade/trade_programs/trade_compliance/compliance_measur.xml (last visited Sept. 14, 2009).

description and match it with the imported product. *Id.* Primarily, the inspectors are looking for “trade fraud . . . [and] things that are restricted or prohibited [from importation].” *Id.* at 122.

The “Import Specialist Comments” column of the CBP ITRAC Report for Entry 701–5112456–0 contains the notation “OK COMPLIANT.” *Id.* The “Remarks” column indicates, among other things, the code “ISNI”—Import Specialist Not Involved—which, according to Customs, indicates that no import specialist was involved in the cargo examination. *See* Undisputed Material Facts, II.B., *supra*, ¶¶56, 64–66. Mr. Swanson also testified that the information contained in the “Import Specialist Comments” column, here “OK COMPLIANT,” could have been entered at a date *after* the cargo examination. *See* Swanson Depo. Tr. 130–132. Generally, however, data recorded in the “Import Specialist Comments” field of the ACS, which was then replicated in the CBP ITRAC Report, is recorded by an import specialist. *Id.* at 89–90. Similarly, the “Import Specialist Comments” field on the ITRAC Report for Entry 399–0801291–5 also notes “OK COMPLIANT.” However this record neither confirms nor excludes the presence of a customs import specialist during the cargo examination. *See* Swanson Depo. Tr. 90–102.

The Court finds that the notation “OK COMPLIANT” does not have any particular significance relative to the propriety of the classification of the merchandise and, in fact, could refer to an array of criteria, such as that the goods match the product description, or that no contraband was found, or that the quantities match up. Additionally, as the CBP ITRAC record indicates that no import specialist was involved in the actual physical inspection of Entry No. 701–5112456–0, this Court finds it difficult to ascertain how there could be, as Kahrs maintains, an “actual determination by a Customs officer regarding the facts and issues involved in the claimed treatment.” 19 CFR § 177.12(c)(1)(i). Moreover, based on the totality of the evidence presented, it appears that the cargo exams to which these two entries were subject, were engineered for routine, random security and trade purposes. There is no evidence that Customs reviewed, ascertained or approved the classification of these entries.

Regarding the evidence presented on Entries 399–0803895–1 and 399–0802301–1, the CBP ITRAC Report data indicates that import specialists were not involved in either cargo exams, the latter entry due to geographical inaccessibility. *See* Undisputed Material Facts, II.B., *supra*, ¶¶64–65. Additionally, the cargo exam remarks field for Entry 399–0802301–1 indicates “NO ANOMALIES PRESENT.” Customs explained that such a notation refers to the nonintrusive inspection results. *See* Swanson Depo. Tr. 117. In other words, the finding of no anomalies “wouldn’t really have any bearing on what the classification or what the description of the merchandise was.” *Id.* at 117–118.

Finally, with respect to Entry 399-0808440-1, the “Import Specialist Comments” field of the CBP ITRAC Report indicates “SUMMARY LINE COMPLIANT MARKING CERTIFICATION ACCEPTED.” Customs explained that this entry, which was subject to a security and trade exam, was initially found to be noncompliant for country-of-origin marking purposes. *See* Undisputed Material Facts, II.B., *supra*, ¶¶76-78. Upon Kahrs’ correction of this problem, a Customs official apparently recorded a note that the submitted marking certification was then acceptable and this entry was therefore compliant. *See* Swanson Depo. Tr. 31-32; 42-43; 78:16-79:4. Nowhere does the evidence indicate that Customs in fact reviewed the classification of this entry or approved Kahrs’ classification.

In short, when the CBP ITRAC Report data is analyzed in its proper context in toto, it is evident to this Court that none of the exams, intensive or otherwise, were of such a quality as to amount to an approval of Kahrs’ preferred classification. Indeed, Plaintiff assumed that, because it had never been challenged on its use of 4418.30.00 HTSUS before August 2006, it must have been acting correctly. *See, e.g.*, Brennan Depo. Tr. 161-63. Informed compliance, however, is proactive and cannot function on such an assumptive practice. *Cf. Esso Standard Oil Co. (PR) v. United States*, 559 F.3d 1297, 1307 (Fed. Cir. 2009) (Importers are presumed to know the customs law.)

The Federal Circuit held in *Boen Hardwood* that certain engineered wood flooring, which this Court finds is practically identical⁴⁰ with some of Kahrs’ imported flooring, was classifiable as “plywood” under heading 4412 HTSUS. *Boen Hardwood*, 357 F.3d at 1265. *Boen Hardwood* was handed down by the Federal Circuit in February 2004.⁴¹ Apparently oblivious to this ruling, Kahrs continued to classify its hardwood flooring products as “parquet” under 4418.30.00 HTSUS.

⁴⁰ The merchandise in *Boen Hardwood* was described as “hardwood flooring made up of three layers of wood in which the grain of the middle layer is perpendicular to the grain of the two outer layers.” *Boen Hardwood*, 27 CIT at 41. The top layer was “composed of strips of hardwood measuring approximately 1/8 inch thick and 2 3/4 inches wide.” *Id.* at 41-42. “The center layer consist[ed] of spruce slats or strips” which were “laid lengthwise” and “with their grains running perpendicular to the grain of the wood comprising the top and bottom layers.” *Id.* at 42. The bottom layer was also comprised of “spruce strips c inch thick and 2 1/4 to 2 3/4 inches wide.” *Id.* These three layers were laminated, *i.e.*, bonded together, using adhesives and pressure to make a single panel. *Id.* at 41 n.2. The panels were continuously shaped with tongue and groove along its edges and ends and was imported in standard sizes of “5 1/2 inches wide, 7 feet 2 5/8 inches long, and approximately 5/8 of an inch thick.” *Id.* at 41. Compare with Kahrs’ 15 mm 2-strip flooring products, Undisputed Material Facts, II.B., *supra*, ¶¶19-29.

⁴¹ Kahrs makes the excuse, through its agent Mr. Sean Brennan, that it was “not aware” of the Federal Circuit’s *Boen Hardwood* decision, the Revocation Ruling, and their applicability to some of its hardwood flooring products. *See, e.g.*, Brennan Depo. Tr. 129-30; Brennan Decl. 1 ¶¶16 & 17; Brennan Decl. 2 ¶17; *see also* Pl.’s Concise Statement of

Notwithstanding *Boen Hardwood*, Kahrs maintains that three of its cargo exams — Entry Nos. 399–0803895–1, 399–0802301–1 and 399–0808440–1 — occurred after this decision. Thus these three exams, plus the hundreds of liquidations that followed, are proof that a “treatment” was established by Customs. See Pl.’s Opp. Br. 14–15.

First, for the same reasons discussed above, because no § 1625(c)(2) treatment was created by the three post-*Boen Harwood* Customs cargo inspections, the notice and comment provisions of § 1625 are inapplicable.

Second, the other fatal flaw in this treatment argument is that Customs was incapable of limiting the Federal Circuits’ *Boen Hardwood* precedent without conforming to the prescribed statutory procedures outlined by Congress under § 1625(d), whereby Customs can seek to “limit the application of a court decision.” See 19 U.S.C. § 1625(d).⁴² To be sure, Customs is bound by the Federal Circuit’s statutory construction of the scope of heading 4412 HTSUS, set out in *Boen Hardwood*. See *Meuwissen v. Department of Interior*, 234 F.3d 9, 14 (Fed. Cir. 2000) (“The Agency is bound to follow the law as elucidated by the courts.”); *Sea-Land Service, Inc. v. U.S.*, 239 F.3d 1366, 1373–74 (Fed. Cir. 2001) (“Customs is merely implementing this court’s interpretation of [the statute], an interpretation that . . . Customs is required to follow.”). Accordingly, when Customs issued its CF–29s in August 2006, it was merely implementing the interpretive rule handed down by the Federal Circuit in *Boen Hardwood*. And when a handful of Kahrs’ entries underwent CBP stratified cargo exams following the publication of *Boen Hardwood*, Customs, by that act alone, could not alter this judicial precedent by means of establishing a § 1625(c)(2) treatment.

Therefore, under the circumstances revealed in this case, it is not Material Facts Pertaining to the First, Second, Third, Fourth, and Sixth Causes of Action in the Compl. (Docket #104) ¶¶15, 63. The Court finds little sympathy with the Plaintiff on this accord. This court has instructed that

ignorance of our customs laws does not serve as an excuse for a failure to comply with the requirements thereof. . . . The principle of law announced in the maxim *ignorantia legis neminem excusat*. . . is sanctioned by centuries of experience. Anyone dealing with the United States customs authorities is presumed to have full knowledge of all laws and regulations applicable thereto.

Pac. Customs Brokerage Co. v. United States, 28 Cust. Ct. 385, 388 (1952) (citation omitted).

Moreover, while ignorance may serve as an explanation, it is particularly galling that this excuse is proffered by Plaintiff’s counsel in light of the above maxim. Further, considering the fact that Kahrs’ previous legal counsel participated in the *Boen Hardwood* matter under the suspension calendar and test case designation, and excuse of ignorance is even less justified. See Undisputed Material Facts, II.B., *supra*, ¶¶68–71.

⁴² The Court takes no position as to the Constitutionality of 19 U.S.C. § 1625(d).

legally possible for a “treatment” to have existed between Kahrs and Customs. Accordingly, Plaintiff cannot prevail on its § 1625(c)(2) claim. The Court declines to address the other aspects of Kahrs’ § 1625(c)(2) claim, as moot and, in any event, unavailing. In light of the foregoing analysis, Plaintiff’s motion for summary judgment on its first cause of action is DENIED. The Government’s Cross-Motion for summary judgment in this regard is GRANTED.

E. Summary Judgment — Second Cause of Action

The Court now turns to the parties’ cross-motions for summary judgment on Plaintiff’s Second Cause of Action. Plaintiff alleges that on August 16, 2001, CBP impermissibly revoked an “established and uniform practice” (“EUP”), which for years allowed for the duty-free importation of engineered hardwood flooring panels, throughout the U.S., under subheading 4418.30.00 HTSUS, as parquet flooring panels. (Compl. ¶¶30–39.) The EUP was created when CBP liquidated “hundreds” of duty-free entries of “similar or identical” engineered hardwood flooring products that Kahrs and other importers throughout the U.S. imported under subheading 4418.30.00 HTSUS. (*See id.*) Kahrs charges that beginning with the August 16, 2006 CF–29,⁴³ CBP purported to impose a higher duty for this merchandise (from duty free to 8% *ad valorem*). Kahrs contends that, because this tariff rate increase was implemented without publication and comment, pursuant to 19 U.S.C. § 1315(d) and 19 C.F.R. §§ 177.10(c) & (e), it was illegal. (*See id.* at ¶¶36–39; Pl.’s Mot. SJ 2d 13–14.)

The Government contends that § 1315(d) is inapplicable because: (i) the Secretary of the Treasury (or his designee) did not declare that an EUP existed for engineered wood flooring panels; (ii) where a judicial decision requires a change in an EUP, the statute is inapplicable; (iii) Kahrs has failed to demonstrate that a *de facto* EUP existed; and (iv) any *de facto* EUP, if it existed at all, was extinguished before the entry of Kahrs’ subject merchandise. (Def.’s X-Mot. SJ 2d 6–23.)

1. Analysis

a. Section 1315(d)

Section 1315(d) sets out the publication requirement for administrative rulings that result in higher duty rates. It states that

No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an

⁴³ Notices of Action issued to Kahrs: Entry # 399–0808699–2 on 8/16/06; Entry # 701–5216140–5 on 10/3/06; Entry # 701–5216163–7 on 10/11/06; Entry # 701–5216149–6 on 10/11/06; Entry # 399–0411896–3 on 10/17/06; and Entry # 399–0807626–6 on 11/27/06.

established and uniform practice shall be effective with respect to articles entered for consumption or with drawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the *Federal Register* of notice of such ruling.

19 U.S.C. § 1315(d). The statute's plain language bars the imposition and collection of duty increases where an EUP exists charging a lower tariff rate on the particular merchandise, unless the higher rate has been fixed by an administrative ruling, notice of which has been furnished in the *Federal Register*. The corresponding regulations provide for comments:

(c) *Changes of practice*. Before the publication of a ruling which has the effect of changing an established and uniform practice and which results in the assessment of a higher rate of duty within the meaning of 19 U.S.C. 1315(d), notice that the practice (or prior ruling on which that practice was based) is under review will be published in the *Federal Register* and interested parties will be given an opportunity to make written submissions with respect to the correctness of the contemplated change.

...

(e) *Effective dates*. Except as otherwise provided in § 177.12(e) or in the ruling itself, all rulings published under the provisions of this part will be applied immediately. If the ruling involves merchandise, it will be applicable to all unliquidated entries, except that a change of practice resulting in the assessment of a higher rate of duty or increased duties shall be effective only as to merchandise entered for consumption or withdrawn from warehouse for consumption on or after the 90th day after publication of the change in the *Federal Register*.

19 C.F.R. § 177.10(c) & (e). Thus, where an established and uniform practice exists, Customs must publish notice in the *Federal Register* before the existing EUP is altered to institute a higher rate of duty than was levied under the EUP. *See id.* Furthermore, where an EUP is altered to effect a higher rate of duty, Customs shall permit an opportunity for comment by interested parties and its ruling shall not apply to merchandise entered for consumption before the 90th day after *Federal Register* publication. *Id.* Plaintiff argues that an EUP existed of classifying and liquidating its hardwood flooring products under 4418.30.0000 HTSUS, which applied a duty-free rate to the subject merchandise, until this practice was altered starting with the

August 16, 2006 CF-29, *etc.* As a result, Plaintiff contends that the CF-29s cannot apply to the entries at issue in this action because they were entered for consumption before any *Federal Register* publication. (Pl.'s Mot. SJ 2d 13-14, 25, 27.)

Normally, an EUP is established by a finding of the Secretary of the Treasury that such a practice exists. *See* 19 U.S.C. § 1315(d); *see also Jewelpak Corp. v. United States*, 297 F.3d 1326, 1332 (Fed. Cir. 2002) (“[S]ection 1315(d) speaks only in terms of findings made by the Secretary of the Treasury.”). In this case, there is no dispute: there was no such finding by the Secretary of the Treasury. *See* Revocation Ruling, 35 Cust. Bull. 22. Accordingly, in so far as Plaintiff argues that the Secretary of the Treasury had found that there existed an EUP with respect to its merchandise, this Court rejects such contentions. (*See* Def.'s X-Mot. SJ 2d 7-8; Pl.'s Reply 2d 5.) As was discussed earlier in this opinion, Customs unquestionably published the Revocation Ruling in the *Customs Bulletin* on May 30, 2001, which revoked any prior rulings and treatment by CBP that engineered wood flooring was classifiable as “parquet panels” under 4418.30.00 HTSUS. *See* Revocation Ruling, 35 Cust. Bull. 22. This publication also indicated no finding of an EUP in this regard and neither can Plaintiff point to no such a finding. *Id.* Therefore, starting with the Revocation Ruling at the end of May 2001, Kahrs had unambiguous notice that engineered wood floor panels would no longer be classifiable as “parquet” panels under 4418.30.0000 HTSUS.⁴⁴

Plaintiff also argues that a *de facto* EUP exists subsequent to the Revocation Ruling and the *Boen Hardwood* decision. (Pl.'s Mot. SJ 2d 15-28.)

This Court held in *Heraeus-Amersil, Inc. v. United States*, that a plaintiff could show an EUP through actual uniform liquidations, even though the Secretary of the Treasury had made no “finding” that such a practice existed. 8 CIT 329, 335, 600 F. Supp. 221, 226

⁴⁴ Plaintiff's § 1315(d) argument also fails because the CF-29s (for the six subject entries in this lawsuit), which Kahrs claims are administrative rulings that impose higher duties, are not in this instance, actual “administrative ruling[s].” It has long been held that where a judicial decision mandates a change in an EUP, § 1315(d) is inapplicable. *See Sea-Land Service, Inc. v. United States*, 23 CIT 679, 689-90, 69 F. Supp.2d 1371, 1380 (1999) (*citing Westergaard, Berg-Johnsen Co. v. United States*, 17 Cust. Ct. 1, 3, (1946) (noting that § 1315(d) is limited to an administrative ruling changing an EUP of a lower duty rate, but does not apply where the higher assessment is due to a judicial decision)). Here, the CF-29s are more appropriately described as notices implementing the Federal Circuit's *Boen Hardwood* decision. *See Boen Hardwood*, 357 F.3d at 1266 (classifying engineered wood floor panels as “plywood” under heading 4412 HTSUS). Indeed, Customs specifically cited to “CAFC 03-1287,” which is the *Boen Hardwood* decision, as the reason for denying Kahrs' protest on the subject entries. (*See* Compl., Ex. 1A (Protest No. 2704.07.101011).) Therefore, to the extent that Kahrs argues that the CF-29s were in fact “administrative ruling[s]” that improperly revoked its EUP, this Court finds such arguments unavailing.

(1984). This so-called *de facto* EUP is determined where the court makes a finding that Customs consistently classified a particular type of merchandise under a specific category of the HTSUS prior to some distinct point in time. See *Atari Caribe, Inc. v. United States*, 16 CIT 588, 595, 799 F. Supp. 99, 106–07 (1992). The requirements for establishing a *de facto* EUP, however, are stringent. *Jewelpak Corp.*, 297 F.3d at 1332 (citing *Heraeus-Amersil, Inc. v. United States*, 795 F.2d 1575 (Fed. Cir. 1986)). These factors that a Court must consider prior to finding a *de facto* EUP are: “[1] the number of entries resulting in the alleged uniform classifications[; 2] the number of ports at which the merchandise was entered[; 3] the period of time over which the alleged uniform classifications took place[;] and [4] whether there had been any uncertainty regarding the classification over its history.” *Heraeus-Amersil, Inc. v. United States*, 9 CIT 412, 415–16, 617 F. Supp. 89, 93 (1985), *aff’d* 795 F.2d 1575 (Fed. Cir. 1986).

Kahrs argues that it can prove each *Heraeus-Amersil* element and that a *de facto* EUP can be established. (Pl.’s Mot. SJ 2d 17.) The Government responds that Kahrs has, in fact, failed to present sufficient evidence that a *de facto* EUP exists. (See Def.’s X-Mot. SJ 2d 10–15.) Kahrs replies that it need not show that CBP made a deliberate or intentional decision to establish an EUP but need only show “uniform liquidations among many ports over a period of time.” (Pl.’s Reply SJ 2d 8–9 (citing *Arbor Foods, Inc. v. United States*, 9 CIT 119, 607 F. Supp. 1474 (1985)).) The Government, however, argues that the aim of § 1315(d) is to promote uniformity in classification matters. See Def.’s Reply SJ 2d. 7; *Heraeus-Amersil*, 8 CIT at 331. Thus, a *de facto* EUP is predicated on the deliberate and concerted determination by CBP officers, acting in their official capacity, classifying particular merchandise under the expectation of uniform national application. (See Def.’s X-Mot. SJ 2d 13–14.)

In this case, the vast majority of the entries were classified as having been entered under “by-pass” procedures. This Court is of the view that finding a *de facto* EUP through automatic bypass — wherein entries are passed-through and liquidated without examination or deliberate classification and liquidated as entered — would undermine both the Congressional intent behind § 1315(d) and the principle established by *Heraeus-Amersil*, which is that an EUP must be based upon *some* overt, affirmative, official act by CBP and not upon an automated pass-through procedure. This Court above determined that CBP *pro forma* liquidated the vast majority of Kahrs’ merchandise duty-free as entered by Kahrs. Indeed, of the 1867 entries made by Kahrs during the relevant period, only the entry summary for 7 entries were reviewed by an import specialist and this

“review” occurred at only 3 out of 327 CBP ports. Moreover, an “entry summary review” is far from the kind of deliberate, intentional decision made after an examination of the imported merchandise and supporting documents for purposes of determining its proper classification. Finally, as was discussed in Part II.D.3.b., the 5 entries that were the subject of cargo examinations were revealed to have been security or selectivity examinations where no binding classification determinations were made. In the final analysis, it is clear that Kahrs cannot demonstrate that any of its entries, but especially those between July 29, 2001 and August 16, 2006, had in fact been overtly or affirmatively classified by CBP import specialists. As a result, Kahrs may not rely on them to establish a *de facto* EUP.

Because Kahrs fails in this regard, the Court need not address in the abstract the arguments raised about whether the *de facto* EUP was extinguished (*see* Def.’s X-Mot. SJ 2d 16–23) or whether Kahrs was the sole importer of engineered wood flooring panels (*see* Def.’s X-Mot. SJ 2d 15–16). Accordingly, Plaintiff’s motion for summary judgment of its second cause of action is DENIED. Defendant’s motion for summary judgment on Plaintiff’s second cause of action is GRANTED.

IV. Conclusion

Based on the discussion set forth above, the Court is entering an Order dismissing from Plaintiffs’ Complaint, the Seventh Cause of Action and the “reasonable care” claims. The Court is also entering an Order denying Defendant’s motion to strike.

Furthermore, based upon the foregoing, the Court is entering an Order granting Defendant’s motion for summary judgment on the Third, Fourth, and Sixth Causes of Action of Plaintiff’s Complaint. The Court is also entering an Order granting Defendant’s cross-motions on the First and Second Causes of Action of Plaintiff’s Complaint and denying Plaintiff’s motions to the same.

Order

Upon consideration of Defendant’s motion to dismiss and motion to strike, and Plaintiff’s motion for leave to file a sur-reply, and all other papers and proceedings in this case, for the foregoing reasons, it is hereby

ORDERED that Plaintiff’s motion for leave to file a sur-reply is DENIED; it is further

ORDERED that Defendant’s motion to strike is DENIED; it is further

ORDERED that Defendant’s motion to dismiss is GRANTED; it is further

ORDERED that the claims in the Seventh Cause of Action to Plaintiff's Complaint be, and hereby are, dismissed; it is further

ORDERED that all the "reasonable care" claims within Plaintiff's Complaint be, and hereby are, dismissed.

And upon consideration of Plaintiff's and Defendant's cross-motions for summary judgment on the First and Second Causes of Action and Defendant's motion for summary judgment on the Third, Fourth and Sixth Causes of Action to the Complaint, and all other papers and proceedings in this case, for the foregoing reasons, it is hereby

ORDERED that Defendant's cross-motions for summary judgment on the First and Second Causes of Action of Plaintiff's Complaint are, **GRANTED**; it is further

ORDERED that Plaintiff's motions for summary judgment on the First and Second Causes of Action of Plaintiff's Complaint are, **DENIED**; it is further

ORDERED that Defendant's motion for summary judgment on the Third, Fourth and Sixth Causes of Action of Plaintiff's Complaint is, **GRANTED**; it is further

ORDERED that all motions for oral argument are **DENIED**; and it is further

ORDERED that within 14 business days of the entry of this Order, the parties, following a meet and confer, shall submit to this Court a proposed scheduling order regarding further proceedings in this case. Pending the submission of the proposed scheduling order, the parties shall not file any motion in this court without the express written permission of this Court.

Dated: September 18, 2009

New York, New York

/s/ Gregory W. Carman

GREGORY W. CARMAN

Slip Op. 09–102

GILDA INDUSTRIES, INC., Plaintiff, and NESTLÉ WATERS NORTH AMERICA, INC., Plaintiff-Intervenor, v. UNITED STATES, Defendant.

Before **MUSGRAVE, Senior Judge**

Court No. 07–00474

[Denying plaintiff's motion to vacate denial of motion for class certification.]

September 18, 2009

Peter S. Herrick for the plaintiff.

Hogan & Hartson, LLP (Jonathan T. Stoel and Craig A. Lewis) for the plaintiff-intervenor.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Civil Division, Commercial Litigation Branch, United States Department of Justice (*David S. Silverbrand*); Office of the General Counsel for the United States Trade Representative (*William Busis*), of counsel, for The United States of America.

OPINION AND ORDER

MUSGRAVE, Senior Judge:

I.

Introduction

Plaintiff Gilda Industries, Inc. (“Gilda”) moves pursuant to USCIT Rule 60(b)(6) to vacate the portion of the Court’s May 14, 2008 order denying Gilda’s motion for class certification with respect to challenging the retaliatory tariffs imposed pursuant to the EC–Beef Hormones dispute, familiarity with which is presumed. *Cf.* Slip Op. 09–58 (June 16, 2009) *with Implementation of WTO Recommendations Concerning EC– Measures Concerning Meat and Meat Products (Hormones)* 64 Fed. Reg. 40638 (Office of the U.S. Trade Representative, July 27, 1999) (notice of imposition of 100 percent ad valorem duties on certain articles). Gilda’s motion identifies 13 complaints filed after entry of judgment in Gilda’s favor. This new circumstance, Gilda claims, justifies the relief it requests. The government opposes the motion on the ground that this is the only new “issue” raised, and that the motion otherwise merely seeks to re-litigate arguments previously rejected by the court.

USCIT Rule 23(c), which is modeled on the Federal Rules of Civil Procedure, permits alteration or amendment of an order with respect to class certification “before the decision on the merits.” This court reached a decision on the merits of Gilda’s case.

A court may not decide the merits first and then certify a class. It is no more appropriate to certify a class after a determination that seems favorable to the class than it would be to certify a class for the purpose of binding class members by an adverse judgment previously rendered without the protections that flow from class certification.

Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil and Criminal Procedure and Rules of Evidence, 201 F.R.D. 560, 611 (Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Aug. 1, 2001). *See* Advisory Committee Note to 2003 amendments to Rule 23(c) of the Federal Rules of Civil Procedure (“FRCP”). *Cf.* FRCP Rule 23(c); 1966 Advisory Committee Note to amendments to Rule 23(c) (rejecting the

practice of “one-way intervention”). Gilda’s motion must therefore be, and it hereby is, denied.

SO ORDERED.

Dated: September 18, 2009
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE,
SENIOR JUDGE

Slip Op. 09–103

GPX INTERNATIONAL TIRE CORPORATION AND HEBEI STARBRIGHT TIRE CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and BRIDGESTONE AMERICAS, INC., BRIDGESTONE AMERICAS TIRE OPERATIONS, LLC, TITAN TIRE CORPORATION, AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, Defendant-Intervenors.

Before: Jane A. Restani, Chief Judge
Consol. Court No. 08–00285

[Plaintiffs’ motions for judgment on the agency record granted in part. Defendant-Intervenors’ motions for judgment on the agency record granted in part. Remand to Department of Commerce for changes to its nonmarket economy antidumping duty and countervailing duty methodologies to account for or forego the imposition of the countervailing duty law on NME products.]

Dated: September 18, 2009

Winston & Strawn LLP (Daniel L. Porter and James P. Durling); Hinckley, Allen & Snyder LLP (Eric F. Eisenberg); Orrick, Herrington & Sutcliffe LLP (John A. Jurata, Jr.) for the plaintiffs.

Greenberg Traurig, LLP (Philippe M. Bruno and Rosa S. Jeong) for the consolidated plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*John J. Todor* and *Loren M. Preheim*); *John D. McInerney*, Chief Counsel for Import Administration, *Irene H. Chen*, *Carrie L. Owens*, *Matthew D. Walden*, *David Richardson*, and *Ahran Kang McCloskey*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

King & Spalding, LLP (Joseph W. Dorn, Christopher T. Cloutier, Daniel L. Schneiderman, J. Michael Taylor, Jeffrey M. Telep, Kevin M. Dinan, and Prentiss L. Smith); Stewart and Stewart (Geert M. De Prest, Elizabeth A. Argenti, Elizabeth J. Drake, Eric P. Salonen, Terence P. Stewart, Wesley K. Caine, and William A. Fennell) for the defendant-intervenors.

OPINION

Restani, Chief Judge:

I. Introduction

These consolidated court actions challenge the Department of Commerce's ("Commerce") final determinations rendered in concurrent antidumping duty ("AD") and countervailing duty ("CVD") investigations of certain pneumatic off-the-road ("OTR") tires from the People's Republic of China ("PRC" or "China"). Motions for judgment on the agency record were filed by GPX International Tire Corporation ("GPX") and Hebei Starbright Tire Co., Ltd. ("Starbright"), Titan Tire Corporation and the United Steel, Paper and Forestry, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (collectively, "Titan"), Bridgestone Americas, Inc. and Bridgestone America Tire Operations, LLC (collectively, "Bridgestone"), and Tianjin United Tire & Rubber International Co., Ltd. ("TUTRIC"). Pursuant to court order, motions for judgment on the agency record were divided into three key issues: (1) CVD applicability and nonmarket economy ("NME") AD coordination issues; (2) all other AD issues; and (3) all other CVD issues.

For the reasons stated below, the court finds that Commerce is not barred by statutory language from applying the CVD law to imports from the PRC, but that Commerce's current interpretation of the NME AD statute in relation to the CVD statute here was unreasonable. If Commerce is to apply CVD remedies where it also utilizes NME AD methodology, Commerce must adopt additional policies and procedures for its NME AD and CVD methodologies to account for the imposition of the CVD law to products from an NME country and avoid to the extent possible double counting of duties. In the absence of designation as a market economy ("ME"), to identify and measure subsidies in the PRC, Commerce must also determine the type of subsidy and whether the subsidy is measurable at a particular time in the PRC, rather than imposing a bright-line cut-off date.

Accordingly, GPX and Starbright's motion for summary judgment on the CVD and NME AD coordination issues is granted in part and denied in part, and GPX and Starbright's motions for summary judgment on all other AD and CVD issues are granted in part and denied in part. Titan and Bridgestone's motions for judgment on the agency record on all other AD and CVD issues are granted in part and denied in part.¹

¹ The court does not rule on the merits of the AD and CVD issues raised in the parties' briefs to the extent that they do not relate to the above issues, and thus, the court does not resolve

II. Background

On June 18, 2007, Titan filed petitions seeking imposition of ADs and CVDs for certain pneumatic OTR tires from the PRC. (See App. to Brs. Filed by Titan (“Titan App.”) Tab CVD PR Doc. 1.) Commerce initiated AD and CVD investigations for the subject merchandise for the period of October 1, 2006 through March 31, 2007. See *Certain New Pneumatic Off-the-Road Tires From the People’s Republic of China: Initiation of Countervailing Duty Investigation*, 72 Fed. Reg. 44,122 (Dep’t Commerce Aug. 7, 2007) (“CVD Notice”); *Initiation of Antidumping Duty Investigation: Certain New Pneumatic Off-the-Road Tires From the People’s Republic of China*, 72 Fed. Reg. 43,591 (Dep’t Commerce Aug. 6, 2007). Commerce selected three Chinese producers/exporters of pneumatic OTR tires as mandatory respondents for both the AD and CVD investigations: Starbright, TUTRIC, and Guizhou Tyre Co., Ltd. (“Guizhou”).² See *Final AD Determination*, 73 Fed. Reg. at 51,625; *Certain New Pneumatic Off-the-Road Tires From the People’s Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 73 Fed. Reg. 40,480, 40,483 (Dep’t Commerce July 15, 2008) (“Final CVD Determination”). GPX is a domestic importer of OTR tires and wholly owns Chinese producer Starbright. See *Verification of the Factors Response of Starbright in the Antidumping Duty Investigation of Certain New Pneumatic Off-The-Road Tires from the People’s Republic of China*, A-570-912, at 3-4 (May 5, 2008) (“AD Verification Report”), available at Pls.’ App. Tab 11. Titan and Bridgestone are manufacturers of OTR tires in the United States. See *Final AD Determination*, 73 Fed. Reg. at 51,625; (Br. of Titan in Opp’n to GPX & Starbright’s Mot. for J. Upon the Agency R. as to AD/CVD “Coordination” Issue 2).

Using NME methodologies, Commerce calculated an AD margin of 29.93% for Starbright, 8.44% for TUTRIC, and 5.25% for Guizhou.

most separate AD calculations. Nor does the court resolve TUTRIC’s motion for judgment on the agency record on separate CVD issues. The court does find, however, that Titan failed to exhaust its administrative remedies with respect to the managed exchange rate subsidy. Any party which contends that its original action can and should be decided independently of the remand ordered here may file a motion for severance.

² Xuzhou Xugong Tyres Co., Ltd. (“Xugong”) was also selected as a mandatory respondent in the AD investigation and received a zero percent dumping margin. See *Certain New Pneumatic Off-the-Road Tires From the People’s Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 73 Fed. Reg. 51,624, 51,625 (Dep’t Commerce Sept. 4, 2008) (“Final AD Determination”). Titan and Bridgestone’s motions for judgment on the agency record with respect to Xugong were addressed in a separate action before this court. See *Bridgestone Americas, Inc. v. United States*, Slip Op. 09-79, 2009 WL 2390221 (CIT Aug. 4, 2009).

See *Final AD Determination*, 73 Fed. Reg. at 51,625. Commerce also calculated a CVD margin of 14% for Starbright, 6.85% for TUTRIC, and 2.45% for Guizhou. See *Final CVD Determination*, 73 Fed. Reg. at 40,483. The International Trade Commission (“ITC”) published its affirmative injury determination on September 5, 2008. See *Certain Off-the-Road Tires From China; Determination*, 73 Fed. Reg. 51,842 (ITC Sept. 5, 2008).

On September 9, 2008, GPX filed three complaints with the court, contesting the CVD determination, the AD determination, and the ITC’s injury determination.³ On November 12, 2008, the court denied GPX’s motion for a temporary restraining order and a preliminary injunction to prevent the imposition of the approximate 44% cash deposit requirement while the merits of the underlying actions were decided. *GPX Int’l Tire Corp. v. United States*, 587 F. Supp. 2d 1278, 1291–92 (CIT 2008), *reh’g denied*, 593 F. Supp. 2d 1389 (CIT 2008). On February 12, 2009, the court also denied the Ministry of Commerce, People’s Republic of China’s motion to intervene, as good cause was not established for the untimely motion. *GPX Int’l Tire Corp. v. United States*, Slip Op. 09–11, 2009 WL 362136 (CIT Feb. 12, 2009). On January 20, 2009, the court consolidated herewith all actions challenging the final AD and CVD determinations, except for the matter involving Xugong. *Order* (Jan. 20, 2009).⁴

III. Standard Of Review

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will uphold Commerce’s final determinations in AD and CVD investigations unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

³ Titan and Bridgestone filed complaints contesting both the AD and CVD determinations on October 31, 2008. TUTRIC filed a complaint contesting the CVD determination on November 5, 2008.

⁴ On March 25, 2009, GPX’s action challenging the ITC’s injury determination was voluntarily dismissed pursuant to USCIT Rule 41(a)(1)(B).

IV. Discussion

I. CVD Applicability and NME AD Coordination

A. The unfair trade statutes are ambiguous regarding the application of CVD remedies to products from the PRC.

Prior to 2007, Commerce did not apply CVD law to any type of NME country, finding that the centrally controlled economies in NME countries made it difficult to “disaggregate government actions in such a way as to identify the exceptional action that is a subsidy.” *Carbon Steel Wire Rod from Czechoslovakia: Final Negative Countervailing Duty Determination*, 49 Fed. Reg. 19,370, 19372 (Dep’t Commerce May 7, 1984) (“*CSW from Czechoslovakia*”); see also *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,360 (Dep’t Commerce Nov. 25, 1998) (Where [Commerce] determines that a change in status from non-market to market is warranted, subsidies bestowed by that country after the change in status would become subject to the CVD law.”). Commerce effected a sea change in 2007, however, when it determined that although the PRC remained designated as an NME country, Commerce could apply the CVD law to products from the PRC. See *Coated Free Sheet Paper From the People’s Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination*, 72 Fed. Reg. 17,484 (Dep’t Commerce Apr. 9, 2007) (“*CFS Paper Preliminary Determination*”); *Coated Free Sheet Paper from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 72 Fed. Reg. 60,645 (Dep’t Commerce Oct. 25, 2007); *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet from the People’s Republic of China*, C–570–907, at 19–23 (Oct. 17, 2007), available at <http://ia.ita.doc.gov/frn/summary/PRC/E7-21046-1.pdf>. Commerce reasoned that the PRC had enacted significant and sustained economic reforms, which allowed the PRC’s economy to sufficiently advance beyond the Soviet-style command economy so that Commerce could now determine the transfer of a specific financial contribution and benefit from the government to a producer in China. See *Countervailing Duty Investigation of Coated Free Sheet Paper from the People’s Republic of China — Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China’s Present-Day Economy*, C–570–907, at 10 (Mar. 29, 2007) (“*Georgetown Steel Memorandum*”), available at <http://ia.ita.doc.gov/download/nme-separates/prc-cfsp/china-cfs-georgetown-applicability.pdf>. Specifically, Commerce determined that wages between employers and employees

largely appeared to be renegotiated; foreign investment, though directed, was largely permitted; many state-owned enterprises had been privatized; and China's command economy had receded and the majority of prices liberalized. *Id.* at 3, 5–10. Commerce noted that the PRC's present-day economy "features both a certain degree of private initiative as well as significant government intervention, combining market processes with continued state guidance." *Id.* at 7. Despite these findings, Commerce continues to treat the PRC as an NME country due to remaining government constraints, such as the slow process of liberalizing the renminbi to allow development of a normal foreign exchange market, the continuing restrictions on foreign investment, the slow pace of reforms in the banking sector, and the limitations on private ownership. *Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China — China's Status as a non-market economy*, A-570-901, at 2-3, 5 (Aug. 30, 2006) ("*Lined Paper Memorandum*"), available at Pls.' App. Tab 5.

The court previously noted that the leading case upholding Commerce's decision not to apply CVD remedies to imports from an NME country, *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986), is ambiguous. As the court stated, it is "not clear whether the Court of Appeals in interpreting the trade laws at issue in *Georgetown Steel* was deferring to a determination of Commerce based on ambiguity in the statute or whether the Court held that there was only one legally valid interpretation of the statute." *GPX Int'l Tire*, 587 F. Supp. 2d at 1289-90 (citing *Georgetown Steel*, 801 F.2d at 1314-18). Despite this lack of clarity, we do know that, at a minimum, the Court of Appeals affirmed Commerce's determination that the CVD law did not apply to NME countries under the facts extant at the time, reasoning that "[e]ven if one were to label these incentives as a 'subsidy,' in the loosest sense of the term, the governments of those [NMEs] would in effect be subsidizing themselves." *Georgetown Steel*, 801 F.2d at 1316. The Court of Appeals also reasoned that Congress had addressed "the problem of exports by [NMEs] through other statutory provisions" so that "any selling by [NME countries] at unreasonably low prices should be dealt with under the antidumping law."⁵ *Id.*

It is unnecessary, however, to resolve the ambiguity as to the hold-

⁵ An AD is imposed when Commerce "determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," and the ITC determines that a domestic industry is "materially injured." 19 U.S.C. § 1673(1)-(2). Determining less than fair value requires a comparison of a normal value, usually the price for the product in the country of manufacture, with the price of merchandise to be sold in the United States. *See id.* § 1673. Under NME AD procedures, normal value is usually calculated using costs in surrogate ME countries. *See id.* § 1677b(c).

ing of *Georgetown Steel*, as *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), instructs the court that “[b]efore a judicial construction of a statute, whether contained in a precedent or not, may trump an agency’s, the court must hold that the statute unambiguously requires the court’s construction.” *Brand X*, 545 U.S. at 985. Because *Georgetown Steel* did not hold unambiguously that the CVD law may not be applied to the imports from an NME, the court must now decide whether the relevant provisions of the CVD law itself, 19 U.S.C. §§ 1671 and 1677(5), are ambiguous. If the statutes are ambiguous, it does not matter whether Commerce’s new interpretation of the statutes conflicts with its old interpretation, because the court is now looking at Commerce’s new interpretation and will give that interpretation deference if it is reasonable. See *United States v. Eurodif S.A.*, 129 S. Ct. 878, 886 (2009) (“[A] court’s choice of one reasonable reading of an ambiguous statute does not preclude an implementing agency from later adopting a different reasonable interpretation.”).

Under § 1671, Commerce determines whether “the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported . . . into the United States.” 19 U.S.C. § 1671(a)(1). The term “country” is defined broadly and applies to foreign countries, among other entities. See *id.* § 1677(3). Neither of these provisions limits the type of country to which Commerce is permitted to apply the CVD law, nor does either provision specifically reference NME countries. Similarly, while the NME AD statute specifically discusses NME countries, it makes no reference to the imposition of CVDs on the goods of an NME country. See *id.* § 1677b.

A review of the legislative history since *Georgetown Steel* indicates that the AD and CVD statutes do not account for Commerce’s new hybrid treatment. The 1988 Omnibus Trade and Competitiveness Act changed the NME AD law, but the CVD statute was left relatively unchanged. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, 102 Stat. 1107. While language was proposed that would have granted Commerce the authority to apply CVD law to NME countries on a case-by-case basis, ultimately such language was not adopted. See H.R. Rep. No. 100–576, at 628 (1988) (Conf. Rep.). Additionally, in 1994, the Uruguay Round Agreements Act changed both the AD and CVD laws, but did not add a reference to NME countries to the CVD law. Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994).

GPX argues that this legislative history indicates that “Congress has reaffirmed a statutory scheme that unambiguously does not allow application of the CVD law to NMEs,” by continuously leaving the

CVD statute intact while actively amending the AD law as it applied to NME countries. (Pls.' Mem. of P. & A. in Supp. of Mot. for J. on the Agency Rs. Vol. 1: CVD/NME AD Coordination Issue ("Pls.' Coordination Br.") 11, 12–20.) The Government, by contrast, maintains that the CVD law gives Commerce the authority to apply the CVD law to any type of country. (Def.'s Mem. in Opp'n to Pls.' Mem. Regarding CVD/NME Coordination Issue in Supp. of Mot. for J. Upon the Agency Rs. ("Gov't Coordination Br.") 18.) The Government explains that "[b]ecause Commerce was not considering applying the CVD law to any NMEs at the time, the fact that Congress did not then revise the statute is not significant. There was no need for any revision." (*Id.* at 13.) Further, the Government highlights Congress' authorization of appropriations to Commerce for "defending United States [AD] and [CVD] measures with respect to products of the [PRC]," which the Government argues demonstrates Congress' understanding that Commerce possessed legal authority to apply CVD law to NME countries. (*Id.* at 16–18 (quoting 22 U.S.C. § 6943(a)(1)).)⁶

Congressional silence regarding the application of the CVD law to NME countries may indicate that Congress never anticipated that the CVD law would be applied while a country remained designated as an NME country. *See, e.g., Groff v. United States*, 493 F.3d 1343, 1354 (Fed. Cir. 2007) ("Absent some indication otherwise, Congress' silence is just that — silence." (internal quotation marks and citation omitted)). Commerce's past interpretation of the statutes had only been along clear lines—either a country was an NME country and CVDs were not imposed, or it was an ME country and CVDs could be imposed. Thus, there was no reason for Congress also to amend the CVD law to address concerns unique to NMEs when it amended the AD law. The CVD law was not being applied to NME countries then. Commerce, however, has been granted broad discretion in determining the existence of a subsidy under the CVD law. *See Magnola Metallurgy, Inc. v. United States*, 508 F.3d 1349, 1355 (Fed. Cir. 2007); *Georgetown Steel*, 801 F.2d at 1318. The court, therefore, cannot say from the statutory language alone that Commerce does not have the authority to impose CVDs on products from an NME-designated country.

It is not clear, however, how the CVD and AD law may work together in the NME context, if at all, and *Georgetown Steel* explains that at least with respect to the old-style NME countries, the AD statute was intended to cover the ground. *See* 801 F.2d at 1316. Thus, no coordination was necessary. Unlike the ME context where private decision-making is expected to control the setting of prices, the NME AD statute was designed to account for government intervention in

⁶ Of course, this statement does not address under what conditions or how AD and CVD measures may be applied to the same goods from the PRC.

an NME country's economy, including resulting price distortion. See *Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997) (“The antidumping statute recognizes a close correlation between [an NME] and government control of prices, output decisions, and the allocation of resources.”); see also *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1368 (Fed. Cir. 1999) (“[T]he prices of the goods produced in an NME are subject to discrepancies which distort their value. . . . In such a situation, Commerce calculates the [fair market value] according to 19 U.S.C. § 1677b(c) [by using a surrogate methodology].” (internal quotation marks and citation omitted)). The NME AD statute overlaps with the functioning of the CVD statute, which is “to counteract any unfair advantage gained by government intervention,” *Royal Thai Government v. United States*, 441 F. Supp. 2d 1350, 1365 (CIT 2006), over “the manufacture, production, or export of . . . merchandise imported . . . into the United States,” 19 U.S.C. § 1671(a)(1); see also *Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1117 (Fed. Cir. 1998) (“The [CVD] laws impose additional duties on imported products which are subsidized by the country of export or manufacture. . . . to offset the unfair competitive advantages created by foreign subsidies.”). Thus, the AD and CVD law when applied to NME countries both work to correct government distortion of market prices.

Accordingly, the court finds that while Commerce may have the authority to apply the CVD law to products of an NME-designated country, the CVD and NME AD statutes are unclear as to how Commerce is to account for the overlap between the statutes when imposing both CVD and AD duties on goods from an NME country.

B. Commerce's statutory interpretation and resulting methodologies are unreasonable.

Georgetown Steel makes clear that Commerce need not apply CVD law to the same goods that are subject to NME AD calculations. Nonetheless, here Commerce has attempted to do both. Due to the ambiguity in the AD and CVD statutes, the court must determine whether Commerce's interpretation as to how to apply the AD and CVD law jointly to goods from the PRC is reasonable. See *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994) (“*Chevron* requires us to defer to the agency's interpretation of its own statute as long as that interpretation is reasonable.”). For the reasons discussed below, the court finds that Commerce's interpretation of the NME AD statute in relation to the CVD statute here and the resulting methodologies are unreasonable.

1. Dual imposition of ADs and CVDs in NME countries has a high potential for double remedies.

GPX alleges that the application of both the CVD and AD law using the NME methodology results in a double counting of duties, as it “punishes Chinese companies twice for the same allegedly ‘unfair’ trading practice.” (See Pls.’ Mem. of P. & A. in Supp. of Mot. for J. on the Agency Rs. Vol. 2: All Other AD Issues (“Pls.’ AD Br.”) 25.) The Government, on the other hand, maintains that “[t]he AD and CVD laws provide separate remedies for separate unfair trade practices” and that “the classification of China as an NME under the AD law does not have any necessary consequence under the CVD law.” (Gov’t Coordination Br. 12–13.) The court disagrees with the Government’s position.

Commerce concluded that “absent a statutory directive for an adjustment and underlying assumption similar to that regarding CVDs imposed to offset export subsidies,⁷ or evidence that domestic subsidies⁸ have lowered U.S. prices in a given case, any adjustment for an assumed or undetermined effect would be inappropriate.” *Issues and Decision Memorandum for the Antidumping Investigation of Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China*, A–570–912, POR 10/1/06–3/31/07, at 15–16 (July 7, 2008) (“AD Issues and Decision Memorandum”), available at <http://ia.ita.doc.gov/frn/summary/PRC/E8-16156-1.pdf> (internal quotation marks and citation omitted). Commerce is referring to the requirement under 19 U.S.C. § 1677a, to make an adjustment to export price in its AD margin calculations for export subsidies in an ME country by the amount of any CVD imposed. See 19 U.S.C. § 1677a(c)(1)(C). Here, Commerce found that the silence in § 1677a “about the plainly related issue of CVDs to offset domestic subsidies, is not complete silence — it implies that no adjustment is appropriate.” *AD Issues and Decision Memorandum* at 14. That is, Commerce could see “no reason why Congress would have provided for the addition of export subsidy CVDs, but not considered the plainly related issue of domestic subsidy CVDs.” *Id.* Further, Commerce determined that it would be speculative to presume that domestic subsidies automatically lower export prices, and that the respondents had not provided evidence that “the benefits received from any domestic subsidy lowers U.S. prices, *pro rata*.” *Id.* at 13–14; see also *Certain New Pneumatic Off-The-Road Tires From the People’s Republic of*

⁷ An export subsidy “is a subsidy that is, in law or in fact, contingent upon export performance, alone or as 1 of 2 or more conditions.” 19 U.S.C. § 1677(5A)(B). or evidence that domestic subsidiesA domestic subsidy is “a specific subsidy [other than an export subsidy or import substitution subsidy], in law or in fact, to an enterprise or industry within the jurisdiction of the authority providing the subsidy.” 19 U.S.C. § 1677(5A)(D).

⁸ A domestic subsidy is “a specific subsidy [other than an export subsidy or import substitution subsidy], in law or in fact, to an enterprise or industry within the jurisdiction of the authority providing the subsidy.” 19 U.S.C. § 1677(5A)(D).

China; Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 Fed. Reg. 9278, 9287 (Dep't Commerce Feb. 20, 2008) (“*Preliminary AD Determination*”) (“Whereas the connection between export subsidies and export prices is direct, the connection between domestic subsidies and export price is indirect and subject to a number of variables.”).

GPX argues that double counting occurs when Commerce imposes a CVD remedy to offset an alleged government subsidy, but then compares a subsidy-free constructed normal value (essentially using information from surrogate countries) with the original subsidized export price to calculate the AD margin. (*Id.*) GPX maintains that just as Commerce must make adjustments to avoid double counting to its AD margin calculations for export subsidies, Commerce must also adjust its methodology to account for domestic subsidies that have been remedied under the CVD law whenever an AD margin is being calculated based upon NME AD methodology.⁹ (Pls.’ Coordination Br. 29–32.) GPX argues that it “makes no economic sense” to assume that a foreign producer will always keep for corporate purposes all of the benefit received from a domestic subsidy by not lowering its price, but give up all such benefit by lowering its prices when it receives an export subsidy. (Pls.’ AD Br. 27.) While GPX concedes that the effect of domestic subsidies on export prices depends on the economic circumstances, it contends that when Commerce has already imposed a CVD based on the full value of the subsidy, Commerce must then “take that action into account when making decisions in the parallel AD case.” (*Id.* at 30.)

GPX further argues that by finding no double remedy problem absent affirmative evidence from a respondent, Commerce created a rebuttable presumption that domestic subsidies do not lower export prices without providing a rational basis for doing so or giving advance notice to the parties. (*Id.* at 32.) GPX maintains that in requiring respondents to submit evidence that domestic subsidies actually lowered export prices, Commerce has imposed an impractical and onerous burden that is not required of respondents under the export subsidy adjustment. (*Id.* at 34–35.)

⁹ In ME countries, an export subsidy is assumed to result in a lower export price, because it creates an incentive for export sales over domestic sales. A CVD in the amount of the export subsidy fully corrects for this subsidy, and thus when an AD is also imposed to correct for sales at less than fair value, this results in double remedies and an adjustment is made. *See* 19 U.S.C. § 1677a(c)(1)(C). As GPX explains, there is no double remedy problem for domestic subsidies in ME AD cases, because the foreign producer’s or exporter’s own prices, however they may be affected by such subsidies, are used to calculate the AD margins. (Pls.’ Coordination Br. 30–31.)

As previously discussed, the NME AD statute was designed to remedy the inability to apply the CVD law to NME countries, so that subsidization of a foreign producer or exporter in an NME country was addressed through the NME AD methodology. See *Georgetown Steel*, 801 F.2d at 1316. Commerce's dual imposition of CVD and AD law on products of NME countries creates issues which do not present themselves when AD margins for ME countries are calculated. Congress' silence with respect to domestic subsidies under § 1677a, as with its silence in other areas of the AD and CVD law, may well indicate that Congress did not consider this new hybrid when it enacted the export subsidy adjustment, and not, as Commerce argues, that Congress intended to prohibit adjustments to the NME AD methodology because of domestic subsidies.

Commerce has previously noted in an investigation involving an ME country that "[d]omestic subsidies presumably lower the price of the subject merchandise both in the home and the U.S. markets, and therefore have no effect on the measurement of any dumping that might also occur." *Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium From France*, 69 Fed. Reg. 46,501, 46,506 (Dep't Commerce Aug. 3, 2004). Here, the export price is not being compared with the price of the good in the PRC in which case both sides of the comparison would be equally affected, but rather, export price, however it is affected by the subsidy, is compared with the presumptively subsidy-free constructed normal value. Without some type of adjustment for this, the imposition of AD duties could very well result in a double remedy. See, e.g., *U.S.-China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties*, GAO-05-474, at 28 (June 2005) ("*GAO Report*"), available at <http://www.gao.gov/new.items/d05474.pdf> ("[W]hen the [constructed] normal value is compared with the export price, the difference will, at least in theory, reflect the price advantages that the exporting company has obtained from both export and domestic subsidies."). The Government acknowledges that "domestic subsidies may have some effect upon export prices," but contends that this "effect is so uncertain that it would not have been a sound basis for any formal determination." (Def.'s Mem. in Opp'n to Pls.' & Def.-Intervenors' Memoranda Regarding AD Issues in Supp. of Mot. for J. Upon the Agency Rs. 31.)

Commerce cannot avoid addressing an important aspect of the problem caused by applying CVD and AD methodologies to goods from NME countries by placing the burden to demonstrate double counting on GPX, because there is likely no way for any respondent to accurately prove what may very well be occurring. As the CVD law

recognizes, the exact effect of subsidies on price is difficult to measure. Thus, the price effect is not measured in the calculations of CVDs. See 19 U.S.C. § 1677(5)(C). The court does not expect parties to prove in an individual NME case confirmable double counting just for the purpose of getting Commerce to address the problem of the greater potential for double counting in NME cases than exists with ME calculations.¹⁰ There is an assumption that CVD remedies equalize the competitive playing field, by raising the price of the good when it is exported into this country. See, e.g., *GAO Report* at 33 (“[T]here is substantial potential for double counting of domestic subsidies if Commerce applies CVDs to China while continuing to use its current NME methodology to determine [ADs].”).¹¹ If there is a substantial potential for double counting, and it is too difficult for Commerce to determine whether, and to what degree double counting is occurring, Commerce should refrain from imposing CVDs on NME goods until it is prepared to address this problem through improved methodologies or new statutory tools.

Commerce has a choice. The unfair trade statutes, as *Georgetown Steel* recognized, give Commerce the discretion not to impose CVDs as long as it is using the NME AD methodology. Thus, Commerce reasonably can do all of its remedying through the NME AD statute, as it likely accounts for any competitive advantages the exporter received that are measurable. If Commerce now seeks to impose CVD remedies on the products of NME countries as well, Commerce must apply methodologies that make such parallel remedies reasonable, including methodologies that will make it unlikely that double counting will occur. The court finds that it was unreasonable for Commerce to require GPX to submit specific evidence that a double remedy of a particular amount actually was imposed on its products when parallel NME AD and CVD procedures were utilized. Sufficient error has been demonstrated to require remand.

2. Commerce’s failure to address GPX’s request for market oriented enterprise treatment because it had no policies, procedures, or standards for evaluating market oriented enterprise status was arbitrary and capricious and not supported by substantial evidence

¹⁰ While subsidies may affect allocation of resources in some instances, there is no reason to presume that price effects are therefore unlikely in most cases.

¹¹ The Government Accountability Office opined that “in such a situation, Commerce should be provided authority to proactively address potential double counting, rather than waiting for it to occur and create methodological and legal problems.” *Id.*

Commerce declined to address GPX's request for individual market oriented enterprise ("MOE") treatment in order for Starbright's AD margin to be calculated according to ME calculation rules, stating that it has "no policies, procedures or standards for evaluating the MOE status of a company at this time." *Starbright — Request for Market-Oriented Entity Status and Market-Economy Section B Response*, A-570-912, POR 10/01/06-3/31/07, at 2 (May 8, 2008) ("*MOE Memorandum*"), available at Pls.' App. Tab 10. Commerce found that under its current practice, "there is no category of NME companies defined as MOEs and there are no criteria that qualify a company as an MOE such that we would use the ME methodology for a NME company."¹² *AD Issues and Decision Memorandum* at 184 (internal quotation marks and citation omitted). The court finds that Commerce's decision here was arbitrary and capricious and unsupported by substantial evidence.

GPX alleges that even if Commerce has the authority to impose CVDs on NME countries, fundamental fairness compels Commerce to amend its NME methodology to allow for some type of application of its ME AD methodology. (Pls.' Coordination Br. 33.) In particular, GPX maintains that it was legal error for Commerce to refuse to consider Starbright's request to be considered an MOE, as the record demonstrated that Starbright was "a U.S. owned and managed company for which normal value would be based on third country export sales, and for which Commerce has complete and verified market economy data." (Pls.' AD Br. 14-15; see also Pls.' App. Tab 9.)

As a preliminary matter, Commerce did not dismiss GPX's request for MOE status because it was untimely, but rather, because it did not have the procedures to address it. *MOE Memorandum* at 2. Bridgestone contends that Starbright's untimely submission of its ME normal value information "deprived Petitioners of any opportunity to comment, precluded Commerce from issuing supplemental questionnaires, and prevented Commerce from issuing [an ME] verification outline." (Bridgestone's Br. in Opp'n to Pls.' Mot. for J. Upon the Agency R. for CVD/NME AD Coordination Issue 39.) The court disagrees. On February 20, 2008, Commerce published its preliminary determination, which calculated a separate rate for Starbright based on NME methodology. See *Preliminary AD Determination*, 73 Fed. Reg. at 9283, 9291. On March 18, 2008, GPX requested that Com-

¹² China's World Trade Organization ("WTO") Accession Protocol allows for some adjustments to be made on an industry or sector-wide basis. See World Trade Organization, Protocol on the Accession of the People's Republic of China, pt. I, § 15(d) (Nov. 23, 2001), WT/L/432, available at http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm ("[S]hould China establish . . . that market economy conditions prevail in a particular industry or sector, the non-market economy provisions . . . shall no longer apply to that industry or sector."). GPX did not request such treatment, presumably because it would be difficult to use ME calculations for the entire pneumatic OTR tire industry.

merce grant Starbright an ME AD margin through MOE treatment, if Commerce refused to collapse Starbright and TUTRIC so as to be treated as a single entity. (See Pls.' App. Tab 9, at 2.) This request was filed a week before Commerce conducted verification in the AD investigation, see *AD Verification Report* at 1, and nearly four months before the final determination was published, see *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 40,485 (July 15, 2008), amended by 73 Fed. Reg. 51,624. Thus, Commerce had sufficient time to address GPX's request. Further, Commerce cannot now rely on any claim of untimeliness because that was not its avowed reason for the rejection of the request.

Commerce is required to "establish[] antidumping margins as accurately as possible." *Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001). In order for Commerce to apply the NME AD methodology, Commerce must determine that "the subject merchandise is exported from [an NME] country," 19 U.S.C. § 1677b(c)(1)(A), which is defined as "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise," *id.* § 1677(18). Commerce must also find "that available information does not permit the normal value of the subject merchandise to be determined." *Id.* § 1677b(c)(1)(B).¹³ By refusing even to consider GPX's request for MOE status, Commerce did not meet this statutory requirement.

The NME AD statute contains blunt procedures, basically the use of factors of production from surrogate countries, see *id.* § 1677b(c), and does not provide for fine-tuned adjustments. Further, fine-tuning is likely impossible because the surrogate cannot be compelled to provide detailed data; general public information is used. Commerce, however, has provided alternatives to surrogate values when necessary for accuracy. See *Shakeproof*, 268 F.3d at 1383 (finding that Commerce was not required to use only surrogate values when the best available information on what an input would cost in an ME country was the price actually paid by the Chinese producer for the input from an ME country); see also *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) ("The Act simply does not say—anywhere—that the factors of production must be ascertained

¹³ Thus, Commerce must address whether it may use third country sales or some other measure to determine normal value, see *id.* § 1677b(a)(1)(C), or whether all non-surrogate methods of calculating normal value for Chinese goods are unreliable under 19 U.S.C. § 1677(18). If GPX's suggested methodology is rejected as a matter of law or otherwise, the coordination issue addressed in part I.A, *supra*, will remain.

in a single fashion,” but rather, requires the “determination to be based on the best available information.” (internal quotation marks and citation omitted). Commerce was aware that modification of its NME AD methodology might be necessary when it decided to begin imposing CVD law on the PRC. *See Georgetown Steel Memorandum* at 11 (“The features and characteristics of China’s present-day economy also suggest that modification of some aspects of the Department’s current NME antidumping policy and practice may be warranted, such as the conditions under which the Department might grant an NME respondent [ME] treatment.”). Indeed, Commerce has even requested comments on this very issue. *See Anti-dumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment*, 72 Fed. Reg. 60,649 (Dep’t Commerce Oct. 25, 2007); *Anti-dumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise*, 72 Fed. Reg. 29,302 (Dep’t Commerce May 25, 2007).

It is impossible to tell if Commerce was not required to apply MOE status to Starbright because Commerce simply refused to address the issue. As stated previously, however, if the CVD statute is being imposed in an NME country situation, Commerce must modify its application of the NME AD statute, which it did not do.¹⁴ Commerce must determine how best to harmonize these two statutes and account for the fact that the statute provides no direction as to how to

¹⁴ The court does not decide here if any adjustments are permissible under the statute so that CVD remedies could be imposed. Both sides have suggested potential adjustments to Commerce’s AD methodology in the NME context, including GPX’s request for a constructed export price offset and Titan and Bridgestone’s request for non-production energy to be included in overhead calculations. (*See* Pls.’ AD Br. 4–14; Mem. of Titan in Supp. of Mot. for J. Upon the Administrative R. (Addressing “All Other” Antidumping Issues) (“Titan AD Br.”) 19–24.) Many of these adjustments, however, seem logically inconsistent. When Commerce calculates surrogate values, the information used is not gathered in response to questions asked of mandatory respondents, but rather, Commerce relies on broad information from public documents, which is not broken down in a way that Commerce needs in order to make fine-tuned adjustments.

GPX also argues that Commerce should reverse the presumption that all Chinese exporters are controlled by the state because it is at odds with Commerce’s factual findings concerning China’s present-day economy. (Pls.’ Coordination Br. 34–36.) Commerce may wish to re-evaluate its methodology with respect to the presumption. *Qingdao Taifu Group Co. v. United States*, Slip Op. 09–83, 2009 WL 2447502, at *6 n.6 (CIT Aug. 11, 2009). As the court recently noted, “[p]resumptions cannot become an excuse for inadequate investigation or assessment.” *Id.* In any case, the court believes its rulings herein do not require it to address this aspect of GPX’s argument further.

Titan and Bridgestone also argue that unrefunded value added tax (“VAT”) should have been included in the normal value calculations. (Titan AD Br. 16–19.) To the extent that Commerce used surrogate values to determine the costs of inputs, and not actual purchase prices paid by NME producers for inputs obtained from ME suppliers, the court finds that its recent conclusion that “the amount of unrefunded VAT is irrelevant to the normal value calculation” resolves this issue. *Bridgestone*, 2009 WL 2390221, at *7.

calculate both NME ADs and CVDs at the same time. That is, Commerce must meaningfully address this issue, fill in these gaps, and have some procedures for addressing GPX's legitimate concerns as to NME ADs if it chooses to impose CVDs on the products of NME-designated countries, despite how administratively difficult such an endeavor may be. Many adjustments for the sake of accuracy are made in ME cases, and Commerce cannot fail to make any adjustments here because the agency has not yet decided upon a method to use. If Commerce has a way of fine-tuning adjustments so that it is more likely no double counting will occur, this may be acceptable, but Commerce must make such a decision. Commerce chooses to proceed without regulations in many instances. In such situations it must make case-by-case determinations. Here, it promulgated no regulations nor made a decision in the specific case before it. Accordingly, the court finds that Commerce's failure to address GPX's request for MOE status because it had no policies, procedures, or standards for evaluating MOE status was arbitrary and capricious and unsupported by substantial evidence.

The court remands this matter to Commerce to address the administration of the statute. If it decides it will impose CVDs on NME products, Commerce must find a reasonably accurate way of imposing CVDs on the goods of NME-designated countries, while at the same time using the NME AD methodology, that is consistent with the statute.

II. All Other CVD Issue

A. Commerce's adoption of a December 11, 2001, cut-off date was arbitrary and unsupported by substantial evidence.

Commerce must impose a countervailing duty "equal to the amount of the net countervailable subsidy," 19 U.S.C. § 1671(a), and determine the "ad valorem subsidy rate by dividing the amount of the benefit allocated to the period of investigation or review by the sales value during the same period," 19 C.F.R. § 351.525(a). When allocating the benefit for non-recurring subsidies, Commerce "normally allocate[s] a non-recurring benefit to a firm over the number of years corresponding to the average useful life ("AUL") of renewable physical assets," *id.* § 351.524(b)(1), which, in this case, Commerce determined to be fourteen years, *see Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination: Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, C-570-913, at 5 (July 7, 2008) ("*CVD Issues and Decision Memorandum*"), available at <http://ia.ita.doc.gov/frn/summary/PRC/E8-16154-1.pdf>. Here, however, Commerce did not allocate ben-

efits over the entire fourteen-year AUL for non-recurring subsidies, and instead, imposed a cut-off date of December 11, 2001, for identifying and measuring subsidies in the PRC. *Id.* at 62–64. Application of this cut-off date was arbitrary and unsupported by substantial evidence.

Where Commerce has previously imposed cut-off dates in CVD investigations in which the CVD law is applied for the first time to a former NME country, Commerce’s practice has been to use the date that a NME country “graduated” to ME status as the official cut-off date for identifying and measuring non-recurring subsidies. See *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Sulfanilic Acid from Hungary*, C–437–805, at 14–15 (Sept. 18, 2002), available at <http://ia.ita.doc.gov/frn/summary/hungary/02-24358-1.pdf> (“[T]he concept that the receipt of a subsidy constitutes a distortion in the normal allocation of resources has no meaning in [an NME].” (citation omitted)). Here, because Commerce determined that the PRC has not achieved ME status, Commerce could not use the country’s graduation date as the cut-off date. Instead, Commerce concluded that December 11, 2001, the date of the PRC’s accession to the WTO, would serve as the cut-off date for identifying and measuring subsidies in the PRC. *CVD Issues and Decision Memorandum* at 62–64; see also *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China*, C–570–911, POR 1/1/06–12/31/06, at 41–44 (May 29, 2008) (“*CWP from China Issues and Decision Memorandum*”), available at <http://ia.ita.doc.gov/frn/summary/PRC/E8-12606-1.pdf> (applying the December 11, 2001, cut-off date for the first time in CVD investigations involving the PRC). Commerce explained that by December 11, 2001, significant reforms, including the elimination of price controls on most products, the development of a private industrial sector, and the abolition of the government’s mandatory credit plan, had been implemented in the Chinese economy to achieve WTO membership, which allowed Commerce to identify and measure subsidies in the PRC. See *CVD Issues and Decision Memorandum* at 62; *CWP from China Issues and Decision Memorandum* at 41.

Commerce reasoned that a uniform cut-off date was necessary because “a program-by-program, company-by-company approach [was] not administratively feasible.” *CVD Issues and Decision Memorandum* at 63. Specifically, Commerce noted that it was examining more than thirty alleged subsidies in this investigation, administered at varying government levels, and that many programs were not

straightforward and “require[d] analysis of several levels of government and banks because practices vary from jurisdiction to jurisdiction.” *Id.* Commerce explained that it could not complete CVD investigations within the statutorily mandated deadlines if it was first required to identify and measure subsidies “on a land plot-by-land plot or loan-by-loan basis” before then investigating the subsidy. *Id.*

GPX supports the application of a cut-off date when imposing CVD law on the PRC, but maintains that Commerce has not provided a proper basis for abandoning its past finding that CVD law cannot apply prior to Commerce’s conclusion that the NME country became sufficiently market-based as to apply the CVD law. (*See* Pls.’ Mem. of P. & A. in Supp. of Mot. for J. on the Agency Rs. Vol. 3: All Other CVD Issues (“Pls.’ CVD Br.”) 7–14.) GPX further argues that the December 11, 2001, cut-off date is fundamentally inconsistent with Commerce’s logic in the *Lined Paper Memorandum*, which explained that because of the incomplete changes in the Chinese economy, Commerce would continue to treat the PRC as an NME. (*See id.* at 11–14); *see also Lined Paper Memorandum* at 2–5. Thus, GPX contends that the cut-off date used should be April 9, 2007, the date when Commerce first applied the CVD law to China, as the date is analogous to an ME graduation date. (*See* Pls.’ CVD Br. 8); *see also CFS Paper Preliminary Determination*, 72 Fed. Reg. at 17,486.¹⁵

Titan and Bridgestone, by contrast, argue that the cut-off date is unlawful, as it causes Commerce arbitrarily to ignore subsidies granted before December 11, 2001, contrary to the statutory requirement under 19 U.S.C. § 1671(a) that Commerce impose CVDs equal to the amount of the net countervailable subsidies. (*See* Titan Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R. (CVD) (“Titan CVD Br.”) 23–25.) They maintain that no additional administrative burden would be placed on Commerce if the cut-off date is eliminated, as Commerce is already required to determine whether a subsidy can be identified and measured for each alleged subsidy, and “[i]f a subsidy were granted under conditions that prevented [Commerce] from identifying and measuring the subsidy, this fact would emerge in the context of determinations Commerce already makes in its normal practice.” (*Id.* at 26.) In the alternative, if application of a cut-off date is permissible, Titan and Bridgestone maintain that an earlier date should be used, as many of the reforms relied on by Commerce were present at earlier dates. (*See id.* at 27–29.)

¹⁵ While the *Georgetown Steel Memorandum* first discussed Commerce’s decision to apply the CVD law to the PRC, this memorandum did not become public until the publication of the preliminary determination in *CFS Paper*. *See CFS Paper Preliminary Determination*, 72 Fed. Reg. at 17,486.

While “agencies with statutory enforcement responsibilities enjoy broad discretion in allocating investigative and enforcement resources,” *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995), Commerce’s methodology must still be a “reasonable means of effectuating the statutory purpose” and be supported by substantial evidence, *Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 966 (CIT 1986). Commerce’s application of the cut-off date could cause it to impose CVDs not equal to the amount of the net countervailable subsidies, as it arbitrarily based decisions on whether the benefit was received after December 11, 2001. *See* 19 U.S.C. § 1671(a). For example, Commerce found certain loans to TUTRIC to have been forgiven once the repayment date passed, but found that because this debt forgiveness occurred before December 11, 2001, it was not countervailable. *See CVD Issues and Decision Memorandum* at 15 n.20. Similarly, in the preliminary determination, Commerce found the Chinese government’s provision of land-use rights to Guizhou to be countervailable, *see Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 72 Fed. Reg. 71,360, 71,368 (Dep’t Commerce Dec. 17, 2007), but because Commerce received supplemental information, which indicated that all of the essential terms and conditions associated with Guizhou’s land use were established prior to the cut-off date, Commerce did not evaluate whether these were countervailable in the final determination, *see CVD Issues and Decision Memorandum* at 26, 173–74.

The application of the uniform cut-off date is also inconsistent with Commerce’s reasoning that it was now able to apply the CVD to an NME by “re-examin[ing] the economic and reform situation of the NME on a case-by-case basis to determine whether [Commerce] can identify subsidies in that country.” *Id.* at 64. By not looking at the specific facts for each subsidy, however, Commerce fails to fully reexamine the relevant economic and reform situation in the PRC. Commerce appears more concerned with determining on what side of the cut-off date a subsidy falls, rather than with evaluating the facts of each alleged subsidy to determine if the particular facts for that subsidy allow Commerce now to calculate a subsidy where it was previously unable to do so. For example, Commerce determined that Starbright’s predecessor, Hebei Tire, had received alleged debt forgiveness for guarantees of loans made by state-owned commercial banks to various entities. *Id.* at 148. Commerce found that Hebei Tire was not a purely private entity due to some government ownership through a local village committee and other government interest-based motivations with respect to its employees. *See id.* at 126–128. While the court need not address here the merits of these findings,

the court does observe that such an alleged subsidy — that is, alleged debt forgiveness given from one government arm to another — appears to be exactly the type of subsidy that Commerce previously said it could not properly calculate and countervail in NME countries. *See CSW from Czechoslovakia*, 49 Fed. Reg. at 19,371–72 (finding that “in an NME system the government does not interfere in the market process, but supplants it” and that therefore Commerce “could not disaggregate government actions in such a way as to identify the exceptional action that is a subsidy”); *see also Georgetown Steel Memorandum* at 10 (“[G]iven the pervasive role of NME governments in the economy in general, . . . an alleged subsidy essentially involved one arm of the government giving money to another arm.”). In such a situation, it is too facile to say that the subsidy is the debt forgiveness when it is not clear there was any debt to begin with, because of the level of government intervention.¹⁶

As China’s economy is in a continuing state of transition and reform, for Commerce to identify and measure subsidies in the PRC, Commerce must determine what kind of subsidy exists and whether the subsidy is measurable at a particular time in the PRC, rather than through imposition of a bright-line rule. Commerce itself has recognized that “economic reform is a process that occurs over time” and is uneven, as “reforms may take hold in some sectors of the economy or areas of the country before others.” *CVD Issues and Decision Memorandum* at 63. Indeed, Commerce conceded that “there was not a single moment or single reform law that suddenly permitted us to find subsidies in the PRC,” and that “[m]any reforms were put in place before the PRC acceded to the WTO, but [Commerce] has identified other areas where the PRC economy continues to exhibit nonmarket characteristics.” *Id.* While the approach of making specific findings for specific programs may be difficult for Commerce to administer, the AD and CVD laws as enacted by Congress function best by distinguishing between NME and ME countries. If Commerce chooses to recognize a gray area, it must adjust its methodology accordingly.

Commerce’s use of a cut-off date was unsupported by substantial evidence, and the court remands to Commerce to determine the existence of countervailable subsidies based on the specific facts for each subsidy, rather than by examining those subsidies found after an arbitrary cut-off date. The court cannot determine whether the applicable dates at which these subsidies are found are earlier or

¹⁶ While it would be premature for the court to address whether the change-in-ownership methodology Commerce used to address GPX’s alleged loan guarantee subsidy was accurate (*see GPX CVD Br. 15–31*), the court does note that village ownership does not always equal government ownership for purposes of the unfair trade laws, *see Qingdao Taifa*, 2009 WL 2447502, at *7–9.

later than December 11, 2001, based on the record evidence, but Commerce must engage in this case-by-case analysis if it chooses to apply CVD and AD remedies while China is still designated as an NME country.

B. Titan failed to exhaust its administrative remedies with respect to the managed exchange rate subsidy.

Titan argues that Commerce unlawfully refused to investigate the allegation from its petition that the Government of China's managed exchange rate subsidy program constituted a countervailable subsidy. (Titan CVD Br. 9–19; *see also* Titan App. Tab CVD PR Doc. 1., at 47–57.) Commerce's *CVD Notice* determined that, pursuant to 19 U.S.C. § 1671a(b)(1), Titan had not alleged the necessary elements for imposition of a countervailing duty, and, therefore, it did not include the subsidy in its CVD investigation. *See CVD Notice*, 72 Fed. Reg. at 44,124. Titan did not object to this determination in its case brief below. (*See* App. in Supp. of Def.'s Resp. to Mots. for J. Upon the Agency Rs. Tab 51.)

“[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998) (internal quotation marks and citation omitted). Commerce's regulations provide that a party's case brief “must present all arguments that continue in the submitter's view to be relevant to [Commerce's] final determination.” 19 C.F.R. § 351.309(c)(2). This is so that all arguments “may be appropriately addressed by [Commerce]” before any judicial review occurs. *Nakornthai Strip Mill Pub. Co. v. United States*, 558 F. Supp. 2d 1319, 1329 (CIT 2008) (internal quotation marks and citations omitted). Further, the exhaustion of administrative remedies is required “where appropriate.” 28 U.S.C. § 2637(d). Although Titan made the allegation in its petition, failure to raise an argument in a case brief can be a failure to exhaust administrative remedies. *See Carpenter Tech. Corp. v. United States*, 464 F. Supp. 2d 1347, 1349–50 (CIT 2006). Titan knew of the disposition of its claim and stood mute.

While the court does not here rule on the merits of the parties' other subsidy specific arguments, the court does find that because Titan did not object to the exclusion of the managed exchange rate subsidy in its case brief below, Titan has failed to exhaust its administrative

remedies with regard to its managed exchange rate subsidy allegation.¹⁷ Accordingly, the court declines to allow Titan to raise this argument now.

V. Conclusion

For all the foregoing reasons, the court remands the matter for Commerce to forego the imposition of CVDs on the merchandise at issue or for Commerce to adopt additional policies and procedures to adapt its NME AD and CVD methodologies to account for the imposition of CVD remedies on merchandise from the PRC. Additionally, if it imposes CVD remedies, Commerce must refrain from using a uniform cut-off date for identifying and measuring subsidies in the PRC while it remains a designated NME and must evaluate the specific facts of each subsidy to determine what kind of subsidy exists and whether it is measurable at a particular time in the PRC.

Commerce shall file its remand determination with the court within ninety days of this date. GPX, TUTRIC, Bridgestone, and Titan have eleven days thereafter to file objections, and Commerce will have seven days thereafter to file its response.

Dated: This 18th day of September, 2009.

New York, New York.

/s/ Jane A. Restani

JANE A. RESTANI CHIEF JUDGE

¹⁷ Additionally, none of the exceptions to the exhaustion doctrine apply. These limited exceptions include: (1) the issue is a pure question of law that would not require further agency involvement; (2) the petitioner did not have access to confidential information; (3) an intervening judicial decision excuses the failure to raise the issue below; and (4) futility. *See, e.g., Budd Co. v. United States*, 773 F. Supp. 1549, 1555 n.2 (CIT 1991). Titan contends that the futility exception applies because no adequate relief could have been granted at the administrative level. (Br. of Titan in Reply to the Opp'n of the United States & GPX & Starbright to Titan's Mot. for J. on the Agency R. (CVD) 1-4.) The futility exception, however, is narrow and only applies in situations where parties "would be required to go through obviously useless motions in order to preserve their rights." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (internal quotation marks and citation omitted). Here, nothing in the record suggests that comments submitted in a case brief would constitute an obviously useless endeavor. By raising the argument Titan would have given Commerce the opportunity to address its concerns.

