

U.S. Customs and Border Protection

Slip Op. 15–06

DIGIDESIGN, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Judith M. Barzilay, Senior Judge
Court No. 08–00331

[On classification of certain electronic machines summary judgment granted for Defendant; summary judgment denied for Plaintiff.]

Dated: January 22, 2015

Michael J. Horton, Michael J. Horton Law Office, for the plaintiff.

Joyce R. Branda, Acting Assistant Attorney General; Amy M. Rubin, Assistant Director, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Marcella Powell); and Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (Paula S. Smith), of counsel, for the defendant.

OPINION

BARZILAY, Senior Judge:

This case is before the court on cross-motions for summary judgment. Plaintiff Digidesign, Inc. (“Digidesign”), challenges the decision of Defendant U.S. Customs and Border Protection (“Customs”) denying Digidesign’s protest of Customs’ classification of its Control 24 and 002 Factory consoles within the Harmonized Tariff Schedule of the United States (“HTSUS”). Customs classified the merchandise as “electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and apparatus: Other: Other: Other: Other” under subheading 8543.89.96 (and later under 8543.89.97 and still later under 8543.70.96) of the HTSUS, all of which carry a 2.6% *ad valorem* duty.¹ Digidesign contends that the merchandise is properly classified as units of automatic data processing (“ADP”) machines under HTSUS Heading 8471. Digidesign suggests classification under two alternative subheadings, 8471.60.10 and 8471.80.90 of the HTSUS, both of

¹ Effective April 1, 2006, provisions within heading 8543, HTSUS, were renumbered and subheading 8543.89.96, HTSUS, became 8543.89.97, HTSUS. There was no material change to the language of the provision. Effective February 7, 2007, heading 8543, HTSUS, was further modified in that one of the “other” subdivisions was removed. Again, there was no material change to the language of the provision.

which carry a 0% *ad valorem* duty. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a). For the reasons set forth below, Digidesign's motion for summary judgment is denied and Customs' motion is granted.

I. STANDARD OF REVIEW

The court reviews Customs' protest decisions *de novo*. 28 U.S.C. § 2640(a)(1). USCIT Rule 56 permits summary judgment when "there is no genuine issue as to any material fact . . ." USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering whether material facts are in dispute, the evidence must be considered in a light most favorable to the non-moving party, drawing all reasonable inferences in its favor, as well as all doubts over factual issues. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 253–54.

A classification decision involves two steps. The first addresses the proper meaning of the relevant tariff provisions, a question of law. *See Faus Group, Inc. v. United States*, 581 F.3d 1369, 1371–72 (Fed. Cir. 2009) (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)). The second step determines the nature of the imported merchandise and is a question of fact. *See id.* When there is no factual dispute regarding the merchandise, the resolution of the classification issue turns on the first step, determining the proper meaning and scope of the relevant tariff provisions. *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999); *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365–66 (Fed. Cir. 1998).

Although the court accords deference to Customs' classification rulings relative to their "power to persuade," *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), the court has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms." *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)).

II. UNDISPUTED FACTS

The following facts are not in dispute. The subject merchandise consists of two types of machines: (1) the Control 24 and (2) the 002 Factory (also known as the 002 Controller). Digidesign entered the subject merchandise between May 2005 and March 2007. The Control 24 and 002 Factory are frequently referred to as "control surfaces" because they allow the user to edit, mix, and otherwise manipulate music in digital format on the computer's hard drive with the switches, faders, and knobs located on the consoles. The Control 24

and 002 Factory are sold through professional audio and musical instrument retailers, and used by professionals in the audio industry for recording and editing music. Both machines can be connected to a computer (PC or Mac) by means of (1) an Ethernet cable in the case of the Control 24 and (2) a Fire Wire cable in the case of the 002 Factory. Presumably, this host computer has been loaded with Pro Tools®, Digidesign's proprietary digital audio software system.

No digital recording, editing, or mixing occurs on the Control 24 itself; the console controls those functions on the host computer only. Music and sound are manipulated or recorded on the host computer through a separate unit (an audio interface unit) that converts the Control 24's analog signals into digital signals that can be processed by the host computer.² When the user presses a key, uses a fader, or turns a knob on the Control 24, an electrical signal is sent through the Ethernet cable providing instructions to the Pro Tools® software running on the host computer. The Control 24, therefore, is able to deliver data in a form (code or signals) that can be used by an ADP system.

The Control 24 includes 16 premium microphone preamps, a line sub-mixer, and a control room monitoring section, which are non-data processing functions. These functions can be used on a stand-alone basis, operating unassisted by the host computer, regardless of whether the Control 24 is connected to Pro Tools® or routed to destinations other than Pro Tools®. The Control 24's microphone preamps offer 16 channels of input, which can be routed through the Control 24 to Pro Tools® for recording. The preamps allow the user to adjust the level of the analog signal before it is fed into the audio interface unit for conversion into a digital signal for use in Pro Tools®. The Control 24's preamps can also be routed to destinations other than Pro Tools®.

The line sub-mixer of the Control 24 is an independent, eight channel sub-mixer. It takes signals from up to eight sources and mixes them down to two output sources. For instance, the source of the signals could be instruments or synthesizers that are on separate channels. Those channels are fed into the Control 24, the volume adjusted and the channels mixed. The line sub-mixer outputs can then be integrated into Pro Tools® or other external destinations through discrete connections to audio interface units, or used only as monitoring sources within the Control 24.

² Conversely, the audio interface unit can convert digital signals into analog signals then send those signals to the Control 24, which can then adjust the levels of sound heard on speakers and headphones.

The control room monitoring section of the Control 24 routes input from Pro Tools® and other sources to multiple sets and configurations of speakers and headphones. In particular, this monitoring section of the Control 24 permits the user to hear the digital signals that have been manipulated in Pro Tools®. The Control 24 provides visual feedback from Pro Tools® by means of light emitting diodes (LED). For instance, levels of sound in Pro Tools® are fed back to the Control 24 and displayed on the console by means of a meter bridge, which is a row of lights. The Control 24's control room monitoring section is also used to communicate between the control room and other rooms or booths, a function referred to as Talkback and Listenback.

Unlike the Control 24, the 002 Factory can perform analog signal to digital signal conversion. Consequently, the 002 Factory can record music and sound directly on the user's computer for manipulation in the Pro Tools® software, which can all be accomplished without an audio interface unit. When the user presses a key, uses a fader, or turns a knob on the 002 Factory, an electrical signal is sent through the Fire Wire cable, sending instruction to the Pro Tools® software running on the host computer. The 002 Factory, therefore, is also able to deliver data in a form (code or signals) that can be used by an ADP system.

The 002 Factory includes two analog audio features, which are non-data processing functions. Specifically, the machine has four microphone preamps and a control room monitoring section. The 002 Factory's preamps function similarly to the Control 24's preamps. Also, as with the Control 24, the 002 Factory's control room monitoring section provides several options for routing outputs and monitoring alternate input sources. However, the 002 Factory can also operate as a separate, stand-alone 8x4x2 digital mixer. As a stand-alone 8x4x2 digital mixer, the 002 Factory allows the user to mix eight channels of music and sound using the faders and then send the resulting signals out to speakers or headphones. Using the 002 Factory as a stand-alone digital mixer does not involve the user's computer or Pro Tools®. Internal controls within the 002 Factory automatically disconnect from the computer and communication with Pro Tools® is suspended when the machine is used as such. Separate cables not imported with the 002 Factory must be purchased to use the machine as a stand-alone digital mixer.

III. DISCUSSION

A. Subject-Matter Jurisdiction Over The “002 (RACK) Controller FAC”

Customs challenges the court’s subject-matter jurisdiction over the articles in Entry No. 607–1466937–5 listed as “002 (RACK) Controller FAC” on the corresponding commercial invoices. Def. Br. 8 n.11. Customs argues that the term “RACK” refers to a product not at issue in this case, the 002 Rack also known as the Digi 002R. *See* Def. Reply Br. 13. According to Customs, the court lacks jurisdiction over these articles in Entry No. 607–1466937–5 since Digidesign’s complaint does not include any claims relating to the Digi 002R. Def. Br. 8 n.11.

Digidesign, however, argues that the description “002 (RACK) Controller FAC” on the commercial invoices related to Entry No. 607–1466937–5 refers to the 002 Factory. Pl. Reply Br. 10. Digidesign argues that the court maintains jurisdiction over the articles in Entry No. 607–1466937–5 that bear this description on the related invoices. *Id.* Digidesign advances several arguments in support of its position. Digidesign argues that this description contains the misprint, “RACK”, which the relevant bill of lading corrects. *Id.* at 7–9. Moreover, Digidesign contends that the Digi 002R and 002 Factory are distinguishable by their claimed values. *Id.* at 9. According to Digidesign, the 002 Factory is “significantly more expensive” than the Digi 002R. *Id.* As such, Digidesign argues, the \$588.00 unit cost of the articles described as “002 (RACK) Controller FAC” on the commercial invoices, when compared to the \$399.00 unit cost of the Digi 002R, makes clear that the “002 (RACK) Controller FAC” is in actuality the 002 Factory. *Id.* Additionally, Digidesign argues that Customs’ decision regarding Digidesign’s protest further supports this conclusion. *Id.* at 9–10. In particular, Digidesign points to Customs’ reliance on the protest worksheet prepared by Digidesign, which states that “002 (RACK) Controller FAC” on the commercial invoices refers to the 002 Factory. *Id.*

Pursuant to 28 U.S.C. § 1581(a), the court “has exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.” Protests “may challenge the classification of a single entry of merchandise, or encompass a number of entries” *DaimlerChrysler Corp. v. U.S.*, 442 F.3d 1313, 1314 (Fed. Cir. 2006). Therefore, the identification of specific entries in a plaintiff’s complaint in part defines the boundaries of the court’s subject-matter jurisdiction in a given action. Moreover, it is the commercial invoice that sets forth a

“detailed description of the merchandise” within each entry, further defining the bounds of the court’s jurisdiction. 19 C.F.R. § 141.86(a)(3).

Here, Digidesign identified Entry No. 607–1466937–5 in its complaint. Compl. Schedule A at 3. Furthermore, four types of merchandise are described on the relevant commercial invoices for Entry No. 607–1466937–5: the MboxII FAC, 002 (RACK) Controller FAC, 002 (RACK) Controller and Control 24. Pl. Reply Br. Ex. D. Yet, despite Digidesign’s arguments to the contrary, Digidesign’s designated agent testified that the term “RACK” signifies the Digi 002R, which is a product not referenced in any claim raised by Digidesign. Def. Reply Br. Ex. B at 151–52 (Plaintiff’s Deposition Transcript (Cont.)); *see generally* Compl. Therefore, as Digidesign included in its complaint claims referencing only the Control 24 and 002 Factory, the court lacks subject-matter jurisdiction over the articles in Entry No. 607–1466937–5 described as “MboxII FAC”, “002 (RACK) Controller FAC” and “002 (RACK) Controller” on the related commercial invoices.³

B. Classification Of The Control 24 And 002 Factory

The court now turns to the classification of the subject merchandise. The “General Rules of Interpretation (“GRIs”) govern classification of merchandise under the HTSUS, and are applied in numerical order.” *Honda of America Mfg. v. United States*, 607 F.3d 771, 773 (Fed. Cir. 2010) (internal quotations and citations omitted). “What is clear from the legislative history of the World Customs Organization (“WCO”) and case law is that GRI 1 is paramount.” *Telebrands Corp. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1277, 1280 (2012). When determining the correct classification for merchandise, a court first construes the language of the headings in question, in light of any related section or chapter notes. *See* GRI 1; *Faus Grp., Inc. v. United States*, 581 F.3d 1369, 1372 (Fed. Cir. 2009) (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998)).⁴ The “terms of the HTSUS are construed according to their common

³ It is undisputed that the MboxII FAC is not at issue in this case. *See* Pl. Reply Br. 10; Def. Br. 3 n.5.

⁴ This case also involves the interpretation of the HTSUS subheadings, which requires application of GRI 6, which prescribes the same methodology set forth in GRI 1 and provides that classification “shall be determined according to the terms of those subheadings and any related subheading notes,” including “the relative section, chapter and subchapter notes.” GRI 6.

commercial meanings.” *Millenium Lumber Distrib. Ltd. v. United States*, 558 F.3d 1326, 1329 (Fed. Cir. 2009). To ascertain the common commercial meaning of a tariff term, the court “may rely on its own understanding of the term as well as lexicographic and scientific authorities.” *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). The court may also refer to the Harmonized Description and Coding System’s Explanatory Notes (“Explanatory Notes”) “accompanying a tariff subheading, which - although not controlling - provide interpretive guidance.” *E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004) (citing *Len-Ron*, 334 F.3d at 1309).

This case involves the proper classification of Digidesign’s consoles as either units of automatic data processing machines or electrical machines having specific non-data processing functions not covered under any HTSUS provision. The competing tariff provisions are HTSUS Heading 8471 and HTSUS Heading 8543. HTSUS Heading 8471 provides in relevant part:

Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included:

...

8471.60 Input or output units, whether or not containing storage units in the same housing:

8471.60.10 Combined input/output units0%

...

8471.80 Other units of automatic data processing machines:

8471.80.90 Other0%

HTSUS Heading 8471. Therefore, HTSUS Heading 8471 covers machines that are automatic data processing machines and units thereof.

Alternatively, HTSUS Heading 8543 provides in relevant part:

Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof:

...

8543.70 Other machines and apparatus:

8543.70.96 Other2.6%

HTSUS Heading 8543. HTSUS Heading 8543 is a residual heading that covers machines whose specific functions are not covered by any

other heading of the HTSUS. Therefore, HTSUS Heading 8471 and HTSUS Heading 8543 are mutually exclusive. If merchandise is classified under HTSUS Heading 8471, then it cannot be classified under HTSUS Heading 8543.

The Chapter Notes to HTSUS Heading 8471 define the term “automatic data processing machines.” Chapter 84, Note 5(B) provides:

Automatic data processing machines may be in the form of systems consisting of a variable number of separate units. Subject to paragraph (E) below, a unit is to be regarded as being a part of a complete system if it meets all of the following conditions:

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

HTSUS Chapter 84, Note 5(B). Chapter 84, Note 5(B) references Chapter 84, Note 5(E), which states:

Machines performing a specific function other than data processing and incorporating or *working in conjunction* with an automatic data processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.

HTSUS Chapter 84, Note 5(E) (emphasis added).

Customs maintains that the subject merchandise cannot be classified as units of ADP machines, but must instead be classified under the residual heading based upon their non-data processing functions. Def. Br. 9. More specifically, Customs argues that Chapter 84, Note 5(E) precludes classification of the subject merchandise under HTSUS Heading 8471. *Id.*

First, Customs identifies the subject merchandise’s non-data processing functions. *See id.* at 14, 16. The Control 24’s non-data processing functions include preamps, line sub-mixing, and control room monitoring. *Id.* at 14. The 002 Factory’s non-data processing functions include preamps and control room monitoring. *Id.* at 16. Next, Customs contends that “working in conjunction” with an ADP machine “refers to a machine that performs or operates [non-data processing functions] while conjoined (joined together, connected) with an ADP machine.” *Id.* at 15. According to Customs, the “Control 24 is capable of and is in fact expressly designed for remaining connected

to an ADP machine while simultaneously performing both data processing functions and other specific, non-data processing/analog functions.” *Id.* Moreover, according to Customs, “specific non-data processing functions may be performed while [the] 002 Factory is connected to an ADP machine (computer) and while the user is running Pro Tools to digitally edit and mix music.” *Id.* at 16.

Digidesign takes the position that Chapter 84, Note 5(E) does not apply to the subject merchandise. Pl. Reply Br. 2. More specifically, Digidesign argues that “working in conjunction” should be interpreted as requiring the ADP machine (host computer) to be “running, assisting, or somehow interacting with the machine to help the machine perform the non-data function.” Pl. Br. 32–33. According to Digidesign, no such interaction exists between the host computer and either the Control 24 or the 002 Factory. *Id.* at 35–37. Digidesign further argues that the subject merchandise meets all the requirements of Chapter 84, Note 5(B), and, therefore, qualifies to be classified as units of ADP machines under HTSUS Heading 8471 by virtue of GRI 1. Pl. Br. 7.

The parties acknowledge that this case may ultimately turn on whether Chapter 84, Note 5(E) precludes classification of the subject merchandise under HTSUS Heading 8471. Pl. Reply Br. 2; Def. Br. 9. The court, therefore, will determine whether the Chapter Note does indeed resolve this case.

C. The Meaning And Scope Of Chapter 84, Note 5(E)

To effect preclusion, Chapter 84, Note 5(E) first requires that a machine perform “a specific function other than data processing.” This requirement is satisfied. The Control 24 performs three non-data processing functions. The machine functions as a microphone preamp, a line sub-mixer, and a control room monitor. The 002 Factory performs two non-data processing functions. The machine functions as a microphone preamp and a control room monitor.

Next, Chapter 84, Note 5(E) requires that the machine either incorporate an ADP machine or work in conjunction with an ADP machine. Neither the Control 24 nor the 002 Factory incorporate an ADP machine. Rather, this portion of the dispute turns on the meaning and application of the phrase “working in conjunction.”

The HTSUS does not specifically define the phrase “working in conjunction.” Digidesign, however, contends that the Federal Circuit “established certain important precedent []” in *BenQ America Corp. v. United States*, 646 F.3d 1371 (Fed. Cir. 2011). Pl. Br. 15.

BenQ concerned the classification of LCD monitors equipped with connectors for receiving data from a personal computer, digital cam-

era, VCR, DVD player and other devices. 646 F.3d at 1373. Before concluding that the Court of International Trade erred in not conducting a principal use analysis with respect to the LCD monitors, the Federal Circuit noted that application of Chapter 84, Note 5(E) “is limited to ‘[m]achines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine.’” *Id.* at 1373, 1379. Moreover, according to the Federal Circuit, “when ‘performing a specific function other than data processing,’ such as when the monitors are serving as video monitors for other devices such as DVD players and VCRs, the monitors are ‘working in conjunction’ with those other devices, not with an automatic data processing machine.” *Id.* at 1379 (footnote omitted). Digidesign reads into this observation a pronouncement regarding the meaning of “working in conjunction.” The court does not agree. The Federal Circuit did not define, much less elaborate on, the phrase. No analysis was given. *BenQ*, therefore, provides no aid to the court’s understanding of the phrase “working in conjunction.” *See, e.g., Thacker v. FCC (In re Magnacom Wireless, LLC)*, 503 F.3d 984, 993–94 (9th Cir. 2007) (“[S]tatements made in passing, without analysis, are not binding precedent.”) (citation omitted); *NFL v. Primetime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000) (“We accord the decision little weight largely because it contains no analysis of the Copyright Act.”).

Consequently, the court now turns to lexicographic sources to interpret the phrase “working in conjunction.” “Working” is derived from the verb “work.” Oxford English Dictionary (2014), available at <http://www.oed.com/view/Entry/230236?rskey=FfEiZa&result=1#eid> (last visited Dec. 2, 2014). “Work” means “to act, do, function, operate,” or, with respect to a machine “to function, run, operate, especially properly or effectively, or in a specified manner.” Oxford English Dictionary (2014), available at <http://www.oed.com/view/Entry/230217?rskey=zKFfI6&result=2#eid> (last visited Dec. 3, 2014). “Conjunction” is defined as “the action of conjoining; the fact or condition of being conjoined; union, connection, combination.” Oxford English Dictionary (2014), available at <http://www.oed.com/view/Entry/39279?redirectedFrom=conjunction#eid> (last visited Dec. 3, 2014). “Conjoin” means “to join together; to connect, unite.” Oxford English Dictionary (2014), available at <http://www.oed.com/view/Entry/39248?rskey=Lc9eNK&result=2&isAdvanced=false#eid> (last visited Dec. 3, 2014). “Conjoin” also means “to join together for a common purpose.” Merriam-Webster Online Dictionary (2014), available at <http://www.merriam-webster.com/dictionary/conjoin> (last visited Dec. 3, 2014).

Therefore, “working in conjunction” can be defined under the HTSUS as functioning or operating in a specified manner while joined together for a common purpose. From this definition the court determines that the Control 24 and the 002 Factory are machines that are precluded from classification under HTSUS Heading 8471 by operation of Chapter 84, Note 5(E). More specifically, the Control 24 and the 002 Factory not only perform a specific function other than data processing, but the machines do so while working in conjunction with ADP machines (host computers).

As marketed, the Control 24 provides preamp, line sub-mixing, and control room monitoring non-data processing functions while connected to a host computer loaded with Pro Tools® to digitally edit and mix music. Def. Facts Ex. N at 3 (“*Control 24 User Guide*”). In particular, the Control 24’s preamp function adjusts the signals coming into the Control 24 from microphones or other sources to appropriate levels before they are fed through the audio interface unit and into the host computer running Pro Tools®. Def. Br. Ex. B at 62 (“*Plaintiff’s Deposition Transcript Part 1*”). The Control 24’s line sub-mixer function blends channels of signals for eventual input into the host computer running Pro Tools®. *Control 24 User Guide* at 13, 20. Finally, digital signals from the host computer running Pro Tools® are converted to analog signals by the audio interface unit and are sent “back into the monitoring section of the Control 24 . . . where you then adjust the volume for your studio speakers” *Plaintiff’s Deposition Transcript Part 1* at 71.

The 002 Factory, although less sophisticated in its circuitry and hardware control features, “operates much like the Control 24 in terms of mixing and editing of music” while the machine is connected to a host computer running Pro Tools®. Pl. Br. 10. More specifically, no difference exists between the functionality of the preamps of the Control 24 and the 002 Factory. Def. Facts ¶ 29; Pl. Resp. Facts ¶ 29. Furthermore, the 002 Factory’s control room monitoring function also receives signals from the host computer running Pro Tools® and allows the user to adjust the volume for their studio speakers. See Def. Reply. Br. Ex. J (Digi 002 & Digi 002 Rack Getting Started Guide); *Control 24 User Guide* at 53.

The Control 24 and 002 Factory therefore “work in conjunction” with an ADP machine because the consoles perform the abovementioned functions while connected to a host computer loaded with Pro Tools® to achieve the common purpose of digitally editing and mixing music. As the two requirements of Chapter 84, Note 5(E) are satisfied,

the Control 24 and 002 Factory must be classified “in the headings appropriate to their respective functions or, failing that, in residual headings.”

No other HTSUS heading describes the specific non-data processing functions provided by either the Control 24 or 002 Factory. More specifically, the consoles’ preamp, line sub-mixer and control room monitoring functions are not described by any other HTSUS heading. The consoles, therefore, are classifiable in the residual provision, HTSUS Heading 8543. *See* HTSUS Chapter 84, Note 5(E); HTSUS Heading 8543. In particular, both machines are properly classified as “electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and apparatus: Other” under subheading 8543.70.96 of the HTSUS (and 8543.89.96 and 8543.89.97 of the HTSUS depending on the year of importation). *See* GRI 6.

IV. CONCLUSION

For the foregoing reasons, summary judgment is granted in favor of Defendant. Judgment will be entered accordingly.

Dated: January 22, 2015

New York, NY

/s/ Judith M. Barzilay

JUDITH M. BARZILAY, SENIOR JUDGE



Slip Op. 15–07

CHANGZHOU HAWD FLOORING Co., LTD., et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Donald C. Pogue, Senior Judge
Court No. 12–00020

[remand redetermination affirmed in part and remanded in part]

Dated: January 23, 2015

Gregory S. Menegaz and *J. Kevin Horgan*, deKieffer & Horgan, PLLC, of Washington, DC, for the Plaintiffs.

Kristin H. Mowry, *Jeffrey S. Grimson*, *Jill A. Cramer*, *Sarah M. Wyss*, and *Daniel R. Wilson*, Mowry & Grimson, PLLC, of Washington, DC, for Plaintiff-Intervenor Fine Furniture (Shanghai) Ltd.

H. Deen Kaplan, *Craig A. Lewis*, and *Mark S. McConnell*, Hogan Lovells US LLP, of Washington, DC, for Plaintiff-Intervenor Armstrong Wood Products (Kunshan) Co., Ltd.

Mark Ludwikowski, *Kristen Smith*, and *Lana Nigro*, Sandler, Travis & Rosenberg, PA, of Washington, DC for Plaintiff-Intervenors Lumber Liquidators Services, LLC, and Home Legend, LLC.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With him on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel was *Shana Hofstetter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Jeffrey S. Levin, Levin Trade Law, P.C., of Bethesda, MD, for the Defendant-Intervenor Coalition for American Hardwood Parity.

OPINION AND ORDER

Pogue, Senior Judge:

This action is again before the court following a second redetermination and a voluntary partial third redetermination. In the third redetermination, the Department of Commerce (“Commerce”) reaffirmed the second redetermination of the final results of the anti-dumping (“AD”) duty investigation of multilayered wood flooring from the People’s Republic of China (“PRC” or “China”).¹

Still at issue are the AD duty rates assigned to eight separate rate respondents – the Plaintiffs and Plaintiff-Intervenors here (collectively, “Plaintiffs”)² – for the underlying AD duty investigation. Specifically, Plaintiffs challenge Commerce’s decision to assign seven of them an unspecified, non-*de minimis* AD duty rate for the investigation, to provide for liquidation of their entries at the rates established for them in the first administrative review³ (as limited by the provisional measures deposit cap), and to initiate a full investigation of the remaining eighth Plaintiff, Changzhou Hawd Flooring Co. (“Changzhou Hawd”), as it has certified no shipment of subject merchandise

¹ *Multilayered Wood Flooring from the [PRC]*, 76 Fed. Reg. 64,318 (Dep’t Commerce Oct. 18, 2011) (final determination of sales at less than fair value) (“*Final Determination*”) and accompanying Issues & Decision Memorandum, A-570-970, POI Apr. 1, 2010 – Sept. 30, 2010 (Oct. 11, 2011) (“*Final Determination I & D Mem.*”). Commerce initiated this investigation in response to a petition by Defendant-Intervenor (the Coalition for American Hardwood Parity (“CAHP”)), alleging dumping of multilayered wood flooring from the PRC on the U.S. market. *Multilayered Wood Flooring from the [PRC]*, 75 Fed. Reg. 70,714 (Dep’t Commerce Nov. 18, 2010) (initiation of antidumping duty investigation).

² Plaintiffs are cooperative, non-individually investigated respondents in the underlying administrative investigation. They have all established their entitlement to a separate rate from the PRC-wide entity. See *Final Determination*, 76 Fed. Reg. at 64,321–22.

³ See *Multilayered Wood Flooring from the [PRC]*, 78 Fed. Reg. 70,267 (Dep’t Commerce Nov. 25, 2013) (preliminary results of antidumping duty administrative review; 2011–2012) (“*Preliminary Review*”); *Multilayered Wood Flooring from the [PRC]*, 79 Fed. Reg. 26,712 (Dep’t Commerce May 9, 2014) (final results of antidumping duty administrative review; 2011–2012) (“*Final Review*”); *Multilayered Wood Flooring from the [PRC]*, 79 Fed. Reg. 35,314 (Dep’t Commerce June 20, 2014) (amended final results of antidumping duty administrative review; 2011–2012) (“*Amended Final Review*”). The first administrative review is currently at issue before this Court. See *Fine Furniture (Shanghai) Ltd. v. United States*, Consol. Ct. No. 14–00135.

in the first administrative review and therefore otherwise lacks any relevant calculated rate. The court has jurisdiction pursuant to § 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c) (2012).⁴

As explained below, Commerce's determination regarding the group of seven Plaintiffs is based on a reasonable reading of the law and record evidence. However, the agency's decision to conduct, at this late date, a full investigation of Changzhou Hawd is arbitrary and capricious. Therefore, the court remands again for further consideration in accordance with this opinion.

BACKGROUND

Litigation of the separate rate⁵ has so far produced two court opinions,⁶ two corresponding redeterminations by Commerce,⁷ and, most recently, a voluntary remand and redetermination by Commerce.⁸

In each successive determination, Commerce has established the separate rate in a different way. In the *Final Determination*, having individually investigated three fully cooperative mandatory respondents,⁹ Commerce loosely followed 19 U.S.C. § 1673d(c)(5)(A) and

⁴ All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition.

⁵ Plaintiffs' action was previously consolidated with Court Numbers 11-00452, 12-00007, and 12-00013, under Consolidated Court Number 12-00007. Order, May 31, 2012, Consol. Ct. No. 12-00007, ECF No. 37. Court Number 11-00452 was ultimately severed and dismissed. Am. Order Nov. 27, 2012, Consol. Ct. No. 12-00007, ECF No. 75; Judgment, Ct. No. 11-00452, ECF No. 68; see *Baroque Timber Indus. (Zhongshan) Co., Ltd. v. United States*, __ CIT __, 853 F. Supp. 2d 1290 (2012); *Baroque Timber Indus. (Zhongshan) Co., Ltd. v. United States*, __ CIT __, 865 F. Supp. 2d 1300 (2012).

⁶ *Baroque Timber Indus. (Zhongshan) Co., Ltd. v. United States*, __ CIT __, 925 F. Supp. 2d 1332 (2013); *Baroque Timber Indus. (Zhongshan) Co., Ltd. v. United States*, __ CIT __, 971 F. Supp. 2d 1333 (2014).

⁷ Final Results of Redetermination Pursuant to Ct. Order, Consol. Ct. No. 12-00007, ECF No. 132 ("*First Redetermination*"), and Final Results of Redetermination Pursuant to Ct. Order, ECF No. 52 ("*Second Redetermination*"). Following the first remand determination, Court Numbers 12-00007 and 12-00013 were severed and final judgment entered. Order Granting Mot. to Sever, Consol. Ct. No. 12-00007, ECF No. 162; Judgment, Ct. No. 1200007, ECF No. 163; Judgment, Ct. No. 12-00013, ECF No. 32. These were appealed by Defendant-Intervenor CAHP. Notice of Appeal, Ct. No. 12-00007, ECF No. 166; Notice of Appeal, Ct. No. 12-00013, ECF No. 33. Defendant-Intervenor moved to voluntarily dismiss the appeal, without opposition. The motion was granted. *Zhejiang Layo Wood Indus. Co. v. United States*, 576 F. App'x 1000 (Fed. Cir. 2014).

⁸ Final Results of Redetermination Pursuant to Ct. Order, ECF No. 107 ("*Third Redetermination*").

⁹ Commerce requested quantity and value ("Q&V") data from 190 companies and received timely responses from 80. *Multilayered Wood Flooring from the [PRC]*, 76 Fed. Reg. 30,656, 30,657 (Dep't Commerce May 26, 2011) (preliminary determination of sales at less than fair value) ("*Preliminary Determination*"). From these, Commerce selected the three largest

took a simple average¹⁰ of the two non-*de minimis* mandatory respondent rates (resulting in a separate rate of 3.31 percent). *Final Determination*, 76 Fed. Reg. at 64,321–22. Plaintiffs challenged the determination. Compl., ECF No. 9 at ¶ 3. It was ultimately remanded on other grounds. *Baroque Timber*, ___ CIT ___, 925 F. Supp. 2d 1332.

In the *First Redetermination*, changes to the underlying surrogate values and calculation methodology resulted in all three mandatory respondents receiving AD duty rates of zero. *First Redetermination*, Consol. Ct. No. 12–00007, ECF No. 132, at 2, 52. Because of this, Commerce recalculated the separate rate under 19 U.S.C. § 1673d(c)(5)(B), and decided that “any reasonable method” included a simple average of the three zero mandatory rates and a rate based on adverse facts available (“AFA”).¹¹ This resulted in a higher separate rate of 6.41 percent. *First Redetermination*, Consol. Ct. No. 12–00007, ECF No. 132, at 27. The court found that this method, while not *per se* unreasonable, was unsupported by substantial evidence, because Commerce had failed to articulate a rational connection between Plaintiffs’ economic reality and the use of the AFA rate in the calculation of their rate. *Baroque Timber*, ___ CIT ___, 971 F. Supp. 2d at 1344–45. The court accordingly remanded to Commerce for a redetermination of the separate rate. *Id.* at 1346.

Between the second remand and the corresponding redetermination, Commerce issued the final determination in the first administrative review following the investigation at issue here. *Final Review*, 79 Fed. Reg. 26,712. Because of this, in the *Second Redetermination*, rather than recalculate the separate rate for all separate rate respondents, Commerce inferred that, because there were 110 non-cooperative respondents in the investigation, *see* Part IIA, *infra*, the exporters (by volume) to be mandatory respondents. *Id.* at 30,658; *see* 19 U.S.C. § 1677f-1(c)(2)(B). The remaining exporters and producers were invited to submit a separate-rate status application. Commerce received timely-filed responses from 74 companies, all of which demonstrated eligibility for separate rate status (including the Plaintiffs here). *Final Determination*, 76 Fed. Reg. at 64,321. The 110 companies that did not respond to Commerce’s Q&V questionnaire were treated as part of the PRC-wide entity. *Preliminary Determination*, 76 Fed. Reg. at 30,661–62 (unchanged in *Final Determination*, 76 Fed. Reg. at 64,322).

¹⁰ Commerce declined to use the weighted average indicated in 19 U.S.C. § 1673d(c)(5)(A) because doing so would have risked disclosure of mandatory respondents’ proprietary information. *Final Determination*, 76 Fed. Reg. at 64,322.

¹¹ If Commerce finds that “an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information,” then, in calculating that party’s AD duty rate, Commerce may “use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.” 19 U.S.C. § 1677e(b). When Commerce “relies on secondary information [as facts otherwise available] rather than on information obtained in the course of an investigation or review,” it must “to the extent practicable, corroborate that information from [reasonably available] independent sources.” *Id.* at 1677e(c).

appropriate separate rate for the investigation was more than *de minimis*. It then assigned seven of the Plaintiffs¹² the rate calculated for them in the first administrative review (as limited by the provisional measures deposit cap). *Second Redetermination*, ECF No. 52, at 6–8. The remaining eighth Plaintiff, Changzhou Hawd, having certified no shipments, did not have a calculated rate for the first review. Commerce concluded that it did not have enough data on the record to calculate a rate reflective of that company’s economic reality and initiated an individual investigation of this eighth respondent. *Id.* at 8–9.¹³

The *Second Redetermination* was challenged in extensive briefing before the court,¹⁴ and, at the court’s suggestion, *see* Telephone Conf., ECF No. 79, Commerce requested a partial voluntary remand “to determine whether it should conduct a limited investigation of the eight separate rate [P]laintiffs,” rather than a full investigation of just Changzhou Hawd. Mot. for Voluntary Remand, ECF No. 92 at 1 (quotation marks omitted). The court granted the voluntary remand. *Changzhou Hawd*, __ CIT at __, 6 F. Supp. 3d at 1362. It was ultimately a futile exercise. Commerce essentially decided that it was impossible to take an approach that was both measured and fact-based, and reaffirmed its results and reasoning in the *Second Redetermination*. *See Third Redetermination*, ECF No. 107, at 17.

¹² Fine Furniture (Shanghai), Ltd. (“Fine Furniture”); Dunhua City Jisen Wood Industry Co., Ltd; Dunhua City Dexin Wood Industry Co., Ltd; Dalian Huilong Wooden Products Co.; Kunshan Yingyi-Nature Wood Industry Co., Ltd.; Armstrong Wood Products (Kunshan) Co., Ltd. (“Armstrong”); and Karly Wood Product Ltd. *Second Redetermination*, ECF No. 52, at 1–2, 7–8.

¹³ Changzhou Hawd subsequently filed a petition for a writ of mandamus to compel Commerce to refrain from the individual investigation. Pl. Changzhou Hawd Flooring Co., Ltd. Pet. for Writ of Mandamus, ECF No. 71. Commerce agreed to suspend the deadlines for Changzhou Hawd’s individual investigation, Letter from Commerce to Ct., ECF No. 82, and the court accordingly denied the petition as moot. *Changzhou Hawd Flooring Co. v. United States*, __ CIT __, 6 F. Supp. 3d 1358, 1360 n.9 (2014).

¹⁴ *See* Comments of Certain Separate Rate Appellants to Second Remand Redetermination, ECF No. 69 (“*Pls. Comments*”); Comments of Def.-Intervenor Re Dep’t of Commerce Final Results of Redetermination Pursuant to Remand, ECF No. 73; Comments of Fine Furniture (Shanghai) Ltd. on Dep’t of Commerce May 30, 2014 Final Results of Redetermination Pursuant to Ct. Order, ECF No. 74 (“*Fine Furniture Comments*”); Comments in Opp’n to Dep’t of Commerce May 29, 2014 Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 75 (“*Armstrong Comments*”); Resp. of Lumber Liquidators Services, LLC in Opp’n to U.S. 2d Remand Redetermination, ECF No. 76 (“*Lumber Liquidators Comments*”); Reply to Comments of Def.-Intervenor Re Dep’t of Commerce Final Results of Redetermination Pursuant to Remand, ECF No. 89; Reply Comments of Lumber Liquidators Services, LLC in Opp’n to the U.S. 2d Remand Redetermination, ECF No. 90; Reply Comments of Fine Furniture (Shanghai) Ltd. on Dep’t of Commerce May 30, 2014 Final Results of Redetermination Pursuant to Ct. Order, ECF No. 91; Reply Comments of Def.-Intervenor Re Dep’t of Commerce Final Results of Redetermination Pursuant to Remand, ECF No. 93.

STANDARD OF REVIEW

The court will sustain Commerce's determinations 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). The court will set aside agency actions found to be arbitrary and capricious. *Changzhou Wujin Fine Chem. Factory Co., Ltd. v. United States*, 701 F.3d 1367, 1377 (Fed. Cir. 2012) (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 284 (1974)).

DISCUSSION

I. Commerce's Methodology

Commerce generally follows 19 U.S.C. § 1673d(c)(5) to establish the separate rate. *Second Redetermination*, ECF No. 52, at 3; *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1374 (2013). Thereunder, the general rule sets the separate rate as equal "to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins [based entirely on facts otherwise available]." 19 U.S.C. § 1673d(c)(5)(A). The exception to this rule, which applies only when all individually investigated rates are zero, *de minimis*, or based entirely on facts otherwise available, allows Commerce to use "any reasonable method to establish the estimated [separate rate] for exporters and producers not individually investigated." *Id.* at § 1673d(c)(5)(B). "Any reasonable method" is expected to mean the average of the rates calculated for individually investigated respondents. 19 U.S.C. § 1673d(c)(5)(B); Uruguay Round Agreements Act, Statement of Administrative Action ("SAA"), HR. Doc. No. 103-316 (1994) at 873, reprinted in 1994 U.S.C.C.A.N. 4040, 4201.¹⁵ However, "if [the expected] method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods." SAA at 873, reprinted in 1994 U.S.C.C.A.N. at 4201.

Here, all three individually investigated respondents had AD duty rates of zero. *Second Redetermination*, ECF No. 52, at 3. Commerce accordingly established the separate rate under the exception — using "any reasonable method" — rather than the rule. *Id.*; 19 U.S.C. § 1673d(c)(5)(B). Commerce elected not to use the expected method, or

¹⁵ The SAA is recognized by Congress as an authoritative expression concerning the interpretation and application of the Tariff Act of 1930. 19 U.S.C. § 3512(d).

even to calculate a specific separate rate for the investigation. Rather, the agency went no further than inferring that the separate rate, on the record evidence, must be more than *de minimis*. *Second Redetermination*, ECF No. 52, at 4–7. Plaintiffs argue that this is not in accordance with law, contending Commerce must calculate a *de minimis* separate rate for the investigation.¹⁶

The AD statute does not speak directly to the question at issue;¹⁷ it only requires “any reasonable method to establish” the separate rate. See 19 U.S.C. § 1673d(c)(5)(B). “Any reasonable method” is a “lenient standard,” *Bestpak*, 716 F.3d at 1378, and “establish” is a broader term than “calculate.” The court must “leave the discretion provided by the ambiguities of [the AD] statute with the implementing agency,” *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (Fed. Cir. 2014) (quoting *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009)), even where “the court might have preferred” a different interpretation, *Koyo Seiko*, 36 F.3d at 1570 (citation omitted). The broad language of the statute allows Commerce to tailor its method to the record evidence before it. See *Eurodif*, 555 U.S. at 317–18 (“[In reading regulatory statutes] form should be disregarded for substance and the emphasis should be on economic reality.” (quotation marks and citation omitted)).

Here, Commerce’s decision to infer a more than *de minimis* but otherwise unspecified separate rate for the investigation, using instead the cash deposit rates from the first administrative review, as limited by the provisional measures deposit cap, is within a reasonable construction of the statute.¹⁸ That “any reasonable method” is available to Commerce, not just the expected method, indicates the

¹⁶ *Pls. Comments*, ECF No. 69, at 4–7, 10–13; *Armstrong Comments*, ECF No. 75, at 4–8; *Lumber Liquidators Comments*, ECF No. 76, at 3.

¹⁷ Commerce’s methodology must be in accordance with law. See 19 U.S.C. § 1516a(b)(1)(B)(i). If the statute speaks clearly “to the precise question at issue,” then it defines agency action; “[i]f the statute does not clearly answer the relevant question, then the court must . . . decide whether the agency’s interpretation amounts to a reasonable construction of the statute.” *Bestpak*, 716 F.3d at 1377 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). Commerce’s interpretation “need not be the only reasonable interpretation” nor the “most reasonable.” *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (original emphasis omitted) (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978)).

¹⁸ Contrary to Plaintiffs’ arguments, see *Lumber Liquidators Comments*, ECF No. 76, at 1–2, this result is not barred by *Baroque Timber*, __ CIT __, 971 F. Supp. 2d 1333. While a redetermination must “comply with the court’s remand order,” *Amanda Foods (Vietnam) Ltd. v. United States*, __ CIT __, 837 F. Supp. 2d 1338, 1343 (2012) (quotation marks and citation omitted), the court only remanded “for further consideration.” *Baroque Timber*, __ CIT __, 971 F. Supp. 2d at 1346. It did not establish parameters or requirements other than that Commerce be reasonable.

statute contemplates the possibility of a more than *de minimis* separate rate even where, as here, all individually investigated rates are zero. *See* 19 U.S.C. § 1673d(c)(5)(B). Further, while in most circumstances Commerce would need a specific separate rate for the investigation, so that an AD duty can be assessed (or not) with publication of an AD duty order, *see* 19 U.S.C. § 1673e, that is not the case here. Because Commerce has already calculated rates for some Plaintiffs from the first administrative review (based on their actual sales experience, not the assortment other companies' *de minimis* and AFA rates otherwise available in this investigation), and these rates will apply to the period at issue regardless, *see* 19 U.S.C. § 1675(a)(2)(C)), Commerce has established rates "reasonably reflective of potential dumping margins" for the separate rate respondents. *See* SAA at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201. Accordingly, Commerce's method is not *per se* unreasonable.

II. Commerce's Methodology in the Context of the Record

A. Commerce's Inference that the Separate Rate is More Than De Minimis

In the investigation, 110 companies did not respond to Commerce's Q&V questionnaire. *Second Redetermination*, ECF No. 52, at 4. Commerce assumes that, when a company so completely fails to participate, it has made "a knowing and rational decision" not to respond "based on which choice will result in the lower rate." *Id.* at 5 (citations omitted). Commerce is permitted to make this assumption, *see Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990)),¹⁹ and Plaintiffs have not offered evidence sufficient to suggest that Commerce is wrong in doing so here.²⁰

This rational actor assumption is the core of the well-worn presumption that allows Commerce to use AFA against non-cooperating respondents, *see* 19 U.S.C. § 1677e(b), thereby shifting the burden of

¹⁹ *See Tianjin Mach. Imp. & Exp. Corp. v. United States*, ___ CIT ___, 752 F. Supp. 2d 1336, 1347 (2011) ("In other words, [*Rhone Poulenc*] stands for the proposition that a respondent can be assumed to make a rational decision to either respond or not respond to Commerce's questionnaires, based on which choice will result in the lower rate.")

²⁰ Instead, Plaintiffs only provide alternative speculation. *See, e.g., Pls. Comments*, ECF No. 69 at 13–15; *Fine Furniture Comments*, ECF No. 74, at 6.

production²¹ and incentivizing future cooperation.²² Similar but distinct, this same rational actor assumption allows Commerce to infer²³ from companies' non-cooperation that "[their] dumping margins during the period of investigation were not zero or *de minimis*, and that, if [Commerce] had received complete information, [it] may have chosen one of these companies as a mandatory respondent." *Second Redetermination*, ECF No. 52, at 4 (footnote omitted). That is, the 110 non-cooperating respondents would have participated if their rates were zero or *de minimis*, and the gap in the evidentiary record their non-cooperation creates reflects on the separate rate respondents only insofar as it conceals data that would have applied in the calculation of the separate rate. Where, as here, all individually investigated respondents have received a zero rate (or *de minimis* rate, or AFA rate), this gap is effectively dispositive: "if the 110 companies had chosen to cooperate," and one had been selected as a mandatory

²¹ A presumption is "a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of presumed fact, until presumption is rebutted." *Wilner v. United States*, 24 F.3d 1397, 1411 (Fed. Cir. 1994) (quoting *Black's Law Dictionary* 1185 (6th ed. 1990)). It serves "to allocate the burden of production," *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 492 n.2 (Fed. Cir. 1997), ideally compelling the party against whom the presumption operates to produce the necessary evidence, *A.C. Aukerman Co. v. R.L. Chaides Constr.Co.*, 960 F.2d 1020, 1037 (Fed. Cir. 1992). "Because Commerce lacks subpoena power, Commerce's ability to apply [the AFA presumption] is an important one." *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012) (citation omitted).

²² See *KYD, Inc. v. United States*, 607 F.3d 760, 767 (Fed. Cir. 2010) ("[A]n antidumping rate based on AFA is designed to provide respondents with an incentive to cooperate [. . .]" (internal quotation marks and citation omitted)); SAA at 870, reprinted in 1994 U.S.C.A.N. at 4199 (explaining that the purpose of the AFA presumption is to encourage future cooperation by "ensur[ing] that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully"). Cf. *Mueller Comercial de Mexico, S. de R.L. de C.V. v. United States*, 753 F.3d 1227, 1234–35 (Fed. Cir. 2014) (holding that Commerce "must carry out a case-specific analysis of the applicability of deterrence and similar policies," such that the AFA rationale may only be used against a cooperating party where it has the power to "potentially induce" non-cooperating parties to provide requested evidence) (citation omitted); *Fine Furniture*, 748 F.3d at 1372–73 ("[A]n adverse inference imposed due to [one party's] failure to cooperate that collaterally impacts [another party is] proper" because it "has the potential to encourage cooperation from [the first party], or it would at least encourage importers not to deal with [that party] and other non-cooperating exporters." (citing *KYD*, 607 F.3d at 768)).

²³ See *A.C. Aukerman Co.*, 960 F.2d at 1037 ("A factual conclusion reached by inference is based on a process of reasoning and experience. A presumption, however, is a method of dealing with proof, normally to give it a greater effect than it would have if it were handled solely by the inferential process.") (alteration, quotation marks and citation omitted); *Changzhou Wujin Fine Chem. Factory Co. v. United States*, __ CIT __, 942 F. Supp. 2d 1333, 1340 (2013) ("[F]ailing to cooperate in an antidumping investigation gives Commerce the discretion to draw certain inferences about the uncooperative respondent's pricing practices. [. . .] This, though, is separate and distinct from an adverse inference in which Commerce selects a rate sufficiently adverse to deter noncompliance." (citations omitted)).

respondent, “the examined company’s rate would have been above *de minimis*” but below AFA, and, pursuant to 19 U.S.C. § 1673d(c)(5)(A), “would have been assigned to the separate rate plaintiffs as [the] separate rate in the *Final Determination*.” See *Second Redetermination*, ECF No. 52, at 6.

Commerce corroborates its inference of a more than *de minimis* separate rate for the investigation with citation to the results of the first administrative review. *Second Redetermination*, ECF No. 52, at 7, 30. There, Commerce individually investigated three respondents, including Plaintiffs Fine Furniture and Armstrong, and ultimately found a more than *de minimis* rate for Fine Furniture and a zero rate for Armstrong.²⁴ Commerce views this as confirmation that dumping occurred during the period of investigation: if dumping occurred during the review, under the discipline of an AD order, it is likely to have also occurred here, without the discipline of an AD order to disincentivize such pricing behavior.²⁵ While it is true that “each administrative review is a separate segment of proceedings with its own unique facts,” *Peer Bearing Co.-Changshan v. United States*, 32 CIT 1307, 1310, 587 F. Supp. 2d 1319, 1325 (2008) (quotation marks and citation omitted), and that Commerce cannot consider AD duty rates from other reviews when those rates bear “no rational relationship to any pricing behavior during the [period of review] or to the likely pricing behavior of the recipients of the margin,” *Albemarle Corp. v. United States*, __ CIT __, 931 F. Supp. 2d 1280, 1292 (2013),²⁶ this does not undermine Commerce’s determination here. Commerce references the first review results as corroboration, not for calculation. The first

²⁴ In the preliminary results, Commerce found dumping margins of 0.00, 0.67, 8.85, and 8.87 percent for individually investigated respondents Nanjing Minglin Wooden Industry Co. Ltd. (“Minglin”), Fine Furniture, Zhejiang Layo Wood Industry Co., Ltd. (“Layo Wood”), and Armstrong, respectively. *Preliminary Review*, 78 Fed. Reg. at 70,268. In the *Final Review*, Commerce found dumping margins of 0.00, 5.74, and 0.00 for Minglin, Fine Furniture, and Armstrong, respectively (Layo Wood was excluded because of its zero rate in the investigation on remand). 79 Fed. Reg. at 26,714. Fine Furniture’s rate became the separate rate (as the only individually investigated non-*de minimis*, non-AFA rate). Id. The final results were subsequently amended, to correct a ministerial error, changing Fine Furniture’s rate to 5.92 percent (with the separate rate revised accordingly). *Amended Final Review*, 79 Fed. Reg. at 35,315–16.

²⁵ *Second Redetermination*, ECF No. 52, at 30. This distinguishes the instant case from *Amanda Foods (Vietnam) Ltd. v. United States*, where the court held that it was unreasonable to use in the first review, where there was an AD discipline, rates from the investigation, where there was no AD discipline, because there was evidence on the record that plaintiffs had “changed their pricing behavior so as to comply with the [AD] order.” 33 CIT 1407, 1418–21, 647 F. Supp. 2d 1368, 1380–82 (2009).

²⁶ Cf. *Pls. Comments*, ECF No. 69, at 31–32; *Fine Furniture Comments*, ECF No. 74, at 13–15; *Armstrong Comments*, ECF No. 75, at 15–16; *Lumber Liquidators Comments*, ECF No. 76 at 9; see also *Final Review*, 79 Fed. Reg. at 26,712, 26,714–15; 19 U.S.C. § 1673d(c)(5)(A).

review serves to confirm that the separate rate respondents' economic reality is more varied and complicated than the mandatory respondent *de minimis* rates here suggest. It confirms that the separate rate respondents merit the closer consideration that keeping them subject to the order affords, some receiving *de minimis* rates and others not. The individually investigated rates for two Plaintiffs, one of which, as the only non-*de minimis* rate, defines the separate rate for five other of the Plaintiffs, bear a rational relationship to the pricing behavior of the recipients of the margin. As the rates at which the entries at issue will be liquidated (as limited by the provisional measures deposit cap), they are also reasonably related to the time period at issue.

Because "the question here is whether the evidence and reasonable inferences from the record support [Commerce's] finding," *Matsushita Electric Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984), "not whether some other inference could reasonably have been drawn," *Daewoo Elecs. Co. v. Int'l Union of Elec., Elec., Technical, Salaried & Mach. Workers, AFL-CIO*, 6 F.3d 1511, 1520 (Fed. Cir. 1993), Commerce's determination holds. Commerce's conclusion that — based on the silence of 110 respondents, the resultant gap in the record, and the mixed results of the first administrative review — the separate rate (and thus Plaintiffs' rate) in this investigation is somewhat more than *de minimis* and less than AFA, while not the only possible inference, is a reasonable inference from the record, and therefore supported by substantial evidence. See *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

B. Commerce's Refusal to Calculate a Specific Separate Rate

Having reasonably inferred that the separate rate for the period of investigation is more than *de minimis*, Commerce declined to calculate a specific (higher than *de minimis*) rate for seven of the eight Plaintiffs. *Second Redetermination*, ECF No. 52, at 7. The agency concluded that "[w]hile it is normally necessary to assign a specific rate to separate rate respondents . . . in this instance, it would be an unnecessary use of administrative and judicial resources" because specific rates would be without consequence and without use. *Id.* at 7–8.

Commerce is correct that further precision would be without consequence. In an AD investigation, Commerce calculates dumping margins for respondents and imposes an AD order based on those margins. *Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013) (citing 19 U.S.C. §§ 1673a, 1673b(b), 1673b(d), 1673d(a), 1673d(c)). Respondents with *de minimis* or zero margins are excluded from the order (and therefore subsequent administrative reviews).

See 19 U.S.C. §§ 1673b(b)(3), 1673d(a)(4). This exclusion is not premised on a specific rate, but rather whether the rate is *de minimis* or not. Having reasonably inferred that the separate rate is more than *de minimis*, Commerce has made the determination necessary to impose the AD order on Plaintiffs.

Commerce is also correct that a specific rate for the seven Plaintiffs would be without use. This is because “the rate[s] determined in the first administrative review supersede[] the cash deposit rate established in the final determination of the investigation.” *Second Redetermination*, ECF No. 52, at 7 (citing 19 U.S.C. § 1675(a)(2)(C)). Plaintiffs’ entries would have been and will be liquidated at the rates established in the first administrative review (as limited by the provisional measures deposit cap)²⁷ regardless of whatever non-*de minimis* rate might be assigned to them in the investigation.

Further, contrary to Plaintiffs’ arguments,²⁸ any rate calculated pursuant to this litigation would not affect the provisional measures deposit cap. The provisional measures deposit cap ensures that, for the interstitial period of the investigation — after the preliminary determination but prior to the issuance of an AD order — importers are not liable for more than the rate set for them at the time of entry. 19 U.S.C. § 1673f(a); 19 C.F.R. § 351.212(d) (2014). If the AD duty rate set in the first administrative review (or subsequent litigation) is less, the difference between it and the cash deposit, bond, or other security provided at entry, is refunded. If the AD duty rate is ultimately more, then the difference is not owed. *Thai Pineapple Canning Indus. Corp. v. United States*, 273 F.3d 1077, 1086 (Fed. Cir. 2001). Because the cap “limits the rate based on the deposited amount, not an amount that a final determination indicates should have been deposited,” *Universal Polybag Co. v. United States*, 32 CIT 904, 925, 577 F. Supp. 2d 1284, 1303 (2008), this action and its results do not affect the cap. Rather, the cap is set by the amount collected, “[not] the amount that should have been collected.” *Id.*, 32 CIT at 925, 577 F. Supp. 2d at 1303–04; accord *Yantai Oriental Juice Co. v. United States*, 26 CIT 605, 623 (2002) (not reported in the Federal Supplement) (“[The cap] merely directs how the deposit rate should be used, not how it should be calculated.”).

²⁷ Plaintiffs suggest that this frustrates the *Bestpak* requirement that their rate be based on their economic reality, see *Armstrong Comments*, ECF No. 75, at 14–15, that their rate bear “some relationship to their actual dumping margins.” *Bestpak*, 716 F.3d at 1380. However, as the more than *de minimis* rate is corroborated by Plaintiffs’ subsequent individually investigated or calculated rates, and those rates will ultimately apply to the entries at issue, see *Final Review*, 79 Fed. Reg. at 26,714–15; 19 U.S.C. §§ 1675(a)(2)(C), 1673d(c)(5)(A), *Bestpak* is satisfied.

²⁸ See *Pls. Comments*, ECF No. 69, at 6–7.

Accordingly, as a specific rate for the seven Plaintiffs would be without use and without effect, in the interest of administrative and judicial economy,²⁹ it was reasonable for Commerce to decline to calculate a more specific rate for this investigation.

C. *Commerce's Decision to Individually Investigate Changzhou Hawd*

Having inferred that the separate rate for the investigation is more than *de minimis*, but declining to calculate a specific separate rate in favor of rates from the first administrative review, Commerce determined it was necessary to conduct an individual investigation of the one Plaintiff that did not receive a rate in the first administrative review, Changzhou Hawd. Changzhou Hawd has certified no shipments of subject merchandise for the period of the first administrative review, and therefore has no calculated rate for that period. *Final Review*, 79 Fed. Reg. at 26,713. Commerce believes that “with the very limited information currently on the record, [it] is unable to calculate a dumping rate based on Changzhou Hawd’s own economic reality” without a full individual investigation. *Second Redetermination*, ECF No. 52, at 8–9; *see also Third Redetermination*, ECF No. 107, at 17 (concluding that anything short of a full investigation would not be practically or legally feasible). Plaintiffs challenge this determination as arbitrary and capricious.³⁰

While the decision to reopen the record is generally within the agency’s discretion, *see Essar Steel*, 678 F.3d at 1277–78, that discretion cannot be exercised in a manner that is arbitrary and capricious. *See Changzhou Wujin Fine Chem.*, 701 F.3d at 1377 (citing *Bowman Transp.*, 419 U.S. at 284). Arbitrary and capricious is a “narrow” standard of review, but still “searching and careful.” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Commerce must “articulate a rational connection between the facts found and the choice made.” *Bowman*, 419 U.S. at 285 (quotation marks and citation omitted). The agency’s decision cannot have “relied on factors [that] Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it], or [be] so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

²⁹ See USCIT R. 1; *Union Camp Corp. v. United States*, 23 CIT 264, 280, 53 F. Supp. 2d 1310, 1325 (1999).

³⁰ See *Pls. Comments*, ECF No. 69, at 33–36; *Lumber Liquidators Comments*, ECF No. 76, at 5–7.

Here, Commerce has decided to conduct an individual investigation of a single separate rate respondent in the third iteration of a much-contested AD determination. *Second Redetermination*, ECF No. 52, at 8–9, 36–37. This, despite Commerce’s emphatic claims of limited administrative resources. *Final Determination I & D Mem.*, cmt. 43 at 110 (“[T]he Department lack[s] the resources required to examine more than three respondents in this investigation.”); *Second Redetermination*, ECF No. 52, at 7–8 (declining to calculate a specific separate rate because of “limited administrative resources”). Moreover, Commerce has repeatedly declined to conduct an individual investigation of another Plaintiff in this investigation, would-be voluntary respondent Fine Furniture, citing lack of resources.³¹ *Final Determination I & D Mem.*, cmt. 43 at 110–112; *First Redetermination*, Consol. Ct. No. 12–00007, ECF No. 132, at 49; *Second Redetermination*, ECF No. 52, at 3740; *Third Redetermination*, ECF No. 107, at 10–11.

Commerce cannot have it both ways. It is well-established that “[a]n agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently.” *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (alteration, quotation marks and citation omitted). An agency “must cogently explain why it has exercised its discretion in a given manner.” *State Farm*, 463 U.S. at 48 (citations omitted). Internal inconsistency and self-contradiction do not satisfy this requirement.

Commerce asserts that because the current record has only “very limited information” on Changzhou Hawd (specifically, only “aggregate [Q&V] data and Changzhou Hawd’s separate rate application”), Commerce “is unable to calculate a dumping rate based on Changzhou Hawd’s own economic reality” without a full investigation. *Second Redetermination*, ECF No. 52, at 9. While Commerce is correct that a separate rate respondent’s AD duty rate must be reasonably related to its economic reality, *Bestpak*, 716 F.3d at 1380, that cannot reasonably be said to necessitate a full individual investigation in every instance. If Commerce can, indeed must, tie an AFA rate to the recipient’s actual dumping margin,³² where, by definition, Commerce cannot conduct a meaningful, let alone full, investigation to establish

³¹ Commerce received multiple voluntary respondent requests in this investigation, all of which it denied. *Preliminary Determination*, 76 Fed. Reg. at 30,658 (noting voluntary respondent requests from Fine Furniture, Armstrong, Shanghai Lizhong Wood Products Co., Ltd., and Dun Hua City Jisen Wood Co., Ltd.); *Final Determination I & D Mem.*, cmt. 43 at 110 (declining to individually investigate more than the three mandatory respondents).

³² *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1325 (Fed. Cir. 2010).

a rate,³³ it cannot be impossible to do the same for a fully cooperative separate rate respondent with the record evidence present here and Commerce's continued ability to reasonably reopen the record.³⁴ *Cf. Amanda Foods (Vietnam) Ltd. v. United States*, __ CIT __, 774 F. Supp. 2d 1286 (2011).

Commerce also believes that it is statutorily impossible for it to do anything less than a full investigation. *Third Redetermination*, ECF No. 107, at 8–9, 17. But this does not comport with the plain language of the applicable statute. Commerce is only obliged to use “any reasonable method” to calculate a separate rate. 19 U.S.C. § 1673d(c)(5)(B). Commerce's internally inconsistent rationalization is “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *State Farm*, 463 U.S. at 43.

Commerce now has both an investigation and first administrative review, each with three fully cooperative individually investigated respondents. *Second Redetermination*, ECF No. 52, at 3–4; *Final Review*, 79 Fed. Reg. at 26,713. It has denied multiple voluntary respondent applications, *Preliminary Determination*, 76 Fed. Reg. at 30,658; *Final Determination I & D Mem.*, cmt. 43 at 110, but still has an evidentiary record much more robust than would be available in a typical investigation. In this context, while Commerce retains the discretion to reasonably reopen the record, its decision to conduct a full individual investigation of Changzhou Hawd at such a late date is arbitrary and capricious.

CONCLUSION

While it is reasonable on this record for Commerce to infer that the separate rate is more than *de minimis*, and to decline to calculate a specific rate in favor of those already calculated for the first administrative review, it is arbitrary and capricious for Commerce to now launch an individual investigation of Changzhou Hawd.

Accordingly, this matter is affirmed in part and remanded in part to Commerce for further consideration in accordance with this opinion. Commerce shall have until March 24, 2015 to complete and file its

³³ See 19 U.S.C. § 1677e(b) (allowing application of AFA only when an interested party has “failed to cooperate by not acting to the best of its ability to comply with a request for information”).

³⁴ See *Bestpak*, 716 F.3d at 1380 (“Even with determinations of an AFA-rate, Commerce may not select unreasonably high rates having no relationship to the respondent's actual dumping margin. Likewise, rate determinations for nonmandatory, cooperating separate rate respondents must also bear some relationship to their actual dumping margins.”) (citing *Gallant Ocean*, 602 F.3d at 1323).

remand redetermination. Plaintiffs shall have until April 7, 2015 to file comments. Defendant and Defendant–Intervenor shall have until April 17, 2015 to file any reply.

IT IS SO ORDERED.

Dated: January 23, 2015
New York, NY

/s/Donald C. Pogue
DONALD C. POGUE, SENIOR JUDGE

Slip Op. 15–08

JBLU, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Nicholas Tsoucalas, Senior Judge
Court No. 12–00042

[Plaintiff’s motion for partial summary judgment is denied. Defendant’s cross-motion for summary judgment is granted.]

Dated: January 28, 2015

Elon A. Pollack and Mandy A. Edwards, Stein Shostak Shostak Pollack & O’Hara, LLP, of Los Angeles, CA, for Plaintiff.

Alexander Vanderweide, Trial Attorney, Civil Division, U.S. Department of Justice, of New York, for defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Michael W. Heydrich*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Tsoucalas, Senior Judge:

This case is before the court on cross-motions for summary judgment. *See* Pl.’s Mot. for Partial Summ. J., ECF No. 21 (“Pl.’s Br.”); Def.’s Cross-Mot. for Summ. J., ECF No. 24 (“Def.’s Br.”). Plaintiff JBLU, Inc., (“JBLU” or “Plaintiff”) challenges the decision of Defendant U.S. Customs and Border Protection (“Customs” or “Defendant”) to issue Notices to Mark and/or Redeliver for the goods in subject entries. *See* Summons (Feb. 7, 2012), ECF No. 1. Plaintiff claims that the presence of its trademarks trigger the marking requirements of 19 C.F.R. § 134.47. *Id.* Therefore, Plaintiff insists that the subject merchandise is properly marked with the country of origin and is not required to be re-labeled. *Id.*

BACKGROUND

The following facts are not in dispute. Plaintiff, JBLU, Inc., is a California corporation registered in the County of Los Angeles doing

business as C'est Toi Jeans USA. Compl. at ¶¶ 1,4,5, September 21, 2012, ECF No. 5. The subject merchandise consists of seventeen shipments of jeans, exported from China between September 11 and October 20, 2010, and entered in the port of Los Angeles. Compl. at ¶¶ 6,8; Answer ¶¶ 6, 8, Feb. 25, 2013, ECF No. 10. The instant action concerns eleven of the seventeen shipments. Compl. at ¶ 7; Answer at ¶ 7. Subsequent to inspecting samples of the jeans, Customs issued Notices to Mark and/or Redeliver to JBLU, pursuant to 19 C.F.R. § 134.46, stating that the jeans were not legally marked with the country of origin. Compl. at ¶ 10,11; Answer at ¶ 10,11.

The jeans display one of the following markings which are embroidered on the inside of the waistband: "C'est Toi Jeans Los Angeles," "CT Jeans USA," and "C'est Toi Jeans USA." Pl.'s Br., Photographs of Representative Jean Samples, Ex. 2 at 37–49, July 3, 2014, ECF No. 21. The trademark applications were filed on October 8, 2010. Pl.'s Br., Trademark Applications for C'est Toi Jeans USA and CT Jeans USA filed with the U.S. Patent and Trademark Office ("USPTO") and Trademark Registration Certificates for C'est Toi Jeans USA and CT Jeans USA, Ex. 4 at 59. The trademark applications claimed that the two marks had been used in commerce since at least July 1, 2005. *Id.* at 60. The trademarks were registered with the USPTO on May 31, 2011 and June 14, 2011. *Id.* at 66, 74.

JBLU filed protests on November 5, 2010 and November 22, 2010 contesting the Notices to Mark and/or Redeliver the jeans. *See* HQ H137556. In its protest, JBLU insisted that the less stringent country of origin marking requirements of 19 C.F.R. § 134.47 should apply instead of 19 C.F.R. § 134.46, and therefore the subject jeans were legally marked. *Id.*

Customs denied Plaintiff's protests in part. HQ 137556 (June 13, 2011). Customs held that the jeans displaying the markings "C'est Toi Jeans USA" and "CT Jeans USA" were entered before Plaintiff submitted its trademark applications to USPTO and therefore were not properly marked with the country of origin. *Id.* Additionally, Customs determined that the jeans displaying the marks entered on or after JBLU's applications were filed with the USPTO were legally marked. *Id.* Customs further determined that it has not previously accepted evidence of use in commerce as conclusive evidence of a trademark. *Id.*

JURISDICTION and STANDARD OF REVIEW

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(a) (2012). Summary judgment is appropriate where, "the plead-

ings, depositions . . . 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 judgment as a matter of law.” *Anderson v. Liberty, Inc.*, 477 U.S. 242, 247 (1986); *See also Torrington Co. v. United States*, 19 CIT 1189, 1191, 903 F.Supp. 79, 81 (1995).

More specifically, when reviewing an agency’s interpretation of its regulations, the court must give substantial deference to the agency’s interpretation, *Michaels Stores, Inc. v. United States*, 766 F.3d 1388, 1391 (Fed. Cir. 2014) (citing *Torrington Co. v. United States*, 156 F.3d 1361, 1363–64 (Fed. Cir. 1998)), according it “controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, (1994) (citations omitted); *accord Viraj Group v. United States*, 476 F.3d 1349, 1355 (Fed. Cir. 2007). In this context, “[d]eference to an agency’s interpretation of its own regulations is broader than deference to the agency’s construction of a statute, because in the latter case the agency is addressing Congress’s intentions, while in the former it is addressing its own.” *Viraj*, 476 F.3d at 1355 (quoting *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 837 (Fed. Cir. 2006)).

DISCUSSION

Before the court are the following questions: (1) whether the marking requirements of 19 C.F.R. § 134.46 or 19 C.F.R. § 134.47 apply to the subject merchandise; (2) whether any genuine issues of material fact remain with regards to Plaintiff’s compliance with the controlling regulation.

I. Controlling Marking Regulation

Merchandise imported into the United States shall be marked in a conspicuous space as legibly, indelibly, and permanently as the nature of the article will permit, to indicate to an ultimate purchaser in the United States the English name of the country of origin. *See* 19 U.S.C. § 1304(a) (2012). The Customs regulations implementing the requirement and exceptions of 19 U.S.C. § 1304 are set forth in 19 C.F.R. § 134. Specifically, 19 C.F.R. § 134.46 provides for marking requirements when the name of a country other than country of origin appears on merchandise:

In any case in which the words “United States,” or “American,” the letters “U.S.A.,” any variation of such words or letters, or the name of any city or location in the United States, or the name of any foreign country or locality other than the country or locality in which the article was manufactured or produced appear on an imported article or its container, and those words, letters or

names may mislead or deceive the ultimate purchaser as to the actual country of origin of the article, there shall appear legibly and permanently in close proximity to such words, letters or name, and in at least a comparable size, the name of the country of origin preceded by “Made in,” “Product of,” or other words of similar meaning.

19 C.F.R. § 134.46. Additionally, 19 C.F.R. § 134.47 provides as follows:

When as part of a trademark or trade name or as part of a souvenir marking, the name of a location in the United States or “United States” or “America” appear, the article shall be legibly, conspicuously, and permanently marked to indicate the name of the country of origin of the article preceded by “Made in,” “Product of,” or other similar words, in close proximity or in some other conspicuous location.

19 C.F.R. § 134.47.

Plaintiff argues that because 19 C.F.R. § 134.47 and the pertinent Customs laws and regulations are silent, “it is logical that the definition of trademark is provided by either federal statute or the common law.” Pl.’s Br. at 9, 11. Specifically, Plaintiff argues that the definition of “trademark” is supplied by the Lanham Act for the purposes of 19 C.F.R. § 134.47. *Id.* at 2; *See* 15 U.S.C. § 1127 (2012). The Lanham Act defines trademark as:

[A]ny word, name, symbol, or device, or any combination thereof-

- (1) used by a person, or
- (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.

15 U.S.C. § 1127. Plaintiff insists that the Lanham Act’s definition provides for trademarks that are actually used in Commerce, intended to be used, or marks that are pending registration with the USPTO. Pl.’s Br. at 10. Furthermore, Plaintiff notes that the Lanham Act’s definition of trademark is “essentially the same as the common law definition,” and are both intended to protect unregistered trademarks. *Id.* at 10–11. Accordingly, Plaintiff contends that the Lanham

Act should define trademark as it pertains to 19 C.F.R. § 134.47. *Id.* at 11.

The court disagrees. In the instant case, Plaintiff concedes that 19 C.F.R. § 134.47 is silent as to the definition of the term “trademark.” *See* Pl.’s Br. at 12. As such, the court must give Customs’ interpretation of 19 C.F.R. § 134.47 substantial deference, unless it is “plainly erroneous or inconsistent with the regulation.” *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, (1994) (citations omitted); *accord Viraj Group v. United States*, 476 F.3d 1349, 1355 (Fed. Cir. 2007).

Customs interprets the term trademark in the regulation as including either registered trademarks or marks subject to a pending application. *See* HQ H137556 (June 13, 2011). In its ruling, Customs stated that it: “has long accepted an application filed with the [USPTO] as sufficient evidence of a trademark for purposes of 19 C.F.R. § 134.47 because the regulation does not specify what evidence is necessary to establish a trademark.” HQ H137556 (June 13, 2011). Plaintiff makes no effort to view Customs’ interpretation of the term at issue through the prism of the controlling standard of review discussed above, instead Plaintiff turns to the Lanham Act offering it as a “logical” interpretation of the term trademark within the regulation. *See* Pl.’s Br. at 9. Although Plaintiff offers one possible interpretation of the term trademark, Plaintiff was charged with the task of demonstrating that Customs’ interpretation was “plainly erroneous or inconsistent with the regulation.” *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, (1994) (citations omitted); *accord Viraj Group v. United States*, 476 F.3d 1349, 1355 (Fed. Cir. 2007).

Moreover, Plaintiff insists that Customs’ interpretation of the term “trademark” is inconsistent with prior Customs rulings. The court disagrees. Plaintiff appears to have misinterpreted the rulings on which it relies to support its contention. Specifically, Plaintiff contends that both HQ 731707 and HQ 733617 support its claim that a pending trademark application or registration is not necessary for purposes of country of origin marking under 19 C.F.R. § 134.47. Pl.’s Br. at 13–14, Ex. 12 at 145. First in HQ 731707, Customs found that the mark “American Trouser” constituted a trademark for the purpose of 19 C.F.R. § 134.47. HQ 731707 (July 26, 1989). Second, in HQ 733617, Customs found that the mark “Engineered in the USA TM” was part of a claimed trademark and thus satisfied the requirements of 19 C.F.R. § 134.47. HQ 733617 (July 30, 1991). Ultimately, both HQ 731707 and HQ 733617 were silent as to whether the trademarks at issue were presented to Customs as a registered trademark, a pending application, or an abandoned application, and thus do not provide support for or against the Plaintiff’s argument.

Additionally, Plaintiff claims that both HQ 734455 and HQ 734644 stand for the proposition that registered trademarks are not required for 19 C.F.R. § 134.47 to apply. Pl.'s Br. at 14–15. Specifically, Plaintiff insists that the rulings support the notion that “intent to use [an] application for a trademark filed with the USPTO is acceptable evidence of use to qualify as a trademark under 19 C.F.R. § 134.47.” *Id.* at 14. In both of these rulings a pending application was before the agency, thus it is unclear to the court how either of these rulings are inconsistent with Customs’ interpretation of the term “trademark.” *See* HQ 734455; *See* HQ 734644.

Moreover, Plaintiff relies on HQ 541445 and HQ 541685 to support its contention that when defining the term trademark, for the purposes of country of origin, Customs looks to the Lanham Act. Plaintiff’s reliance is misplaced. The instant action involves the definition of a trademark with regards to the country of origin marking requirements, as opposed to in HQ 541445, where Customs considered whether royalty payments relating to a trademark are dutiable. HQ 541445 (Oct. 13, 1977). In addition, HQ 541685 considered whether royalty payments for use of one’s name, likeness and endorsement, are included in the dutiable value of merchandise. HQ 541685 (June 29, 1977). Therefore, both of these Customs rulings address intellectual property rights issues that are unrelated to the regulation at issue in the instant case.

Accordingly, Customs did in fact demonstrate that its definition of “trademark” has been consistently applied in prior headquarter rulings. E.g., HQ 561060 (Nov. 3, 1998) (concluding that “Customs has accepted a filed application with the U.S. Patent and Trademark Office as sufficient evidence of a trademark for purposes of 19 C.F.R. § 134.47 since the regulation does not specify what evidence is necessary to establish a trademark.”); *accord* HQ 734073 (July 10, 1991); HQ 734066 (July 15, 1991); HQ 734644 (July 1, 1992); HQ 734455 (July 1, 1992); HQ 735085 (June 4, 1993); HQ 735180 (May 17, 1994); HQ 735019 (June 28, 1998); and HQ 561060 (November 3, 1998).

Furthermore, the court finds that Customs’ interpretation of 19 C.F.R. § 134.47 is consistent with the stated purpose of the regulation and 19 U.S.C § 1304. The purpose of both 19 C.F.R. § 134.46 and 19 C.F.R. § 134.47 is to prevent the ultimate purchaser from being misled or deceived when the name of a country or place other than the country of origin appears on imported merchandise. *See* HQ H016234 (Mar. 3, 2009); *see* HQ 563175 (Mar. 31, 2005). Conversely, unlike the regulations at issue here, the purpose of the Lanham Act is to protect intellectual property rights by preventing consumer confusion with

regards to the producer of the merchandise. See *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 534–35 (1987). Accordingly, since Customs’ interpretation of the regulation, discussed above, is consistent with the regulation and its stated purpose, it must be given controlling weight. See *Auer v. Robbins*, 519 U.S. 452, 461–63, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997) (agency interpretation of its own regulation must be given controlling weight unless plainly erroneous or inconsistent with the regulation); see also *White v. United States*, 543 F.3d 1330, 1333–34 (Fed. Cir. 2008).

Because Customs’ interpretation of the regulation was not plainly erroneous or inconsistent with the regulation, the court defers to Customs’ reading of the term trademark concluding that trademarks are either registered or marks that are subject to pending applications. See *id.* As Plaintiff’s markings on their merchandise did not constitute trademarks pursuant to 19 C.F.R. § 134.47, the court agrees with Customs that 19 C.F.R. § 134.46 controls here.

II. Issues of Material Fact

The final question the court must address is whether any genuine issues of material fact remain with regards to Plaintiff’s compliance with 19 C.F.R. § 134.46.

First, Plaintiff argues that there is a genuine issue of material fact because Customs has not offered evidence that an ultimate consumer would be confused or misled with regards to the country of origin of the jeans. Pl.’s Mem. in Reply to Government’s Opp’n to Pl.’s Mot. for Partial Summ. J. and in Opp’n to Government’s Cross-Mot. for Summ. J. at 12, Oct. 20, 2014, ECF No. 25 (“Pl.’s Reply”). Specifically, Plaintiff insists that the “stricter standard of ‘close proximity’ is only triggered if a locality term is found on the article that may mislead or deceive the ultimate customer as to the country of origin.” *Id.* (citing HQ 561060 (Nov. 3, 1998); Country of Origin Marking, 62 Fed Reg. 44211, 44211 (Aug. 20, 1997)) (internal footnotes omitted). Plaintiff contends that “because a consumer can easily find the country of origin marking, ‘Made in China’ upon casual inspection of the inside waistband of the jeans, a consumer will not be confused.” *Id.*

The court disagrees. Plaintiff fails to recognize that by displaying text representing a locality different from the merchandise’s country of origin, the text may “mislead or deceive the ultimate purchaser as to the actual country of origin of the article.” 19 C.F.R. § 134.46. Moreover, the regulation does not require Customs to provide evidence demonstrating that a consumer is being misled, rather the presence of the text itself may be sufficient to mislead the consumer, unless there appears “legibly and permanently in close proximity to

such words, letters or name, and in at least a comparable size, the name of the country of origin preceded by ‘Made in,’ ‘Product of,’ or other words of similar meaning” informing the consumer of the country of origin of the merchandise. 19 C.F.R. § 134.46. Additionally, Plaintiff appears to misinterpret HQ 561060. Pl.’s Reply at 12–13. Unlike here, in HQ 561060, Customs determined that pursuant to 19 C.F.R. § 134.47 it was “unnecessary to place an additional country of origin marking on the hangtag containing a trademark with a non-origin geographical reference.” HQ 561060. Contrary to Plaintiff’s assertion, this ruling does not stand for the premise that “if the close proximity requirement is not triggered, then the conspicuous location standard applies.” 19 C.F.R. § 134.46. As discussed above, 19 C.F.R. § 134.46 outlines specific marking requirements that an importer must follow when the name of a country, other than country of origin, appears on merchandise. *Id.* Nowhere in the regulation is “upon casual inspection” of the merchandise discussed as a suitable marking alternative. *See id.*

Subsequently, Plaintiff argues that the Defendant is “not entitled to a judgment as a matter of law because Customs’ decision to require the jeans to be remarked after importation is contrary to 19 C.F.R. § 134.32(o) because remarking would be ‘economically prohibitive.’” Pl.’s Reply at 13.

Merchandise may be exempted from the marking requirement if it “cannot be marked after importation except at an expense that would be economically prohibitive.” 19 C.F.R. § 134.32(o).

Notwithstanding the fact that arguments raised for the first time in a reply brief are not properly before this court, *United States v. Ford Motor Co.*, 463 F.3d 1267, 1276–77 (Fed. Cir. 2006), and such arguments are usually deemed to be waived, *Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002); *see Ford Motor Co.*, 463 F.3d at 1276–77, Plaintiff has not provided evidence supporting its conclusory claim that remarking the jeans would be economically prohibitive. The court finds that Plaintiff’s bare assertions made for the first time in its reply brief do not constitute an issue of material fact in the instant case.

As discussed above, because the subject merchandise do not display a trademark in accordance with 19 C.F.R. § 134.47, the subject merchandise must satisfy the marking requirements of 19 C.F.R. § 134.46. First, the jeans display the logos “C’est Toi Jeans USA,” “CT Jeans USA,” and “C’est Toi Jeans Los Angeles” in various styles, scripts and dimensions, on the backs of some of the jeans, on the care label stitched into the front waistbands of the jeans, on the hang-tags affixed to the outside of the jeans, on the pocket linings of the jeans,

and on the back waistbands of the jeans. *See* Pl.'s Br. at Ex. 2; HQ H137556. Secondly, the "Made in China" labels are only sewn into the front waistband of the jeans, several inches from the zipper, above or next to the care label. *Id.* Thus, the country of origin is not displayed in close proximity to each "USA" or "Los Angeles" logo on the backs of the jeans, pocket linings, back waistbands, and hang-tags. *Id.* Finally, the "Made in China" label is in smaller print-size than the "C'est Toi Jeans USA," "CT Jeans USA," and "C'est Toi Jeans Los Angeles" logos embroidered into the back waistbands of the jeans and displayed on the jean hang-tags. *Id.* Accordingly, the subject merchandise is not properly marked pursuant to 19 C.F.R. § 134.46. Because the markings on Plaintiff's merchandise did not comply with 19 C.F.R. § 134.46, the court finds that Customs Notices to Mark and/or Redeliver were properly issued.

CONCLUSION

For the foregoing reasons, the court grants Defendant's cross-motion for summary judgment and denies Plaintiff's motion for partial summary judgment. Judgment will be entered accordingly.

Dated: January 28, 2015

New York, New York

/s/ Nicholas Tsoucalas

NICHOLAS TSOUCALAS SENIOR JUDGE

