Slip Op. 06–24

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

Before: Timothy C. Stanceu, Judge
Court No. 06–00025

[Plaintiff's motion for stay of execution of penalty enforcement or collection denied for failure to satisfy requirements for preliminary injunction]

MEMORANDUM OPINION AND ORDER

Plaintiff Sakar International, Inc. ("Sakar") has filed a Motion for Stay of Execution of Penalty Enforcement or Collection ("Motion for Stay") pertaining to an administrative penalty proceeding conducted by the U.S. Department of Homeland Security, Bureau of Customs and Border Protection ("Customs"). Following the signature line of the Motion for Stay, plaintiff included a Notice of Motion for Oral Argument, which Sakar states it will execute unless defendant stipulates to the stay. For the reasons discussed herein, the court concludes that plaintiff has failed to satisfy the requirements for preliminary injunctive relief and, accordingly, that the Motion for Stay must be denied.

I. BACKGROUND

Sakar filed a summons and a complaint in this court on January 25, 2006, seeking "judicial review and a judgment reversing, setting aside, and vacating" a Customs administrative decision issued on December 29, 2005 by the Director of the Office of Fines, Penalties and Forfeitures, Newark/New York Area. *Compl.* at 1. The Customs administrative decision assessed a mitigated penalty of $67,775 "under the provisions of 19 U.S.C. § 1526(f)" and provided Sakar 30 days in which to pay the mitigated penalty. *Compl.* Ex. 1. Concurrent with the filing of the summons and complaint in this action, Sakar also filed the Motion for Stay, in which it moves the court, specifically, "[t]o order a Stay of any enforcement or collection of any

Customs and Border Protection ('CBP') Civil Penalty amount, in issue by the instant action, by defendant United States as against plaintiff pending judicial review to finality." *Motion to Stay* ¶ 1. Defendant United States, on February 16, 2006, filed an opposition to plaintiff's Motion for Stay and moved, pursuant to U.S.C.I.T. R. 12(b), to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. The time period for the filing of a response to defendant's motion to dismiss, as provided in the Rules of this Court, has not yet expired.

II. DISCUSSION

Because plaintiff has moved for a stay of agency action "pending judicial review to finality," the court has evaluated plaintiff's motion according to the showing required for a motion for a preliminary injunction under U.S.C.I.T. R. 65(a) and applicable case law. To obtain a preliminary injunction, plaintiff must establish: (1) a likelihood of success on the merits; (2) that it will suffer immediate and irreparable harm if preliminary injunctive relief is not granted; (3) that the balance of hardships favors the plaintiff, *i.e.*, that the potential harm to the moving party in the absence of a preliminary injunction would outweigh the harm that a preliminary injunction would cause to the non-moving party; and (4) that the public interest would be better served by the granting of a preliminary injunction. *See U.S. Assoc. of Imps. of Textiles & Apparel v. Dep't of Commerce*, 413 F.3d 1344, 1347 (Fed. Cir. 2005). Plaintiff has failed to make the required showing under any of these four factors.

Plaintiff has failed to show a likelihood of success on the merits of its underlying claim, in which Sakar attempts to obtain an order of this court vacating an administrative penalty decision. This administrative penalty decision, according to plaintiff's own pleadings, has not yet ripened into a collection action in any court. Plaintiff, although alleging that this court has subject matter jurisdiction under 28 U.S.C. § 1581(i), has alleged no facts, and provided no legal argument, establishing that its claim on the merits is within the scope of this jurisdictional provision. *See Compl.* ¶ 1. Therefore, on grounds of both ripeness and subject matter jurisdiction, plaintiff thus far has failed to make any showing that this court would have jurisdiction to hear its claim on the merits.

Plaintiff's argument concerning immediate and irreparable harm is confined to the statement that "significant if not drastic financial harm would be irreparably done to plaintiff movant if penalty collection were allowed to proceed *pendente lite*." *Motion for Stay* ¶ 1. However, Sakar has made no showing, and has failed even to allege facts, that would allow this court to assess the validity of its claim of irreparable harm.

A litigant's failure to show a likelihood of success on the merits and irreparable harm precludes this court from issuing a prelimi-

nary injunction, regardless of any showing made on the remaining two factors. *See Reebok Int'l v. J. Baker, Inc.*, 32 F.3d 1552, 1556 (Fed. Cir. 1994). The court observes, however, that plaintiff has not satisfied either of the remaining two factors. Concerning the balance of hardships, Sakar asserts that, while it would be drastically harmed should penalty collection proceed, "no prejudice or harm will be done to defendant by virtue of such Stay." *Motion for Stay* ¶ 1. Plaintiff has not demonstrated that the balance of hardships tips in its favor. Sakar, as discussed previously, has made no showing that it will be irreparably harmed absent a stay or preliminary injunction but, in effect, asks this court to presume that the United States would not be affected adversely if this Court were to halt collection action on a penalty claim that defendant presumably is entitled to pursue judicially. Finally, the Motion to Stay fails to address the public interest factor.

III. CONCLUSION AND ORDER

For the foregoing reasons, the court concludes that plaintiff has failed to make a showing entitling it to a stay or preliminary injunction pending a decision on the merits of this action. Accordingly, it is hereby

ORDERED that plaintiff's Motion for a Stay of Execution of Penalty Enforcement or Collection, filed on January 25, 2006, is DENIED; and it is further

ORDERED that plaintiff's Notice of Motion requesting oral argument on the Motion for a Stay of Execution of Penalty Enforcement or Collection is DENIED as moot.

Slip Op. 06–25

LADY KELLY, INC., Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Before: Richard W. Goldberg,
Senior Judge
Court No. 05–00480

OPINION

[Defendant's motion to dismiss is denied. Defendant's motion for judgment on the agency record under USCIT R. 56.1 is granted.]

Dated: February 24, 2006

R. Michael Patrick, for plaintiff Lady Kelly, Inc.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. De-

partment of Justice (*Michael James Dierberg*), for defendant United States Secretary of Agriculture.

GOLDBERG, Senior Judge: Defendant United States Secretary of Agriculture ("**Defendant**" or "**USDA**") moves the Court to dismiss Plaintiff Lady Kelly, Inc.'s ("**Plaintiff**") complaint, under USCIT R. 12(b)(5), for failure to state a claim upon which relief may be granted. Defendant also moves in the alternative for judgment on the agency record under USCIT R. 56.1. For the reasons that follow, Defendant's motion to dismiss is denied, and Defendant's motion for judgment on the agency record is granted.

I. *BACKGROUND*

Plaintiff is a corporation engaged in the shrimping business in Georgia. The Foreign Agriculture Service of the USDA recertified a petition for trade adjustment assistance ("**TAA**") filed by the Georgia Shrimp Association ("**GSA**") on behalf of Georgia shrimpers for the fiscal year 2005. *See Trade Adjustment Assistance for Farmers*, 69 Fed. Reg. 68,303 (Dep't of Agric. Nov. 24, 2004). The effective date of the recertification was November 29, 2004. *See id.* The notice was promptly published in the *Federal Register*, and instructed potential applicants that "[s]hrimpers who land their catch in Georgia will be eligible to apply for fiscal year 2005 benefits during a 90-day period beginning on November 29, 2004. The application period closes on February 28, 2005." *Id.*

Plaintiff filed an application that was received by the USDA's Wayne County Farm Service Agency office on June 9, 2005, more than 180 days after the date of recertification. On July 21, 2005, Defendant informed Plaintiff that its application for benefits had been denied because it failed to file within the statutorily prescribed ninety-day window, which had expired on February 28, 2005. On August 17, 2005, Plaintiff commenced proceedings in this Court, invoking the Court's jurisdiction under 28 U.S.C. § 1581(d), and contending that the application was in fact mailed on January 8, 2005, in light of which the Court should equitably toll the ninety-day window.

Plaintiff asserts that it mailed a completed application on January 8, 2005, one day after it received the application form from GSA. Plaintiff further alleges that in March 2005, its owner contacted the relevant Farm Service Agency county office to inquire about the status of its application. Plaintiff has also introduced evidence in the form of a photocopied envelope, with a handwritten note documenting the mailing date of the alleged January 8, 2005 application.[1]

---

[1] The envelope at issue is addressed from GSA to Stewart Sadler, Plaintiff's shareholder. The Court presumes that the envelope contained GSA's notification to Plaintiff of the recertification, as well as an application form. Plaintiff did not introduce a copy of the envelope it used to mail its application to the USDA.

On November 4, 2005, Defendant filed a motion to dismiss, or, in the alternative, for judgment based on the agency record under USCIT R. 56.1. Both motions draw on the same facts to bolster the case for dismissal or entry of judgment on the agency record, respectively: namely, Defendant denied Plaintiff access to TAA benefits because Plaintiff's application was late, and Plaintiff had not adduced sufficient evidence to demonstrate that equitable tolling was appropriate. Plaintiff insists that it is entitled to equitable relief in this case. The Court has jurisdiction over the claim under 19 U.S.C. § 2395(a).[2] *Accord Ingman v. U.S. Dep't of Agric.*, 29 CIT ___ , ___ , Slip Op. 05–119 at 5–7 (Sept. 2, 2005).

II. *DISCUSSION*

Defendant moves the Court to dismiss for failure to state a claim upon which relief may be granted, and for judgment on the agency record. The Court will address each defense separately.

A. Failure to State a Claim

In ruling on a motion to dismiss for failure to state a claim, a court reviews the sufficiency of the complaint, assuming all alleged facts to be true, and drawing all factual inferences in the plaintiff's failure, to determine if any set of circumstances would entitle the plaintiff to the relief it seeks. *See Scheuer v. Rhodes* 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984); *Adams v. United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004); *Amoco Oil Co. v. United States*, 23 CIT 613, 613, 63 F. Supp. 2d 1332, 1334–35 (1999).

Defendant's argument has two interdependent prongs: first, Plaintiff did not file its application within the ninety-day window provided by 19 U.S.C. § 2401e(a)(1); and second, the complaint fails to state a claim for equitable tolling. The first prong is uncontroversial. Plaintiff does not dispute that Defendant first received the TAA application on June 9, 2005. Since eligibility for the adjustment assistance disbursed pursuant to 19 U.S.C. § 2401e is conditioned on an "adversely affected agricultural commodity producer" filing a TAA

---

[2] Plaintiff's invocation of 28 U.S.C. § 1581(d) is misplaced. That section grants the U.S. Court of International Trade ("**CIT**") jurisdiction of disputes over certain plaintiffs' "eligibility" for TAA benefits. *See* 28 U.S.C. § 1581(d)(1)–(3)(1999). Notably, 28 U.S.C. § 1581(d) does not mention "agricultural commodity producers," a recently created class of beneficiaries that includes Plaintiff. Rather, "agricultural commodity producers" may challenge the USDA's eligibility determination by recourse to 19 U.S.C. § 2395(a), which allows such plaintiffs to challenge a "determination of the Secretary of Agriculture under section 2401b of this title[.]" 19 U.S.C. § 2395(a) (2005). Congress added the language in that statute dealing with agricultural commodity producers when it passed the Trade Act of 2002, *see* Pub. L. 107–210, 116 Stat. 933, 953 (2002). Therefore, the CIT has subject matter jurisdiction over USDA TAA cases under 19 U.S.C. § 2395, despite the absence of a corollary amendment to 28 U.S.C. § 1581(d) giving the CIT jurisdiction over eligibility disputes brought by agricultural commodity plaintiffs.

application within ninety days of the date of certification, *see* 19 U.S.C. § 2401e(a)(1), Plaintiff's application was received more than three months after the statutory ninety-day period had passed, and was untimely.

The second prong, however, is contested. Equitable tolling, which allows courts to disregard non-compliance with statutes of limitations or deadlines under certain circumstances where equity demands, is presumptively available with respect to statutes of limitations for filing suits against the government. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95–96 (1990). Congress may at any time choose to preclude equitable tolling with respect to a statute, and render the statutory terms of its waiver of sovereign immunity exhaustive, but in such a case a defendant government agency must adduce evidence that such Congressional intent existed in order to rebut the presumption of availability. *See United States v. Brockamp*, 519 U.S. 347, 350 (1997) (examining "*Irwin's* negatively phrased question: Is there good reason to believe that Congress did *not* want the equitable tolling doctrine to apply?"); *Irwin*, 498 U.S. at 95.

Defendant has produced no such evidence. Previous court decisions have repeatedly allowed equitable tolling in TAA cases. *See, e.g., Former Employees of Sonoco Prods. Co. v. Chao*, 372 F.3d 1291, 1296–98 (Fed. Cir. 2004) (holding sixty-day time limit for filing suit in labor TAA cases may be equitably tolled); *Former Employees of Quality Fabricating, Inc. v. U.S. Sec. of Labor*, 27 CIT ___, ___, 259 F. Supp. 2d 1282, 1285–86 (2003) (equitably tolling the statute of limitations in TAA case where Department of Labor made misrepresentations to plaintiff about how she was to obtain notice of final determination); *Former Employees of Siemens Info. Comm. Networks, Inc. v. Herman*, 24 CIT 1201, 1208, 120 F. Supp. 2d. 1107, 1113 (2000) ("Finally, the relevant legislative history fails to disclose any intent on the part of Congress to prohibit equitable tolling. Indeed, the remedial purpose of the trade adjustment assistance program supports the conclusion that equitable tolling is available in this context.") (citation omitted).

The Court notes that the precise issue in this case is one of first impression in the CIT. No court has ruled on whether equitable tolling is available with respect to an applicant's failure to comply with 19 U.S.C. § 2401e(a)(1)'s ninety-day statutory deadline. The previous cases have all addressed the availability of equitable tolling in instances where plaintiffs have failed to commence a case in the CIT within sixty days of the reviewable determination as required by 19 U.S.C. § 2395(a). *See* 19 U.S.C. § 2395(a) (2005) ("[A plaintiff] may, within sixty days after notice of such determination, commence a civil action in the United States Court of International Trade for review of such determination."). However, the Court sees no reason why this distinction should occasion a different application of the eq-

uitable tolling standards. The language and structure of 19 U.S.C. § 2401e are not suggestive of any Congressional intent to limit the equitable tolling doctrine. Statutes of limitations that are not susceptible to equitable tolling, such as 19 U.S.C. § 1514, are characterized by forceful language that reinforces the exclusionary properties of the limitation. *See, e.g.*, *U.S. JVC Corp. v. United States*, 22 CIT 687, 694–95, 15 F. Supp. 2d 906, 913–14 (1998) (holding equitable tolling of 19 U.S.C. § 1514's ninety-day statute of limitations was inappropriate because that statute provided that absent protests, decisions by Customs Service were "final and conclusive"). Section 2401e, by contrast, contains no such language.

Moreover, the doctrine of equitable tolling is not limited to cases where a party fails to commence a timely case before courts. Administrative deadlines, like statutes of limitations, are susceptible to equitable tolling. *See, e.g.*, *Mahmood v. Gonzalez*, 427 F.3d 248, 251 (3d Cir. 2005) (8 U.S.C. § 1229a's deadline for filing a motion to reopen with an immigration judge is subject to equitable tolling); *Commc'ns Vending Corp. of Arizona, Inc. v. FCC*, 365 F.3d 1064, 1075 (D.C. Cir. 2004) (47 U.S.C. § 415(a)'s two-year deadline for certain actions before the Federal Communications Commission may be equitably tolled); *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1367–68 (D.C. Cir. 1998) (42 U.S.C. § 2000e–5(e)(1)'s requirement that a plaintiff file an administrative complaint with Equal Employment Opportunity Commission within 180 days of alleged unlawful practice may be equitably tolled).

Finally, Defendant seems to agree that equitable tolling is at least *available* in such a case; its motion to dismiss never impugns its discretion to toll the ninety-day window, and instead focuses on whether exercising such discretion in this case would have been appropriate. As such, the Court holds that equitable tolling of the ninety-day statutory deadline contained in 19 U.S.C. § 2401e(a)(1) is available in appropriate circumstances.

Whereas equitable tolling is *available* with respect to the TAA program, it is only *granted* sparingly out of deference to Congress' decision to establish a deadline in the first place. The exception must not swallow the rule, even in the TAA context where Congress has erected an administrative regime to disburse benefits to a class of sympathetic plaintiffs with relatively little sophistication in matters of federal litigation.

As a general matter, equitable tolling is available only where a plaintiff "has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or when the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96. In other words, equitable tolling may be appropriate where a plaintiff has "exercise[d] due diligence in preserving his legal rights." *Id.*; *see also Brandenburg v. Principi*, 371 F.3d 1362, 1364 (Fed. Cir. 2004). Rep-

resentative examples of a plaintiff's due diligence include the timely filing of a correct complaint in the wrong court, *see Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 429–30 (1965), or the filing of a defective notice of appeal, *see Santana-Venegas v. Principi*, 314 F.3d 1293, 1298 (Fed. Cir. 2002).

Here, Plaintiff alleges that it mailed a completed application on January 8, 2005, one day after it received the application form from GSA. Plaintiff has also introduced evidence to that effect. Plaintiff further alleges that in March 2005, its representative contacted the relevant Farm Service Agency county office to inquire about its application.

Assuming all Plaintiff's allegations as true, and drawing all favorable inferences from those facts, the Court finds that Plaintiff has stated a claim upon which relief may be granted. If a plaintiff may be entitled to equitable tolling when it files a defective pleading, or when it inappropriately files a motion for federal relief in state court, it would be inequitable to erect an insuperable bar to such relief in cases where a plaintiff addresses the correct forms to the correct recipient, mails them, but, through no fault of plaintiff's, the forms never arrive. Defendant's motion to dismiss must therefore be denied.

B. Judgment on the Agency Record

As noted above, this case presents an equitable tolling issue of first impression. Here, the relevant statutory deadline limits applicants' access to TAA benefits, and has nothing to do with a plaintiff's ability to obtain judicial review. The deadline operates at the agency level. As such, the USDA has already considered the evidence in favor of equitable tolling at the agency level. The Court's jurisdiction under 19 U.S.C. § 2395 is limited to judicial review of the "determination" that Plaintiff had filed its application out of time, and that equitable tolling was not appropriate in this case.

In a TAA proceeding, this Court will uphold the USDA's factual findings that are supported by "substantial evidence." *See* 19 U.S.C. § 2395(b) (2005). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Because the USDA's decision not to toll the statutory deadline appears to have rested on its determination that Plaintiff did not exercise due diligence in pursuing its rights, the challenged "determination," 19 U.S.C. § 2395(a), is a "factual finding" that will be upheld if "substantial evidence" underlies it, *id.* § 2395(b). *See Former Employees of Siemens*, 24 CIT at 1208, 120 F. Supp. 2d at 1114 ("Whether a plaintiff has acted with due diligence is a fact-specific inquiry, guided by reference to the hypothetical reasonable person."); *cf. Commn'cs Vending Corp.*, 365 F.3d at 1075 (D.C. Circuit upholding the Federal Communications Commission determination not to equi-

tably toll 47 U.S.C. § 415(a) because agency's finding that plaintiff had not exercised due diligence was supported by substantial evidence).

In this case, the absence of any compelling evidence that Plaintiff pursued its rights with due diligence led to the USDA's factual finding that equitable tolling was inappropriate. The Court is unable to say that the existence of a photocopy of an envelope with handwritten annotations relating to the crucial events in this action[3] is sufficiently forceful evidence as to place the USDA's conclusion outside the boundaries of reasonableness. If Plaintiff had shown the USDA a certified mail receipt or registered mail receipt, the Court's conclusions would likely be different. However, the USDA acts well within the bounds of reasonableness when it refuses to equitably toll a statutory deadline on the basis of a self-serving photocopy that an applicant presents. Indeed, to rule otherwise would open a loophole in the TAA regime whereby any applicant that allows the ninety-day time period to lapse could, provided it produces a similar photocopied envelope, obtain access to guaranteed benefits at a later date. The current ruling recognizes that postal errors do, on occasion, occur, but also encourages future applicants to document those errors by sending their applications via certified or registered mail. Defendant's motion for judgment on the agency record is granted.

III. *CONCLUSIONS*

For the foregoing reasons, Defendant's motion to dismiss is denied, and Defendant's motion for judgment on the agency record is granted. An order will be issued dismissing Plaintiff's case.

---

[3] After surveying Plaintiff's summons, complaint, and response to Defendant's motions, it is unclear whether Plaintiff ever presented the envelope to the USDA personnel reviewing the untimely application. If the USDA never saw the envelope, then it was not part of the agency record that the Court is currently reviewing. Because it makes no difference to the ultimate disposition of the Rule 56.1 motion, the Court will assume such evidence was available to the USDA personnel, and explain why *even with such evidence*, the USDA's actions are unassailable on judicial review.

Slip Op. 06–26

OPTREX AMERICA, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 00-08-00382

[Judgment for Defendant.]

Dated: February 27, 2006

Sonnenberg & Anderson, (*Steven Patrick Sonnenberg* and *Michael Jason Cunningham*) for Plaintiff Optrex America, Inc.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams,* Attorney-in-Charge, International Trade Field Office; *Amy M. Rubin,* Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Amy M. Rubin*); and *Beth C. Brotman,* Office of Assistant Chief Counsel, International Trade Litigation, for Defendant United States.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. The Court has jurisdiction over this action under 28 U.S.C. § 1581(a).

2. Plaintiff, Optrex America, Inc. ("Optrex"), is the importer of record for the entries in issue.

3. The administrative protests underlying this action were timely filed and all liquidated duties and fees on the entries in issue have been paid.

4. The articles in issue were imported from Japan, Germany, China and Taiwan into the United States through the Ports of Detroit, Chicago and Los Angeles in 1998 and 1999.

5. The imported merchandise consists of articles referred to generally as "liquid crystal displays," "liquid crystal devices" or "LCDs."

6. The United States Customs Service ("Customs")[1] liquidated the merchandise under various provisions, including subheading 8531.20.00, and subheading 9013.80.70, Harmonized Tariff Schedule of the United States ("HTSUS").

7. Following discovery, Defendant, the United States ("the Government") amended its answer to assert counterclaims under subheading 9013.80.70, subheading 9013.80.90, and subheading 8537.10.90, HTSUS.

---

[1] Currently, U.S. Customs and Border Protection.

8. The LCDs in issue are high technology products that utilize liquid crystals that respond to an electric field by twisting along their axes, thereby changing their optical qualities.

9. The LCDs in issue enable visual character displays, dot matrix displays and/or the display of information through icons.

10. Each imported LCD has an indium tin oxide layer deposited and patterned on the glass.

11. Optrex presented evidence at trial with respect to three types of LCDs: LCD panels, LCD modules and subassemblies that include an LCD module. The LCD modules in issue include both graphic display modules and character display modules.

12. All part numbers beginning with the prefix "DMC" describe character display modules.

13. The first three digits of a base part number beginning with "DMC" indicates the number of characters and the number of character lines (*e.g.*, DMC-40401NY-LY is a 40 character by 4 line character display module.) Thus, the following part numbers are all LCD character display modules capable of displaying more than 80 characters at a time:

    DMC-40401NY-LY, DMC-40457N, DMC-40457N-SEW-B, DMC-40457NYJ-LY-D, DMC-40457NY-LY-B.

    The above five part numbers are subject to Defendant's first alternative counterclaim under 9013.80.70, HTSUS. (Second Amended Answer in Court file.) All of the remaining character display modules in issue display 80 or fewer characters.

14. All part numbers beginning with the prefix "AM" describe segmented character display modules.

15. All part numbers beginning with the prefix "DMF" describe graphic display modules.

16. All part numbers beginning with the prefixes "FRS," "FSD," "FSS," "FTD," "FTS," "GTD," "NRD," "NSD," "NTD," "NTX," "VTD," "VTS," and "WSD" describe LCD panels (sometimes referred to as glass sandwiches). All of the part numbers subject to the Government's second alternative counterclaim are LCD panels.

17. In their condition as imported, the LCDs can not display data or accept input.

18. Some of the imported LCDs are "distribution parts" or are "sold through distribution," which means that they are sold through stocking resellers of Optrex's products. These distributors in-

clude Pioneer, Apollo, Digikey, Norvell and Sager. Optrex does not always know the ultimate customer for distribution parts.

19. For some of Optrex's products, according to Allen Houck, Optrex's witness, "[a] custom product in Optrex terminology is a product that we do some design, some modification to another product to fit that customer's end application. So we may have another product that's similar that we maybe make some modifications to tailor it directly to their application."

20. The drawings and specifications produced by Optrex for its LCDs do not specify a particular end use application.

21. Most of Optrex's "standard" products were originally developed as custom products for particular customers.

22. The "ground-up" custom LCDs in issue that were later sold to other customers are not limited, by design, to a single end use application.

FINDINGS RE: CUSTOM LCDs AND/OR LCDs SOLD TO A SINGLE CUSTOMER DURING THE TIME PERIOD IN ISSUE

23. AM-50090H-3-(N) is a character display module used in Motorola PCS cell phones.

24. AM-50702HU-T-3 is a character display module with 11 characters of 7 segments each plus icons used in Delco Electronics automotive trip odometers. This module has an alternative (Delco) part number - 16227389.

25. AM-50885HU-LA is a character display module with 11 characters of 7 segments each plus icons used in Delco Electronics automotive trip odometers.

26. DMC-16230NYU-LY-25 is a 16 character by 2 line character display module used in Wayne Systems credit card scanners for gas pumps.

27. DMC-16249N-SEB is a 16 character by 2 line character display module used in Federal Express handheld terminals.

28. DMC-50037N-B-7, DMC-50037N-B-5 and DMC-50037N-B-6 are 40 character by 2 line character display modules used in Avaya/Lucent desktop phones.

29. DMC-50042-1 is a 16 character by 1 line character display module containing printed circuit contacts used in Data South dot matrix or ink jet printers. The printed circuit contacts are used to control certain printer functions.

30. DMC-50461 is a 20 character by 4 line character display module with three indicator light emitting diodes and printed cir-

cuit contacts used in Lexmark laser printers. The printed circuit contacts are used to control certain printer functions.

31. DMC-50777N-AAE, DMC-50777N-B, and DMC-50777N-B-F40 are 16 character by 2 line character display modules containing printed circuit contacts used in Lexmark laser printers. The printed circuit contacts are used to control certain printer functions.

32. Allen Houck testified that Part Nos. DMC-50461, DMC-50777N-AAE, DMC-50777N-B, DMC-50777N-B-F40 and DMC-50042-1 are substantially similar to the articles described in NY Ruling NY 816263.

33. Although the firmware on a particular printer which incorporates Optrex LCDs can be changed or upgraded, it would be changed or upgraded by an engineer or the manufacturer. In addition, with respect to the printers about which Optrex presented testimony, printing a test page executes a fixed program that already resides in the printer. In other words, in printing a test page, the user is selecting a function that is already built in to the printer.

34. DMC-50293H-LA is an 8 character by 2 line character display module used in Motorola PCS mobile phones.

35. DMC-50387NYL-LY-B is a 20 character by 2 line character display module with a micro-controller on board used in IBM point of sale displays.

36. DMC-50513N-LY-B-1-F40 is a 24 character by 2 line character display module used in Avaya desktop phones.

37. DMC-50553NJL-SLY-10 and DMC-50553NJL-SLY-11 are 12 character by 4 line character display modules with icons used in Motorola Iden cell phones.

38. DMC-50593NFJ-SLY-2 is a 12 character by 3 line character display module with icons used in a Lucent cell phone.

39. DMC-50684NJ-SLY-3 is a 12 character by 2 line character display module with icons used in Motorola PCS cell phones.

40. DMC-50739-FW-1 is a 40 character by 2 line character display module with icons used in Xerox copiers.

41. DMC-50799NYU-SLY-B is a 16 character by 4 line character display module with printed circuit contacts used in Compaq file servers.

42. DMC-50799NYU-SLY-B-COM is a subassembly used in a Compaq file server that incorporates character display module DMC-50799NYU-SLY-B and contains printed circuit contacts

and a rubber keypad with popple dome switches. The popple dome switches are not used to control the server or input information to the server.

43. DMC-50877NY-B is a 20 character by 2 line character display module with a built in microcontroller containing firmware used in NCR point of sale terminals. The user of the point of sale terminal cannot change or amend the functions of that device and any change to the firmware would typically be made by NCR.

44. DMC-50922NFJ-SLY-2 is a 12 character by 4 line character display module with icons used in Qualcomm cell phones.

45. DMC-50968N-B-1-F38 is a 16 character by 2 line character display module used in Avaya desktop phones.

46. DMC-50980NFJL-SLY is a 12 character by 4 line character display module with icons and popple dome switches used in Motorola Iden cell phones. The popple dome switches control the mode and menu selections.

47. DMC-51039NFJ-SLY is a 12 character by 4 line character display module with icons used in Qualcom cell phones.

48. DMF-50020NFU-FW is a 240 by 128 pixel graphic display module with printed circuit contacts used in Pitney Bowes scales.

49. DMF-50020NFU-FW-1 is a subassembly containing module DMF-50020NFU-FW as well as a rubber keypad with carbon pills used in Pitney Bowes scales.

50. DMF-50073NF-FW is a graphic display module supplied with an attached touch screen used in a Xerox document center. This part is subject to Defendant's third alternative counterclaim under 8537.10.90.

51. DMF-50082NY-SEW is a 320 x 40 pixel graphic display module used in SPX Corporation hand held testing monitors.

52. DMF-50088NBU-FW is a 640 x 200 pixel graphic display module used in Micros Systems restaurant point of sale terminals.

53. DMF-50190N is a 128 x 64 pixel graphic display module used in Fisher Rosemont/Emerson flow meters.

54. DMF-50246NB-FW-3 is a 352 x 35 pixel graphic display module used in IPC/Global Crossings stock market turrets.

55. DMF-50247NB-FW is a 640 x 480 pixel graphic display module used in Micros Systems restaurant point of sale terminals.

56. DMF-50260NFU-FW-23 is a 640 x 480 pixel graphic display module used in Hewlett Packard medical equipment such as

heart monitors. Hewlett Packard may have allowed Optrex to show and sell the same display to other customers, including Datascope.

57. DMF-50260NFU-FW-31 is a 640 x 480 pixel graphic display module used in Hewlett Packard/Agilent medical equipment such as heart monitors.

58. DMF-50260NF-FW-32 is a 640 x 480 pixel graphic display module used in Hewlett Packard medical equipment such as heart monitors.

59. There is nothing in the design of the LCDs that are used in Hewlett Packard medical monitors that limits the LCDs from being used only in those end use applications.

60. DMF-50331N-SLY is a 105 x 64 pixel graphic display module used by Primus in GTE airplane telephones.

61. DMF-50375N-SEW is a 120 x 64 pixel graphic display module used in Symbol Technologies hand held inventory scanners.

62. DMF-50386N-SLY is a 105 x 64 pixel graphic display module used in Primus airplane telephones.

63. DMF-50521NBU-FW is a 240 x 64 pixel graphic display module used in Wayne Systems credit card scanners on gas pumps.

64. DMF-50531NF-FW is a 320 x 240 pixel graphic display module used by Crestron Electronics in a touch screen terminal for its Smart Touch radio frequency wireless control system. This module is not imported with a touch screen.

65. DMF-50562NFU-FW is a 640 x 320 pixel graphic display module used in Hewlett Packard/Philips/Agilent medical monitoring equipment.

66. DMF-50573NB-FW is a 480 x 80 pixel graphic display module used in IPC/Global Crossings stock market turrets.

67. DMF-50646NFJ-SLY-1 is a 96 x 32 pixels graphic display module with icons, printed circuit contacts and a hall effect sensor used in Motorola PCS cell phones.

68. DMF-50656NY-T is a graphic display module with two 119 x 16 pixel sections plus icons used in a Motorola pager.

69. DMF-50772NCWJU-FW is a 240 x 128 pixel color graphic display module used in Garmin International aviation GPS devices.

70. DMF-50796H-LAR is a 45 x 28 pixel graphic display module used in Delco Electronics automotive message centers.

71. DMF-50824N-SLY and DMF-50824N-SLY-2 are 240 x 128 pixel graphic display modules used in Hewlett Packard external defibrillators. Allen Houck was unable to identify the differences between these two modules.

72. DMF-50831NJ is a 265 x 65 pixel graphic display module with printed circuit contacts used in Square D remote power switching systems.

73. DMF-50886NF-FW is a 640 x 200 pixel graphic display module used in Psion Teklogix vehicle mount terminals.

74. DMF-50897NFJ-SEB is a 192 x 272 pixel graphic display module containing a touch screen used in Motorola PCS cell phones. Any module with the base number 50897 would contain a touch screen.

75. DMF-50988NF-SLY is a 128 x 32 pixel graphic display module used in Sims Deltec infusion pumps.

76. DMF-50995N-1 is a 240 x 112 pixel graphic display module with printed circuit contacts used in Avaya Communications business telephones. The design of the LCDs that are used in Avaya telephones does not limit their use only to that end use.

77. DMF-50998NFJL-SLY-1 and DMF-50998NFJL-SLY-3 are 96 x 48 pixel graphic display modules with icons used in Motorola Iden cell phones.

78. DMF-51070NFJ-SLY and DMF-51070NFJ-SLY-AC are 96 x 32 pixel graphic display modules with icons, a hall effect sensor and either popple dome switches or printed circuit contacts used in Motorola PCS cell phones. The popple dome switches and printed circuit contacts would be under the keypad and would control the operations of the cell phone.

79. DMF-51097NFJL-SLY DMF-51097NFJL-LY-AC, and DMF-51097NFJL-SLY-AD are 96 x 48 pixel graphic display modules with icons used in Motorola Iden cell phones.

80. F-51159NYJ-SEW-AA is a 120 x 64 pixel graphic display module used in Symbol Technologies hand-held scanners.

81. FRD-11555AAH is an LCD panel with 9 seven-segment characters plus icons used in Landis & Gyr/Siemens test equipment.

82. FRD-14181ABH-CD is an LCD panel with 3 fourteen-segment characters, 6 seven-segment characters and icons used in Landis & Gyr/Siemens voltage measuring meters.

83. FRS-10813AB and FRS-10813AB-CD are LCD panels with 5 seven-segment characters used by Red Lion Controls.

84. FRS-12280AC-CD is an LCD panel with 7 seven-segment characters and icons used in NCR scales.

85. FRS-13810AAPH-CD is an LCD panel with 3 seven-segment characters and icons used in Johnson Controls temperature-humidity sensing instrumentation products.

86. FSD-15130AAPH-CU is an LCD panel with 8 fourteen-segment characters and icons used in Matsushita Communications car audio systems.

87. FSD-15205AAF-CDA is an LCD panel with an attached flex cable, 8 seven-segment characters on 2 lines (total of 16 seven-segment characters) and icons used in Infinity Informatica Inc. cell phones.

88. FSD-15740AAH-CU is an LCD panel with 3 seven-segment characters, 1 two-segment character and icons used in Lowrance digital depth monitors.

89. FSD-16455AGPH-CU is an LCD panel with 10 seven-segment characters and icons used in Visteon trip odometers. This panel has an alternate (Visteon) part number - F8FF-10D922AB.

90. FTD-11501AGFH and FTD-11501ACFH are different revision levels of the same LCD panel that has 4 seven-segment characters and icons and they are used in Visteon Corporation automotive message centers. This panel has an alternate (Visteon) part number - F6RF-10D922-BB.

91. FTD-12613ABH-CU is an LCD panel with 8 fourteen-segment characters and icons used in Visteon car audio systems. This panel has an alternate (Visteon) part number - F5RF-18B955BC.

92. FTD-13069AAPH-CU is an LCD panel with 4 seven-segment characters and icons used in Matsushita Communications car audio systems

93. FTD-13180AGH is an LCD panel used in Visteon automotive audio systems. This panel has an alternate (Visteon) part number - 95GP-18B55-AC.

94. FTD-13201AEFH-CUA is an LCD panel with 10 seven-segment characters, icons, and a transflective color filter used in Visteon odometer/message centers. This panel has an alternate (Visteon) part number - F5RF-10D922-AB.

95. FTD-13366ABPH-CU is an LCD panel with 3 seven-segment characters, 1 two-segment character and icons used in Delco car audio systems. This panel has an alternate (Delco) part number - 16197564.

96. FTD-14021ACPH-CU is an LCD panel with 4 seven-segment characters, 1 two-segment character and icons used in Matsushita Communications/Panasonic car audio systems.

97. FTD-14171ABPH-CU is an LCD panel with 4 seven-segment characters, 1 two-segment character and icons used in Delco car audio systems. This panel has an alternate (Delco) part number - 16210571.

98. FTD-15286AAPH is an LCD panel with 3 seven-segment characters and icons used in Delco automotive message centers. This part has an alternate (Delco) part number - 16235274.

99. FTD-15491AAPH-CU is an LCD panel with 4 seven-segment characters, 1 two-segment character and icons used in Panasonic car audio systems.

100. FTD-15664 is an LCD panel with 9 characters of varying numbers of segments plus icons used in Delco car audio systems. This panel has an alternate (Delco) part number - 16232895.

101. FTD-15979ABPH is an LCD panel with icons used in Visteon automotive message centers. This part has an alternate (Visteon) part number - 98BP-10D922-BB

102. FTD-16420ACD-CD is an LCD panel with a graphic area of 80 x 7 pixels, 4 seven-segment characters and icons used in Motorola pagers.

103. FTD-16455AAPH is an LCD panel with 10 seven-segment characters and icons used in Visteon automotive trip odometers. This panel has an alternate (Visteon) part number - F8FF-10D922-AA.

104. FTD-16766ABPH is an LCD panel with 6 seven-segment characters, icons and a color filter used in Visteon automotive trip odometers. This panel has an alternate (Visteon) part number - F8FF-10D922-BD.

105. FTD-17029AAPH is an LCD panel with 10 seven-segment characters and a color filter used in a Visteon/Ford Electronics combination automotive clock and odometer. This panel has an alternate (Visteon) part number - 98-BP-10D922-AC.

106. FTS-10813AA is an LCD panel with 5 seven-segment characters used by Red Lion Controls.

107. GMF-51048NFJ is an graphic display module used in the Home Wireless Networks portable telephone handset portion of a house wireless network system.

108. GMF-51076N-S is an 95 x 7 pixel chip on glass graphic display module with a flexible cable and icons used in American Telecom pagers.

109. IM-50888NF and IM-50888NF-1 are character display modules with 12 fourteen-segment characters used in Hewlett Packard/ Agilent measurement and test equipment.

110. NSD-12766AAD-CL is a 320 x 200 pixel LCD panel used in Lowrance Electronics fish finders. Nothing in the design of the LCDs used only in Lowrance fish finders limits the LCDs to that end use application.

111. NSD-14379AA is a 64x128 pixel graphic LCD glass panel with icons used in Telxon Corporation hand held inventory scanners.

112. NSD-15129AAD-CL is a 160 x 160 pixel LCD panel used in a Lowrance Electronics handheld marine global positioning system ("GPS") navigational device.

113. NSD-15319AB is an LCD panel that was sold to Ultratec, Inc. for TTY cellular telephones.

114. NSD-15334AAD-CL is a 65 x 100 pixel LCD panel used in a Lowrance Electronics handheld GPS navigational device.

115. NSD-15920AAD-CL and NSD-15920ABD-CL are 160 x 160 pixel LCD panels used in Lowrance fish finders.

116. NSD-15921ABD-CL is a 240 x 240 pixel LCD panel used in Lowrance fish finders.

117. NSD-16595AED-CL is a 160 x 160 pixel LCD panel used in a Garmin fish finder. Nothing in the design of the LCDs used only in Garmin fish finders limits the LCDs to that end use application.

118. NSD-16598AAD is a 64 x 128 pixel LCD panel used in Lowrance fish finders.

119. NSD-16853AAD-CL is a 104 x160 pixel LCD panel used in Lowrance handheld GPS navigational devices.

120. NSD-16948ACD-CL is a 240 x 240 pixel LCD panel used in Garmin fish finders.

121. NSD-17010ABD-CD is an LCD panel with 60 x 28 pixels configured into 12 character x 4 lines plus icons used in Metro Electronics cell phones.

122. NSD-17024ABD-CL is a 320 x 200 pixel LCD panel used in Lowrance fish finders.

123. NSD-17403ABD-CL is a 64 x 128 pixel LCD panel used in Techsonic fish finders.

124. NSD-7399CXD-CD is a 128 x 112 pixel LCD panel used in Ametek construction machinery information centers.

125. NSD-7551 and NSD-7551AGD-CD are 128 x 128 pixel LCD panels used in Telxon microprocessor-driven hand held inventory terminals.

126. NTD-13787AXD-CL is an LCD panel with two 119 x 16 pixel graphic display areas and icons used in Motorola pagers.

127. NTD-15504AEHD-PCU is a 240 x 80 pixel LCD panel used in Garmin aviation transponders.

128. NTD-16210AB is an LCD panel with two 119 x 16 pixel graphic display areas, holographic filters and icons used in Motorola pagers.

129. NTX-15505AGH-QCD and NTD-15504AEHD-PCU are LCD panels which are individual cells of a double super twisted nematic display used in Garmin aviation GPS devices. NTX-15505AGH-QCD is a "dummy" cell and NTD-15504AEHD-PCU is an "active" cell.

130. VTS-8A80BGFHJ-CU is an LCD panel with icons used in Visteon automotive message centers. This panel has an alternate (Visteon) part number - F0OF-10D922-AA.

131. WSD-14219AIPH-CU is an LCD panel with 6 seven-segment characters and icons used in Yazaki automotive trip odometers.

132. WSD-14282BGPH-CU is an LCD panel with 6 seven-segment characters and icons used in Denso Tennessee automotive trip odometers. This panel has an alternate (Denso) part number - TN461000-1280.

133. WSD-14282BAPH is an LCD panel with 6 seven-segment characters and icons used in Nippon Denso Tennessee automotive trip odometers. This part is a different revision level with a minor design change from WSD-14282BGPH-CU. This panel has an alternate (Denso) part number - TN461000-1190.

134. WSD-15550ABPH-CU is an LCD panel with 6 seven-segment characters and icons used in American Yazaki automotive trip odometers.

135. WSD-16071AAPH-CU is an LCD panel with icons used in Nippon Denso automotive thermometers. This panel has an alternate (Nippon Denso) part number - TN 461000-1450.

136. WSD-16770ACPZ-CD is an LCD panel with 6 seven-segment characters used in Delco Electronics odometers for Harley Davidson. This panel has an alternate (Delco) part number - 16242996.

137. WSD-17304ACPZD is an LCD panel with 11 dot matrix characters and icons used in Delphi automotive audio equipment.

138. DMC-24227N-B-24-F38, DMC-24227N-B-24-F38(I) and DMC-24227N-B-24-T are 24 character by 2 line character display modules. Although these particular modules are used in Avaya desktop telephones, all of the "24227" modules are very similar.

139. DMF-50036NF-FW is a 640 x 200 pixel graphic display module sold to Spectra Electronics, which repairs test equipment.

140. DMF-50036NF-FW-4 is a 640 x 200 pixel graphic display. Although no customers appeared on the shipped order detail for this part in plaintiff's Exhibit 1, Allen Houck testified that, to his knowledge, it was only sold to Toledo Scale, a company that makes scales. However, the base part, 50036, is sold through distribution. Also, the "dash-4" suffix indicates the addition of a Mitsumi connector, but such an addition would not cause this module to be dedicated for use in a scale.

141. DMF-50036NFU-FW-4 is a 640 x 200 pixel graphic display module sold to Toledo Scales. The "-4" version is "essentially the same as the base part number except it has a different type connector."

142. DMF-5005NYJ-SLY-28 is a 240 x 64 pixel graphic display module. This module was sold through distribution and was used by Daniel Instruments for an industrial application. Allen Houck testified that he did not know if this module was sold only to Daniel Instruments.

143. DMF-50260NY-SFW is a 640 x 480 pixel graphic display module. This module was sold to Apollo Display which then sold it to Elite Entry Phone Company.

FINDINGS RE: LCDs ORIGINALLY DEVELOPED FOR A PARTICULAR CUSTOMER IDENTIFIED AT TRIAL BUT ULTIMATELY SOLD TO OTHERS

144. DMC-50070N-B-2 is a character display module. Although it was a custom module used in Avaya/Lucent desktop phones, it was also sold to General Dynamics.

145. DMF-5005NF-SEW is a 240 x 64 pixel graphic display module. Although the original customer for this module was Datascope, which is a medical monitoring equipment company, it is sold through distribution.

146. DMF-50260NF-FW-15 is a 640 x 480 pixel graphic display module. Although this module was designed in conjunction with Hewlett Packard ("HP"), it would not work in HP's medical monitors and was eventually sold to many other customers.

147. DMF-50834NFJ-SEB is a 119 x 73 pixel graphic display module. Although the original design of this module was created for Symbol Technologies, it was also sold to Hand Held Products. These modules are used in hand held inventory scanners.

148. DMF-651ANB-FW-14 is a 640 x 200 pixel graphic display module. The original customer for this part was Datascope, which makes medical monitoring equipment. Allen Houck testified that there were some distribution parts in the "DMF-651 series" but did not know whether the "dash-14" version was one of them.

149. DMF-50174NFL-SFW-11 is a 320 x 240 pixel transflexive graphic display module. Although this module was originally intended to be used in Garmin GPS devices, it has been sold to several customers as well as through distribution and could be used for multiple applications. All of the modules with part numbers containing "50174" are "basically the same" and the differences with the modules discussed at trial involved such characteristics as the cable length and the background color.

FINDINGS RE: LCDs THAT ARE SOLD THROUGH DISTRIBUTION AND/OR TO MULTIPLE CUSTOMERS

150. DMF-50840NB-FW-AK is a 320 x 240 graphic display module that was sold through distribution to Pioneer Standard which, in turn, sold it to a company called Checkmate. Checkmate makes credit card reader terminals. This module has a black bezel which was added at Checkmate's request. Allen Houck does not know whether Pioneer Standard sold this module to customers other than Checkmate but he did state that it is not limited by design for use only in a touch screen terminal.

151. DMF-50840NB-FW is essentially identical to DMF-50840NB-FW-AK except that this module has a silver bezel. This module is sold to multiple customers, including Checkmate and Autotote. According to Allen Houck, "Autotote's product is, in a way, it's a POS system. They do — they do the — not the gambling machines themselves, but they do the register system where somebody's going to go trade in their chips or they are the gambling machines at the horse tracks, those types of products are what they do."

152. DMF-50262NF-FW-ME is a 640 x 400 pixel graphic display module. Although this module was co-developed with

Marquette Electronics for medical monitors, it was sold to Marquette through a distributor, Pioneer Standard. There is nothing about the specific design that limits this module to being used only in medical monitors.

153. DMC-24227N-SEW-B-11 is a 24 characters by 2 line character display module sold through distribution. Although this module may be used in Lucent business telephones, it has no physical characteristics that would commit it to that use and may be used in other applications.

154. DMC-24227N-B is a 24 characters by 2 line character display module sold through distribution.

155. DMC-50747NF is a 16 character by 2 line character display module with a mounted controller chip sold through distribution to multiple customers.

156. DMF-5001NF, DMF-5001NY-LY and DMF-5003NB-FW are 160 x128 pixel graphic display modules sold through distribution.

157. DMF-50036NFU-FW is a 640 x 200 pixel graphic display module sold through distribution to multiple customers. One of the customers is Remanco, which uses the module for a restaurant point of sale (POS) terminal. According to Allen Houck, "some sort of microprocessor" would be required to operate this display.

158. DMF-50036ZNBU-FW is a 640 x 200 pixel graphic display module that was sold to Nautilus, which makes exercise equipment, and also sold through distribution.

159. DMF-50036ZNFU-FW is a 640 x 200 pixel graphic display module sold through distribution. One of the applications is Drason-Stadler clinical audiometers.

160. DMF-5005N-EW is a 240 x 64 pixel graphic display module used by Agilent/Hewlett Packard for medical monitors and also sold through distribution.

161. DMF-5005N is a 240 x 64 pixel graphic display module sold through distribution to a very large number of customers.

162. DMF-5005NYJ-LY is a 240 x 64 pixel graphic display module sold through distribution. One customer, Daniel industries, used it for a fuel measurement device but it could be used in other applications.

163. DMF-5005NY-LY is a 240 x 64 pixel graphic display module sold through distribution.

164. DMF-50081ZNB-FW and DMF-50081ZNB-FW-12 are 320 x 240 pixel graphic display modules sold through distribution to multiple customers.

165. DMF-50081ZNF-FW is a 320 x 240 pixel graphic display module sold through distribution to multiple customers.

166. DMF-5010NB-FW and DMF-5010NBU-FW are 240 x 64 pixel graphic display modules sold through distribution. One of the customers for DMF-5010NB-FW is Novometrics, which uses them for medical monitoring equipment. The only difference between these modules is the viewing angle.

167. DMF-50174ZNB-FW is a 320 x 240 pixel transmissive graphic display module that was sold to Triton Systems for use in an industrial controller application as well as through distribution.

168. DMF-50174ZNF-FW is a 320 x 240 pixel graphic display module sold primarily through distribution.

169. DMF-50260NY-SFW is a 640 x 480 pixel graphic display module. Although one of Optrex's customers for this module is Delphi Engineering, it is also sold by Apollo Display, which is a distributor. Allen Houck.did not know to whom Apollo Display sold this module and was not certain of the Delphi Engineering application. However, according to Mr. Houck, this type of a display would be used with "microprocessor-based products."

170. DMF-50316NF-FW-1 is a 240 x 64 pixel graphic display module sold to Apollo Displays, a distributor.

171. DMF-50383NF-FW is a 640 x 480 pixel graphic display module sold to several specific customers as well as through distribution for multiple uses.

172. DMF-50426NYJ-SLY is a 128 x 32 pixel graphic display module sold through distribution.

173. DMF-50773NF-FW is a 240 x 128 pixel graphic display module sold through distribution.

174. DMF-50840NF-FW-3 is a 320 x 240 graphic display module that is imported with a touch screen. Although it was originally developed for use in a receptionist's telephone, it is a distribution part and could be used in other types of devices. This module is subject to defendant's third alternative counterclaim.

175. DMF-50840NF-FW is a 320 x 240 graphic display module sold to Space Labs, Burdick and also through distribution to other customers. The applications for which this module is used in-

clude electrical chemical analysis multimeters and electrocardiograph machines.

176. DMF-50840NFL-SFW is a 320 x 240 graphic display module sold to several customers including Garmin, Techsonic, I-Con, and also sold through distribution. Although this module is used in GPS devices, it may be used in others as well.

177. DMF-50887NCJU-FW-1 is a 256 x 64 full color graphic display module. Although it was originally designed for an automotive message center application, it is sold to various customers, including distributors.

178. DMF-50961NF-FW is a 640 x 480 pixel graphic display module sold through distribution.

179. DMF-612NF-FW-9 is a 480 x 64 pixel graphic display module sold through distribution. Although Allen Houck testified that it is used by Amtote International, which makes gambling totalizer machines, he stated that it is possible that it is also sold by the distributor to other end customers.

180. DMF-660NK-EW is a 240 x 128 pixel graphic LCD display module sold to Datascope for medical monitoring equipment and also through distribution, possibly for applications other than medical equipment.

181. Although Optrex Part Nos. DMC-20434 and DMC-20434N-B are identified in Volume 2 of plaintiff's Exhibit 1 and Part Nos. DMC-20434HE, DMC-20481NY-LY, DMC-20481NY-LY-B and DMF-682ANF-EW are identified in Volume 9 of Plaintiff's Exhibit 1, Optrex had abandoned any claims with respect to these part numbers prior to trial.

182. Prior to trial, Optrex agreed to abandon its claims with respect to the following part numbers:

C-51148NU-SLY-AA, CBL50073B-UNIT, CCT-50081UNIT-S1, CMF-51048NFJ, COB-50796-C, COV-50739A, DMC-16105NY-LY, DMC-16106C, DMC-16117AN , DMC-16128NY-LY, DMC-16129, DMC-16129H, DMC-16129N-B, DMC-16129U, DMC-16188NY-LY, DMC-16202N-LY-B, DMC-16202N-LY-D, DMC-16202NYJ-LY-D, DMC-16202NY-LY, DMC-16202NY-LY1, DMC-16203NJ-D, DMC-16204N-LR-B, DMC-16205NY-LY, DMC-16207, DMC-16207N, DMC-16207N-B, DMC-16207N-EB, DMC-16230, DMC-16230H, DMC-16230N, DMC-16230NU-EB, DMC-16230NYJ-LY-D, DMC-16230NY-LY, DMC-16230NY-LY-B, DMC-16230NYU-LY, DMC-16433, DMC-16433H, DMC-16433N, DMC-16433N-SEW-B, DMC-20171, DMC-20203NY-LY-B, DMC-20215A, DMC-20261ANY-LY-B, DMC-20261NYJ-LY-D, DMC-20261NY-LY,

DMC-20434, DMC-20434HE, DMC-20434N, DMC-20434N-B, DMC-20481NYJ-LY-D, DMC-20481NY-LY, DMC-20481NY-LY-B, DMC-20481NY-SLY-B-5, DMC-20481NYU-LY-B, DMC-2074NY-LY-B, DMC-40202NY-LY-B, DMC-40218N-B, DMC-40218N-SEW-B, DMC-40267NB-LY-B-8, DMC-40267NY-LY, DMC-40267NY-SLY-B, DMC-40401NY-LY, DMC-40457N, DMC-40457N-SEW-B, DMC-40457NYJ-LY-D, DMC-40457NY-LY-B, DMC-50218, DMC-50218N-B, DMC-50292NYJ-LY-D-1, DMC-50292NY-LY-B, DMC-50448N, DMC-50454NJ-SLY, DMC-50603NY-SLY-B, DMC-50697NFU-SLY-1, DMC-50697NFU-SLY-2, DMC-50787N, DMC-50995N-1, DMC-51008NFJ-SLA, DMC-51099N, DMF-50248N-SEW, DMF-50375N-SFW, DMF-50383NG-FW, DMF-50427NYJ-SLY, DMF-5064NFJ-SLY-1, DMF-50796-LAR, DMF-50893NYJL-SLY, DMF-50980NFJL-SLY, DMF-51026NYU-LY, DMF-51120GNFJ-AA, DMF-605NY-SEB-2, DMF-6104NB-EW, DMF-6104NB-FW, DMF-651ANY-EB, DMF-682AN-EW, DMF-682ANF-EW, DMF-682ANY-EB, DXC-NYU-SL, DXC-50799NYU-SLY-B, EL-161060-C, EL-16106C-C, EL-16117-C, EL-16433-W, F-51138NF-S-AA, GMF-51094NFHU-S, HLD-6116SPC-ED, L11-50-023, LG-50980A, LG-950980A, LGP-50980A, M-50888NF, S-12562-5M, TSW-50138B

183. The functions that can be performed by the end use devices for the LCDs in issue that were identified at trial are set by the manufacturer; the user of the end use device cannot add functions after sale.

184. A car owner would not be able to change the features of an odometer that incorporates any of the LCDs in issue.

185. Allen Houck did not believe that any of the end use devices that incorporate the LCDs in issue, other than computer servers, are capable of accepting new software applications that allow the end user to manipulate data.

186. Other than the computer servers, the end use devices for the LCDs in issue run off operating systems that perform the specific function for the specific device.

187. None of the following features, standing alone and in the absence of contractual obligations, would predestine an LCD for a particular end use application: the color of the bezel, the viewing angle, the backlight color, the impact resistance, the temperature sensitivity.

188. All of the LCD modules in issue whose end use applications were discussed at trial, other than those with permanently etched icons, could be used for other applications if the end use device were designed so that the module fit in it. That is what

is done by the customers who purchase from Optrex's distributors.

189. The majority of the graphic display modules in issue are principally used for signaling.

190. When determining if an imported article is classifiable under Heading 8471, Customs applies the legal notes and the *Explanatory Notes* ("ENs") and also considers the article's design, architecture and function. Customs only considers machines with a principal function of processing data to be "automatic data processing machines" of Heading 8471. According to Customs National Import Specialist ("NIS") Eileen Kaplan, in conformity with the logical structure of the HTSUS, if the principal function of an article is something other than processing data, it can not be classified in Heading 8471, even if, in accomplishing its intended purpose, it happens to process data. Examples of provisions that encompass articles with principal functions other than data processing but which articles may process data in accomplishing their principal functions are the provisions that cover line telephony apparatus, radio telephony apparatus, radio navigational apparatus, measuring and checking apparatus, fuel pumps, cash registers, point of sale apparatus, and copiers. Under Customs' interpretation, Note 5(a) to Chapter 84 is used to exclude those articles that should be classified in these other provisions rather than in Heading 8471.

191. In explaining the basis for Optrex's position that the unknown end-use devices into which the "distribution parts" in issue satisfy Note 5(A)(a) to Chapter 84, HTSUS, Allen Houck stated: "the way we would operate with a standard type product is, you know, if we have a product that we know can go into certain types of products, we will sell them to multiple customers. We will sell them through distribution. However, looking at the interface structures, we've got a pretty good idea what it has to do to operate that product and, in the vast majority of these cases, you are going to need a microprocessor system to perform any type of practical solution to this."

192. A microprocessor is a semiconductor chip, and a semiconductor chip is an integrated circuit.

193. Microcontrollers are microprocessors.

194. The microprocessor to which the LCD display would be connected acts as a central processing unit ("CPU") for the device incorporating the display.

195. In interpreting and applying Note 5(A)(a) to Chapter 84, Customs considers the "user" to be the end user, *i.e.*, the person who purchases and/or uses the device, not the manufacturer or seller of the device.

196. Customs interprets the requirement in Note 5(A) to Chapter 84, HTSUS, that an "automatic data processing machine" must be "capable of" "being freely programmed in accordance with the requirements of the end user" as meaning that the design and architecture of the device is such that it can be programmed to perform functions that correspond to the requirements of the user for the usable life of the machine, not just at the point of sale or distribution. The machine should be able to be programmed to do whatever the user wants it to do, within that machine's capabilities, *e.g.*, to do taxes, to prepare a spreadsheet or a financial report, to play video games or to do word processing. The fact that an automatic data processing machine may become obsolete does not alter its status as an ADP machine. Customs uses the phrases "capable of being freely programmed" and "freely programmable" interchangeably. By contrast, according to the opinion of Optrex's witness, Allen Houck, a device would satisfy this requirement just by having been programmed by the manufacturer, seller or distributor, even if the programs could not be varied according to changing requirements of the end user. In addition, Allen Houck, testified about end-use devices being "freely programmed," the term "freely" had no significance and he meant that the device could be "programmed."

197. Customs classifies machines with multiple functions, one of which is data processing, according to that machine's "principal function."

198. With respect to the requirement in Note 5(A)(a) to Chapter 84, HTSUS, that an "automatic data processing machine" must be "capable of" "performing arithmetical computations specified by the user," Customs does not look to machine functions when referring to "arithmetical computations," but, rather, to standard computations that the machine's user would want to perform such as addition and subtraction. Customs would look to see if the machine can accept applications, such as a calculating program or a tax program, that would allow the user to perform arithmetical computations.

199. If any of these Findings of Fact are more properly denominated Conclusions of Law they shall be deemed to be so.

IV
CONCLUSIONS OF LAW

1. Optrex has effectively abandoned its claims with respect to any and all part numbers encompassed by the entries at issue for which no evidence was presented at trial.

2. At the time relevant to this action, subheading 8531.20.00 encompassed:

> 8531 Electric sound or visual signaling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530; parts thereof:
>
> 8531.20.00 Indicator panels incorporating liquid crystal devices (LCD's) or light emitting diodes (LED's).

3. At the time relevant to this action, subheading 8537.10.90 encompassed:

> 8537 Boards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of chapter 90, and numerical control apparatus, other than switching apparatus of heading 8517:
>
> 8537.10 For a voltage not exceeding 1,000 V:
>
> 8537.10.90 Other.

4. At the time relevant to this action, subheadings 9013.80.70 and 9013.80.90 encompassed:

> 9013 Liquid crystal devices not constituting articles provided for more specifically in other headings; lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in this chapter; parts and accessories thereof:
>
> 9013.80 Other devices, appliances and instruments:
>
> 9013.80.70 Flat panel displays other than for articles of heading 8528
>
> 9013.80.90 Other.

5. At the time relevant to this action, subheading 8473.30.50, HTSUS encompassed:

8473 Parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of headings 8469 to 8472:

8473.30 Parts and accessories of the machines of heading 8471[2]:

8473.30.50 Other.

6. According to the General Rules of Interpretation ("GRI"), HTSUS relevant to this action:

Classification of goods in the tariff schedule shall be governed by the following principles:

1. The table of contents, alphabetical index, and titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions:

* * *

3. When, by application of rule 2(b) or for any other reason, goods are *prima facie*, classifiable under two or more headings, 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.

* * *

7. Additional U.S. Rule of Interpretation 1(c) provides:

In the absence of special language or context which otherwise requires —

---

[2] Heading 8471 covers: "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."

> a provision for parts of an article covers products solely or principally used as a part of such articles but a provision for "parts" or "parts and accessories" shall not prevail over a specific provision for such part or accessory; . . .

8. Section XVI, HTSUS, includes Chapters 84 and 85. Note 2(a) to Section XVI provides, in relevant part:

   > Subject to Note 1 of this Section, Note 1 to Chapter 84 and Note 1 to Chapter 85, parts of machines (not being parts of the articles of heading No. 84.84, 85.44, 85.46 or 85.47) are to be classified according to the following rules:
   >
   > (a) Parts which are goods included in any of the headings of Chapters 84 and 85 (other than headings Nos. 84.85 and 85.48) are in all cases to be classified in their respective headings; . . .

9. Note 5 to Chapter 84, HTSUS, provides, in relevant part:

   > (A) For purposes of heading 8471, the expression "automatic data processing machines" means:
   >
   > (a) Digital machines, capable of (1) storing the processing program or programs and at least the data immediately necessary for execution of the program; (2) being freely programmed in accordance with the requirements of the user; (3) performing arithmetical computations specified by the user; and (4) executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run;
   >
   > * * *

10. Note 2 to Chapter 90, HTSUS, provides, in relevant part:

    > 2. Subject to Note 1 above, parts and accessories for machines, apparatus, instruments or articles of this chapter are to be classified according to the following rules:
    >
    > (a) Parts and accessories which are goods included in any of the headings of this chapter or of chapter 84, 85 or 91 (other than heading 8485, 8548 or 9033) are in all cases to be classified in their respective headings;
    >
    > * * *

Pl. Ex. 6, 90–1.

11. The *Explanatory Notes* are the official interpretation of the scope of the Harmonized Commodity Description and Coding System

(which served as the basis of the HTSUS) as viewed by the Customs Cooperation Council, the international organization that drafted that international nomenclature. While the ENs "do not constitute controlling legislative history," they "nonetheless are intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting its subheadings." *Mita Copystar America v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994).

12. The *Explanatory Notes* to Chapter 84, HTSUS, provide, in pertinent part:

* * *

Heading No. 84.71 does not cover machines incorporating or working in conjunction with an automatic data processing machine and performing a specific function. Such machines are classified in the headings appropriate to their respective functions or, failing that, in residual headings.

Pl. Ex. 7, 1136.

13. The *Explanatory Notes* to Heading 8471, HTSUS, provide, in pertinent part:

(I) AUTOMATIC DATA PROCESSING MACHINES AND UNITS THEREOF

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

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

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

They may be self-contained, all the elements required for data processing being combined in the same housing, or they may be in the form of systems consisting of a variable number of separate units.

Such machines are described as digital, analogue or hybrid (analogue/digital), according to the method of processing the data.

This heading also covers separately presented constituent units of automatic data processing systems described above.

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

(A) DIGITAL MACHINES

* * *

The digital data processing machines of this heading must be capable of fulfilling simultaneously the conditions laid down in Note 5 (A) (a) to this Chapter. That is to say, they must be capable of:

(1) Storing the processing program or programs and at least the data immediately necessary for the execution of the program;

(2) Being freely programmed in accordance with the requirements of the user;

(3) Performing arithmetical computations specified by the user; and

(4) Executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run.

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

Part of the data and program or programs may be temporarily stored in auxiliary storage units such as those using magnetic discs or drums, magnetic tapes, etc. But these machines must have a main storage which is directly accessible for the execution of a particular program and which has a capacity at least sufficient to store those parts of the processing and translating programs and the data immediately necessary for the current processing run.

Digital data processing machines usually consist of a number of separately housed interconnected units. They then form a "system".

A complete digital data processing system must comprise, at least:

(1) A central processing unit which generally incorporates the main storage, the arithmetical and logical elements and the control elements; in some cases, however, these elements may be in the form of separate units.

(2) An input unit which receives input data and converts them into signals which can be processed by the machine.

(3) An output unit which converts the signals provided by the machine into intelligible form (printed text, graphs, displays, etc.) or into coded data for further use (processing, control, etc.)

* * *

This heading also excludes:

* * *

(c) Electronic integrated circuits and microassemblies, used as central processing units (known as "microprocessors"), memories, etc. (heading 85.42).

* * *

Pl. Ex. 7, 1297–1298, 1302.

14. The *Explanatory Notes* to Heading 8473, HTSUS, provide, in pertinent part:

Subject to the general provisions regarding the classification of parts (see the General Explanatory Note to Section XVI), this heading covers parts and accessories suitable for use solely or principally with the machines of heading 84.69, 84.70, 84.71 or 84.72.

Pl. Ex. 7, 1304.

15. The *Explanatory Notes* for Heading 8531, HTSUS, provide, in pertinent part:

With the exception of signalling apparatus used on cycles or motor vehicles (heading 85.12) and that for traffic controls on roads (heading 85.30), this heading covers all electrical apparatus used for signalling purposes, whether using sound for the transmission of the signal (bells, buzzers, hooters, etc.) or using visual indication (lamps, flaps, illuminated numbers, etc.), and whether operated by hand (e.g. door bells) or automatically (e.g. burglar alarms).

* * *

This heading includes, *inter alia*:

* * *

(D) Indicator panels and the like. These are used (e.g., in offices, hotels and factories) for calling personnel, indicating where a certain person or service is required, indicating whether a room is free or not . . .

* * *

Pl. Ex. 7, 1381.

16. The *Explanatory Notes* for Heading 9013, HTSUS, provide, in pertinent part:

This heading includes:

(1) Liquid crystal devices consisting of a liquid crystal layer sandwiched between two sheets or plates of glass or plastics, whether or not fitted with electrical connections, presented in the piece or cut to special shapes and not constituting articles described more specifically in other headings of the Nomenclature

* * *

Pl. Ex. 7, 1478.

17. For an LCD to be a "part" of an "automatic data processing machine," the LCD must be dedicated for incorporation into a device that is, itself, an "automatic data processing machine."

18. "Automatic data processing machines" are classifiable in Heading 8471 of the HTSUS.

19. In determining whether a good is classifiable under Heading 8471, HTSUS, the classifier must apply the Legal Notes to Section XVI and Chapter 84, HTSUS. Specifically, an imported article cannot be classified under Heading 8471 if it does not satisfy all of the criteria of Note 5(A)(a) to Chapter 84. The classifier may also be guided by the relevant ENs.

20. For most of the LCDs in issue, the basis for Optrex's claim that the LCDs in issue are classifiable as "parts" of "automatic data processing machines" in Heading 8473 is that each LCD has an interface that will connect the LCD to a microprocessor in an end-use device and the microprocessor satisfies the four criteria of Note 5(a) to Chapter 84, HTSUS.

21. All microprocessors process data (Tr. II 790). However, the microprocessors that interface with the LCDs in issue and act as CPUs are not "automatic data processing machines" under Heading 8471. Tr. II. 878-879; Pl. Ex. 7, 1302. Such microprocessors (integrated circuits) are specifically provided for in Heading 8542, HTSUS. *See* EN

22. Because e the microprocessors contained in the end-use devices for the LCDs in issue are not themselves, "automatic data processing machines," and Optrex has provided no other basis to find that the end use devices, other than the computer servers, are "automatic data processing machines" of Heading 8471, none of the end use devices could be classified in that tariff provision.

23. None of the descriptions of the specific end-use devices provided by Allen Houck demonstrates that these devices, other than the computer servers, satisfy the criteria of Note 5(A)(a) to Chapter 84, as explained below.

24. While there may be multiple definitions of the term "program," (as well as the variations "programming," "programming," and "programmable"), for purposes of determining whether a particular machine satisfies Note 5(A)(a) to Chapter 84, Customs interprets that term as referring to an "application-type" program that has been written to do a specific function. Customs would not, for example, consider programming a video cassette recorder to be "programming" in the Heading 8471 sense because the "program" is "fixed" and already exists on firmware in the VCR and the user merely selects different aspect of that program from a menu or enters data into the machine.

25. Under Customs' interpretation of the relevant ENs, a machine that is limited to a specific function and does not handle "information of all kinds" is not an ADP machine. For example, a business telephone is not an ADP machine because it is not used to process or handle "information of all kinds."

26. In accordance with the ENs to Heading 8471, machines which operate only on fixed programs, that is programs which cannot be modified by the user, are excluded from that heading even though the user may be able to choose between a number of such fixed programs.

27. Application programs are not "fixed" because they can be installed or deleted from a machine.

28. All of the end use devices identified at trial except, perhaps the computer servers, operate on programs that are fixed by the manufacturer and cannot be changed by the user of that device. Tr. II 672, 679. Thus, these devices would, if imported, be excluded from classification in Heading 8471.

29. Customs' manner of determining the classification of articles of Heading 8471 is correct as a matter of law and fact.

30. The requirement in Note 5(A)(a) to Chapter 84, HTSUS, that an "automatic data processing machine" must be "capable of" "performing arithmetical computations specified by the user" is not

satisfied if the device in question only performs mathematical calculations automatically when the user engages a particular feature of the device but does not actually specify the arithmetical computations to be performed.

31. The Court finds that the imported articles are not parts of automatic data processing machines because none of the identified end use devices into which the LCDs will be incorporated satisfies the tariff definition of "automatic data processing machines" in Note 5(A)(a) to Chapter 84. Specifically, none of these products can satisfy the requirement that an ADP machine must be "capable of" "being freely programmed in accordance with the requirements of the user" and, while Optrex has demonstrated that each of the identified end use devices performs arithmetical computations in accomplishing its principal purpose, it failed to demonstrate that any of the end use devices other than perhaps the computer servers, are capable of performing arithmetical computations specified by the user.

32. Even if the end use devices could satisfy the tariff definition of ADP machine, however, Optrex's claim that all of its LCDs are "parts" of ADP machines would still fail since, under various legal notes and Additional U.S. Rule of Interpretation 1(c), the claimed "parts" provision (Heading 8473) cannot prevail over specific provisions such as those for "liquid crystal devices" (Heading 9013), "control panels" (Heading 8473), or "signaling apparatus" (Heading 8531).

33. In determining whether an article is classifiable under subheading 9013.80, which covers liquid crystal devices, not constituting articles provided for more specifically in other headings, Customs first looks to see if the article is more specifically described by another provision. With respect to graphic display modules, Customs would first consider whether the module is classifiable as an ADP display in Heading 8471 or as a visual signaling apparatus in Heading 8531. If the article is classifiable in either of these other headings, that is where Customs would classify it; if not, the article would be classified in Heading 9013.

34. Customs relied on the decisions in *Sharp Microelectronics Technology, Inc. v. United States*, 20 CIT 793, 932 F. Supp. 1499 (1996), *aff'd*, 122 F.3d 1446 (Fed. Cir.1997) ("*Sharp*") to classify LCD panels and, based on that decision, such panels would be classified in subheading 9013.80.90, which provides for, among other things, "other" "liquid crystal devices not constituting articles provided for more specifically in other headings." *Sharp* confirms Customs' position that the provision for liquid crystal devices was more specific than a "parts" provision. Moreover, the existence of etched icons would not alter Customs' analysis be-

cause the icons would not change the fact that the articles are liquid crystal devices in accordance with the definition provided in the *Explanatory Notes*.

35. The Optrex LCD panels are the same type of merchandise as was at issue in *Sharp*. Specifically, as in *Sharp*, each of Optrex's LCD panels contain two rectangular ultra flat glass substrates; the interior of the glass between the substrates is filled with liquid crystals, the glass substrates have inner surfaces that have been coated with indium tin oxide and etched, the interior of each glass substrate is covered with a processed alignment layer which causes the liquid crystal molecules to align in a fixed direction, the substrates are hermetically sealed together and, for many of the panels, when the glass substrates are joined, the electrodes are perpendicular to each other, creating a matrix.

36. As here, the plaintiff in *Sharp* claimed that its LCD panels were classifiable as "parts of ADP machines" of Heading 8473 rather than as "liquid crystal devices not constituting articles provided for more specifically in other headings" in Heading 9013.

37. In *Sharp*, the court stated:

> When determining relative specificity, the court looks at the provision with "requirements which are more difficult to satisfy and which describe the article with the greatest degree of accuracy and certainty." . . . As added guidance, additional U.S. Rule of Interpretation 1(c) provides that "a provision for 'parts and accessories' shall not prevail over a specific provision for such part or accessory." The court finds that Heading 9013 contains a specific provision for liquid crystal devices and thus is more specific than the part provision under Heading 8473.
>
> 932 F. Supp. at 1507 (citation omitted).

38. The Court of Appeals for the Federal Circuit affirmed this court's relative specificity analysis in *Sharp*, which concluded that the claimed parts provision was less specific than Heading 9013.

39. With respect to the Optrex LCDs that are "glass panels" and not "modules," the *Sharp* case is directly on point because Optrex's complaint claims only that the glass panels (and all of the other articles in issue) are classifiable as "parts" of ADP machines, the same claim discussed at length in both *Sharp* decisions.

40. Because, under *Sharp*, basic LCD glass panels are classifiable under Heading 9013, the imported articles identified by Allen Houck as LCD panels are classifiable in that heading. Moreover, because they do not fall within any of the more specifically descriptive subheadings (*e.g.*, periscopes, lasers) and are not suffi-

ciently advanced to constitute "flat panel displays," "magnifiers" or "door viewers," they are properly classifiable as "other" "Other devices, appliances and instruments" in subheading 9013.80.90, HTSUS.

41. In order for an LCD module to be eligible for classification as an indicator panel incorporating a liquid crystal device under subheading 8531.20.00, HTSUS, Customs has consistently taken the position that the module must belong to a class or kind or merchandise that is principally used and/or limited by design to signaling.

42. To be classifiable as an indicator panel incorporating a liquid crystal device under subheading 8531.20.00, HTSUS, the articles must belong to the class or kind of merchandise that is principally used to display limited information that is easily understood by the person viewing it.

43. With respect to the classification of character display modules, Customs has developed a guideline for determining if a character display module is principally used for signaling. In accordance with this guideline, which has been dubbed the "80 character rule," if a character display module can display no more than 80 characters, then, in the absence of any information to the contrary, it is deemed to belong to the class or kind of merchandise that is principally used for signaling.

44. The "80 character rule" is entitled to some deference as reasonable under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), since it has been consistently applied since the early 1990s and provides rational and useful guidance in determining whether a particular LCD module is classifiable in Heading 8531 or in, for example, Heading 9013, which, at the time of the entries in issue, carried a higher duty rate.

45. Customs' position with respect to the characteristics of articles classifiable in Heading 8531 is in harmony with the examples in the ENs to Heading 8531, which states, in pertinent part:

> With the exception of signaling apparatus used on cycles or motor vehicles . . . and that for traffic controls on roads . . . , this heading covers all electrical apparatus used for signaling purposes, whether using sound for the transmission of the signal (bells, buzzers, hooters, etc.) or using visual indication (lamps, flaps, illuminated numbers, etc.), and whether operated by hand (e.g. door bells) or automatically (e.g. burglar alarms).
>
> This heading includes, *inter alia:*
>
> * * *

46. Customs' position with respect to the characteristics of articles classifiable in Heading 8531 also comports with the court's interpretation of the term "indicator panel" in *E.M. Chemicals v. United States*, 920 F.2d 910, 913 (Fed Cir. 1990):[6]

> . . . an indicator panel is properly classified under Item 685.70 if it merely conveys information. *A & A Int'l, Inc. v. United States*, 5 CIT 183, 187–89 (1983). We agree with this interpretation of Item 685.70. An LCD, as a signaling device or an indicator panel, may simply convey information or notify the user of a specific event. An LCD may operate in this manner in normal or abnormal circumstances . . . The terms "indicator panels" or "signaling devices" simply denote objects that "indicate" or "signal" . . . We therefore hold, as a matter of law, that the language "indicator panels . . . [or] other . . . visual signaling apparatus," in Item 685.70, includes devices that signal or indicate generally . . .

47. Optrex has failed to demonstrate that Customs' position with respect to the characteristics of articles classifiable in Heading 8531 is incorrect.

48. With respect to part numbers DMF-50073NF-FW and DMF-50840NF-FW-3, which are graphic display modules that are imported with touch screens attached, because these "touch screen" modules possess the characteristics of control panels of Heading 8537, defendant's third alternative counterclaim is granted.

49. If any of these Conclusions of Law are more properly denominated Findings of Fact they shall be deemed to be so.

---

[3] *E.M. Chemicals* was decided under the Tariff Schedules of the United States ("TSUS") which, unlike the HTSUS, had no express provision for liquid crystal displays such as Heading 9013, and the issue in that case was whether imported liquid crystals were classifiable as "parts of indicator panels" or as a chemical mixture. Thus, although the definition of "indicator panel" applied in that case is useful, the Court of Appeals determined, in effect, that all LCDs that were not incorporated within specific end-use products such as "watches, clock radios, calculators, computers, gas pumps, meters, various medical and scientific instrumentation, toys, and automobile dashboards" (920 F.2d at 911) at the time of importation were "indicator panels." In enacting the HTSUS, which does contain a specific provision for liquid crystal displays, Congress recognized that such articles are not all used as indicator panels.

Slip Op. 06–27

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

LARRY CABANA, Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Court No. 04–00634

[Plaintiff's motion for judgement upon the agency record is denied. The United States Department of Agriculture's negative determination is affirmed. Case dismissed.]

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*William F. Marshall*) for Larry Cabana, plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*); of counsel: *Jeffrey Kahn*, Office of the General Counsel, United States Department of Agriculture, for the United States Secretary of Agriculture, defendant.

February 28, 2006

OPINION

TSOUCALAS, Senior Judge: Plaintiff, Larry Cabana ("Cabana") moves pursuant to USCIT R. 56.1 for judgment upon the agency record. Cabana contends that the United States Secretary of Agriculture ("Secretary" or "Department") erred in determining that he was ineligible for certification to receive trade adjustment assistance ("TAA") benefits. Specifically, Cabana asserts that he is eligible for TAA certification because his net fishing income in 2002 was less than his 2001 net fishing income. The Department responds that 19 U.S.C. § 2401e (c) grants the power to determine "net farm income" to the Secretary, and the Secretary has determined that Cabana's "net farm income" did not decrease in 2002.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 2395 (2000) *amended by* 19 U.S.C. § 2395 (Supp. II 2002).[1]

---

[1] Section 284(a) of the Trade Act of 1974 was amended, effective August 6, 2002, and provided this Court with jurisdiction over trade adjustment assistance matters brought by agricultural commodity producers. *See Trade Act of 2002*, Pub. L. No. 107–210, § 142, 116 Stat. 953 (2002). The statute states that "an agricultural commodity producer (as defined in section 2401(2) of this title) aggrieved by a determination of the Secretary of Agriculture under section 2401b . . . may, within sixty days after notice of such determination, commence a civil action in the United States Court of International Trade for review of such determination." 19 U.S.C. § 2395(a). Accordingly, the Court "shall have jurisdiction to affirm the action of the Secretary of Labor, the Secretary of Commerce, or the Secretary of Agriculture, as the case may be, or to set such action aside, in whole or in part." 19 U.S.C. § 2395(c).

STANDARD OF REVIEW

The Court will uphold the Secretary's determination unless it is unsupported by substantial evidence on the record, or otherwise not in accordance with law. *See* 19 U.S.C. § 2395(b); *see also Steen v. United States*, 29 CIT ___ , ___ , 395 F. Supp. 2d 1345, 1347 (2005). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the [same] evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted).

To determine whether the Secretary's interpretation and application of 19 U.S.C. §§ 2401-2401g is "in accordance with law," the Court must undertake the two-step analysis prescribed by *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under the first step, the Court reviews the Department's construction of a statutory provision to determine whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. "To ascertain whether Congress had an intention on the precise question at issue, [the Court] employ[s] the 'traditional tools of statutory construction.' " *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron*, 467 U.S. at 843 n.9). "The first and foremost 'tool' to be used is the statute's text, giving it its plain meaning. Because a statute's text is Congress' final expression of its intent, if the text answers the question, that is the end of the matter." *Id.* (citations omitted). Beyond the statute's text, the tools of statutory construction "include the statute's structure, canons of statutory construction, and legislative history." *Id.* (citations omitted); *but see Floral Trade Council v. United States*, 23 CIT 20, 22 n.6, 41 F. Supp. 2d 319, 323 n.6 (1999) (noting that "not all rules of statutory construction rise to the level of a canon") (citation omitted).

If, after employing the first prong of *Chevron*, the Court determines that the statute is silent or ambiguous with respect to the specific issue, the question for the Court becomes whether the Department's construction of the statute is permissible. *See Chevron*, 467 U.S. at 843. Essentially, this is an inquiry into the reasonableness of the Department's interpretation. *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996). Provided the Department has acted rationally, the Court may not substitute its judgment for the agency's. *See Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (holding that "a court must defer to an agency's reasonable interpretation of a statute even if the court might have pre-

ferred another"); *see also IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992). The "Court will sustain the determination if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence." *Negev Phosphates, Ltd. v. United States*, 12 CIT 1074, 1077, 699 F. Supp. 938, 942 (1988) (citations omitted).

BACKGROUND

On October 28, 2003, the United States Department of Agriculture certified a TAA petition filed by a group of salmon fishermen from Alaska and the Puget Sound Salmon Commission of Seattle, Washington. *See Trade Adjustment Assistance for Farmers*, 68 Fed. Reg. 62,766 (Nov. 6, 2003). This action involves the November 5, 2004, denial of Cabana's application to receive TAA benefits based on the aforementioned certification. *See* Mem. Law Supp. Pl.'s Mot. J. Upon Agency R., Rule 56.1 ("Cabana's Mem.") at 1; Def.'s Resp. Pl.'s Mot. J. Upon Agency R. ("Secretary's Resp.") at 5. On December 14, 2004, the Court received Cabana's letter seeking judicial review of the Secretary's negative determination. *See* Administrative Record ("Admin. R.") at 25. Subsequently, the Secretary moved to dismiss for failure to state a claim, which the Court denied in *Cabana v. United States Sec'y of Agric.*, ("*Cabana I*") Slip Op. 05–93 (Aug. 1, 2005), of which familiarity is presumed.

Cabana concedes that his original request was denied because his application for certification showed that his net farm income in 2002 was more than that of 2001. *See Cabana I*, Slip Op. 05–93 at 4. Cabana contends that 19 U.S.C. § 2401e does not define the term "net farm income." *See* Cabana's Mem. at 5–6. Cabana asserts, however, that the Secretary's definition of "net farm income" in 7 C.F.R. § 1580.102 is contrary to the statutory language. *See id.* at 6. Cabana argues that if Congress intended to base eligibility for TAA on income, then it would not have included the qualifying term "farm income" in 19 U.S.C. § 2401e(a)(1)(C). *See id.* Cabana maintains that the statutory language indicates Congress intended to grant TAA benefits to agricultural producers whose income from farming decreased because of competing imported agricultural commodities. *See id.* at 3. Cabana states that although his *total* adjusted gross income increased in 2002, his *fishing* income in 2001 and 2002 was $31,663 and $31,195, respectively. *See id.* at 6 (emphasis added). Cabana asserts that the increase in his adjusted gross income in 2002 was a result of an increase in non-fishing business income. *See id.* at 5. Therefore, Cabana argues that he satisfies the decreased income requirement in 19 U.S.C. § 2401e and thus is entitled to TAA benefits. *See id.* at 6.

The Secretary responds that its interpretation and application of 19 U.S.C. § 2401e is in accordance with law, and is subject to the

standard of review set forth in *Chevron*. *See* Secretary's Resp. at 7. Citing *Chevron*, the Secretary further argues that its regulations define "net farm" and "net fishing" income pursuant to 19 U.S.C. § 2401e. *See id*. at 16. The Secretary stresses that its regulations base net farming and fishing income on reported income to the Internal Revenue Service ("IRS"). *See id*. at 14 (quoting 7 C.F.R. § 1580.102). Cabana's IRS reported income indicates a higher income in 2002 than in 2001. *See* Admin. R. at 17–18. As such, the Secretary concludes that its determination that Cabana does not qualify for TAA benefits is supported by substantial evidence on the record. *See* Secretary's Resp. at 17–18.

DISCUSSION

To receive TAA benefits, an applicant engaged in the business of farming or fishing must report that "net farm income (as determined by the Secretary [of Agriculture]) for the most recent year is less than the producer's net farm income for the latest year in which no adjustment assistance was received by the producer. . . ." 19 U.S.C. § 2401e(a)(1)(C) (Supp. II 2002). When Congress has "explicitly left a gap for the agency to fill," the agency's own regulations are "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843–44. As Congress has made it clear in 19 U.S.C. § 2401e (a)(1)(C) that "net farm income" shall be determined by the Secretary, the statutory language precludes any need to go beyond the plain meaning of the statute in order to discern Congressional intent. *See Steen*, 29 CIT at ___ , 395 F. Supp. 2d at 1349–50.

"Net farm" and "net fishing" incomes are used by the Secretary to identify producers who have been harmed by import competition for the purpose of determining TAA applications. *See* 19 U.S.C. § 2401e(a)(1). The Secretary has defined "net farm" and "net fishing" income as follows in its regulations:

> *Net farm income* means net farm profit or loss, excluding payments under this part, reported to the Internal Revenue Service for the tax year that most closely corresponds with the marketing year under consideration.
>
> *Net fishing income* means net profit or loss, excluding payments under this part, reported to the Internal Revenue Service for the tax year that most closely corresponds with the marketing year under consideration.

7 C.F.R. § 1580.102 (Nov. 1, 2004)[2]. The Secretary implemented 19 U.S.C. § 2401e in accordance with Congressional intent. *See generally Steen*, 29 CIT at ___ , 395 F. Supp. 2d at 1349–51 (discussing the legislative history of 19 U.S.C. §§ 2401–2401g). "By defining 'net farm income' and 'net fishing income' as income derived from both TAA-eligible and TAA-ineligible products, the agency ensured that Congressional intent was realized — that relief would be limited to agricultural producers most in need of assistance." *Id.* at ___ , 395 F. Supp. 2d at 1351. The Secretary states that it denied TAA certification to Cabana because Cabana's "net fishing" income rose between 2001 and 2002, as Cabana himself reported in Schedule C of his IRS tax returns. *See* Secretary's Resp. at 17–18; Admin. R. at 17–18.

Cabana argues that he satisfied the income requirements of 19 U.S.C. § 2401e as his "net fishing" income was lower in 2002 thanin 2001. *See* Cabana's Mem. at 6. As support, Cabana points to a letter drafted by his accountant. *See* Admin. R. at 26. The letter, however, was dated November 19, 2004, more than thirty days after the decision was made by the Department on October 5, 2004. *See* Admin. R. at 22 & 26. The timing of the letter's submission to the Department does not alter the fact that the Secretary has the Congressionally delegated authority to define the term "net farm income."[3] *See* 19 U.S.C. § 2401e. The Department's definition of "net farm" and "net fishing" income relies on information reported to the IRS. *See* 7 C.F.R. § 1580.102. Cabana's 2002 "net fishing" income as declared on Schedule C of his IRS 1040 form was $37,331, whereas his IRS declared fishing income for 2001 was $35,759, almost two thousand dollars lower. *See* Admin. R. at 17–18. Cabana did not have a "net fishing" income decline between 2001 and 2002. *See id.* Thus, the Secretary correctly determined that Cabana is ineligible to receive TAA benefits.

---

[2] The Secretary enacted an amended version of 7 C.F.R. § 1580.102 on November 1, 2004. *See Trade Adjustment Assistance for Farmers*, 69 Fed. Reg. 63,317 (Nov. 1, 2004). The amended regulation applies here because the Secretary denied Cabana's application on November 5, 2004, and the Court received Cabana's letter seeking judicial review of the Secretary's negative determination on December 14, 2004. *See* Admin. R. at 22 & 25.

[3] During oral arguments, Cabana stated that Congress had intended TAA benefits to be remedial in nature. As such, Cabana argues that discounting the letter simply due to its submission date would not conform to Congress's remedial aim. However, the Secretary has not argued that the letter should be discounted simply due to its date of submission. Rather, credence was not given to the letter since it contained no information whatsoever as to what Cabana viewed as being non-fishing income. Additionally, the Court notes that the record is absent of any explanation as to what Cabana meant by non-fishing income. Furthermore, the Secretary has the authority to calculate net farm income. *See* 19 U.S.C. § 2401e. The Secretary relies on IRS reported information when calculating net farm and net fishing income. *See* 7 C.F.R. § 1580.102.

CONCLUSION

The Court finds that the Secretary's determination to deny Cabana's application for certification for TAA benefits is supported by substantial evidence on the record and is otherwise in accordance with law. Accordingly, Cabana's motion for judgement upon the agency record is denied and the Secretary's negative determination is affirmed. Judgment will be entered accordingly.

SLIP OP. 06–28

BASF CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

BEFORE: CARMAN, JUDGE

Court No. 02–00260

[After trial, judgment for Defendant.]

Barnes, Richardson & Colburn (James S. O'Kelly, Frederic D. Van Arnam, Jr., Kevin Sullivan), New York, NY, for Plaintiffs.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Bruce N. Stratvert*), for Defendant.

Dated: February 28, 2006

OPINION

CARMAN, JUDGE: This opinion and judgment follow a bench trial. The issue before the Court is the tariff classification of Plaintiff's, BASF Corporation ("BASF" or "Plaintiff"), trademarked polyisobutylene amine ("PIBA") in a solution of hydrocarbon solvent. The trade name of Plaintiff's PIBA in solvent is PURADD® FD–100. In the United States, PURADD® FD–100 is used in the production of gasoline detergent additive packages. At importation, the United States Customs Service[1] ("Customs" or "Defendant") classified PURADD® FD–100 in tariff subheading 3811.19.00 of the Harmonized Tariff Schedule of the United States ("HTSUS").[2] Customs now claims that the correct classification of PURADD® FD–100 is in

[1] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. Homeland Security Act of 2002, Pub. L. 107–296, § 1502, 116 Stat. 2135, 2308–09 (2002). *See also* 19 U.S.C. § 1 (Supp. II 2002); 6 U.S.C. § 542 n.6 (Department of Homeland Security Reorganization Plan of November 25, 2002, as modified).

[2] All references to the HTSUS in this opinion are to the year 2000 HTSUS.

HTSUS subheading 3811.90.00. Plaintiff submits that PURADD® FD–100 is properly classifiable in HTSUS tariff subheading 3902.20.50. Upon due consideration of the evidence presented at trial, post-trial briefs, and other papers presented herein, this Court enters judgment for Defendant.

BACKGROUND

The facts of this case were also set forth in this Court's opinion denying Defendant's motion for summary judgment. *BASF Corp. v. United States*, 28 CIT ___ , 341 F. Supp. 2d 1298 (2004). For ease of reference, certain pertinent facts are reiterated here. Additional Court-found facts will be set forth herein.

This case involves seven entries of PURADD® FD–100 that BASF made between January and July 2000. Based upon a 1995 tariff classification ruling, Customs classified the relevant entries of PURADD® FD–100 at importation under tariff subheading 3811.*19*.00, which covers "antiknock preparations . . . for mineral oils (including gasoline)" that are not based upon lead compounds. HQ 956585 (Apr. 10, 1995).[3] After the entries in question were made, Customs revoked HQ 956585 and reclassified PURADD® FD–100 in tariff subheading 3811.*90*.00, as a gasoline detergent additive. HQ 964310 (June 26, 2001.) Because the revocation of HQ 956585 occurred *after* the seven entries at issue were made, the entries before this Court were entered in reliance on HQ 956585 in tariff subheading 3811.*19*.00. (*See* Pl.'s Summons (Mar. 26, 2002); Pl.'s Compl. ¶ 5.) Plaintiff filed timely protests on the seven entries claiming that PURADD® FD–100 was properly classifiable under tariff subheading 3902.20.50. Customs denied BASF's protests. Thereafter, Plaintiff filed a timely appeal of the denied classification protests to this Court. (*See* Pl.'s Summons.)

During trial, this Court heard and received evidence from both parties, and the Court found both Plaintiff's and Defendant's witnesses to be credible.

PURADD® FD–100 is Plaintiff's trade name for polyisobutyleneamine diluted in a saturated hydrocarbon solvent. (Trial Tr. 43.) Plaintiff's parent corporation, BASF AG, manufactures PURADD® FD–100 in Ludwigshafen, Germany. PURADD® FD–100 is manufactured in a three-step process. First, BASF AG, manufactures the

---

[3] Customs ruling HQ 956585 identifies the subject merchandise as "Pluradyne FD–100" and describes it as "a clear colorless viscous liquid, a mixture containing in part several saturated Hydrocarbons and Poly (Isobutylene) Amine." HQ 956585. The Customs laboratory concluded that Pluradyne FD 100 was "an additive for mineral oils (including gasoline) or for other liquids used for the same purposes as mineral oils." *Id.* Pluradyne FD–100 and PURADD® FD–100 are chemically the same. *See* HQ 964310 (June 26, 2001). (*See also* Trial Tr. 256.)

base polymer GLISSOPAL® 1000 in Belgium. GLISSOPAL® 1000 is a highly reactive polyisobutene ("PIB"). (*Id.* at 44.) In Ludwigshafen, BASF AG dilutes the highly reactive PIB with forty-seven percent (47%) by weight of an inert saturated hydrocarbon solvent. The solvent reduces the viscosity of the PIB and ensures that it can be pumped safely. (*Id.*) Second, BASF AG creates a reaction between the PIB-hydrocarbon solvent solution and carbon monoxide and hydrogen. The result of this reaction is a polyisobuteneoxo product. (*Id.*) After this reaction occurs, BASF AG removes the catalyst. The last step in the manufacture of PURADD® FD–100 is "a reaction between the polyisobuteneoxo product and ammonia at elevated temperature and pressure in the presence of hydrogen and a fixed bed transition metal catalyst." (*Id.* at 44–45.) "The resulting product is a solution of the PIBA in the saturated hydrocarbon solvent." (*Id.* at 45.) According to Plaintiff's witness, "more than 97 percent by weight of the PIBA is PIB." (*Id.* at 43.) At this point, BASF AG considers PURADD® FD–100 a saleable, finished, specialty chemical. (*Id.* at 46, 97, 148.)

Both PIB and PIBA are "sticky" substances. (*Id.* at 47.) BASF AG adds the saturated hydrocarbon solvent to the PIB to reduce viscosity and to safely pump, process, and store the PIB and PIBA. (*Id.*) The saturated hydrocarbon solvent is present throughout the manufacturing process. (*Id.*) Although the ratio of PIB to saturated hydrocarbon solvent has changed over time, "[t]he solvent has never exceeded 50 percent by weight of the imported product." (*Id.*) Plaintiff's witness testified that the solvent "has no impact on the PIBA's chemical structure or its performance as a detergent[-]active component in prepared additive packages for gasoline." (*Id.*)

BASF is the sole importer of PURADD® FD–100 into the United States. (*Id.* at 256.) Nearly all of the imported PURADD® FD–100 is used by BASF as a component of the detergent additive packages BASF sells. (*Id.* at 257.) However, BASF has sold small quantities of PURADD® FD–100 for non-fuel additive applications. (*Id.*)

At the time of importation, the Environmental Protection Agency ("EPA") required that all gasoline transferred or sold to an ultimate consumer contain a certified detergent additive that was effective at controlling port fuel injector deposits and intake valve deposits in gasoline engines. 40 C.F.R. § 80.161(a)(2) (2000). In its imported condition, PURADD® FD–100 is not an EPA certified detergent additive package.[4] (Trial Tr. 284; 397–98.) After importation, PURADD® FD–100 is blended with other items (i.e., synthetic carrier, solvents,

---

[4] A detergent control additive package is a "fuel additive" that "keeps the carburetor and the inflow system clean." (Trial. Tr. 61–62.)

etc.) to formulate certified deposit control additive ("DCA") packages. (*Id.* at 259.) PURADD® FD–100 is the "detergent-active component"[5] of a formulated DCA package. (*Id.* at 61, 185.) BASF sells the blended DCA package to gasoline retailers who add it to gasoline before it is sold to consumers at the pump.

AGREED FACTS

In advance of trial, the parties agreed to the following facts:

1. The imported merchandise is currently sold under the trade name PURADD® FD–100.
2. PURADD® FD–100 is a registered trademark of BASF Corporation.
3. PURADD® FD–100 was previously known as PLURADYNE® FD–100.
4. PURADD® FD–100 is a clear, colorless liquid.
5. The PURADD® FD–100 at issue in this case contains 53% PIBA and 47% saturated hydrocarbon solvent.
6. PURADD® FD–100 is in primary form.
7. The saturated hydrocarbon solvent in PURADD® FD–100 constitutes less than 50 percent of PURADD® FD–100 by weight.
8. PURADD® FD–100 is commonly used as a component of prepared additive detergent packages, which are known in the industry as deposit control additive packages ("DCA package") or detergent additive packages.
9. After importation into the United States, PURADD® FD–100 is blended together with a synthetic carrier oil, and anti-corrosive and other ingredients to produce a fully formulated DCA package, which is then ready for sale to, and use by, gasoline marketers and retailers.
10. Only after PURADD® FD–100 is manufactured into a fully formulated DCA package is there a product that meets the performance specifications of gasoline marketers and retailers.
11. PURADD® FD–100 does not meet the performance specifications of gasoline marketers and retailers.

---

[5] The detergent-active component of a DCA package "disperses deposit precursors and removes exhibiting deposits in the intake system." (Trial Tr. 63–64.)

12. VW Wasserboxer Inlet Valve Sticking Tests performed using a Volkswagen engine showed that PURADD® FD–100 caused inlet valve sticking.
13. Fully formulated DCA packages containing PURADD® FD–100 as the detergent[-]active component are certified by the U.S. Environmental Protection Agency ("EPA") for use in the United States as detergent additive packages.
14. PURADD® FD–100 is not sold or used in the United States as an antiknock preparation.
15. PURADD® FD–100 is not sold or used in the United States as an oxidation inhibitor.
16. PURADD® FD–100 is not sold or used in the United States as an anti-icing preparation.
17. PURADD® FD–100 is not sold or used in the United States as a gum inhibitor.

(Pretrial Order ("PTO"), Schedule C.)

ISSUE PRESENTED

Whether PURADD® FD–100 is properly classifiable in HTSUS tariff subheading 3811.90.00 or under tariff subheading 3902.20.50.

The two HTSUS tariff subheadings at issue provide in relevant part:

Chapter 38	
3811	Antiknock preparations, oxidation inhibitors, gum inhibitors, viscosity improvers, anti-corrosive preparations and other prepared additives, for mineral oils (including gasoline) or for other liquids used for the same purposes as mineral oils:
	. . .
3811.90.00	Other . . . . . 1.5¢/kg + 9.3%
Chapter 39	
3902	Polymers of propylen e or of other olefins, in primary forms:
	. . .
3902.20	Polyisobutylene:
	. . .
3902.20.50	Other 6.5%
	. . .

PARTIES' CONTENTIONS

At the Court's request, the parties submitted post-trial briefs. The positions of the parties as set forth in their respective briefs are summarized below.

I. *Plaintiff's Contentions*

Plaintiff's position is that PURADD® FD–100 is properly classifiable only in tariff subheading 3902.20.50. Plaintiff identifies three requirements that must be met in order for PURADD® FD–100 to be classifiable in HTSUS heading 3902: the imported article must be "(A) a polymer, (B) of propylene or other olefin, and (C) in primary form." (Pl.'s Post Trial Br. ("Pl.'s PT Br.") at 7.) Plaintiff explains that PURADD® FD–100 is a polymer because "PIBA has three different constituent monomer units, one of which repeats 16 times." (*Id.*) Plaintiff next submits that PIBA is a form of the olefin polyisobutylene. In support of its position, Plaintiff points out that polyisobutylene is an *eo nomine* subheading under HTSUS heading 3902. (*Id.* at 9.) Plaintiff also notes that the Explanatory Notes[6] ("EN") include slightly polymerized polisobutylene in heading 3902. (*Id.*) Plaintiff offers that PIBA is slightly polymerized polyisobutylene and, therefore, is classifiable in heading 3902. (*Id.*) Although the parties agreed that PURADD® FD–100 is in primary form, Plaintiff mentions that PURADD® FD–100 satisfies the HTSUS Chapter 39 note 6 definition of "primary form" because PURADD® FD–100 is a liquid. (*Id.* at 12.)

Plaintiff also maintains that none of the Chapter 39 notes acts to preclude the classification of PURADD® FD–100 in heading 3902. Plaintiff contends that Chapter 39 note 2(d) "only excludes such solutions where the solvent, rather than the polymer, exceeds fifty percent of the weight of the solution, or where the solvent is not volatile and organic." (*Id.* at 7.) Plaintiff points out that the parties stipulated that the saturated hydrocarbon solvent does not exceed fifty percent (50%) by weight of PURADD® FD–100. (*Id.* at 8.) Plaintiff offers that testimony submitted during trial confirms that the saturated hydrocarbon solvent is both volatile and organic, which Plaintiff indicates Defendant admitted during the summary judgment portion of these proceedings. (*Id.* at 8–9.) Plaintiff states that one of its witnesses confirmed that PURADD® FD–100 satisfies the distil-

---

[6] The Harmonized Tariff System Explanatory Notes are a non-binding aid to assist a court in determining the scope of tariff headings. "While these notes are not controlling legislative history, they are nonetheless intended to clarify the scope of HTSUS subheadings and to offer guidance in their interpretation." *Len-Ron Mfg. Co., Inc. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). The EN may be persuasive authority when an article is specifically enumerated or, conversely, when an article is specifically excluded. *See, e.g., Bausch & Lomb, Inc. v. United States*, 21 CIT 166, 174–75, 957 F. Supp. 281 (1997).

lation test in Chapter 39 note 3(a). (*Id.* at 10–11.) Plaintiff also notes that PURADD® FD–100 meets the requirements of Chapter 39 note 3(c). (*Id.* at 11.)

Plaintiff also addresses the EN exclusion from heading 3902 of "[p]repared additives for mineral oils." EN Ch. 39, Vol. 2, p.718 (3rd ed. 2002). Plaintiff argues that nothing is added to PURADD® FD–100 or to the PIBA. (*Id.* at 13.) Rather, Plaintiff explains that the saturated hydrocarbon solvent is added to GLISSOPAL® 1000, the polyisobutylene used as the base for PURADD® FD–100. (*Id.*) Plaintiff maintains that the presence of the saturated hydrocarbon solvent does not alter "PIBA's chemical structure or its performance as a component in the deposit control additive packages created by [P]laintiff in the U.S." (*Id.* at 14.) Plaintiff insists that there is "no evidence or testimony to establish that the presence of the saturated hydrocarbon solvent makes the imported product a 'prepared additive' for gasoline." (*Id.*) Thus, Plaintiff asserts that because PURADD® FD–100 cannot be classified in HTSUS heading 3811 the EN exclusion does not apply. (*Id.*)

Plaintiff advances its argument by pointing out that PIB comprises more than ninety-five percent (95%) by weight of the total polymer content of PURADD® FD–100. (*Id.* at 18.) Therefore, Plaintiff insists that classification in the *eo nomine* HTSUS tariff subheading 3902.20.50 is legally correct. (*Id.*)

To counter Defendant's proposed classification of PURADD® FD–100 in HTSUS tariff subheading 3811.90.00, Plaintiff submits that "(A) PURADD® FD–100 is not a 'prepared additive' for gasoline, (B) it is not used as a prepared additive for gasoline, and (C) the decision in *Mitsui Petrochemicals (Am.), Ltd. v. United States*, 21 CIT 882 (1997) is inapposite to the facts at hand." (*Id.* at 19.)

Plaintiff asserts that in order "for something to be classified as a prepared additive for gasoline, that product in its condition as imported must have been made 'ready beforehand' to be a substance that is added to gasoline for the specific purpose of improving, strengthening or altering it somehow." (*Id.* at 20.) Plaintiff also asserts that "the gasoline additives industry defines the phrase 'prepared additive for gasoline' as 'something that can go [directly] into gasoline.' " (*Id.* at 21 (*quoting* Trial Tr. 212–13).) Plaintiff submits that PURADD® FD–100 is not added directly to gasoline but rather is first blended with other components to create a DCA package. (*Id.* at 21.) According to Plaintiff, Defendant did not refute this point. (*Id.*) Plaintiff also maintains that PURADD® FD–100 is not a detergent because it is not a preparation " 'used to keep the carburettor [sic] and the inflow and outflow of the cylinders clean.' " (*Id.* at 22 (*quoting* EN 38.11 at p.688).) Plaintiff claims that only DCA packages can act as detergents in the United States due to EPA regulations. (*Id.* at 23.) Further, Plaintiff posits that "prepared additives used to impart detergency in gasoline are those that in fact 'may be

added to gasoline,' either separately or in combination with other chemicals such as carrier oil." (*Id.*) Plaintiff argues that PURADD® FD–100 may not be added directly to gasoline because to do so would be in violation of EPA regulations and might lead to harmful valve sticking or other engine malfunction. (*Id.*)

Plaintiff next submits that HTSUS tariff heading 3811 is a "use" provision. (*Id.* at 24.) As such, Plaintiff explains that PURADD® FD–100 must meet certain criteria in order to be classifiable in the heading. (*Id.*) Plaintiff concludes that PURADD® FD–100 is "not in the same class or kind as 'other prepared additives' that can impart detergency into gasoline," and therefore, PURADD® FD–100 cannot be classifiable in heading 3811. (*Id.* at 29.) In support of its position, Plaintiff claims that evidence presented at trial demonstrates that "the expectations of the ultimate purchasers of PURADD® FD–100 differ from that of the ultimate purchaser of the detergent additive packages;" "PURADD® FD–100 and detergent additive packages move through different channels of trade;" "the environment of the sale of PURADD® FD–100 demonstrates that it is not used in its imported condition to impart detergency into gasoline;" "the imported merchandise is used differently than prepared additives for gasoline that impart detergency;" "PURADD® FD–100 cannot be economically used as a detergent or any other form of prepared additive for gasoline;" and "the industry recognizes that PURADD® FD–100 is not used as a prepared additive for gasoline." (*Id.* at 25–29.)

Lastly, Plaintiff counters Defendant's argument that PURADD® FD–100 should be classified as an incomplete or unfinished prepared additive for gasoline pursuant to General Rule of Interpretation ("GRI") 2(a) of the HTSUS. (*Id.* at 35.) Plaintiff contends that "if application of GRI 1 provides the proper classification for imported merchandise, then this Court may not consider any subsequent GRIs." (*Id.*) Plaintiff posits that PURADD® FD–100 is classifiable in HTSUS tariff heading 3902 by operation of GRI 1, and PURADD® FD–100 is not classifiable in HTSUS tariff heading 3811 because it does not satisfy the terms of the heading or chapter notes. (*Id.* at 35–36.) Because Plaintiff concludes that PURADD® FD–100 is not *prima facie* classifiable in heading 3811, Plaintiff reasons that it is improper for the Court to consider whether PURADD® FD–100 is classifiable in heading 3811 by operation of GRI 2(a). (*Id.* at 36.) Plaintiff also notes that articles classifiable in Section VI of the HTSUS, where heading 3811 falls, are not normally classified on the basis of GRI 2(a). (*Id.*) Lastly, Plaintiff insists that because PURADD® FD–100 is a "complete, finished and discrete article of commerce at the time of importation," it cannot be considered incomplete or unfinished for classification purposes. (*Id.*)

As an alternative, Plaintiff suggests that PURADD® FD–100 may be classifiable in HTSUS tariff subheading 3911.90.90.[7] (*Id.* at 38.)

II. *Defendant's Contentions*

Defendant claims that the correct classification for PURADD® FD–100 is in HTSUS tariff subheading 3811.90.00. Defendant reasons that the provision for "other prepared additives, for mineral oils (including gasoline)" in heading 3811 includes all additives that are specifically prepared for use in gasoline; the relevant language of the heading is not limited to DCA packages. (Def. U.S.'s Proposed Findings of Fact & Conclusions of Law ("Def.'s PT Br.") at 2.) Defendant adduces its position in part from the definition of "detergent additive package" set forth by the EPA:

> *Detergent additive package* means any chemical compound or combination of chemical compounds, including carrier oils, that may be added to gasoline, or to post-refinery component blended with gasoline, in order to control deposit formation. Carrier oil means an oil that may be added to the package to mediate or otherwise enhance the detergent chemical's ability to control deposits. A detergent additive package may contain non-detergent-active components such as corrosion inhibitors, antioxidants, metal deactivators, and handling solvents.

(*Id.* at 2–3 (*quoting* 40 C.F.R. § 80.140 (2005) (emphasis in original).) From this definition, Defendant postulates that PURADD® FD–100 may be considered a detergent additive package "because a 'package means any chemical compound' and does not require a combination of compounds in order to be a detergent additive package." (*Id.* at 3 (*quoting* 40 C.F.R. § 80.140.) In addition, Defendant notes that the presence of non-detergent-active components is not necessary for a product to be designated by EPA as a detergent additive package. (*Id.*) Defendant also comments that the "FD" in PURADD® FD–100 stands for "fuel detergent." (*Id.*) Defendant posits that the "narrow range of molecular weights" of PURADD® FD–100 "makes it particularly well suited to function as a gasoline detergent." (*Id.*) Thus, Defendant reasons that PURADD® FD–100 is classifiable in HTSUS tariff subheading 3811.90.00 as a prepared additive for gasoline by operation of GRI 1. (*Id.* at 4.)

Defendant alternatively argues that PURADD® FD–100 is classifiable in heading 3811 by operation of GRI 2(a) as "an unfinished or incomplete form of a prepared additive for gasoline." (*Id.*) Defendant states that "[i]nsofar as fuel additives for gasoline are also referred to as 'deposit control additive packages,' it is implicit in that descrip-

---

[7] The Court heard no testimony and received no evidence to support Plaintiff's alternative classification. Thus, the Court is unable to determine the applicability of Plaintiff's alternative classification.

tion that the detergent provides the identifying characteristic to such packages and therefore gives them their essential character." (*Id.*) For similar reasons, Defendant suggests that "the Government should prevail under an essential character analysis by application of GRI 3(b), as well." (*Id.*)

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (2000).

STANDARD OF REVIEW

This Court reviews Customs' classification determinations *de novo*. *See* 28 U.S.C. § 2640(a)(1) (2000) (stating that in cases contesting the denial of a protest, the Court makes "its determinations upon the basis of the record before the court"); *see also Cargill, Inc. v. United States*, 28 CIT ___ , 318 F. Supp. 2d 1279, 1287 (2004). "Accordingly, the Court must determine 'whether the government's classification is correct, both independently and in comparison with the importer's alternative.' " *Cargill*, 318 F. Supp. 2d at 1287 (*quoting Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984)).

The Court gives *Chevron* deference[8] to Customs' interpretations of tariff terms in regulations but not those interpretations found in classification rulings. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999). *See also Warner-Lambert Co. v. United States*, 425 F.3d 1381, 1384 (Fed. Cir. 2005) ("Customs classification rulings are not accorded *Chevron* deference."). Although not entitled to deference, a Customs classification decision may be entitled to some weight.

> [Agency] rulings, interpretations and opinions . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). "Customs classification rulings are entitled to a respect proportional to [their] power

---

[8] *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, ____ U.S. ____ , 125 S. Ct. 2688, 2699, (*citing Chevron*, 467 U.S. at 843–44).

to persuade, but the Court has an independent responsibility to decide the legal issue regarding the proper meaning and scope of the HTSUS terms." *Simon Mktg., Inc. v. United States*, 29 CIT ___ , 395 F. Supp. 2d 1280, 1286 (2005) (bracketing in original) (quotations & citations omitted).

DISCUSSION

"Plaintiffs in a classification case are faced with two hurdles in order to prevail: (1) deference to an agency's reasonable interpretation of the statute it administers; and (2) the statutory presumption, found in *28 U.S.C. Sec. 2639*, that Customs's decisions have proper factual basis unless the opposing party proves otherwise." *E.M. Chems. v. United States*, 20 CIT 382, 385 (1996) (quotation & citations omitted). In this case, Defendant is not entitled to the statutory presumption of correctness because the classification Customs required at entry—3811.*19*.00—was admittedly in error. *See Tomoegawa USA, Inc. v. United States*, 12 CIT 112, 114, 681 F. Supp. 867 (1988), *aff'd in part*, 861 F.2d 1275 (Fed. Cir. 1988); *Universal Elecs., Inc. v. United States*, 20 CIT 337, 338 (1996), *aff'd*, 112 F.3d 488 (Fed. Cir. 1997) ("This presumption of correctness does not attach to Customs' classification, however, when Customs admits that its classification is erroneous."). *See also* HQ 964310.

Determining the correct classification of a good is a two-step process. *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). In the first step, the Court determines the legal question of "the proper meaning of the tariff provisions." *Id.* In the second step, the Court determines "whether merchandise falls within a particular tariff provision," which is a question of fact. *Id.* When construing tariff terms, the court may look to common and commercial meanings. *The Mead Corp. v. United States*, 283 F.3d 1342, 1346 (Fed. Cir. 2002). To ascertain the common meaning of a tariff term, the court may refer to dictionaries, scientific authorities, and similarly reliable resources. *Id.* The Court may also look to the EN for guidance. *Len-Ron Mfg. Co., Inc. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003).

Tariff classification is governed by the HTSUS GRIs and the Additional U.S. Rules of Interpretation ("AUSRI"). *Orlando Food*, 140 F.3d at 1439. The GRIs "are considered statutory provisions of law for all purposes." *Toy Biz, Inc. v. United States*, 26 CIT 816, 819, 219 F. Supp. 2d 1289 (2002). The Court applies the GRIs in numerical order. *Carl Zeiss*, 195 F.3d at 1379.

GRI 1 requires that the Court determine classification "according to the terms of the headings and any relative section or chapter notes." To apply GRI 1, the Court must construe "the language of the heading, and any section or chapter notes in question, to determine whether the product at issue is classifiable under the heading." *Orlando Food*, 140 F.3d at 1440. The Court must identify the proper

heading or headings in which an article is classifiable before it can determine the subheading that provides the classification for the item. *Id.* Only when application of GRI 1 does not resolve a classification question may the Court proceed to the remaining GRIs. *Simon Mktg.*, 395 F. Supp. 2d at 1287.

GRI 2(a) instructs that a heading must be understood to include incomplete and unfinished importations of the articles it covers provided the imported article has the "essential character" of the complete or finished article. GRI 2(b) then requires that goods consisting of more than one material or substance be classified in accordance with GRI 3.

GRI 3 governs the classification of goods that are *prima facie* classifiable under two or more headings. GRI 3(a) states that "[t]he heading which provides the most specific description shall be preferred to headings providing a more general description." This is known as the rule of "relative specificity." *Carl Zeiss*, 195 F.3d at 1380.

In applying these rules, as explained below, this Court holds that PURADD® FD–100 is classifiable in HTSUS tariff heading 3811, specifically subheading 3811.90.00.

I. *HQ 964310 Is Persuasive But Not Controlling.*

In 2001, Customs issued HQ 964310 revoking HQ 956585 and classifying PURADD® FD–100 in HTSUS tariff subheading 3811.*90*.00. This Court must decide, pursuant to the factors outlined in *Skidmore*, what weight to give this ruling. As a Headquarters ruling, the Court takes notice that it was prepared by an attorney and provides legal justification and explanation for the classification Customs adopted. Because HQ 964310 revoked an existing classification ruling, it was also the subject of public notice and comment.[9] However, this Court finds the analysis in HQ 964310 incomplete.[10] As a result, this Court gives some persuasive effect to HQ 964310 but does not rely upon it entirely in deciding the classification of PURADD® FD–100.[11]

---

[9] The Court notes that the only comment Customs received to the notice of proposed ruling revocation was from BASF. HQ 964310.

[10] This Court finds Customs' analysis in HQ 964310 incomplete for several reasons. Among the reasons for incompleteness are the following. Customs failed to fully explain why PURADD® FD–100 satisfies the heading, section, and chapter notes for heading 3811. In addition, Customs determined without complete explanation that PURADD® FD–100 was not classifiable under heading 3902 based on GRI 1. Further, Customs—again without complete explanation—concluded that "PURADD® FD–100 is an unfinished product." HQ964310. Using a GRI 2(a), Customs then determined that PURADD® FD–100 provides the essential character for the unfinished PURADD® FD–100 product. For this Court to defer to Customs' classification decision, it must be more than reasoned; it must be well-reasoned.

[11] The Court finds interesting Plaintiff's reliance on NY 872123 (Apr. 22, 1992) in support of its contention that PURADD® FD–100 cannot be classified in HTSUS heading 3811.

It is also appropriate for this Court to give less weight to a Customs decision when the decision announces a change in the agency's position. *See Cal. Indus. Prod., Inc. v. United States*, 28 CIT ___ , 350 F. Supp. 2d 1135, 1140–41 (2004), *aff'd*, ___ F.3d ___ , No. 05–1087, 2006 WL 229922 (Fed. Cir. Feb. 1, 2006).

> While Customs may change a view it believes to have been grounded upon a mistaken legal interpretation, the consistency and predictability of an agency's position is a factor in assessing the weight that position is due. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417, 113 S.Ct. 2151, 124 L.Ed.2d 368 (1993) (citing *Auto. Club of Mich. v. Commissioner*, 353 U.S. 180, 180–83, 77 S.Ct. 707, 1 L.Ed.2d 746 (1957)). "*An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.*" *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448, n.30, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (emphasis added) (quoting *Watt v. Alaska*, 451 U.S. 259, 273, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981)).

Id. at 1140–41 (footnote omitted) (emphasis added). Because HQ 964310 announced a change in Customs' position with regard to the classification of PURADD® FD–100, it is owed less weight by this Court. The Court also notes that it has "an independent responsibility to decide the legal issue regarding the proper meaning and scope of the HTSUS terms." *Simon Mktg.*, 395 F. Supp. 2d at 1286 (quotation & citation omitted).

For the foregoing reasons, this Court finds that—while it has some power to persuade—HQ 964310 does not control the outcome of this case.

II. *PURADD® FD–100 is* Prima Facie *Classifiable in HTSUS Tariff Heading 3902.*

As stated above, GRI 1 requires that classification is to be determined "according to the terms of the headings and any relative section or chapter notes." In order to be classifiable in HTSUS heading 3902, PURADD® FD–100 must be (1) a polymer, (2) of propylene or other olefin, and (3) in primary form.

A polymer "consist[s] of molecules which are characterised [sic] by the repetition of one or more types of monomer units." EN Ch. 39 at

---

In NY 872123, Customs classified an amine-based polyether, which Plaintiff states is similar to PURADD® FD–100 (*id.* at 23), in HTSUS tariff subheading 3907.20.00, a classification for "other polyethers." Customs' classification in NY 872123 is without explanation or analysis. Thus, the Court is disinclined to give it any deference. *See Cargill*, 318 F. Supp. 2d at 1287. However, Plaintiff would have this Court give no deference to the reasoned—albeit incomplete—ruling HQ 964310 but rely upon NY 872123, which is devoid of analysis. Plaintiff cannot pick and choose at its convenience and without justification the Customs rulings to which the Court should give deference.

p.712. Plaintiff's witness, Dr. Fehr who has a Ph.D. in chemistry, testified that PURADD® FD–100 has three different monomer units, one of which repeats sixteen times. (Trial. Tr. 54.) The Customs National Import Specialist who also testified at trial agreed that PURADD® FD–100 is a chemically modified polymer. (*Id.* at 325.) Further, Defendant's expert, Dr. Crawford, referred to PURADD® FD–100 as a "detergent-active *polymer*." (*Id.* at 332 (emphasis added).) Thus, this Court is persuaded that PURADD® FD–100 is a polymer.

Next, the Court must determine whether PURADD® FD–100 is an olefin. An "olefin" is "[a] family of unsaturated, chemically active hydrocarbons with one carbon-carbon double bond; includes ethylene and propylene." *McGraw-Hill Dictionary of Scientific and Technical Terms* 1468 (6th ed., E. Geller ed., McGraw-Hill 2003) ("McGraw-Hill"). Olefins "are named after the corresponding paraffins by adding *-ene* or *-ylene* to the stem." *Hawley's Condensed Chemical Dictionary* 817 (14th ed., R. J. Lewis, Sr., ed., John Wiley & Sons, Inc. 2001) ("Hawley's"). The EN define "liquid synthetic poly*olefins*" as "polymers obtained from ethylene, propene, *butenes* or other olefins." EN Ch. 39 at p.714 (emphasis added). PIB is an *eo nomine* provision under heading 3902, which indicates to the Court that PIB is an olefin. In addition, the Court heard testimony that PURADD® FD–100 "is obtained by synthesis from iso*butene*" which is an olefin as apparent from the *-ene* ending and based on the EN definition of polyolefins. (Trial Tr. 49 (emphasis added).) Therefore, PURADD® FD–100 satisfies the second criteria for classification in heading 3902.

Lastly, to be classifiable under the terms of heading 3902, PURADD® FD–100 must be in "primary form." HTSUS Chapter 39 note 6 defines "primary forms" as "[l]iquids and pastes, including dispersions (emulsions and suspensions) and solutions" and "[b]locks of irregular shape, lumps, powders (including molding powders), granules flakes and similar bulk forms." The Court notes that in its imported condition PURADD® FD–100 is a liquid. (*See* PTO, Schedule C, ¶ 4; Trial Tr. 57.) Moreover, the parties agreed that PURADD® FD–100 is in primary form. (PTO, Schedule C, ¶ 6.) Accordingly, the Court finds that PURADD® FD–100 is in primary form and satisfies the terms of HTSUS tariff heading 3902.

After reviewing the terms of the heading, the Court also must consider any applicable section and chapter notes. The notes "have the same legal force as the text of the headings." *Trans-Border Customs Servs., Inc. v. United States*, 18 CIT 22, 25, 843 F. Supp. 1482 (1994). The purpose of the notes is "to define the precise scope of each heading, subheading, chapter, subchapter, and section." *Id.* at 26. The Court finds several chapter notes applicable to HTSUS heading 3902.

HTSUS Chapter 39 note 2(d) excludes from classification in the heading "[s]olutions . . . consisting of any of the products specified in headings 3901 to 3913 in volatile organic solvents when the weight of the solvent exceeds 50 percent of the weight of the solution." The parties agreed that PURADD® FD–100 is comprised of less than fifty percent (50%) by weight of the saturated hydrocarbon solvent. (PTO, Schedule C, ¶ 7.) Additionally, Dr. Fehr, Plaintiff's witness, testified that "volatile organic solvents" and "inert saturated hydrocarbons" are the same. (Trial Tr. 173–74.) Thus, PURADD® FD–100 is not precluded from classification in HTSUS Chapter 39 by operation of chapter note 2(d).

In addition, HTSUS Chapter 39 note 3 requires that goods classifiable in heading 3902 satisfy a distillation test for "[l]iquid synthetic polyolefins of which less than 60 percent by volume distills at 300°C, after conversion to 1,013 millibars when a reduced-pressure distillation method is used (headings 3901 and 3902)."[12] As previously stated, the EN define "liquid synthetic polyolefins" as "polymers obtained from ethylene, propene, butenes or other olefins." EN Ch. 39 at p.714. Dr. Fehr confirmed that PURADD® FD–100 satisfies the definition of "liquid synthetic polyolefins" because "it is a liquid and the polymer PIBA is obtained by synthesis from isobutene," which is an olefin. (Trial Tr. 49.) Dr. Fehr also testified that PURADD® FD–100 satisfies the distillation test set forth in HTSUS Chapter 39 note 3(a). (*Id*. at 49, 54, 58.)

It is worth mentioning that the EN specifically include in heading 3902 "[p]olyisobutylene, slightly polymerised [sic] and meeting the requirements of Note 3(a) to this Chapter." EN 39.03 at p.725. Plaintiff's witness testified that PIBA is a polymer, specifically "a slightly polymerized PIB." (Trial Tr. 48.) Defendant's witness agreed with this characterization. (*Id*. at 324–25.)

Based upon the foregoing analysis, it appears that PURADD® FD–100 is classifiable in HTSUS heading 3902. However, the Court has yet to consider whether HTSUS tariff subheading 3902.20—an *eo nomine* provision for polyisobutylene—covers PURADD® FD–100. The subject merchandise is not simply polyisobutylene but rather a mixture of polyisobutylene-amine and a saturated hydrocarbon solvent. As such, subheading 3902.20 describes only part of PURADD® FD–100.

Plaintiff argues that "[u]nless there is evidence of contrary legislative intent, an *eo nomine* provision naming an article without terms

---

[12] The Court does not accept Plaintiff's assertion that PURADD® FD–100 need not meet the distillation test to be classifiable in heading 3902. (Pl.'s PT Br. at 10.) Plaintiff suggests that it is sufficient that PURADD® FD–100 satisfy HTSUS Chapter 39 note 3(c), which permits classification of "[o]ther synthetic polymers with an average of at least five monomer units" in heading 3901 through 3911. Plaintiff's argument appears misguided. The parenthetical in Chapter 39 note 3(a) indicates that satisfaction of the distillation test is a requirement for goods to be classifiable in headings 3901 and 3902.

of limitation [ ] is deemed to include all forms of the article." *E.T. Horn Co. v. United States*, Slip Op. 03–20, 2003 WL 649080, at *7 (CIT Feb. 27, 2003) (quotation & citation omitted), *aff'd*, 367 F.3d 1326 (Fed. Cir. 2004). (*See also* Pl.'s PT Br. at 18.) "[A]lthough an *eo nomine* provision covers all forms and varieties of the named commodity, there is a point where the addition of parts and functions transforms the object into something else." *Am. Hardboard Ass'n v. United States*, 12 CIT 714, 716 (1988). The Court finds that PURADD® FD–100 has not reached the point at which the product is no longer covered by HTSUS 3902.

Chapter 39 subheading note 1(a) dictates the classification of polymers in headings—such as 3902—that contain a classification breakout for "other." Pursuant to the note, "[t]he designation in a subheading of a polymer by the prefix 'poly' (e.g., polyethylene and polyamide-6,6) means that the constituent monomer unit or monomer units of the named polymer taken together must contribute 95 percent or more by weight of the total polymer content." Ch. 39 HTSUS, subheading n.1(a)(1). During trial, Plaintiff's witness Dr. Fehr testified that "PIB constitutes 97.01 percent by weight of the PIBA." (Trial Tr. 55.) Because PIB constitutes more than ninety-five percent (95%) of the weight of PURADD® FD–100, the addition of the amine tail does not disqualify the product from classification in HTSUS heading 3902.

The Court accepts Dr. Fehr's testimony that the solvent "has no impact on the PIBA's chemical structure or its performance as a detergent[-]active component in prepared additive packages for gasoline." (*Id.* at 47; *see also id.* at 342, 347.) Further, Chapter 39 note 2(d) contemplates that solutions that satisfy the note's requirements are classifiable in the chapter. As such, it appears that PIBA in saturated hydrocarbon solvent is simply another form of PIBA. Therefore, the presence of the solvent also does not disqualify PURADD® FD–100 from classification in HTSUS heading 3902.

Accordingly, the Court finds that PURADD® FD–100 is *prima facie* classifiable in HTSUS heading 3902. The Court nonetheless must decide whether Customs' proposed classification of PURADD® FD–100 in HTSUS heading 3811 is also legally correct, for, as GRI 3 contemplates, an imported article may be *prima facie* classifiable in two or more headings of the HTSUS.

III. *PURADD® FD–100 is* Prima Facie *Classifiable in HTSUS Tariff Heading 3811.*

For the reasons that follow, this Court finds that PURADD® FD–100 is classifiable in HTSUS tariff heading 3811 by operation of GRI 1. Consequently, this Court need not and does not consider whether PURADD® FD–100 is classifiable in HTSUS heading 3811 based upon GRI 2(a).

A. *Terms of heading and notes (GRI 1)*

Pursuant to GRI 1, classification is "determined according to the terms of the headings and any relative section or chapter notes." The relevant portion of HTSUS tariff heading 3811 states that "other prepared additives, for mineral oils (including gasoline)" are included within the heading. In order for PURADD® FD–100 to be classifiable in heading 3811, this Court must find that it is 1) prepared, 2) an additive, and 3) for gasoline.[13] This Court finds that PURADD® FD–100 is a prepared additive for gasoline.

The terms "prepared additive" and "for gasoline" are defined neither by the HTSUS nor the legislative history for the provision. When tariff terms are not defined, the Court may look to common and commercial meanings to ascertain the meaning of these terms. *Mead*, 283 F.3d at 1346. To aid in its decision, this Court refers to dictionaries, scientific authorities, and similarly reliable resources. *Id*. The Court may also refer to the EN for guidance. *Len-Ron*, 334 F.3d at 1309.

1. PURADD® FD–100 is "prepared."

The Oxford English Dictionary ("OED") defines "prepared" as "[m]ade ready, got ready, fitted or put in order beforehand for something" or "[t]reated for some purpose by a special process; made or compounded by a special process." XII *The Oxford English Dictionary* 376 (2d ed., J. A. Simpson & E. S. C. Weiner eds., Clarendon Press 1989) ("OED"). "Prepared" may also mean "subjected to a special process or treatment." *Webster's New Collegiate Dictionary* 901 (H. B. Woolf ed., G. & C. Merriam Co. 1981). By comparison, the verb "prepare" means "[t]o make ready beforehand for a specific purpose," "[t]o put together or make by combining various elements or ingredients; manufacture or compound." *The American Heritage Dictionary of the English Language* 1430 (3d ed., A. H. Soukhanov ed., Houghton Mifflin Co. 1996) ("American Heritage").[14]

Based upon these definitions and the testimony provided at trial, it is apparent to this Court that PURADD® FD–100 is "prepared." (Trial Tr. at 44–45 (describing manufacturing process), 107, 116.) BASF manufactures PURADD® FD–100 through a series of "rigorous chemical transformations." (*Id*. at 342, 358.) The manufacturing process first requires a reaction under pressure and at high temperature to create an "oxo product." (*Id*. at 341.) Next, BASF subjects the oxo product to a reaction—again at high temperature and high

---

[13] None of the Section or Chapter notes precludes the classification of PURADD® FD–100 in HTSUS heading 3811. Therefore, if PURADD® FD–100 satisfies the terms of the heading, it is classifiable therein by operation of GRI 1.

[14] This Court also consulted several scientific and chemical dictionaries and found that none had definitions for either "prepared" or "prepare." Thus, the Court concluded that—for purposes of this case—the common meaning of these terms was relevant and probative.

pressure—to add the amine tail. (*Id.* at 342.) The end result is PURADD® FD–100. (*Id.*) This process is designed to make PURADD® FD–100 ready for its specific purpose as a detergent-active component. (*Id.* at 174, 372, 394.) In other words, PURADD® FD–100 is made "ready beforehand for a specific purpose," *American Heritage* 1430, and is "[t]reated for some purpose by a special process; made or compounded by a special process," XII *OED* 376.

In addition, Dr. Fehr, Plaintiff's own witness, testified that "PURADD® FD–100 is a *prepared* additive component" (Trial Tr. at 107 (emphasis added)) and "a *prepared* additive" (*id.* at 116 (emphasis added)). Dr. Fehr also stated that "[PURADD® FD–100] is *prepared*" and that PURADD® FD–100 is "a preparation." (*Id.* at 107 (emphasis added).) Further, Dr. Fehr avowed that it was his understanding that PURADD® FD–100 "is a *prepared* additive under the definition of the tariff code." (*Id.* at 117 (emphasis added).) Likewise, Plaintiff's expert, Mr. Ketcham, testified that "[w]ithout a doubt [the components of DCA packages] are *prepared* additives." (*Id.* at 231 (emphasis added).) Based on trial testimony and upon reviewing the common meanings of "prepared," this Court has no doubt that PURADD® FD–100 is "prepared."

2. PURADD® FD–100 is an "additive."

> Next, this Court must consider whether PURADD® FD–100 is an additive. "Additive" is
>
> A nonspecific term applied to any substance added to a base material in low concentrations for a definite purpose. Additives can be divided into two groups: (1) those that have an auxiliary or secondary function (antioxidants, inhibitors, thickeners, plasticizers, flavoring agents, colorants, etc.) and (2) those that are essential to the existence of the end product (leavening agents in bread, curatives in rubber, blowing agents in cellular plastics, emulsifiers in mayonnaise, polymerization initiators in plastics, and tanning agents in leather).

Hawley's at 21. An "additive" is also a "substance added to another to strengthen or otherwise alter it for the purpose of improving the performance of the finished product." *McGraw-Hill* at 35. According to the OED, an "additive" is "[s]omething that is added; esp. (in various technical uses) a substance added . . . in order to impart specific qualities to the resulting product." I *OED* at 144. Further, the EPA defines "additive" as "any substance, other than one composed solely of carbon and/or hydrogen, that is intentionally added to a fuel named in the designation (including any added to a motor vehicle's fuel system) and that is not intentionally removed prior to sale or use." 40 C.F.R. § 79.2(e) (2000).

BASF's own marketing practices indicate that PURADD® FD–100 is an additive. For example, BASF markets and sells PURADD®

FD–100 through its "Fuel *Additives*" business unit. (Trial Tr. 291 (emphasis added).) In addition, BASF's product line description identifies "BASF's PIBA" as part of its "complete line of fuel detergent *additives*." (Def.'s Ex. P (emphasis added).)

Without question, PURADD® FD–100 is added to DCA packages to serve as the detergent-active component. (PTO, Schedule C, ¶ 13.) The EPA defines "detergent-active components" as "components of a detergent additive package which act to prevent the formation of deposits, including, but not necessarily limited to, the actual detergent chemical and any carrier oil (if present) that acts to enhance the detergent's ability to control deposits." 40 C.F.R. § 80.140. In this context, PURADD® FD–100 is an additive that meets the second type of additive described in *Hawley's*—one essential to the existence of the end product—a DCA package. As *the* detergent-active component of Plaintiff's DCA package, PURADD® FD–100 imparts the essential and specific detergency property to the DCA package.[15] Moreover, Plaintiff's own witness, Dr. Fehr, admitted that PURADD® FD–100 is an additive. (Trial Tr. 111, 116, 117.) Likewise, Plaintiff's expert, Mr. Ketcham, testified that PIBAs are "detergent *additives*," (*id.* at 220 (emphasis added)), and are, in fact, "effective detergent *additive[s]*," (*id.* at 221(emphasis added)). Moreover, PURADD® FD–100 is registered with the EPA as a gasoline additive. (*Id.* at 112 ("[PURADD® FD–100] is registered so that someone can use it to add it into a gasoline."), 113 ("The PURADD® FD–100 is registered as a gasoline additive with the EPA."), 114; Def.'s Ex. L.) Accordingly, this Court holds that PURADD® FD–100 is an additive.

3. PURADD® FD–100 is "for gasoline."

Lastly, this Court must decide if PURADD® FD–100 is "for gasoline." The phrase "for gasoline" in HTSUS tariff heading 3811 designates that the heading is a principal use provision.

> While some provisions expressly declare that classification of designated merchandise is dependent upon principal use, in most cases, principal use is implied from the language of the HTSUS. In other words, a designation by use may be established, although the word 'use' or 'used' does not appear in the language of the statute.

E.M. Chems., 20 CIT at 386 (quotation & citation omitted). "Use" may be implied from the phrase "for gasoline," for without the implied term the statutory phrase has no meaning. Accordingly, this Court finds that PURADD® FD–100 must be "for [*use in*] gasoline" to be classifiable in tariff heading 3811.

---

[15] By its very nature, a DCA package is also an additive. A DCA package is added to gasoline to "control deposit formation." 40 C.F.R. § 80.140.

Additional U.S. Rule of Interpretation ("AUSRI") 1(a) is statutory and governs tariff classification of imported goods under use provisions. The rule states that

> tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and *the controlling use is the principal use.*

AUSRI 1(a) (emphasis added). "The purpose of 'principal use' provisions in the HTSUS is to classify particular merchandise according to the ordinary use of such merchandise, even though particular imported goods may be put to some atypical use." *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1364 (Fed. Cir. 1999).

At a minimum, AUSRI 1(a) requires a determination of (1) the "class or kind to which the imported goods belong" and (2) the principal use of that class or kind of goods at or immediately prior to the date of importation. "The scope of the 'class or kind' inquiry should be narrowly tailored to 'the particular species of which the merchandise is a member.' " *Brother Int'l Corp. v. United States*, 26 CIT 867, 874 n.7, 248 F. Supp. 2d 1224 (2002) (quoting *Primal Lite*, 182 F.3d at 1364); *see also USR Optonix, Inc. v. United States*, 362 F. Supp. 2d 1365, 1381 (CIT 2005). To determine the class or kind to which the imported goods belong, Customs must determine the class of goods with which the imported goods are "commercially fungible." *Primal Lite*, 182 F.3d at 1364, 1365; *cf. United States v. Carborundum Co.*, 63 CCPA 98, 102, 536 F.2d 373 (1976)[16] ("Factors which have been considered by courts to be pertinent in determining whether imported merchandise falls within a particular *class or kind* include the general physical characteristics of the merchandise, the expectation of the ultimate purchasers, the channels, class or kind of trade in which the merchandise moves, the environment of the sale (i.e.,

---

[16] This Court notes that *Carborundum* was decided prior to the introduction of the HTSUS. The case interpreted statutory provisions of the predecessor to the HTSUS—the Tariff Schedules of the United States (TSUS). While the TSUS rule at issue was similar to AUSRI 1(a), it was not identical:

> [A] tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of the articles of that class or kind to which the imported articles belong, and the controlling use is the *chief use, i.e., the use which exceeds all other uses (if any) combined*.

Carborundum, 63 CCPA at 101 (*quoting* TSUS General Interpretive Rule 10(e)(I)) (emphasis added).

Decisions under the TSUS are not controlling on decisions made under the HTSUS, but TSUS decisions are instructive when interpreting similar HTSUS provisions. *See E.M. Chems.*, 20 CIT at 386 n.5.

accompanying accessories and the manner in which the merchandise is advertised and displayed), the use, if any, in the same manner as merchandise which defines the class, the economic practicality of so using the import, and the recognition in the trade of this use." (citations omitted) (emphasis added)). "Susceptibility, capability, adequacy, or adaptability of the import to the common use of the class is not controlling." *Carborundum*, 63 CCPA at 102; *see also Minnetonka Brands, Inc. v. United States*, 24 CIT 645, 652, 110 F. Supp. 2d 1020 (2000); *USR Optonix*, 362 F. Supp. 2d at 1381.

The parties do not dispute that PURADD® FD–100 ultimately ends up in gasoline. However, the parties differ on the importance of the intervening process—the blending of the DCA package—that PURADD® FD–100 undergoes before it finds its way into gasoline. Plaintiff defines the class or kind of goods to which PURADD® FD–100 belongs as consisting of only DCA packages. (*See, e.g.*, Pl.'s PT br. at 25.) On the other hand, Defendant takes a broader view of the class or kind of goods to which PURADD® FD–100 belongs. (*See, e.g.*, Def.'s PT br. at 20.) Defendant seems to argue that PURADD® FD–100 should be considered as any of the other additives specifically enumerated in HTSUS heading 3811 (i.e., antiknock preparations, oxidation inhibitors, gum inhibitors, viscosity improvers, anticorrosive preparations). (*Id.* at 19 ("These terms are prefaced by the word 'other,' thus signaling that the substances specified earlier in the heading text, for example, antiknock preparation, oxidation inhibitors, gum inhibitors, are also 'prepared additives for mineral oils (including gasoline.)' ").)[17]

Defendant notes that when PURADD® FD–100 is blended with the other components of the DCA package it "retains its individual

---

[17] Without stating so specifically, Defendant has made an *ejusdem generis* argument for the inclusion of PURADD® FD–100 in heading 3811.

> It is well settled that when a list of items is followed by a general word or phrase, the rule of *ejusdem generis* is used to determine the scope of the general word or phrase. In classification cases, *ejusdem generis* requires that, for any imported merchandise to fall within the scope of the general terms or phrase, the merchandise must possess the same essential characteristics or purposes that unite the listed exemplars preceding the general term or phrase.

Aves. in Leather, Inc. v. United States, 423 F.3d 1326, 1332 (Fed. Cir. 2005) (internal citations omitted). However, the *ejusdem generis* principle does not apply if the "specific and primary purpose" of the imported article "is inconsistent with that of the listed exemplars in a particular heading." *Id.* (quotation & citation omitted).

The EN for heading 3811 state that "[t]he preparations of this heading are additives for mineral oils or for other liquids used for the same purposes to eliminate or reduce undesirable properties, or to impart or enhance desirable properties." EN 38.11 at p.687. PURADD® FD–100 is similar to the exemplars in heading 3811 and satisfies the EN description of the scope of the heading in that PURADD® FD–100 is designed to and does provide detergency when added to gasoline. (*See* Trial Tr. at 174–75, 344, 356; Def. Ex. K.)

chemical identi[t]y in the blend, and could be separated out yielding the same starting material if so desired." (*Id.* at 20.) Defendant cites to testimony presented at trial in which Dr. Crawford (Defendant's expert witness) testified that additives blended together to create a DCA package "retain their individual chemical identities in the blend of additives and could be separated yielding the same starting materials if so desired." (Trial Tr. 359; *see also id.* at 118.) Dr. Crawford also pointed out that blending the additives neither forms new chemical bonds nor breaks existing bonds. (*Id.* at 359.)

The EN for HTSUS heading 3811 define the class or kind of goods covered by the heading as "additives for mineral oils . . . to eliminate or reduce undesirable properties, or to impart or enhance desirable properties." EN 38.11 at p.687. PURADD® FD–100 satisfies this definition because it both reduces undesirable properties and enhances desirable properties. First, on its own, PURADD® FD–100 has detergent[18] properties, which "protect the intake system by preventing the formation of deposits," "neutralize and disperse any deposit precursors," and "remove deposits that have formed." (Trial Tr. 141–42.) Second, PURADD® FD–100 may be combined with a carrier oil to optimize detergency. (*Id.* at 186 (PURADD® FD–100 "adds detergency to the final product."), 190, 201.) Also, other DCA package components, of which PURADD® FD–100 is one, are enumerated in HTSUS tariff heading 3811, including corrosion inhibitors and antioxidants. *See also* 40 C.F.R. § 80.140 (EPA regulation defining detergent additive package as perhaps including non-detergent-active components like corrosion inhibitors, antioxidants, metal deactivators, and handling solvents). Ergo, PURADD® FD–100 falls within the class or kind of goods covered by HTSUS heading 3811.

This Court has traditionally reviewed the factors set forth in *Carborundum*, 536 F.2d at 377, when determining whether an imported article falls within a particular class or kind of goods.[19] Based on a review—in the context of this case—of the *Carborundum* fac-

---

[18] The ENs for heading 3811 define "detergents" as "[p]reparations used to keep the carburettor [sic] and the inflow and outflow of the cylinders clean." EN 38.11(A)(2)(d) at p.688. In petroleum terminology, detergents are "to control carburetor and induction system cleanliness." 2 *Van Nostrand's Scientific Encyclopedia* 2701 (9th ed., G. Considine ed., John Wiley & Sons, Inc. 2002). This Court finds it difficult to define "detergent" in industry terms because, as Dr. Fehr testified, "there is not a sharp definition between detergent component and detergent additive package." (Trial Tr. 162.)

[19] This Court does not find the "commercially fungible" test adopted in *Primal Lite*, 182 F.3d at 1364, useful in this case. Although the Court heard testimony about products that compete with PURADD® FD–100 (e.g., polyetheramines, polyoxyakyleneamines, Mannich base products, and polyisobutenylsuccinimides) (Trial Tr. 348–49), this Court was not asked to classify the competing products and was not provided with the tariff classifications of any of the identified competing products. Therefore, comparing PURADD® FD–100 to commercially fungible products does not elucidate the matter at hand.

tors, this Court again concludes that PURADD® FD–100 is a member of the class or kind of goods covered by HTSUS heading 3811.[20]

First, PURADD® FD–100 has the physical characteristics of a chemical with detergency properties. Indeed, Plaintiff's patent for PURADD® FD–100 indicates "that the PIBA material from BASF is giving detergency in the engine." (Trial Tr. 146–48; *see also id.* at 343 ("The patent teaches that [PIBA] product . . . functions as a gasoline detergent"), 356 ("The BASF patent contains data demonstrating its efficacy as a detergent additive when used alone, without the carrier, in unleaded gasoline."); Def.'s Ex. K.) As the detergent-active component of a DCA package, PURADD® FD–100 "disperses deposit precursors and removes exhibiting deposits in the intake system." (Trial Tr. 63–64.) Dr. Fehr stated that PURADD® FD–100 is manufactured specifically for its "detergent aspect." (*Id.* at 174.) Mr. Ketcham, Plaintiff's expert, added that the detergent-active component—PURADD® FD–100—in this instance—is "the most important" component in preventing and cleaning engine deposits. (*Id.* at 205.) According to Mr. Ketcham, PURADD® FD–100 is "a very good detergent." (*Id.* at 247.) In addition, Dr. Crawford, Defendant's expert, pronounced that "PURADD® FD–100 is well known in the industry and accepted as a gasoline detergent." (*Id.* at 335.) Dr. Crawford also testified that the chemical structure of PURADD® FD–100, specifically a "hydrophobic tail with a polar head, namely amino" (*id.* 344–45), is what gives the product its detergency capability. *See also Id.* at 365 ("PURADD® FD–100 already possesses, by virtue of its chemical structure, all the components necessary to function as a gasoline detergent.").

Second, BASF consumes nearly all[21] of the imported PURADD® FD–100 for its production of DCA packages. Gasoline marketers (e.g., Texaco and Chevron) then purchase BASF-formulated DCA packages, which have PURADD® FD–100 as the detergent-active component. The gasoline marketers expect that BASF's DCA packages will (1) "protect the intake system by preventing the formation of deposits," (2) "neutralize and disperse any deposit precursors," and (3) remove deposits that have formed." (*Id.* at 62.) Dr. Fehr admitted that PURADD® FD–100 *alone* can "protect the intake system by preventing the formation of deposits," "neutralize and disperse any deposit precursors," and "remove any deposits that have formed." (*Id.* at 141–42.) As such PURADD® FD–100, at a minimum, meets

---

[20] This Court does not take the view that an imported product is of the same class or kind as other products *only* if the imported product satisfies all of the *Carborundum* factors. *Carborundum* dictates that the Court look to "all the *pertinent circumstances*." *Carborundum*, 536 F.2d at 377 (emphasis added).

[21] The Court recognizes that BASF had "very small sales" of PURADD® FD–100 during an unspecified period to customers outside the fuel area. (Trial Tr. 257.) For purposes of a principal use analysis, these anomalous sales are irrelevant.

BASF's customer expectations for its function as a detergent-active component of a DCA package.

Third, PURADD® FD–100 moves in the same channels of trade as other detergent additives. Dr. Crawford testified that other detergent additives compete with PURADD® FD–100. (Trial Tr. 348–9.) However, the competing products all have differing chemical structures, but each provides detergency to unleaded gasoline. (*Id.* at 349–50.)

Fourth, the environment of sale factor seems inapplicable in this case because PURADD® FD–100 is not sold in its imported condition but is consumed by BASF in DCA package blending. Were PURADD® FD–100 to be sold, this Court presumes it would be sold in much the same manner as the competing detergent additives. Fifth, PURADD® FD–100 is used as a detergent additive, specifically as the detergent-active component. Sixth, PURADD® FD–100 is blended with other components before being added to gasoline because it is more economically practical to do so. (Trial Tr. 126–27, 225–26.) However, the various components of a DCA package, including the detergent-active component (i.e., PURADD® FD–100) may be added *directly* to gasoline. (*Id.* at 126–27, 225–26, 230–31, 360–61.) Seventh, PURADD® FD–100 is recognized by the EPA as both a gasoline additive and detergent-active component. (*Id.* at 111, 113, 332; Def's Ex. L.)

This Court's conclusion is not contrary to the established rule in customs jurisprudence that the court must classify articles based upon their condition as imported. *United States v. Bernard Citroen*, 223 U.S. 407, 414–15 (1912). Although PURADD® FD–100 may not satisfy either EPA regulations or customer specifications for a DCA package, the record is clear that PURADD® FD–100 is registered with the EPA as a gasoline *additive*, is designed to impart gasoline detergency, has detergent properties, is part of the class or kind of articles that impart detergency when added to gasoline, retains its chemical properties when blended in a DCA package, and is dedicated for use as a gasoline detergent. Further, this Court is not hemmed in by EPA regulations or BASF's customers' expectations. HTSUS heading 3811 does not require that EPA or customer requirements be met for goods to be classifiable in the heading. Accordingly, this Court finds that PURADD® FD–100 is of the class or kind of goods classifiable in HTSUS heading 3811.

Once the class or kind to which the imported article belongs has been ascertained, this Court must determine the principal use of that class or kind at or immediately prior to importation. This Court has defined "principal use" as "the use 'which exceeds any other *single* use' " of the article. *Lenox Collections v. United States*, 20 CIT 194, 196 (1996) (citing *Conversion of the Tariff Schedules of the United States Annotated Into the Nomenclature Structure of the Harmonized System: Submitting Report* at 34–35 (USITC Pub. No. 1400)

(June 1983)) (emphasis in original); *see also Minnetonka Brands*, 24 CIT at 651; *USR Optonix*, 362 F. Supp. 2d at 1381. This Court has long-recognized that AUSRI 1(a) requires a determination of "the principal use of the *class or kind of goods to which the imports belong and not the principal use of the specific imports*." *Group Italglass U.S.A., Inc. v. United States*, 17 CIT 1177, 1177, 839 F. Supp. 866 (1993) (emphasis in original); *see also Lenox Collections v. United States*, 19 CIT 345, 346 (1995); *Minnetonka Brands*, 24 CIT at 651; *USR Optonix*, 362 F. Supp. 2d at 1381.

> Evidence of the actual or principal use of the specific imports standing alone could not, absent their constituting the entire class or kind of goods under consideration, make a prima facie case on the issue of principal use where the controlling issue is the principal use of the class or kind to which the merchandise belongs.

Group Italglass, 17 CIT at 1177 n.1. Accordingly, actual use of an imported item is irrelevant to classification in a principal use provision. *See Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1467 (Fed. Cir. 1998) ("[A] principal (or chief) use provision . . . may function as a controlling legal label, in the sense that even if a particular import is proven to be actually used inconsistently with its principal use, the import is nevertheless classified according to its principal use.")

The evidence presented at trial makes clear that the principal use of PURADD® FD–100 is as an additive for gasoline. For starters, PURADD® FD–100 is registered with the EPA as a gasoline additive, which is a very clear indication that the product is for use in gasoline. (Trial Tr. 112 (PURADD® FD–100 "is registered so that someone can use it to add it into gasoline.").) In addition, Dr. Fehr and Mr. Ketcham each testified that PURADD® FD–100 could be added directly to gasoline but is blended with other DCA package components before being added to gasoline for economical reasons. (*Id.* at 126–27, 225–26, 230.) Mr. Ketcham also testified that PIBAs "are detergent additives, components, or *for gasoline*." (*Id.* at 220 (emphasis added).) Furthermore, BASF sells PURADD® FD–100 through its "*Fuel* Additives" business unit, (*id.* at 291 (emphasis added)), and identifies its PIBAs as part of BASF's "complete line of *fuel* detergent additives," (Def.'s Ex. P (emphasis added)). Moreover, Dr. Crawford (Defendant's expert witness) testified that additives blended together to create a DCA package "retain their individual chemical identities in the blend of additives and could be separated yielding the same starting materials if so desired." (Trial Tr. 359; *see also id.* at 118.) Dr. Crawford also pointed out that blending the additives neither forms new chemical bonds nor breaks existing bonds. (*Id.* at 359.)

Plaintiff makes much of its position PURADD® FD–100 cannot be certified as a DCA package and does not meet customer expectations

as a fuel detergent. Plaintiff, therefore, concludes that PURADD® FD–100 cannot be classifiable in HTSUS tariff heading 3811. Plaintiff is simply overstating the requirements of the heading. In fact, the EN for heading 3811 state that "[t]he preparations of this heading are additives for mineral oils or for other liquids used for the same purposes to eliminate or *reduce* undesirable properties, or to impart or enhance desirable properties." EN 38.11 at p.687 (emphasis added). Based upon the EN, in order to be classifiable in heading 3811, PURADD® FD–100 need not eliminate intake system deposits; it is sufficient that PURADD® FD–100 reduce such deposits. BASF's patent establishes that PURADD® FD–100 is "useful in controlling deposit formation." (Trial Tr. 343; *see also id.* at 141–42, 146; Def.'s Ex. K.) Thus, this Court finds that PURADD® FD–100-at a minimum-reduces undesirable intake system deposits, thereby satisfying the EN for heading 3811.

Based upon the evidence presented at trial, this Court finds that PURADD® FD–100 satisfies the requirements of HTSUS heading 3811 as a prepared additive for gasoline. Plaintiff's own witness confirmed this conclusion by testifying that PURADD® FD–100 is a "prepared" (*id.* at 107) "additive" (*id.* at 111) that is "registered [with the EPA] so that someone can use it to *add it into a gasoline*" (*id.* at 112 (emphasis added)). (*See also id.* at 121 (*each* of the components of a DCA package is a gasoline additive).) Further, Plaintiff's own expert testified that PURADD® FD–100 is a prepared additive that finds it way into gasoline. (*Id.* at 231.) In addition, the Court notes that PIBA is recognized as an "[e]ffective, modern detergent additive[ ]" for inlet valve cleanliness when added to automotive fuels. *Ullmann's Encyclopedia of Industrial Chemistry* 260 (6th ed., WILEY-VCH Verlag GmbH & Co. KgaA 2003). This Court does not dispute that PURADD® FD–100 is more effective when blended with carrier oil. However, HTSUS heading 3811 is not restricted to "effective" prepared additives for mineral oils. Even without the carrier oil, the evidence and testimony presented at trial clearly demonstrated that PURADD® FD–100-alone-prevents, neutralizes, disperses, and removes intake system deposits. Hence, PURADD® FD–100 is *prima facie* classifiable in HTSUS heading 3811.

B. *Relative specificity (GRI 3(a))*

This Court found herein that PURADD® FD–100 is *prima facie* classifiable in both HTSUS headings 3811 and 3902. As between these two, this Court must decide which is legally correct.

When goods are *prima facie* classifiable under two or more headings of the HTSUS, GRI 3(a) dictates that "[t]he heading which provides the most specific description shall be preferred to headings providing a more general description." "Under this 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 the

greatest degree of accuracy and certainty." *Orlando Food*, 140 F.3d at 1441. This Court's decision is guided by the general rule in customs law "that in the absence of legislative intent to the contrary, a product described by both a use provision and an *eo nomine* provision is *generally* more specifically provided for under the use provision." *United States v. Siemens Am., Inc.*, 68 CCPA 62, C.A.D. 1266, 653 F.2d 471, 478 (1981). The Court is not obliged to use this general rule, but it is "*a convenient rule of thumb for resolving issues where the competing provisions are otherwise in balance*." *United States v. Simon Saw & Steel Co.*, 51 CCPA 33, 40, C.A.D. 834 (1964) (emphasis in original).

This Court finds that HTSUS heading 3811 is the more specific of the two competing headings. The Court first notes that heading 3811 is a use provision, and heading 3902 is an *eo nomine* provision. Where in balance, a use provisions is generally more specific than an *eo nomine* provision. Further, each of the exemplars listed in heading 3811-like PURADD® FD–100-has been specifically designed, engineered, processed, manufactured, and blended to have a desired effect when added to mineral oil (or the like). In addition, the articles classifiable heading 3811 each has a limited function and purpose. In fact, very nearly all of the imported PURADD® FD–100 is consumed by its limited use as a detergent-active component.

On the other hand, heading 3902 describes the articles classifiable therein in quite general terms. In addition, the articles classifiable in heading 3902 need not have a specific function or purpose. It follows then that PURADD® FD–100, in its "narrow aspect," is a prepared additive for mineral oil, and in its "wider" aspect, PURADD® FD–100 is PIBA in hydrocarbon solvent, which is "a generic term designating all articles of that character." *Fink v. United States*, 170 U.S. 584, 587 (1898).

This court previously addressed a similar classification problem. In *Mitsui Petrochemicals*, the tariff classification of Visnex, a chemical used solely as a viscosity improver in lubricating oils, was before the court. *Mitsui Petrochems. (Am.), Ltd. v. United States*, 21 CIT 882 (1997). The court found as a matter of law that Visnex was *prima facie* classifiable under tariff headings 3811 and 3902. *Id.* at 885. In applying GRI 3(a) to the competing headings, the court noted that the more specific heading " 'is [the] more definite in its application to the article in question than is the other.' " *Id.* at 886 (*quoting Fink*, 170 U.S. at 587). The court noted that subheading 3902.30.00 might include multiple potential chemical combinations and concentrations of propylene, *id.* at 887, with "a myriad of applications," *id.* at 888. As a result, the court found that tariff subheading 3902.30.00 was a "general chemical subheading" with a comprehensive grouping. *Id.* at 887.

In contrast, the court found it compelling that Visnex was imported "*solely* for use as viscosity improver for lubricating oil." *Id.*

The court stated that "[i]t follows that the language of subheading 3811.29.00, which embraces viscosity improvers which are additives for lubricating oil, 'more definitely applies' to Visnex than does the generic provision under subheading 3902.30.00, propylene copolymers." *Id.* The court held that subheading 3811.29.00 was the more difficult to satisfy because it "embodies a smaller number of compounds." *Id.* at 888. The court also acknowledged the general principle that "a use provision will describe the article with greater specificity and, therefore, provide the correct classification." *Id.* at 889.

This Court also finds that HTSUS heading 3811 is more specific than heading 3902 because the requirements of heading 3811 are the more difficult to satisfy. Further the principle of use supports the conclusion that the use provision of heading 3811 is more specific than the *eo nomine* provision of heading 3902. Accordingly, by operation of GRI 3(a), PURADD® FD–100 is classifiable in HTSUS tariff heading 3811.[22]

IV. *The Applicable Subheading for PURADD® FD–100 is 3811.90.00.*

With the applicable HTSUS heading for PURADD® FD–100 selected, the Court may turn its attention to determining the proper subheading into which PURADD® FD–100 falls. Because PURADD® FD–100 is neither an antiknock preparation (subheadings 3811.11 and 3811.19) nor an additive for lubricating oils (subheadings 3811.21 and 3811.29), PURADD® FD–100 must be classified in HTSUS subheading 3811.90.00, the "other" category.

CONCLUSION

For the reasons stated herein, this Court finds that the proper classification of PURADD® FD–100 is 3811.90.00. Accordingly, judgment is entered for Defendant.

---

[22] The conclusion reached by this Court also is consistent with a limiting note found in the EN:

> When as a result of the addition of certain substances, the resultant products answer to the description in a more specific heading elsewhere in the Nomenclature, they are excluded from Chapter 39; this is for example, the case with:
>
> * * *
>
> (b) Prepared additives for mineral oils (heading 38.11).

EN Ch. 39 at p.718. Due to the addition of the hydrocarbon solvent and amine tail to the PIB to create BASF's PIBA product, or PURADD® FD–100, this Court finds that the limiting rule in the EN applies in this case and directs that PURADD® FD–100 is classifiable in the more specific HTSUS heading, namely heading 3811.

ERRATUM

BASF Corporation v. United States, Court No. 002–00260, Slip Op. 06–28, dated February 28, 2006:

Page 1, "*Michael W. Heydrich* Office of General Counsel, United States Customs Service, of counsel," is added before "for Defendant" as counsel for Defendant.

February 28, 2006

Slip Op. 06–29

THAN VIET DO AND BINH THI NGUYEN, Plaintiffs, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Before: Chief Judge Restani

Court No. 05–00062

[Plaintiffs' motion for judgment on the agency record as to eligibility for trade adjustment assistance DENIED.]

Dated: February 28, 2006

Hays, McConn, Rice & Pickering (John R. Walker) for the plaintiffs.

Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director; Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Delfa Castillo); Jeffrey Kahn, Office of the General Counsel, International Affairs & Commodity Programs Division, United States Department of Agriculture, of counsel, for the defendant.

OPINION

Restani, Chief Judge: This matter is before the court on the motion for judgment on the agency record brought by Plaintiffs Than Viet Do and Binh Thi Nguyen pursuant to USCIT R. 56.1. Plaintiffs contest the United States Secretary of Agriculture's ("Agriculture") determination denying their application for trade adjustment assistance ("TAA").

Agriculture denied Plaintiffs' application for TAA because their net fishing income did not decline from 2001 to 2002. Specifically, Plaintiffs' fishing business lost less money in 2002 than it did in 2001. Plaintiffs do not contend that their net fishing income, as defined by Agriculture, did not decline but instead argue that Agriculture should consider how the sale of one of Plaintiffs' vessels affected their net fishing income. Specifically, Plaintiffs argue that Agriculture erred in its determination for two reasons: 1) Agriculture should have treated each of their vessels as a producer entitled to TAA under 19 U.S.C. § 2401e (Supp. II 2002), and 2) Agriculture's definition of "net fishing income" is unreasonable. Plaintiffs ask the court to

grant their motion for judgment on the agency record or, in the alternative, for "good cause" shown, to remand the determination to Agriculture for reconsideration of their TAA eligibility.

Agriculture argues that Plaintiffs' vessels are not considered producers for purposes of obtaining TAA and that it properly examined Plaintiffs' aggregate income from their two vessels as reflected on their Internal Revenue Service ("IRS") Tax Form 1040 ("1040"). Agriculture maintains that it reasonably defined net fishing income and properly applied its regulation. Agriculture argues that because Plaintiffs suffered a greater loss in 2001 than in 2002, their net fishing income did not decrease. The court agrees and denies Plaintiffs' motion for judgment on the agency record.

FACTUAL & PROCEDURAL BACKGROUND

Than Viet Do ("Do") and his wife, Binh Thi Nguyen ("Nguyen"), own and operate a shrimping business in Palacios, Texas. Prior to 2002, Plaintiffs' shrimping business had two vessels, the Master Francis and the Master Jimmy. At the end of 2001, Plaintiffs sold the Master Francis because it was unprofitable.

On December 11, 2003, Plaintiffs responded to a notice by the Foreign Agriculture Service ("FAS") certifying Texas shrimp producers as eligible for trade adjustment assistance,[1] and filed an application for TAA with the Farm Service Agency ("FSA") office in Matagorda County, Texas.[2] Trade Adjustment Assistance for Individual Producers, Pls.' App. Tab 2 [hereinafter TAA Application]. Based on TAA requirements,[3] Plaintiffs submitted copies of their 2001 and 2002 Indi-

---

[1] On October 21, 2003, the Texas Shrimp Association petitioned the FAS for certification of TAA eligibility on behalf of Texas shrimp producers. *See* Trade Adjustment Assistance for Farmers, 68 Fed. Reg. 65,239 (Dep't of Agric. Nov. 19, 2003). On November 19, 2003, the FAS certified their eligibility for TAA, finding "that increased imports of farmed shrimp contributed importantly to a decline in the landed prices of shrimp in Texas by 27.8 percent during January 2002 through December 2002, when compared with the previous 5-year average." *Id.* To qualify for benefits under this certification, shrimp producers had to apply for benefits with their local FSA office by February 9, 2004. *Id.*

[2] The record contains two TAA applications, Number 746 and 1785, both dated December 11, 2003. Application Number 746 bears the name and signatures of both Do and Nguyen. TAA Application, Pls.' App. Tab 2. Application Number 1785 lists Do and Nguyen, but is signed only by Do. Trade Adjustment Assistance for Individual Producers, Pls.' App. Tab 3. It appears that the two applications were consolidated. The applications did not list Plaintiffs' boats.

[3] The TAA application requires that applicants submit verifiable documentation of: 1) the production of the commodity and the amount produced; 2) a decline in net fishing income from the latest year in which no TAA payment was received; 3) technical assistance received from the Cooperative State Research, Education, and Extension Service of the United States Department of Agriculture; and if requested, 4) Adjusted Gross Income in accordance with other USDA regulations. *See* TAA Application, Pls.' App. Tab 2. Plaintiffs satisfied the TAA requirement of technical assistance by receiving training on January 27, 2004. Trade Adjustment Assistance, Technical Assistance Certification Form, Pls.' App. Tab 8, Tab 9.

vidual Tax Returns. Form 1040, U.S. Individual Income Tax Return, 2001, Pls.' App. Tab 1; Form 1040, U.S. Individual Income Tax Return, 2002, Pls.' App. Tab. 7. Plaintiffs' 2001 tax return contained two Schedule Cs (Profit or Loss from Business), one for each of their two ships. Form 1040, U.S. Individual Income Tax Return, 2001, Pls.' App. Tab 1, at 3–4. The 2001 tax return listed an adjusted gross income of $49,228 and a business loss of $77,504. Id. at 1. Of this loss, $44,534 stemmed from the Master Francis and $32,970 stemmed from the Master Jimmy. Id. at 2-3. Furthermore, the 2001 tax return listed $126,405 from "[o]ther gains or losses." Id. at 1. Although the record does not conclusively establish the source of this item, it is noted that Plaintiffs sold the Master Francis in late 2001.

Plaintiffs' 2002 tax return contained one Schedule C for the Master Jimmy and none for the Master Francis. The 2002 tax return also listed an adjusted gross income of negative $47,849 and a business loss of $48,137. Form 1040, U.S. Individual Income Tax Return, 2002, Pls.' App. Tab. 7. The business loss was attributed entirely to the Master Jimmy. Id. at 3. The record shows that Agriculture denied Plaintiffs' claim after examining their 1040s and comparing their $77,504 business loss in 2001 with their $48,137 business loss in 2002. Form 1040, U.S. Individual Income Tax Return, 2001, Pls.' App. Tab 1; Form 1040, U.S. Individual Income Tax Return, 2002, Pls.' App. Tab. 7.

On August 14, 2004, Plaintiffs wrote a letter to the National Appeals Division ("NAD") "asking for an appeal because [they were] denied . . . TAA payment." Letter from Than Viet Do to Office of the Area Supervisor, Nat'l Appeals Div., W. Reg'l Office (Aug. 14, 2004), Pls.' App. Tab 17. On November 1, 2004, Plaintiffs received a letter from NAD stating that the Texas FSA was withdrawing the adverse decision in their case and that Plaintiffs' appeal was moot. Letter from Patricia Leslie, Assistant Dir., Office of the Sec'y, Nat'l Appeals Div., U.S. Dep't of Agric., to Than Viet Do and Binh T. Nguyen (Nov. 1, 2004), Pls.' App. Tab 20. The letter further advised Plaintiffs that the NAD appeal would be dismissed unless a letter was received from them within five days explaining why the appeal should not be dismissed. Id.

On November 23, 2004, Plaintiffs received notification from the FSA that it had referred the appeal to the FAS who made a final determination that Plaintiffs were ineligible for TAA payment. Letter from Ronald Lord, Deputy Dir., Imp. Policies & Programs Divs., Foreign Agric. Serv., & Grady Bilberry, Dir., Price Support Div., Farm Serv. Agency, U.S. Dep't of Agric., to Than Viet Do and Binh T. Nguyen (Nov. 23, 2004), Pls.' App. Tab 21. The letter stated that the "application was disapproved because [Plaintiffs'] net fishing income for 2002 did not decline from 2001." Id. The letter also informed Plaintiffs that they could appeal the determination by contacting the

United States Court of International Trade within 60 days. Id. Plaintiffs filed a timely appeal of the final determination.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 2395(c) (2000). In reviewing a challenge to Agriculture's determinations regarding eligibility for trade adjustment assistance, the court will uphold the determination "if the factual findings are supported by substantial evidence on the record and its legal determinations are otherwise in accordance with the law." Trinh v. than a 'mere scintilla,' but sufficient evidence to reasonably support a conclusion." Former Employees of Shaw Pipe, Inc. v. United States Sec'y of Labor , 21 CIT 1282, 1284–85, 988 F. Supp. 588, 590 (1997) (citation omitted).

DISCUSSION

In the present case, the only issue is whether Plaintiffs satisfied the requirements of 19 U.S.C. § 2401e(a)(1)(C) and 7 C.F.R. § 1580.301(e)(4)(2005). In pertinent part, 19 U.S.C. § 2401e(a)(1)(C) requires that "[t]he producer's net farm income (as determined by the Secretary) for the most recent year is less than the producer's net farm income for the latest year in which no adjustment assistance was received by the producer under this part." Id. Agriculture implemented this provision through 7 C.F.R. § 1580.301(e)(4), which requires "[c]ertification that net farm or fishing income was less than that during the producer's pre-adjustment year." Id.

Here, Plaintiffs argue that 1) a vessel is entitled to TAA under Agriculture's own regulations, and 2) Agriculture has unreasonably defined "net fishing income."

I. A vessel is not entitled to TAA

First, the court addresses whether a vessel is entitled to cash benefits under the TAA statutes and regulations. 19 U.S.C. § 2401e(a)(1) provides that a "[p]ayment of a trade adjustment allowance shall be made to an adversely affected agricultural commodity producer," but does not specifically define "producer." Id. (emphasis added). Rather, Agriculture defined producer as "a person who is either an owner, operator, landlord, tenant, or sharecropper, who shares in the risk of producing a crop and who is entitled to share in the crop available for marketing from the farm, or a qualified fisherman." 7 C.F.R. § 1580.102 (emphasis added).

In this case, Agriculture did not interpret its definition of producer to encompass vessels. Plaintiffs, however, argue that a vessel is a producer under Agriculture's own regulations because it is a qualified fisherman. A qualified fisherman is "a person whose catch competes in the marketplace with like or directly competitive aquaculture products and report net fishing income to the Internal

Revenue Service on Schedules C or C-EZ (Form 1040)."[4] 7 C.F.R. § 1580.102 (emphasis added). Therefore, there are two requirements for a vessel to be considered a qualified fisherman: first, the vessel must be considered a person, and second, the vessel must have a catch that competes in the marketplace and must report income to the IRS. Id.

Plaintiffs claim that a vessel is ' "a person' in the eyes of the law" by resorting to admiralty law dealing with in rem procedure. Pls.' Br. 15. Plaintiffs argue that a vessel is a person because it may be sued as a "wrongdoer" for the purposes of in rem jurisdiction. Plaintiffs then argue that because a vessel owns its catch, it is a qualified fisherman and therefore, a producer entitled to a TAA claim. Thus, Plaintiffs contend that they should receive TAA for the Master Jimmy because the net fishing income for Master Jimmy was less in 2002 than it was in 2001.[5] The court concludes that a vessel is not a person and thus not a producer for the purposes of TAA.[6]

In reviewing Agriculture's determination, the court is mindful that "[a]n agency's interpretation of its own regulations is normally en-

---

[4] Agriculture further defined person as "an individual, partnership, joint stock owner, corporation, association, trust, estate, or any other legal entity as defined in 7 C.F.R. 1400.3." 7 C.F.R. § 1580.102.

7 C.F.R. § 1400.3 provides in relevant part that:

(1) A person is:
  (i) An individual, including any individual participating in a farming operation as a partner in a general partnership, a participant in a joint venture, or a participant in a similar entity;
  (ii) A corporation, joint stock company, association, limited partnership, limited liability partnership, limited liability company, irrevocable trust, revocable trust combined with the grantor of the trust, estate, or charitable organization, including any such entity or organization participating in the farming operation as a partner in a general partnership, a participant in a joint venture, a grantor of a revocable trust, or as a participant in a similar entity . . .

(2) In order for an individual or entity, other than an individual or entity that is a member of a joint operation, to be considered a separate person for the purposes of this part, in addition to other provisions of this part, the individual or entity must:
  (i) Have a separate and distinct interest in the land or the crop involved;
  (ii) Exercise separate responsibility for such interest; and
  (iii) Maintain funds or accounts separate from that of any other individual or entity for such interest.

[5] As indicated, in 2001, the net income from the Master Jimmy was negative $32,970, while its net income in 2002 was negative $48,137. Form 1040, U.S. Individual Income Tax Return, 2001, Pls.' App. Tab 1; Form 1040, U.S. Individual Income Tax Return, 2002, Pls.' App. Tab. 7.

[6] Agriculture argues that the court should not consider whether a vessel is a person or producer because Do listed himself and his wife, not their vessels, as the producers. Although the record reflects that Plaintiffs did not list their boats as the producers, the record does reflect the fact that Plaintiffs operated two separate fishing vessels. Thus, if a vessel is a person and a producer for purposes of TAA, then Agriculture should not allow a minor mistake in filing procedures to prevent it from fulfilling the remedial nature of trade adjustment assistance and properly awarding benefits. *See* 19 U.S.C. § 2401e(a)(1)(C). Accordingly,the form of the Plaintiffs' claim does not prevent the court from considering Plaintiffs' argument that a vessel is a producer.

titled to considerable deference." Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1561 (Fed. Cir. 1996) (quoting Perry v. Martin Marietta Corp., 47 F.3d 1134, 1137 (Fed. Cir. 1995) (citation omitted)). That interpretation is "ordinarily accepted 'unless it is plainly erroneous or inconsistent with the regulation." ' Id. at 1561 (quoting Honeywell Inc. v. United States, 661 F.2d 182, 186 (Ct. Cl. 1981)).

Here, it is not erroneous or inconsistent for Agriculture to interpret "qualified fisherman" as excluding vessels, because a vessel is not a "person" for purposes of TAA. The treatment of a vessel as a fictitious person in admiralty law does not establish that it may be compensated with TAA as a real person. First, there is no indication that Congress intended to apply admiralty law to TAA claims or that Congress intended to benefit vessels, rather than fishermen, with TAA. See 19 U.S.C. § 2401; H.R. Rep. No. 107–624 (2002) (Conf. Rep.); H. R. Rep. No. 107–290 (2001); S. Rep. No. 107–126 (2001). The final statute and the Congressional debates do not mention the applicability of admiralty law or the possibility that vessels may be beneficiaries of TAA. See 19 U.S.C. § 2401; 148 Cong. Rec. S3530, 3536 (2002); 147 Cong. Rec. E2156, 2157 (2001). Instead, members of Congress mentioned real persons – farmers, ranchers, and fishermen – as the beneficiaries of TAA, not fictional legal entities used exclusively in admiralty law. See 148 Cong. Rec. S3530, 3536 (statement of Sen. Wellstone) (referring to the beneficiaries of TAA as "family farmers, ranchers and independent fishermen"); 147 Cong. Rec. E2156, 2157 (statement of Rep. Bentsen) (also referring to the beneficiaries of TAA as "family farmers, ranchers and independent fishermen"). Moreover, if a vessel is considered a qualified fisherman and a producer, then a TAA applicant could successfully make as many TAA claims as he has vessels. This conflicts with the legislative intent to limit cash benefits to $10,000 per farmer or fisherman. See 19 U.S.C. § 2401e(c) ("The maximum amount of cash benefits . . . shall not exceed $10,000."); 145 Cong. Rec. S13657, 13667 (1999) (statement of Sen. Conrad) 13668–69 (statement of Sen. Murkowski) ("The cash benefits would be capped at $10,000 per fisherman.") (emphasis added). Thus, there is no indication that the legislature intended to rely upon admiralty law to treat a vessel as a person or producer and thereby allow fishermen to have multiple TAA claims.

Second, the proposition that a vessel is a person is a legal fiction that is particular to admiralty law and is not generally applicable in other contexts.[7] See Homer Ramsdell Transp. Co. v. LA Compagnie Generale Transatlantique, 182 U.S. 406, 414 (1901) (stating that the concept that a vessel is considered the wrongdoer is "a distinct prin-

---

[7] Plaintiffs analogize the vessel to another fictional legal entity, a corporation, because it incurs legal obligations. Plaintiffs, however, do not demonstrate that a vessel is recognized as a legal entity outside admiralty and maritime law, as a corporation is.

ciple of the maritime law") (citing Ralli v. Troop, 157 U.S. 386, 402 (1895)). Courts created this legal fiction to allow an injured party to "proceed in rem directly against the vessel." Ventura Packers, Inc. v. F/V Jeanine Kathleen (In re Her Tackle), 424 F.3d 852, 858 (9th Cir. 2005) (quoting Chugach Timber Corp. v. N. Stevedoring & Handling Corp. (In re Chugach Forest Prod., Inc), 23 F.3d 241, 245 (9th Cir. 1994)). In doing so, courts were affording security to an injured person in the event of a successful judgment. See Baker v. Raymond Int'l, Inc. , 656 F.2d 173, 183 (5th Cir. 1981) (stating that an injured party "was not confined to exploring the potentially empty purse of the charterer but could secure redress by affixing a lien to the vessel"); see also Cargill B.V. v. S/S "Ocean Traveller," 726 F. Supp. 56, 61 (S.D.N.Y. 1989) (stating that the legal fiction of a vessel's liability saves the injured party from having to "circle the globe in efforts to sue and collect from the owner"). The reason for using this legal fiction in admiralty cases is simply not applicable in the context of TAA, where a fishing vessel owner is obtaining a benefit rather than incurring a legal obligation.[8]

In sum, a vessel is not a person and thus, not a producer for purposes of TAA. Therefore, Agriculture's treatment of vessel owners, not vessels, as producers is not plainly erroneous or inconsistent with its regulations.[9] Accordingly, Plaintiffs do not have separate TAA claims for each of their vessels and Agriculture correctly used the aggregate income from their vessels to determine their net fishing income.

II. Agriculture reasonably defined "net fishing income"

Plaintiffs also challenge Agriculture's definition of "net fishing income" as unreasonable for failing to take into account the sale of a fishing vessel. Here, Agriculture was specifically granted the authority to define net fishing income. 19 U.S.C. § 2401e(a)(1)(C) ("The producer's net farm income (as determined by the Secretary). . . .") (emphasis added). Agriculture, in turn, defined net fishing income as "net profit or loss, excluding payments under this part, reported to the IRS for the tax year that most closely corresponds with the marketing year under consideration." 7 C.F.R. § 1580.102.

In calculating net profit or loss, Agriculture excluded the gains or losses from the sale of business assets. Agriculture examined Line 12

---

[8] Plaintiffs also fail to address how a vessel satisfies the definition of personhood stated in 7 C.F.R. § 1400.3, requiring that a person must: "(i) [h]ave a separate and distinct interest in the land or the crop involved, (ii) [e]xercise separate responsibility for such interest; and (iii) [m]aintain funds or accounts separate from that of any other individual or entity for such interest." 7 C.F.R. § 1400.3.

[9] Additionally, as Defendant suggests in its brief, a vessel may be better described as equipment. "Equipment is the machinery and implements needed by the farming operation to conduct activities of the farming operation. . . ." 7 C.F.R. § 1400.3. Here, a fisherman uses a vessel in order to conduct business.

of Plaintiffs' 1040 from year 2001 and 2002 to determine that Plaintiffs' net fishing income had not declined. See Form 1040, U.S. Individual Income Tax Return, 2001, Pls.' App. Tab 1; Form 1040, U.S. Individual Income Tax Return, 2002, Pls.' App. Tab. 7. Line 12 of the 1040, titled "[b]usiness income or (loss)," is derived from Line 31, titled "[n]et profit or (loss)," on the Schedule C, which does not include the sale of business assets in its calculation of net profit or loss. See Form 1040, U.S. Individual Income Tax Return; Form 1040, U.S. Individual Income Tax Return, Schedule C.

Plaintiffs contend that Agriculture should include the sale of their vessel in its calculation of their net fishing income. Plaintiffs argue that Agriculture should derive net fishing income from their 1040's adjusted gross income, which includes income from the sale of business assets. Plaintiffs argue that the sale of their fishing vessel should be included in net fishing income because their entire income stems from fishing. Plaintiffs' adjusted gross income in 2001 includes income from "[o]ther gains or (losses)" in the amount of $126,405.[10] Form 1040, U.S. Individual Income Tax Return, 2001, Pls.' App. Tab 1. Plaintiffs' adjusted gross income also decreased from $49,228 in 2001[11] to negative $47,849 in 2002, ostensibly because the sale proceeds of the Master Francis was accounted for in 2001. Form 1040, U.S. Individual Income Tax Return, 2001, Pls.' App. Tab 1; Form 1040, U.S. Individual Income Tax Return, 2002, Pls.' App. Tab. 7. Essentially, Plaintiffs argue that Agriculture unreasonably defined net fishing income because net profit or loss from fishing should include the gains or losses from the sale of business assets. The court disagrees.

In determining whether an agency properly interpreted and applied a statute, courts undertake a two-step analysis prescribed by Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc., 467 U.S. 837 (1984). The first step examines whether Congress has spoken directly on the issue by examining the text of the statute, the canons of statutory construction, and the legislative history. Id. at 842. If the statute is silent or ambiguous as to the issue, the court examines whether the agency's interpretation is permissible. Id. at 843. If the agency has acted reasonably and rationally, the court may not substitute its own judgment for the agency's. Steen v. United States, 395 F. Supp. 2d 1345, 1349 (CIT 2005) (citing Koyo Seiko Co. v. United States , 36 F.3d 1565, 1570 (Fed. Cir. 1994)).

---

[10] Plaintiffs do not explain, nor do they provide evidence of, the source of this amount; however, the source is likely from the sale of the Master Francis because they claim that their entire income came from fishing and furthermore, that they sold their vessel in 2001.

[11] Plaintiffs' adjusted gross income in 2001 is the sum of positive $126,405, positive $327 from interest payments, and negative $77,504 in business losses. Form 1040, U.S. Individual Income Tax Return, 2001, Pls.' App. Tab 1.

Here, Agriculture's definition of "net fishing income" is reasonable. In general, net income is the "[t]otal income from all sources minus deductions, exemptions, and other tax limited "net income" to net income from fishing. See 19 U.S.C. § 2401e(a)(1)(c). It is reasonable for Agriculture to interpret Congress' "fishing" restriction as including only the net profit or loss from operating a fishing business and excluding income from the sale of a business asset. If Agriculture included the sale of business assets within the definition of net fishing income, then TAA may be given to producers whose income decreased because the sale of business assets inflated their income in one year and the lack of such sales decreased income in the next year, and not because the producers were adversely affected by trade. Thus, it was reasonable for Agriculture to define net fishing income as net profit or loss excluding the gain or loss from the sale of business assets. The court has also implicitly approved Agriculture's definition of net fishing income as net profit or loss as reported to the IRS on a Schedule C. See Rood v. U.S. Sec'y of Agric., Slip Op. 05–112, 2005 Ct. Int'l Trade LEXIS 120, *5 (CIT Aug. 29, 2005) (examining "fishing business loss" from applicant's Schedule C to determine if net fishing income had declined) (emphasis added). Thus, the court upholds Agriculture's definition of net fishing income as a reasonable interpretation of the statute.

Furthermore, Agriculture correctly used information deduced from Plaintiffs' Schedule Cs to determine their net fishing income. Contrary to Plaintiffs' argument, Agriculture should not have used adjusted gross income to determine net fishing income because adjusted gross income includes the sale of business assets in Line 14, titled "[o]ther gains or (losses)." Form 1040, U.S. Individual Income Tax Return. Thus, because net fishing income does not include income from the sale of a business asset, Agriculture conducted a reasonable inquiry and correctly compared Plaintiffs' net business income from their Schedule Cs to determine their net fishing income. Here, Plaintiffs' business losses decreased from 2001 to 2002. Therefore, there was no decline in net fishing income.

Accordingly, Agriculture's denial of Plaintiffs' TAA claim for failure to demonstrate a decline in net fishing income is supported by substantial evidence and is in accordance with the law.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for judgment on the agency record is denied and judgment will enter for Defendant pursuant to USCIT R. 56.2(b).

Slip Op. 06–30

HANGZHOU SPRING WASHER CO., LTD., Plaintiff, v. UNITED STATES OF AMERICA, Defendant, and SHAKEPROOF ASSEMBLY COMPONENTS DIVISION OF ILLINOIS TOOL WORKS, INC., Defendant-Intervenor.

Before: Carman, Judge
Court No. 04–00133

JUDGMENT

In *Hangzhou Spring Washer Co., Ltd., v. United States*, 29 CIT ___ , 387 F. Supp. 2d 1236 (2005), the Court affirmed in part and remanded in part this matter to the United States Department of Commerce ("Commerce"). This Court affirmed the issues of valuation of plating and overhead, selling, general and administrative expenses, and profit as being supported by substantial evidence on the record or otherwise in accordance with law. *Hangzhou*, 387 F. Supp. 2d at 1251. Pursuant to Commerce's voluntary remand request to review the issue of subsidy suspicion policy regarding the valuation of steel wire rod, the Court also remanded the issue of revocation insofar as the review would have affected its outcome.

On October 14, 2005, Commerce filed its *Redetermination on Remand Pursuant to Hangzhou Spring Washer Co., Ltd., v. United States, Court No. 04–00133 (*"*Remand Redetermination*"). In its *Remand Redetermination*, Commerce determined that no modifications needed to be made to *Certain Helical Spring Lock Washers from the People's Republic of China*, 69 Fed. Reg. 12,119 (Dep't Commerce Mar. 15, 2004) (final results of antidumping duty administrative review) ("*9th Review Final Results*"). Upon review, Commerce found that its decision regarding the use of surrogate prices to value steel wire rod in the *9th Review Final Results* was correct. *See Remand Redetermination* at 1. Commerce reconsidered the issue of valuation of steel wire rod in light of its subsequent decision in *Certain Color Television Receivers from the People's Republic of China*, 69 Fed. Reg. 20,594 (Dep't Commerce Apr. 15, 2004) (final determination) ("*Color Televisions*"). After revisiting the issue, Commerce stated that *Color Televisions* "was a departure from [its] practice and should not be followed because it did not take proper account of the directive in the legislative history for [Commerce] to avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices." *Remand Redetermination* at 6. Consequently, Commerce found that the dumping margin for Hangzhou Spring Washer Company ("Hangzhou") continues to be above *de minimis* and therefore revocation is unwarranted. *See id.* at 1. Accordingly, Hangzhou's antidumping duty margin for the period from October 1, 2001, to Sep-

tember 30, 2002, remains 28.59 percent. *See 9th Review Final Results* at 12,120.

Having received, reviewed and duly considered Commerce's *Remand Redetermination* and comments from parties, this Court holds that Commerce complied with the remand order. Further, this Court holds that Commerce's *Remand Redetermination* is reasonable, supported by substantial evidence on the record and otherwise in accordance with law; and it is hereby

ORDERED that the *Remand Redetermination* filed by Commerce on October 14, 2005, is affirmed in its entirety.

Slip Op. 06–31

ROBERT ROOD**, Plaintiff, v. U.S. SEC'Y OF AGRIC. Defendant.**

Before: Carman, Judge
Court No. 05–00303

JUDGMENT

This Court, having received and reviewed the United States Department of Agriculture's Corrected Reconsideration upon the Application of Robert Rood, whereby Plaintiff was found to be eligible to receive benefits pursuant to 19 U.S.C. § 2401e(b)(1) (Supp. II 2002), hereby

ORDERS that the United States Department of Agriculture's corrected reconsideration is affirmed.