

U.S. Customs and Border Protection



Slip Op. 13-5

SIGMA-TAU HEALTHSCIENCE, INC., Plaintiff, v. UNITED STATES,
Defendant.

Court No. 11-00093

[Granting defendant a limited extension of time to file an answer or otherwise respond to the complaint]

Dated: January 10, 2013

Leslie A. Glick, John C. Monica and Karri N. Allen, Porter, Wright, Morris & Arthur, LLP, of Washington, DC, for plaintiff.

Justin R. Miller, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With him on the motion were *Stuart F. Delery*, Principal Deputy Assistant Attorney General and *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office.

ORDER

Stanceu, Judge:

Defendant United States moves under USCIT Rules 6 and 7 for an extension of 29 days, to February 1, 2013, for the filing of its answer to the complaint. Def’s Mot. for an Extension of Time to File its Answer or Otherwise Respond to Pl.’s Compl. (Dec. 31, 2012), ECF No. 11 (Def.’s Mot.). Plaintiff “requests that defendant’s motion be denied, or alternatively, that only a ten day extension be granted to January 14, 2013.” Pl.’s Opp’n. to Def.’s Second Mot. for Extension of Time to File Answer or Otherwise Respond (Jan. 4, 2013), ECF No. 12.

Opposing the motion, plaintiff notes that defendant’s answer originally was due on November 19, 2012 and that defendant earlier moved, with plaintiff’s consent, for an extension that resulted in the current due date of January 3, 2013. *Id.* at 2. Plaintiff argues that it will be prejudiced by an extension of the requested length, *id.* at 3, informing the court that the requested extension will interfere with its preparation of a complaint in a subsequent case involving similar subject matter, which complaint is due on February 11, 2012, and that its next protest for entries of similar products is due on January 16, 2013, *id.* at 1-2.

The court is not persuaded that plaintiff will be prejudiced by defendant's receiving a limited time extension. Defendant's answer may or may not be informative for plaintiff's preparation of future complaints and protests, but in any event that delay will not prevent plaintiff from taking procedural steps to protect its rights. Nevertheless, the court, cognizant of its obligation to ensure a speedy resolution of this action, USCIT R. 1, observes that defendant, as a result of the earlier extension, already has been granted 111 days to answer the complaint, which was served on September 14, 2012. Defendant states that due to the complex and technical nature of the issues involved, the number of allegations, and Hurricane Sandy, U.S. Customs and Border Protection has not completed its review of plaintiff's claims. Def.'s Mot. 2. Without more than defendant has presented, the court is not persuaded that a completion of that review is essential to defendant's preparation of an answer. Therefore, the court will not grant the full extension as requested. The court will allow defendant until January 25, 2013, to file its answer. By that time, defendant will have had more than 130 days to accomplish this filing.

In consideration of defendant's motion, plaintiff's response thereto, and all papers and proceedings herein, it is hereby

ORDERED that the time for the filing of defendant's answer to the complaint be, and hereby is, extended to January 25, 2013.

Dated: January 10, 2013

New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE



Slip Op. 13-6

INTERNATIONAL CUSTOM PRODUCTS, INC., Plaintiff, v. UNITED STATES,
Defendant.

Before: Gregory W. Carman, Judge
Court No. 07-00318

Carman, J.:

Before the Court is a motion by Defendant United States styled as "Defendant's Motion for Review of the Clerk's Taxing of ICP's [Plaintiff International Custom Products, Inc.] Bill of Costs and Motion for a Stay [of] the Taxing of ICP's Bill of Costs" ("*Motion for Review*"). See ECF No. 261.

Briefly, the following background is relevant to Defendant's motion. After a bench trial, the Court entered judgment on November 20, 2012. See Slip Op. 12-140 and Judgment, ECF No. 258. On December 4, 2012, well within the 60 day limit for Defendant United States to

appeal the judgment pursuant to Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure, Plaintiff filed a Bill of Costs pursuant to Rule 54(d)(1) of the Rules of the United States Court Of International Trade (“USCIT”) and the USCIT Guidelines for Bill of Costs. ECF No. 259. On December 20, 2012, the Clerk of the Court filed an order entering ICP’s Bill of Costs. ECF No. 260. Later that day the United States filed the *Motion for Review*. The government argues that ICP filed its Bill of Costs prematurely, citing the official USCIT Guidelines for Bills of Costs¹, which state:

Within thirty (30) days after the expiration of the time allowed for appeal of a final judgment, whether or not an appeal has been filed, the prevailing party shall serve on the attorney for the adverse party and file with the clerk of court the original and one copy of a Bill of Costs and Disbursements (Form 21), together with a certificate of service.

The government contends that this language means that “[t]he 30 day period for filling [sic] the bill of costs does not begin until the expiration of the time allowed for appeal of a final judgment,” and that ICP’s filing of its Bill of Costs was therefore premature. *Motion for Review* at 3. The government therefore requests that the Court vacate the Clerk’s order taxing the Bill of Costs. *Id.*

The government also asks that the Court issue an order staying the taxing of Plaintiff’s Bill of Costs until the conclusion of any appeals or the expiration of the government’s time to appeal. *Id.* According to the government, a stay is “required to avoid” the “unfair result” that would occur if the Court were to permit the taxing of ICP’s Bill of Costs prior to any appeal, since that appeal might overturn the judgment on which the Bill of Costs is founded. *Id.* at 3–4.

ICP responds that the government has misread the USCIT Guidelines for Bill of Costs. Plaintiff’s Response to Motion for Review and Stay of Taxing of Costs (“ICP’s Response”) at 1, ECF No. 262. According to Plaintiff, the “clear intent of the Guidelines is to set a deadline before which a bill of costs must be filed,” and “not a window of time within which a bill of costs must be filed.” *Id.* ICP contends that “nothing is going to change between now and the expiration of the time allowed for appeal that would impact ICP’s bill of costs.” *Id.* at 2.

Plaintiff states that it does not object to “an order providing that no execution may issue on costs taxed in this matter . . . until after the expiration of the time allowed for the Defendant to appeal [the judgment], or while an appeal of that judgment is pending, if the Defen-

¹ The USCIT Guidelines for Bill of Costs have “the same force and effect as the provisions of [Rule 54].” See USCIT Rule 54, Practice Comment.

dant appeals,” and provides a draft order to that effect. *Id.* at 2, Attach.

Plaintiff’s reading of the Guidelines is correct. A party may file its Bill of Costs pursuant to USCIT Rule 54 and the USCIT Guidelines for Bill of Costs prior to the expiration of the period for appeals to be filed. As Plaintiff notes, neither the Rule nor the Guidelines specifies that the filing of a Bill of Costs must await the expiration of the period for filing of an appeal. The government appears to rely on the notion that it would be improper to file a Bill of Costs prior to the expiration of the appeals period or, if filed, the decision of an appeal because the judgment forming the basis for the Bill of Costs may be overturned by an appeal. But the language of the guidelines specifically permits the filing of a Bill of Costs while an appeal is pending when they state that the Bill of Costs deadline is set for 30 days after expiration of the appeals deadline, “*whether or not an appeal has been filed.*” Guidelines for Bill of Costs (emphasis added). The Rule and the Guidelines therefore must be read as explicitly contemplating the filing of a Bill of Costs, even where the judgment on which the Bill of Costs is based is currently under appellate review. The government’s proposed interpretation would read the above-emphasized clause out of the Guidelines, and the clause would be rendered a nullity if a party could not file a Bill of Costs while a case was on appeal. It is therefore clear, as Plaintiff argues, that nothing affecting the Bill of Costs changes between the judgment and the expiration of the time allowed for appeal requiring Plaintiff to defer filing the Bill of Costs until after the appeals time expires.

The Court will issue a stay, however, on issuance of any execution on costs taxed and proceedings to collect such costs until after the expiration of the time for appeal, or during pendency of any appeal taken, since this allays Defendant’s concerns and Plaintiff does not object.

It is therefore

ORDERED that Defendant’s Motion for Review of the Clerk’s Taxing of ICP’s Bill of Costs and Motion for a Stay of the Taxing of ICP’s Bill of Costs is denied; and it is furthermore

ORDERED that issuance of any execution on costs taxed in this matter, or proceeding taken to collect any such costs, shall be, and hereby is, stayed until after the expiration of the time allowed for the Defendant to appeal this Court’s November 20, 2012 Judgment, or while any appeal of that Judgment is pending (should Defendant file an appeal).

Dated: January 10, 2013
New York, New York

/s/ Gregory W. Carman
GREGORY W. CARMAN, JUDGE

Slip Op. 13–7

GRK CANADA, LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Judith M. Barzilay, Senior Judge
Court No. 09–00390

[On classification of certain steel screws summary judgment granted for Plaintiff; summary judgment denied for Defendant.]

Dated: January 14, 2013

Montgomery, McCracken, Walker & Rhoads, LLP (Craig E. Ziegler) for Plaintiff.
Stuart F. Delery, Principal Acting Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jason M. Kenner*); and Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (*Beth Brotman*), of counsel, for Defendant.

OPINION

BARZILAY, Senior Judge:

This case is before the court on cross-motions for summary judgment. Plaintiff GRK Canada, Ltd. (“GRK”), challenges the decision of Defendant U.S. Customs and Border Protection (“Customs”) denying GRK’s protest of Customs’s classification of its R4 Screws and Trim Head Screws within the Harmonized Tariff Schedule of the United States (“HTSUS”). Customs classified the merchandise as “other wood screws” under subheading 7318.12.00 of the HTSUS, which carries a 12.5% *ad valorem* duty. Plaintiff claims that the merchandise is properly classified as “self-tapping screws” under subheading 7318.14.10 of the HTSUS, which carries a 6.2% *ad valorem* duty. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a). For the reasons set forth below, Plaintiff’s motion for summary judgment is granted and Defendant’s motion is denied.

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, as is the case here, 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).

While 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. GRK imports steel screws into the United States. There are two styles of screws at issue in this case: (1) GRK model R4 Screws and (2) GRK model Trim Head Screws. There are two variations of Trim Head Screws: (1) RT Composite Trim Head Screws and (2) Fin/Trim Head Screws. GRK entered the subject screws between January 2008 and August 2008. The screws are made of corrosion resistant case hardened steel, have heads, shanks, threads, points, and are of various lengths and diameters.

The head of a screw is the end that resembles a mushroom top and allows it to be turned or driven into the target material. After being fastened the head normally comes to rest along the surface of the material to which it is fastened. The cylindrical portion of the screw from the underside of the head to the tip is known as the shank. It can be fully or partially threaded. The threaded portion of a screw can be recognized as the male part of the screw with spiraling metal threads

that create female threads in the target material. The tip of a screw (also called the point) is the part that first enters the target material.

GRK's R4 screws (of all sizes) have a flat self-countersinking head with saw-blade-like cutting teeth and six self-contained cutting pockets on the underside of the head. This design eliminates the need to perform a separate countersinking operation because the underside of the head cuts away the top layer of material as the screw is driven into place. R4 screws with a length of 1¼ inches and longer have a patented thread design GRK refers to as "W-Cut" threading. It is located near the tip, along the threaded portion of the screw. R4 screws with a length of 2 inches and longer have a secondary area of threading GRK refers to as "CEE" threading. It is located closer to the head, directly underneath the unthreaded part of the shank. R4 screws without "CEE" threading simply have a partially unthreaded shank. The "W-Cut" threading acts like a saw blade and cuts through the material as the screw is being driven into place, while the "CEE" threading enlarges the screw hole to allow the two materials being fastened together to settle easily around the non-threaded portion of the screw.

GRK's Trim Head Screws have much smaller heads (the smallest available) that are designed to prevent the screws from cracking and splitting the target material. Trim Head Screws with a length of 1¼ inches and longer have "W-Cut" threading. GRK's RT Composite Trim Head Screws (a variation of the Trim Head Screw) have a second set of threads near the head, underneath the unthreaded shank, called reverse threading. Reverse threading allows the head of the screw to be less noticeable along the surface of the target material. GRK's Fin/Trim Head Screws (the other type of Trim Head Screw) do not have reverse threading and simply have a partially unthreaded shank.

Both GRK models (R4 and Trim Head screws) have gimlet points, which is a type of tip characterized by a sharp threaded point. GRK's screws have point angles between 25 and 35 degrees. In addition to having gimlet points, R4 screws of 1¼ inches and longer have a feature called a Type 17 point that GRK refers to commercially as a "Zip-Tip." Trim Head Screws of all sizes have Type 17 points. A Type 17 point is a gimlet point with a slot or groove with sharp edges cut into it. It allows the screw's insertion into the material to start more easily by giving the point an additional cutting edge, thereby reducing the torque needed to drive the screw into place. A Type 17 point cuts and removes material as it is being turned into the target material.

Both models are manufactured to meet certain minimum torsional strength requirements. Torsional requirements measure the ability of a screw to resist torque forces that cause it to twist off course as it is being driven into the material. The subject screws are available in carbon steel and stainless steel. The carbon steel versions are made of heat-treated, case-hardened steel. The stainless steel versions have been hardened through a process called draw hardening.

The subject screws can be used in wood, sheet metal, plastics, medium-density fiberboard, polyvinyl chloride (PVC) board, cement fiberboard, melamine, arborite, and other man-made composite materials. More specifically, GRK's R4 Screws are recommended for use in wood, particle board, plastic, sheet metal, cement fiber board and wood decking, pressure treated lumber decking, cedar and redwood decking. GRK's Trim Head Screws are recommended for most fine carpentry applications and trim applications, and can be used to anchor composite decking material to wood beams.

III. DISCUSSION

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)).¹ The "terms of the HTSUS are construed according to their common 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

¹ This case 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.

— 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).

There is no dispute that GRK’s screws are covered by HTSUS Heading 7318, which provides for “screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers . . . and similar articles, of iron or steel.” HTSUS Heading 7318 (emphasis added). The dispute concerns the proper HTSUS subheading for GRK’s screws:

Threaded articles:

...

7318.12.00 Other wood screws 12.5%

...

7318.14 Self-tapping screws:

7318.14.10 Having shanks or threads with a diameter of less than 6 mm 6.2%

Id. The subheadings are *eo nomine* provisions, or more simply, provisions “that describe[] an article by a specific name, *not by use.*” *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312 (Fed. Cir. 2012) (citing *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011)) (emphasis added). Absent limiting language or contrary legislative intent, an *eo nomine* provision covers all forms of the named article. *Nidec Corp. v. United States*, 68 F.3d 1333, 1336 (Fed. Cir. 1995). *Eo nomine* provisions are different from use provisions. A use provision classifies an article by its principal or actual use. See *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1363 (Fed. Cir. 1999). The interpretation of use provisions is guided by the HTSUS Additional U.S. Rules of Interpretation (“ARI”). See ARI 1(a)-(b).

This is a challenging case. The HTSUS does not specifically define the terms “other wood screws” or “self-tapping screws.” GRK argues that the terms should be defined (and distinguished) by the physical characteristics of wood and self-tapping screws. Pl. Supplemental Resp. Br. 2–4, 19. According to GRK, the subject screws are self-tapping screws—with case hardened steel, minimum torsional strength requirements, and no need for a tapping operation²—thereby mandating classification under subheading 7318.14.10 (self-tapping screws). Pl. Br. 13–20. GRK observes that “[a] self-tapping

² A tap is defined as “a tool for forming an internal screw thread (as in a nut) consisting of a hardened tool-steel male screw grooved longitudinally so as to have cutting edges.” Webster’s Third New International Dictionary 2339 (1993). A tapping operation involves using a tapping tool to create female threads in the target material. Before performing a tapping operation, though, one must drill or punch a pilot hole. Generally speaking, tapping screws are capable of cutting or forming their own threads without the use of a tap but to

screw is essentially an enhanced wood screw — a wood screw on steroids, if you will — that offers performance capabilities that a mere wood screw simply cannot provide. But the fact that a self-tapping screw has these enhanced capabilities, to penetrate sheet metal, plastics, marble, slate, etc., does not preclude that self-tapping screw from also being used in wood, where its enhanced capabilities are not needed and are mere surplusage.” Pl. Resp. Br. 13.

The Government, on the other hand, argues that the terms should not be defined by their physical characteristics alone, but also by the materials in which they are used. Def. Br. 13–20. According to the Government, “the common meaning of ‘wood screws’ are those primarily intended to be *used* in wood or other resilient materials (such as wood composite materials), while the common meaning of ‘self-tapping screws’ are those primarily intended to be *used* in materials like steel, concrete, and marble.” Def. Supplemental Response Br. 4 (emphasis added). The Government argues that GRK’s screws are designed primarily for *use* in wood applications, not metal, and that this critical factor mandates classification under subheading 7318.12.00 (other wood screws). Note that the Government’s argument depends heavily on use even though there is no dispute that the subheadings in question are *eo nomine* provisions. This is a weakness that ultimately undermines the Government’s proposed classification.

A. Scope of Subheading 7318.12.00 (Other woods screws)

As noted above, the HTSUS does not specifically define the term “other wood screws.” Turning to lexicographic sources, Webster’s Third New International Dictionary defines a “wood screw” as a “pointed metal screw formed with a sharp thread of comparatively coarse pitch for insertion in wood.” Webster’s Third New Int’l Dictionary 2631 (1993). The Oxford English dictionary defines a “wood screw” as designating a “metallic screw specially adapted for fastening together parts of woodwork or wood and metal.” The Oxford English Dictionary 504 (2d. ed. 1989). The McGraw-Hill Dictionary of Scientific and Technical Terms defines a “wood screw” as “[a] threaded fastener with a pointed shank, a slotted or recessed head, and sharp tapered thread of relatively coarse pitch for use only in wood.” McGraw-Hill Dictionary of Scientific and Technical Terms 2302 (6th ed. 2003). The Academic Press Dictionary of Science and Technology defines a “wood screw” as “a metal fastener used for wood, do so they first require a separate operation to create a pilot hole. See Industrial Fasteners Institute Pamphlet, “An Introduction to Tapping Screws” Docket Entry No. 44 Ex. A at 0060 (explaining functionality of tapping screws) (“IFI Pamphlet”).

usually having a flat, slotted head, a pointed shank, and a coarse thread.” Academic Press Dictionary of Science and Technology 2378 (1992).

The Explanatory Notes to HTSUS Heading 7318 provide some additional interpretive guidance for the term “wood screws” that is consistent with the aforementioned dictionary definitions:

Screws for wood differ from bolts and screws for metal in that they are tapered and pointed, and they have a steeper cutting thread since they have to bite their own way into the material. Further, wood screws almost always have slotted or recessed heads and they are never used with nuts.

Explanatory Notes for HTSUS Heading 73.18.

The industry standards for mechanical fasteners provide further guidance. They are published by the American National Standards Institute/American Society of Mechanical Engineers (ANSI/ASME) and provide dimensional characteristics and mechanical requirements for various types of fasteners. *See* Initial Expert Report of Dr. David R. Bohnhoff³ at 5–6 (Jan. 13, 2011). Standard B.18.12 (Glossary of Terms for Mechanical Fasteners) defines a wood screw as “a thread forming screw having a slotted or recessed head, gimlet point, and a sharp crested, coarse pitch thread, and generally available with flat, oval, and round head styles. It is designed to produce a mating thread when assembled into wood or other resilient materials.” ANSI/ASME Standard B.18.12 ¶ 3.1.2.30 (2001). Standard B.18.6.1 (Wood Screws), which covers general and dimensional data, notes that wood screws “shall have coarse pitch spaced threads and a gimlet point. The threads may be either cut or rolled The length of the thread on wood screws having cut threads shall be equivalent to approximately two-thirds of the nominal length of the screw. . . . Rolled thread wood screws shall have a length of thread equivalent to at least four times the basic screw diameter or two-thirds of the nominal screw length, whichever is greater. . . . Wood screws shall be supplied in steel, corrosion resistant steel, brass, aluminum alloy, or other materials as designated by the purchaser. Unless otherwise specified, no chemical or physical requirements shall apply. Screws may be heat treated at the option of the purchaser or the manufacturer to develop adequate torsional strength for the intended application. . . . Unless otherwise specified, wood screws shall be supplied

³ Dr. David R. Bohnhoff, Ph.D, P.E., is Plaintiff’s expert witness. He is a full professor in the Biological Systems Engineering Department at the University of Wisconsin-Madison. *See* Bohnhoff Deposition at 42–49 (May 18, 2011).

with a natural (as processed) finish, unplated or uncoated.” ANSI/ASME Standard B.18.6.1 ¶¶ 2.3–2.7 (1981).

GRK urges the court to limit the HTSUS definition of “wood screws” to the industry standards (Glossary of Terms) definition of a “standard wood screw,” which has (1) a flat, oval, or round head, (2) sharp crested, coarse pitch threads, and (3) a sharp gimlet point.⁴ Pl. Br. 10–15. An *eo nomine* provision, however, such as “other wood screws,” “include[s] all forms of the named article[,] even improved forms.” *CamelBak Prods, LLC v. United States*, 649 F.3d 1361, 1365 (Fed. Cir. 2011) (quoting *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (“*Carl Zeiss*”). Modern wood screws have evolved from the original, standard wood screw. See Greenslade Deposition at 104–06. The first departure from the standard wood screw design was the conventional drywall screw or twinfast wood screw. See *id.* It introduced sharper point angles and case hardening into the standard wood screw model. See *id.* More recent innovations in wood and drywall screws are built on the twinfast design. See *id.* Accordingly, the subheading for “other wood screws” covers more than standard wood screws; it also covers various modified wood screws. Putting all of the aforementioned together (dictionary definitions, explanatory notes, and evolving industry standards) for a workable definition within the HTSUS, “other wood screws” can be defined as having (1) a flat, recessed, oval, round, or slotted head, (2) partially unthreaded shank, (3) coarse pitch spaced threads, and (4) a sharp gimlet point, and may also have (5) potential modifications to these criteria (such as sharper point angles or case hardening) so long as the modified screw retains an essential resemblance to a standard wood screw.⁵

B. Scope of Subheading 7318.14.10 (Self-tapping screws)

As noted above, the HTSUS does not specifically define the term, “self-tapping screws.” Turning to lexicographic sources, Webster’s Third New International Dictionary does not have an entry for “self-tapping screws” but defines “tapping screws” as a “hardened screw

⁴ ANSI/ASME Standard B. 18.6.1 specifies that, for wood screws, the length of the threading is almost invariably two-thirds of the total length of the screw. Except for screws of very short overall length, almost all wood screws will be threaded for approximately two-thirds of their length. See Greenslade Deposition at 111–15. Thus, a partially unthreaded shank is also a feature of standard wood screws.

⁵ The court notes that the simple observation that a wood screw is any screw used in wood is not correct in this context. Absent any standard, “the layperson would define a wood screw as any screw used in wood. Such a definition is unworkable for tariff purposes as the true end use of virtually all fasteners can never be determined with any degree of certainty.” Initial Expert Report of Dr. David R. Bohnhoff at 14; see also Bohnhoff Response to Greenslade Report at 9 (Apr. 3, 2011). The term “wood screw” refers to a specific type of fastener recognized within the industry by certain design features.

that cuts threads in the piece it secures and that is used in materials which would otherwise require a separate tapping operation or the use of a nut.” Webster’s Third New Int’l Dictionary 2340 (1993). The Oxford English dictionary defines “self-tapping” as a “hardened screw that will cut its own thread in a hole in metal that would otherwise need tapping.” The Oxford English Dictionary 932 (2d. ed. 1989). Additionally, there is subtext under the definition that states “[s]elf-tapping screws are screws that may be driven into an untapped hole, forming the thread in the hole as they are driven. . . . From the point of view of large-scale production of sheet metal components, the great design change has been brought about by the Parker-Kalon or self-tapping screw.” *Id.* The McGraw-Hill Dictionary of Scientific and Technical Terms defines “selftapping screws” as having a “specially hardened thread that makes it possible for the screw to form its own internal thread in sheet metal and soft materials when driven into a hole that has been drilled, punched, or punched and reamed. The McGraw-Hill Dictionary of Scientific and Technical Terms 1893 (6th ed. 2003). The Academic Press Dictionary of Science and Technology defines a “self-tapping screw” as a “specially hardened screw used in wood and soft metals that self-cuts its own thread into the material being worked on. Also, TAPPING SCREW, SHEET METAL SCREW.” Academic Press Dictionary of Science and Technology 1951 (1992).

The Explanatory Notes to HTSUS Heading 7318 provide some additional interpretive guidance for the term “self-tapping”:

The heading includes self-tapping (Parker) screws; these resemble wood screws in that they have a slotted head and a cutting thread and are pointed or tapered at the end. They can therefore cut their own passage into thin sheets of metal, marble, slate, plastics, etc.

Explanatory Notes for Heading 73.18. The reference to “Parker” provides a helpful clue about the original scope of subheading 7318.14.10 (self-tapping screws). Parker-Kalon Corporation was one of the first screw manufacturers to develop and market self-tapping screws, also known as sheet metal screws. *See* Greenslade Deposition⁶ at 102–103; Smithsonian Institution, Trade Catalogs from Parker-Kalon Corp. (“Since developing the world’s first self-tapping screw in 1913, Parker-Kalon® has become a leading manufacturer of

⁶ Joe Greenslade (“Greensalde”) is the Government’s expert witness. He is Director of Engineering Technology of the Industrial Fasteners Institute (IFI). He is also a member of the fastener committees of the American Society of Material and Testing (ASTM F16), SAE International, USA Delegate to the International Organization of Standard (ISO TC2), and the American Society of Mechanical Engineers (ASME B18), for which he is the current Chairman. *See* Declaration of Joe Greenslade, Def. Ex. I part 1, Docket Entry No. 29 (Oct. 13, 2012).

engineered threaded fasteners aka specialty screws for industrial, construction and automotive use; these include self-tapping, sheet metal, self-drilling & drive screws”) *available at* http://collections.si.edu/search/results.htm?q=record_ID:SILNMAHTL_28740 (last visited Jan. 14, 2013). As noted, sheet metal screws are sometimes referred to as Parker screws (PK screws).⁷ In other words, the three terms—sheet metal screws, Parker screws, and self-tapping screws—have been used interchangeably within the industry to describe the same type of screw. The Explanatory Notes go on to mention other materials through which self-tapping screws can cut their own passage (tap their own threads), which broadens the scope of the subheading beyond self-tapping, sheet metal screws.

The ANSI/ASME industry standards provide guidance on the characteristics of tapping screws. Standard B.18.12 (Glossary of Terms for Mechanical Fasteners) defines a tapping screw as having a “slotted, recessed, or wrenching head and is designed to form or cut a mating thread in one or more of the parts to be assembled. Tapping screws are generally available in various combinations of the following head and screw styles: fillister, flat, flat trim, hexagon, hexagon washer, oval, oval trim, pan, round, and truss head styles with thread-forming screws, Types A, B, BA, BP, and C, or thread cutting screws, Types D, F, G, T, BF, BG, and BT. . . .” ANSI/ASME Standard B.18.12 ¶ 3.1.2.22 (2001). The Glossary of Terms also defines a gimlet point as “a

⁷ See, e.g., DatWiki, Parker-Kalon Screw (“The registered trade name for a self-tapping sheet metal screw, often called a PK screw. Parker-Kalon screws, made of hardened steel and having sharp, coarse threads, are used to hold thin sheets of metal together. As the screw is turned through matching holes in the thin metal, the threads clamp the sheets tightly together.”) *available at* <http://www.datwiki.net/page.php?id=5838&find=ParkerKalon%20screw&searching=yes> (last visited Jan. 14, 2013); DatWiki, Self-Tapping Screw (“A type of screw with sharp threads that cut their own matching threads when screwed into soft metal, wood, or plastic. Self-tapping screws are especially suited for holding together sheets of thin metal, and for this reason, they are often called sheet-metal screws, or PK screws, after Parker-Kalon, one of their major manufacturers.”) *available at* <http://www.datwiki.net/page.php?id=7025&find=self-tapping+screw&searching=yes> (last visited Jan. 14, 2013); Orbital fasteners, Self-Tapping Screws (“Self tapping screws are often referred to as self tappers or PK’s as many of them were originally manufactured by the Parker-Kalon company. In America they are known as sheet metal screws as they are for use in sheet metal”) *available at* <http://www.orbitalfasteners.co.uk/en/categories/self-tapping-screws> (last visited Jan. 14, 2013); Alma Bolt Company & Prime Fasteners, Self-Tapping Screws (“Also know[n] as . . . Sheet Metal Screws, . . .”) *available at* <http://www.almabolt.com/pages/catalog/screws/selftapping.htm>; Fastener Superstore, Self-Tapping Screws (“Self-Tapping Screws, also called Sheet Metal Screws, tap their own mating thread in pre-drilled holes.”) *available at* http://www.fastenersuperstore.com/screws/Self_Tapping-Screws (last visited Jan. 14, 2013); Hudson Fasteners, Sheet Metal & Self-Tapping Screws (offering different styles of self-tapping, sheet metal screws) *available at* <http://www.hudsonfasteners.com/sheet.htm> (last visited Jan. 14, 2013).

threaded cone point usually having a point angle of 45 to 50 deg. It is used on thread forming screws such as Type AB tapping screw, wood screws, lag bolts, etc.” *Id.* ¶ 2.2.12.3. Standard B.18.6.4 (Thread Forming and Thread Cutting Tapping Screws and Metallic Drive Screws), which covers general and dimensional data, states that “[t]hread forming tapping screws are generally for application in materials where large internal stresses are permissible, or desirable, to increase resistance to loosening.” ANSI/ASME Standard B.18.6.4 ¶ 1.3.1 (1998). Alternatively, “[t]hread cutting tapping screws are generally for application in materials where disruptive internal stresses are undesirable or where excessive driving torques are encountered with thread forming screws.” *Id.* ¶ 1.3.2. “Tapping screws are normally fabricated from carbon steel of high quality, case hardened to meet the performance requirements set forth in these specifications.” *Id.* ¶ 2.6.1 “Where so specified, tapping screws may also be made from corrosion resistant steel, brass, monel, and aluminum alloys.” *Id.* ¶ 2.6.2. “Unless otherwise specified, tapping screws shall be supplied with a natural (as processed) finish, unplated or uncoated. Where corrosion preventative treatment is required, screws shall be plated or coated as agreed upon between the manufacturer and the purchaser.” *Id.* ¶ 2.7. Tapping screws must also satisfy performance requirements, such as a drive test and a torsional strength test. *See id.* ¶ 2.9.⁸

For whatever reason the industry standards do not mention “self-tapping” screws. Plaintiff contends the two terms are used interchangeably and that the HTSUS “self-tapping” nomenclature is a “distinction without a difference.” Pl. Supplemental Resp. Br. 5. Customs, on the other hand, claims that the term “self-tapping screws” under the HTSUS is different from the term “tapping screws” under the ANSI/ASME industry standards. Def’s Supplemental Br. 6. More specifically, Customs argues:

[T]he terms “tapping” and “self-tapping” generally describe the same functionality – creating one’s own threads. But, the term “self-tapping” in the HTSUS provision for “Self-tapping screws” is limited to screws intended to create their own threads in non-wood applications such as metal and concrete. *See Explanatory Note 7318*. We know that “self-tapping” within the tariff

⁸ Although there are certain types of tapping screws that can drill their own pilot holes, cut their own threads, and fasten all in one operation, they are referred to as self-drilling screws, not self-tapping screws. *See* Supplemental Expert Report of Dr. David R. Bohnhoff, PhD., P.E. at 1, 4 (Apr. 3, 2011) (“Self-tapping screws should not be confused with self-drilling. Self-tapping is the cutting of female threads.”); *see also* Eagle Fastener Corporation, Screws (illustrating different types of screws) available at <http://www.eaglefastener.net/fasteners/screws.html> (last visited Jan. 14, 2013).

must mean something other than a general description of the functionality of creating one's own threads because assuming the terms "tapping" and "self-tapping" were synonymous for tariff purposes, renders the term "self-tapping" surplusage, as screws described by the competing subheading of "Other wood screws" also create their own threads.

...

Rather, the scope of the tariff provision for self-tapping screws covers those screws primarily designed to create their own threads in materials such as metal, concrete, masonry etc. The relevant ENs explain that "this heading includes self-tapping (parker) screws; these resemble wood screws in that they have a slotted head and a cutting thread and are pointed or tapered at the end. They can therefore cut their own passage into thin sheets of [sic] marble, slate, plastics, etc." Further, as stated in *David Komisar*, "metal screws, machine screws, or tapping screws, the terms being synonymous, are fully threaded. A machine screw will make its own threads in metal . . ." *David Komisar* 88 Cust. Ct at 89. As such, it cannot be reasonably disputed that the tariff term "self-tapping screws" encompasses screws designed primarily for metal, concrete, marble etc. applications. And while this term would certainly encompass and sprang from sheet metal screws which are designed to anchor a thin sheet of metal to another sheet of metal (*see, e.g.,* Exhibit 1), based upon the ENs the term is not only limited to sheet metal screws, but can encompass screws for concrete, marble, *etc.*

Def. Supplemental Resp. Br. 6–7. Customs believes the Explanatory Notes define self-tapping screws by their use in metal and other "non-wood" applications, which creates a distinction between "self-tapping screws" as defined in the HTSUS, and "tapping screws" as defined by industry standards, which do not have such a limitation. The court, though, is not persuaded.

The Explanatory Notes describe the physical characteristics of self-tapping screws, which resemble wood screws, but add case hardening and the ability to tap their own threads as distinguishing characteristics. Explanatory Notes at XV-7318–2. The statement at the end, listing the materials in which they can "cut their own passage into thin sheets of metal, marble, slate, plastics, etc." does not manifest a clear direction to limit "self-tapping" screws to the types of materials in which they are used. *Id.* It merely provides a non-exhaustive list of various materials into which self-tapping screws cut their own pas-

sage. The court cannot join Customs in reading this list as some form of delimiter for self-tapping screws, especially if that delimiter is a use limitation on an otherwise *eo nomine* provision. See *Carl Zeiss*, 195 F.3d at 1379 (“[A] use limitation should not be read into an *eo nomine* provision unless the name itself inherently suggests a type of use.”).

The court does not share Customs’ interpretation of the Explanatory Notes as defining “self-tapping screws” based on the materials in which the screws are used. The court is mindful that, as with the subheading for “other wood screws,” an *eo nomine* provision includes “improved forms.” *CamelBak Prods, LLC*, 649 F.3d at 1365. The subheading for self-tapping screws is not limited to the original Parker-Kalon (sheet metal) screws that gave birth to the subheading; it also includes the larger family of tapping screws that have since evolved from sheet metal screws. See United States International Trade Commission Ruling and Harmonized Tariff Schedule, Rulings by Tariff Numbers – 7318.14.10 (listing Customs HQ Rulings classifying deck screws, steel framing screws, drywall screws, zinc-plated decking screws, roofing screws, among others, as self-tapping screws under subheading 7318.14.10), available at <http://www.faqs.org/rulings/tariffs/73181410.html> (last visited Jan. 14, 2013); IFI Pamphlet, Docket Entry No. 44 Ex. A at 0060–61 (explaining evolution of tapping screws) (“IFI Pamphlet”).

Putting the aforementioned together to ascertain a workable definition (not relying on use), “self-tapping screws” can be defined under the HTSUS as being a specially hardened screw that can cut or form its own threads in the substrate without a separate tapping operation. More specifically, self-tapping screws (1) are made of case hardened steel, (2) have passed certain performance requirements, and (3) do not require a separate tapping operation.⁹

C. Defining the Subheadings on the Basis of Use

The main thrust of the Government’s classification argument depends upon use, both in interpreting the two subheadings (“other wood screws” and “self-tapping screws”), and in classifying the subject merchandise. According to the Government, “the common meaning of ‘wood screws’ are those primarily intended to be used in wood

⁹ Though many tapping screws are fully threaded, Greenslade Deposition at 122, that characteristic is not mentioned in the Explanatory Notes, dictionary definitions, or industry standards, and is therefore not a necessary criterion. Head style is also not a necessary criterion because although the Explanatory Notes only mention slotted heads, the ANSI/ASME industry standards mention slotted, recessed, wrenching heads, among others. See Standard B.18.12 ¶ 3.1.2.22; see also IFI Pamphlet at 0060 (“There is an almost unlimited variety of combinations of sizes, thread types, head styles, drive mechanisms and performance capacities to choose from . . .”).

or other resilient materials (such as wood composite materials), while the common meaning of ‘self-tapping screws’ are those primarily intended to be used in materials like steel, concrete, and marble.” Def. Supplemental Resp. Br. 4. The Government argues that GRK’s screws are designed primarily for use in wood applications, not metal, and that this critical factor mandates classification under subheading 7318.12.00 (other wood screws).

To advance its “use” arguments, Customs relies on cases under the predecessor Tariff Schedules of the United States (“TSUS”), to support an interpretation that distinguishes between wood and self-tapping screws based on whether they are used for wood or metal applications. Def. Supplemental Resp. Br. 3–6 (citing *Trans-Atlantic Co. v. United States*, 68 Cust. Ct. 105, 108 (1972) (“*Trans-Atlantic*”) (“The use of an article provided for *eo nomine* has oftentimes been considered an important factor in determining the proper tariff classification.”); *David Komisar & Son, Inc. v. United States*, 77 Cust. Ct. 88 (1976); *United States v. Quon Quon Co.*, 46 CCPA 70, 72–74 (1959) (“*Quon Quon*”) (“Of all things most likely to help in the determination of the identity of a manufactured article, beyond the appearance factors of size, shape, construction and the like, use is of paramount importance.”). In each of the TSUS cases cited by the Government, the court determined that it was not precluded from considering use even though it was interpreting *eo nomine* provisions.¹⁰

However, the “HTSUS supplanted the Tariff Schedules of the United States (TSUS) in 1989. . . . The HTSUS is actually quite different from the TSUS. The HTSUS is a system of nomenclature organized in a hierarchical structure and has far greater specificity, continuity, and completeness than the TSUS. Cases decided under the TSUS may be instructive, but they do not bind courts interpreting the HTSUS.” Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 West’s Fed. Forms, National Courts § 13343 (2d ed. 2012) (“Fed. Forms § 13343”).

¹⁰ Government also cites three CIT decisions from the 1990s, *Nestle Refrigerated Food Co. v. United States*, 18 CIT 661 (1994); *H.J. Stotter, Inc. v. United States*, 18 CIT 696, 858 F. Supp. 236 (1994); *Mark D. Myers v. United States*, 21 CIT 654 (1997). Def. Br. 16. These cases are not persuasive. As for *Nestle*, the Federal Circuit explained the court had misapplied the HTSUS. See *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998). Likewise in *H.J. Stotter*, the court was operating with an incorrect standard of review by applying the presumption of correctness within the context of cross motions for summary judgment, concluding that plaintiff had “overcome the presumption of correctness” for the legal question of the proper interpretation of the tariff terms in issue. See *Universal Electronics*, which explains the proper application of the presumption of correctness. See *Universal Elects. Inc. v. United States*, 112 F.3d 488 (Fed. Cir. 1997). In *Myers*, the court rejected the notion that an *eo nomine* provision may be governed by use.

The court cannot support this instance of reading use into an *eo nomine* tariff provision under the HTSUS. See *Carl Zeiss*, 195 F.3d at 1379 (“[A] use limitation should not be read into an *eo nomine* provision unless the name itself inherently suggests a type of use.”); see also *Aromont USA, Inc.*, 671 F.3d at 1312 (“The soups and broths portion of this heading is an *eo nomine* provision, that is, a provision that describes an article by a specific name, not by use.”). Obviously, a use provision implicates a different analytical framework than does an *eo nomine* provision. See *Primal Lite, Inc.*, 182 F.3d at 1363.

The TSUS cases cited by the government fail to adequately explain the potential problem of inadvertently converting an *eo nomine* provision into a use provision. For example, in *Trans-Atlantic*, a case decided in 1972, the court was faced with an issue similar to the one presented here. The court reasoned:

. . . the issue therefore revolves about the extent of the common meaning, i.e., does it refer to a physically distinct type of screw, having only two-thirds of its shank threaded or does it embrace any kind of screw which is primarily used in wood?

We are of the opinion that the latter controls notwithstanding the fact that the statute provides *eo nomine* for wood screws. The use of an article provided for *eo nomine* has oftentimes been considered an important factor in determining the proper tariff classification. *United States v. Quon Quon Company*, 46 CCPA 70, C.A.D. 699 (1959). The intent of Congress in enacting the language “Screws, commonly called wood screws” from the Tariff Act of 1897 to the Tariff Act of 1930 clearly indicates the term to mean screws intended for use in wood. The Summaries of Tariff Information, 1920, 1921, 1929; Dictionary of Tariff Information, 1924. The dictionary definitions set forth in the case of *United States v. Astra Bentwood Furniture Co.*, 25 CCPA 340, T.D. 49434 (1938), and the present day dictionaries such as Funk & Wagnalls Standard Dictionary, international edition (1963), p. 1449, and Webster’s Third New International Dictionary, unabridged (1961), p. 2631, confirm the fact that wood screws are intended for use in wood.

Trans-Atlantic, 68 Cust. Ct. at 108. The *Trans-Atlantic* court apparently construed the TSUS tariff term for wood screws as some sort of use provision, effectively converting an *eo nomine* provision into a use provision because it better captured the common and commercial meaning of the term. Here, the court cannot adopt the same approach, especially when operating under the HTSUS, which has far greater specificity, continuity, and completeness than the TSUS. See

Fed. Forms § 13343. The court will not convert an *eo nomine* provision into a use provision based on the Government's arguments in this case. The court must instead operate from the premise that the HTSUS provisions here are *eo nomine* and do not implicate a use analysis. The court will focus not on use, and instead design characteristics, as Customs itself did for many years. *See, e.g.*, HQ Ruling 967919 (Jan. 24, 2006).

D. Classification of the Subject Merchandise

GRK's screws are not your standard wood or self-tapping screws. They are modified screws that have features of both self-tapping and wood screws. For example, GRK's screws have several characteristics of self-tapping screws. They are (1) made of heat-treated, case hardened steel, (2) manufactured to meet certain minimum torsional strength requirements, and (3) capable of cutting their own mating threads without a separate tapping operation. Moreover, GRK's screws have additional features (i.e., Type 17 Point, W-Cut Threading, etc.) that permit them to create their own pilot hole, tap their own threads, and some even perform a self-countersinking operation. GRK's screws, therefore, possess the defining characteristics of "self-tapping screws."

GRK's screws also have the general characteristics of "other wood screws." They have (1) flat recessed heads (R4 models), (2) coarse pitch spaced threads, (3) partially unthreaded shank, and (4) a sharp gimlet point. GRK's screws have additional features similar to the modified features of "other wood screws." They are case hardened. They also have Type 17 points and W-Cut Threading.¹¹ These added

¹¹ Customs' treatment of the Type 17 Point illustrates the agency's evolving view concerning certain features of GRK's screws. Prior to 2010, Customs classified screws with a Type 17 Point under subheading 7318.14.10 (self-tapping screws). *See* HQ Ruling 967919 ("Auger and double auger points, on the other hand, are not listed in the identified standards either for wood screws or tapping screws. This is a point type modified by cutting a slot into the tip of the fastener to allow for the displacement of material and to reduce the cracking or splitting of the material as the screw is driven. Screws with this modified design feature function in a manner similar to self-drilling screws and are often used to mate dissimilar materials. This is not a typical wood screw application. In addition, auger points have a strong resemblance to the BT Type (flute) point identified in tapping screw specification ASTM/ASME B18.6.4."); NY Ruling G85347 (Dec. 18, 2000) ("You have described your submitted samples as 18-8 stainless steel deck screws with each having a bugle head and a type 17 cutting point. . . . The applicable subheading for all of the deck screws will be 7318.14.1030 . . .").

Then, in 2010, Customs issued an informed compliance publication that instructed the trade community to classify screws with Type 17 Points under subheading 7318.12 (other wood screws). *See* CBP Informed Compliance Publication, What Every Member of the Trade Community Should Know About: Fasteners of Heading 7318 (Feb. 2010) ("Wood screws are generally tapered and will always have a gimlet point and steep cutting threads. There are times that the gimlet point will have a single slot cut partially through the point. This is

features eliminate the need for predrilling (in certain materials) and allow the screws to cut away material in a saw-like fashion, thereby reducing the amount of torque required to install the screw. Def. Br. Ex. F part 1 at 0117 (GRK's product guide). GRK's R4 screws (2 inches and longer) have what is called CEE threading. This feature improves upon standard wood screws by enlarging "the screw hole for the non-threaded portion of the fastener, allowing the wood to settle easily. It increases the screw's drawing strength and reduces the friction on the screw shank that lowers the driving torque." *Id.* at 0119. Similarly, GRK's RT Composite Trim Head screws have reverse threading, which "helps the screw head disappear beneath the surface of the classic wood composite material, reducing or eliminating the dimple that sometimes appears when using the FIN/Trim screw." *Id.* Ex. F part 2 at 0141.

GRK's R4 screws improve upon the standard flat recessed head and also have saw-blade-like cutting teeth and self-contained cutting pockets on the underside of the head that allows them to bore away the target material and sit flush against the surface. This eliminates the need for a separate countersinking operation. *See id.* part 1 at 0119. GRK's Trim Head screws have heads that do not resemble standard wood screws. They are very small and resemble a finishing nail. This head is designed to sit flat or just under the surface of the top layer of material (virtually unnoticeable) and prevent splitting in trim applications, much like a finishing nail. *See* Def. Br. Ex. F part 2 at 0141. Finally, GRK's screws have sharper point angles (25–35 degrees) than tapping screws, which is consistent with Greenslade's description of drywall and twinfast wood screws. *See* Greenslade Deposition at 105–06. Accordingly, GRK's screws also possess the defining characteristics of "other wood screws."

Therefore, if the court focuses exclusively on the key characteristics that define wood and self-tapping screws, it is difficult to select one tariff provision over another for GRK's screws. One could reasonably conclude that GRK's screws satisfy the definition of self-tapping screws. Many of their added features essentially transform what would otherwise be a wood screw into a screw that satisfies the definition of a self-tapping screw. GRK's screws are capable of functioning exactly like self-tapping screws. Similarly, one could just as easily conclude that GRK's screws satisfy the definition of wood screws. Their features significantly improve upon standard wood

known as a Type 17 point. . . . The gimlet point may also have saw type threading." Apparenty, this change in policy may have resulted from communications between a Customs official and Joe Greenslade. *See* Greenslade Deposition at 167–170. According to Greenslade, the Type 17 Point is a feature of screws designed for application in wood and wood substitutes. Customs has adopted that view.

screws and eliminate the need for time consuming predrilling, tapping, and countersinking operations. The Trim Head model resembles a finishing nail and the R4 model resembles a deck screw built on the twinfast design. Accordingly, the court believes that classification could reasonably be under either proposed subheading following a GRI 1 analysis. Therefore, analysis under the subsequent GRIs is required.

This case does not involve unfinished or incomplete goods. Therefore, GRI 2 is inapplicable. Moving to GRI 3, when “goods are, *prima facie*, classifiable under two or more headings [or subheadings], classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

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

(c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

GRI 3(a)-(c).

Here, GRK’s screws have the essential characteristics of both self-tapping and wood screws. They are therefore *prima facie* classifiable under subheading 7318.14.00 (Self-tapping screws) and subheading 7318.12.00 (Other wood screws), as the court has defined those terms. *See e.g., Lemans Corp. v. United States*, 660 F.3d 1311, 1316 (Fed. Cir. 2011); *Orlando Foods*, 140 F.3d at 1440.

Under GRI 3(a), the “most specific description shall be preferred to [subheadings] providing a more general description.” In this case, the tariff terms do not lend themselves to a relative specificity analysis. *See Lemans Corp.*, 660 F.3d at 1316 (Fed. Cir. 2011) (“Under the so-called rule of relative specificity, we look to the provision with

requirements that are more difficult to satisfy and that describe the article with greatest degree of accuracy and certainty.”). Neither subheading is more difficult to satisfy than the other. They each have their own defined set of characteristics that distinguish one type of screw from the other. If one tariff provision described the article with greater accuracy and certainty, this case would have been resolvable at GRI 1. Therefore, GRI 3(a) does not resolve the issue. Nor does GRI 3(b), which is reserved for composite goods consisting of different materials or made up of different components.

This leaves GRI 3(c). Although GRI 3(c) is to be rarely used, *see, e.g., Telebrands*, 865 F. Supp. 2d at 1280–81; here analysis under that rule is appropriate. GRI 3(c) provides that among subheadings which equally merit consideration, the goods shall be classified under the subheading “which occurs last in numerical order.” *Cf. Orlando Foods*, 140 F.3d at 1442. Here, subheading 7318.14.10 (self-tapping screws) occurs last in numerical order when compared to subheading 7318.12.00 (other wood screws). Therefore, GRK’s R4 and Trim Head screws are classified under subheading 7318.14.10, self-tapping screws. This is a logical outcome if one considers that the addition to the HTSUS of self-tapping screws generally reflects advances in design and technology within this universe of fasteners. In the absence of a clear classification path for the subject merchandise under GRI 1, classification by reference to GRI 3(c) leads the court to classify the subject merchandise under the last subheading.

IV. CONCLUSION

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

Dated: January 14, 2013

New York, NY

/s/ Judith M. Barzilay

JUDITH M. BARZILAY, SENIOR JUDGE



Slip Op. 13–8

UNITED STATES, Plaintiff, v. ACTIVE FRONTIER INTERNATIONAL, INC.,
Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 11–00167

[Granting plaintiff’s third motion to amend its complaint]

Dated: January 16, 2013

Carrie Dunsmore, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for plaintiff. With her on the motion were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the motion was *Jean M. Del Colliano*, Office of the Associate Chief Counsel, U.S. Customs and Border Protection, of New York, NY.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff brought this action to recover a monetary penalty under section 592 of the Tariff Act of 1930, 19 U.S.C. § 1592 (2006) (“Section 592”),¹ from defendant Active Frontier International, Inc. (“AFI” or “Active Frontier”), a New York corporation, alleging that AFI falsely declared the country of origin of imported wearing apparel on seven entries made between June 5, 2006 and March 2, 2007. Compl. ¶¶ 1, 3, 6, 16 (May 31, 2011), ECF No. 2. Plaintiff contends that the entry documentation filed with U.S. Customs and Border Protection (“Customs”) variously identified one of three countries, Indonesia, South Korea or the Philippines, as the country of origin and that the wearing apparel instead was manufactured in the People’s Republic of China (“China”). *Id.* ¶¶ 6, 8(a)-(b). Plaintiff seeks to recover \$80,596.40, representing 20% of the dutiable value of the seven entries of the merchandise, the maximum penalty authorized by Section 592(c)(3)(B) (19 U.S.C. § 1592(c)(3)(B)) for a violation based on negligence. *Id.* ¶ 17, Prayer for Relief. The Clerk of the Court entered AFI’s default, AFI having failed to plead or otherwise defend itself in response to the summons and complaint. Entry of Default (Aug. 4, 2011), ECF No. 7.

In its first opinion and order in this matter, issued August 30, 2012, the court denied plaintiff’s application for a default judgment on the ground that plaintiff did not allege facts allowing the court to conclude that the false country of origin statements allegedly made by AFI upon entry were “material” within the meaning of section 592(a)(1)(A)(i), 19 U.S.C. § 1592(a)(1)(A)(i).² *United States v. Active Frontier International, Inc.*, 36 CIT __, __, Slip Op. 12–112, at 10–11, 14 (“*Active Frontier I*”). Plaintiff originally asserted, incorrectly, that all wearing apparel on the seven entries was subject to a quantitative

¹ Citations to Section 592 of the Tariff Act of 1930 as codified are to the relevant portions of Title 19 of the U.S. Code, 2006 edition.

² Section 592(a)(1) provides, in pertinent part, that [N]o person, by fraud, gross negligence, or negligence—

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

(i) any document or electronically transmitted data or information, written or oral statement, or act which is *material* and false.

19 U.S.C. § 1592(a)(1) (emphasis added).

restriction (*i.e.*, “quota”); after the court pointed out that this assertion appeared to be in error, plaintiff stated in a supplemental brief that a quota applied only to some of the merchandise at issue in the case. *Id.* at 9. The court stated in *Active Frontier I* :

The error aside, both plaintiff’s application and the supplemental brief allege facts beyond those stated in the complaint, which, in contrast to these two submissions, fails to describe the goods sufficiently to allow the court to conclude that some or all of the goods fall within a class, kind, or category of apparel that was subject to a quantitative restriction. Instead, the complaint offers only a vague description, “certain articles of wearing apparel manufactured in the People’s Republic of China.” Compl. ¶ 6. The alleged false origin statements could have affected the admissibility of all the merchandise, as described in the complaint, only if all wearing apparel of Chinese origin were subject to quota at the time the entries were made, which was not the case. Plaintiff’s complaint impermissibly would require the court to speculate that the unspecified apparel articles were quota merchandise. Because the court must rule on plaintiff’s application according to well-pled facts, facts not pled in the complaint but offered only in a subsequent submission will not suffice.

Id. at 9–10. The court added that it “cannot conclude from the facts pled in the complaint that the alleged misstatements of country of origin made upon entry affected admissibility or had any potential to affect any other determination Customs or another agency was required to make under any law applying to the importation of the merchandise.” *Id.* at 11.

The court offered plaintiff an opportunity to seek leave to amend its complaint. *Id.*, 36 CIT at __, Slip Op. 12–112, at 14. Plaintiff’s first motion to amend, filed on October 1, 2012, followed that order. Mot. to Amend, ECF No. 16. On October 3, 2012, the court denied plaintiff’s motion to amend because plaintiff did not lodge a proposed amended complaint with its motion and thereby prevented the court from determining, for purposes of USCIT Rule 15(a)(2), whether the motion would be futile. *United States v. Active Frontier International, Inc.*, 36 CIT __, __, Slip Op. 12–127, at 4. The court gave plaintiff an opportunity to refile its motion accompanied by a proposed amended complaint. *Id.* On October 9, 2012, plaintiff refiled its motion and included a proposed amended complaint. Pl.’s Second Mot. to Amend Compl., ECF No. 19; Am. Compl., ECF No. 19. On October 24, 2012, the court held a telephonic status conference with plaintiff’s attor-

neys. Based on a discussion during the conference related to the question of materiality, plaintiff sought, and the court granted, leave to withdraw the motion without prejudice to the filing of a renewed motion to amend. Order (Oct. 24, 2012), ECF No. 20. On October 31, 2012, plaintiff lodged another proposed complaint to accompany a third motion to amend, which is now before the court. Pl.'s Third Mot. to Amend Compl., ECF No. 21 ("Pl.'s Mot."); *id.*, Ex. 1 ("Proposed Am. Compl.").

USCIT Rule 15(a)(2) directs that "[t]he court should freely give leave" to amend a pleading "when justice so requires." In ruling on a motion to amend a complaint, a court may consider various factors, including whether the amendment would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Intrepid v. Pollock*, 907 F.2d 1125, 1128 (Fed. Cir. 1990). If an amendment would not survive a motion to dismiss pursuant to USCIT Rule 12(b)(5), it is deemed futile. *Kemin Foods v. Pigmentos Vegetales Del Centro*, 464 F.3d 1339, 1354–55 (citation omitted). Normally, an amended complaint supersedes the original. *See Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 438, 1122 n.4 (2009) (citation omitted). Therefore, the court's futility inquiry looks only to the proposed amended complaint.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim of relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A claim has facial plausibility when it "raise[s] a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (internal citation omitted). Determining whether the factual pleading standard has been met is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

The stated purpose of plaintiff's intended amendment is "to expand [the] pleading of the element of materiality" and "to address the concerns raised by the Court in [*Active Frontier I*]." Pl.'s Mot. 1, 4. Unlike the original complaint filed in this action, Plaintiff's proposed amended complaint draws a distinction between quota merchandise and non-quota merchandise, identifying the specific tariff provisions declared by AFI in its entry documentation and the dutiable value of the merchandise listed on each entry, identified by textile/apparel category. Proposed Am. Compl. ¶ 13.

In moving for leave to amend, plaintiff objects to the "narrow" materiality standard the court articulated in *Active Frontier I*. Pl.'s Mot. 4–9. Plaintiff would have the court consider the new proposed complaint under a broader view of materiality, submitting that this

proposed complaint “alleges that [AFT’s] false statement [of country of origin] is material because each entry at issue contained merchandise subject to quota, and [] explain[s] exactly what the relevant quota was.” *Id.* at 9 (citation omitted). Reiterating some arguments it has made previously in this case, which the court rejected, plaintiff submits that the proposed amended complaint sets forth facts demonstrating materiality as to all merchandise at issue in this action, including some merchandise plaintiff describes as not subject to quota. *Id.* at 10 (citation omitted).

Having addressed in *Active Frontier I* the materiality standard for Section 592(a) as it applies to this case, *Active Frontier I*, Slip Op. 12–112, at 4–14, the court is not persuaded by plaintiff’s repetition of its earlier arguments. As the court then discussed, plaintiff’s expansive definition of materiality impermissibly would expand the concept beyond that which Congress intended. One argument plaintiff reiterates is that “when Active Frontier provided a false statement of country of origin for each entry, the false statement was material to that entry, and thus to all the goods in that entry.” Pl.’s Mot. 9. Plaintiff posits that a misstatement of country of origin for a single entry cannot be material as to “some of the goods contained within that entry . . . and not material as to other[s].” *Id.* However, plaintiff does not cite to any authority, either within the text of Section 592 or elsewhere, for the principle it advances. The court sees no reason why a false origin designation could not be material with respect to some merchandise on a given entry, such as merchandise subject to quota, and on the particular facts presented be immaterial with respect to other merchandise on the same entry, such as non-quota merchandise. In this example, the determination of admissibility would involve the application of law to findings of fact specific to each the two types of merchandise in question. *See Active Frontier I*, Slip Op. 12–112, at 10–11. For these reasons, the court, in reviewing plaintiff’s proposed amendment, applies the statutory construction of the term “material” discussed in *Active Frontier I*.

The only remaining question posed by plaintiff’s motion is whether sufficient facts are pled to allow the court to view the alleged false origin statements as “material” within the meaning of Section 592(a)(1)(A)(i), properly construed.³ *See United States v. Ford Motor Co.*, 463 F.3d 1286, 1296–98 (Fed. Cir. 2006) (futility is a sufficient

³ The proposed amended complaint does not raise a question as to the adequacy of pleading negligence on the part of defendant. It does not plead facts from which the court can conclude that AFT’s alleged misstatements of country of origin made occurred by negligence, *see* Pl.’s Third Mot. to Amend Compl., Ex. 1 (Oct. 31, 2012), ECF No. 31 (“Proposed Am. Compl.”), but this omission does not render the motion to amend futile. Section 592(e)(4) places the burden on the United States to show that an act or omission within the purview

ground to deny motion to amend complaint). The new complaint plaintiff lodges, like plaintiff's original complaint, fails to identify the imported merchandise with specificity. See *Active Frontier I*, 36 CIT __, __, Slip Op. 12-112, at 9-10. The court again is informed that the merchandise consists of "certain articles of wearing apparel manufactured in the People's Republic of China," Proposed Am. Compl. ¶ 6, a description too vague to allow the court to determine tariff classification and, accordingly, ascertain whether any of the merchandise at issue in this case falls within tariff provisions to which a quota on Chinese apparel articles applied at the time of entry.⁴ Appearing in paragraph 9(d) is the allegation that "[a]ccording to the entry information, each entry contained merchandise that was listed under Harmonized Tariff Schedule (HTS) number 6204.63.3090." *Id.* ¶ 9(d). This allegation, which states no more than that plaintiff listed subheading 6204.63.3090, HTSUS on its entry documentation, is not an allegation that goods correctly classified within the identified subheading actually were imported and thus were subject to the quota. The *eo nomine* article description for subheading 6204.63.3090, HTSUS identifies "water resistant women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear) of synthetic fiber." Subheading 6204.63.3090, HTSUS (2006, 2007). The proposed complaint further states that "category 648" of the quota on Chinese-origin apparel "covered women's or girl's synthetic fibers [all of which are classifiable under HTSUS 6204.63.3090]," *id.* ¶¶ 9(a)9(b), 9(d) (citations omitted), but this is a conclusion of law, not a factual allegation.⁵ In summary, the proposed amended complaint leaves the court to speculate as to the actual class or kind of apparel items that were imported under cover of each of the seven entries upon which plaintiff has grounded its claim for a civil penalty. Plaintiff's motion thus raises the question of whether the standard established by the Section 592(a) occurred and shifts to the defendant the burden of establishing that the act or omission did not occur as a result of negligence. 19 U.S.C. § 1592(e)(4).

⁴ In earlier submissions in this case, plaintiff identified the class or kind of merchandise for some but not all of the entries in this action. See *Active Frontier I*, 36 CIT __, __, Slip. Op. 12-112, at 10 n.2. The complaint plaintiff now proposes lacks such specificity for any entry.

⁵ See Proposed Am. Compl. ¶¶ 9(a), 9(b) (citing *Establishment of Agreed Import Levels and the ELVIS (Electronic Visa Information System) Requirement for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in the People's Republic of China*, 70 Fed. Reg. 74,777 (Dec. 13, 2005); *Establishment of Agreed Import Levels for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in the People's Republic of China*, 71 Fed. Reg. 62,999 (Oct. 27, 2006)).

lished by the Supreme Court in *Twombly* and *Iqbal* is satisfied on the issue of whether the alleged false origin statements were material. The court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. at 678.

Although the new proposed complaint fails to identify the imported merchandise with specificity, the court concludes that plaintiff’s motion to amend should not be denied on the ground of futility. In construing the complaint, the court must draw all reasonable inferences in favor of the plaintiff. *See Cary v. United States*, 552 F. 3d 1373, 1376 (Fed. Cir. 2009) (citation omitted). With respect to materiality of the alleged false origin statements, the complaint plaintiff lodges is saved from futility by a single sentence in paragraph 9(d): “By misstating the country of origin on these articles, Active Frontier allowed them to be entered into the country without having them count towards the quota on these goods.” Compl. ¶ 9(d). The court construes this statement as an implied assertion of fact that the apparel items actually imported, whatever they were, were encompassed by the article description for subheading 6204.63.3090, HT-SUS. When read in the context of the other allegations in the proposed amended complaint, this statement alleges facts allowing the court to conclude that the alleged false origin statements made as to the imported quota merchandise were material within the meaning of Section 592(a)(1)(A)(i). As applied to the country of origin of the imported apparel items subject to quota, the alleged false statements AFI is alleged to have made affected, or at least had the potential to affect, the administration of the quota by Customs.

For the reasons discussed in the foregoing, upon consideration of plaintiff’s third motion to amend the complaint, as filed on October 31, 2012, and all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that plaintiff’s third motion to amend the complaint be, and hereby is, granted.

Dated: January 16, 2013

New York, New York

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU JUDGE

