U.S. Customs and Border Protection

Slip Op. 12–115

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

Before: Jane A. Restani, Judge
Court No. 11–00064

[Judgment for Defendant in Customs classification matter.]

Dated: September 6, 2012

Robert F. Seely, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY, for plaintiff. With him on the brief were *Robert B. Silverman* and *Peter W. Klestadt*.

Amy M. Rubin, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, and *Barbara S. Williams*, Attorney-In-Charge. Of counsel on the brief was *Chi S. Choy*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of New York, NY.

OPINION

Restani, Judge:

INTRODUCTION

In this action, plaintiff importer Telebrands Corporation ("Telebrands" or "Plaintiff") challenges the U.S. Customs and Border Protection's ("Customs" or "Defendant") classification for tariff purposes of certain pedicure items. After first classifying the importer's merchandise under subheading 8214.20.30, Harmonized Tariff Schedule of the United States ("HTSUS") (2007), Customs reclassified and reliquidated the merchandise under subheading 8214.90.90, HTSUS, pursuant to its ruling in HQ H063622. Application for Further Review of Protest No. 2720–09–100197; Classification of PedEgg™ pedicure sets, Cust. HQ Rul. H063622 (Sept. 1, 2010), *available at* App. to Pl.'s Mot. for Summ. J., Ex. C. Plaintiff asserts the proper classification is subheading 8214.20.90, HTSUS. Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Br.") 2.

The claimed classifications are found under heading 8214, HTSUS. It reads as follows:

8214	Other articles of cutlery (for example, hair clippers, butchers' or kitchen cleavers, chopping or mincing knives, paper knives); manicure or pedicure sets and instruments (including nail files); base metal parts thereof:
8214.10.00	Paper knives, letter openers, erasing knives, pencil sharpeners (nonmechanical) and blades and other parts thereof
8214.20	Manicure or pedicure sets and instruments (including nail files), and parts thereof:
8214.20.30	Cuticle or cornknives, cuticle pushers, nail files, nail-cleaners, nail nippers and clippers, all the foregoing used for manicure or pedicure purposes, and parts thereof.
	Manicure and pedicure sets, and combinations thereof, in leather cases or other containers of types ordinarily sold therewith in retail sales:[1]
8214.20.60	In leather containers
8214.20.90	Other[2]
8214.90	Other:
	Cleavers and the like not elsewhere specified or included:
8214.90.30	Cleavers with their handles
8214.90.60	Other
8214.90.90	Other (including parts)

FACTS

The following are undisputed facts. *See generally*, Pl.'s Separate Statement of Material Facts Not in Issue ("Pl.'s Facts"), *and* Def.'s Resp. to Pl.'s Statement of Material Facts as to which There are No Genuine Issues to be Tried ("Def.'s Resp. Statement of Facts").

1. The subject merchandise was entered under entry number 862–0393676–9 dated November 13, 2007. Pl.'s Facts ¶ 4.
2. The subject merchandise was described as follows on commercial invoice number "TEL 12/11/2007," which covered the subject entry:
   - Foot pedicure (white) with two loose emery boards – item #2839;
   - Two foot pecicure [sic; should be "pedicure"] (white) with two loose emery boards each – item #3052;

[1] This provision was amended in 2009 to eliminate the phrase, "in leather cases or other containers of types ordinarily sold therewith in retail sales." Proposed Modifications to the Harmonized Tariff Schedule of the United States Addendum, USITC Pub. No. 3945 at 6, (Aug. 2007) ("USITC Proposed Modification"), *available at* http://www.usitc.gov/publications/tariff_affairs/pub3945.pdf (last visited July 26, 2012). That amendment does not apply to the imports before the court.

[2] This item is footnoted to subheading 9902.25.55, HTSUS, which provides for a temporary lower duty rate. No party argues that subheading 9902.25.55, HTSUS, alters the meaning of subheading 8214.20.90, HTSUS.

- Foot pedicure (black) with 1 pack of 5 emery boards – item #2843;
- Two foot pedicure (black) with 1 pack of 5 emery boards – item #3058. *Id.* ¶ 5.

3. The merchandise consists of two shaped and curved pieces of plastic (top and bottom half) and an interior plastic frame piece fitted into the top half forming a generally egg-shaped object. *Id.* ¶ 7; Def.'s Resp. Statement of Facts ¶ 7.
4. The merchandise is labeled with the trademark PedEgg™ containing the silhouette of a human foot appearing between the letters "Ped" and "Egg" and is marketed under this trademark in the United States. Pl.'s Facts ¶ 8.
5. As advertised for retail sale, the PedEgg™ is described as designed to fit in the hand while in use. *Id.* ¶ 9.
6. A flat stainless steel perforated object is affixed to the inside plastic frame piece that fits into the interior top half of the PedEgg™. It is described in marketing materials as a "microfile." *Id.* ¶ 10.
7. The metal object is advertised for retail sale to "gently remove[] calluses and dead skin." *Id.* ¶ 13.
8. The metal object's function is to slice away very small, thin pieces of callused skin. *Id.* ¶ 14.
9. As advertised for retail sale, the PedEgg™ is described as "designed to collect all the skin shavings in a convenient storage compartment." Def.'s Resp. Statement of Facts ¶ 15; Pl.'s Facts ¶ 15.
10. When fitted together, the three plastic pieces of the PedEgg™ enclose the metal object. Pl.'s Facts ¶ 16.
11. The items described on the commercial invoice as emery "boards" consist of flexible emery pads having a self-adhesive backing (hereafter "emery pads"). *Id.* ¶ 17.
12. The subject emery pads are designed to adhere to the curved outside top surface of the PedEgg™. *Id.* ¶ 18.
13. The emery pads have been advertised as "high quality emery buffing pads." *Id.* ¶ 19.
14. The emery pad functions by scraping or abrading away very small particles of dry or callused skin. *Id.* ¶ 20.
15. As imported, each item consists of the PedEgg™, the emery pads (enclosed together in plastic wrap), and an instruction sheet. *Id.* ¶ 21.
16. Each item of subject merchandise was imported in a plain cardboard box. *Id.* ¶ 25.

17. Items packaged in plain cardboard boxes are sold directly to the ultimate consumer by mail order from website, newspaper, or television advertisements. *Id.* ¶ 27.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over the denial of a protest pursuant to 28 U.S.C. § 1581(a). Customs classification decisions are reviewed de novo. *See* 28 U.S.C. § 2640(a)(1). Summary judgment is appropriate when "there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1364–65 (Fed. Cir. 1998).

DISCUSSION

Cross motions for summary judgment are before the court. Pl.'s Br. 1; Def.'s Mem. in Support of Cross-Mot. for Summ J. and in Opp'n to Pl.'s Mot. for Summ. J. ("Def.'s Br.") 1. There are no disputed issues of material fact. The questions before the court are whether the imported items are to be classified as other items of cutlery under heading 8214, HTSUS, and, if so, whether they are "pedicure sets" or unitary cutting instruments with added emery pads, not specifically listed in HTSUS heading 8214. If they are the former, Plaintiff will prevail. If the latter, Defendant's classification is correct.

The PedEgg™ is a callus remover. It is imported with one or more emery pads that may be affixed to the PedEgg™ for further smoothing. Pl.'s Facts ¶¶ 18–21; Def.'s Resp. Statement of Facts ¶¶ 18–21.[3] The court has before it samples of the imported items in cardboard boxes and samples of the same items in a clam-shell packaging, both types of packaging apparently intended for disposal upon opening. In the event some of the importations at issue were in the latter type of packaging, the court notes that the distinction is unimportant to the resolution of this matter.

Because there seems to be confusion in some of the Court cases about how classification is to proceed in general, the court sets forth the background here. Resolution of classification disputes under the HTSUS is guided by its General Rules of Interpretation ("GRI"). *Honda of Am. Mfg. v. United States*, 607 F.3d 771, 773 (Fed. Cir. 2010). What is clear from the legislative history of the World Customs Organization ("WCO") and case law is that GRI 1 is paramount. It provides in relevant part, "classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes." GRI 1. GRI 2 references specific issues such as unfinished

[3] Defendant suggests that the emery pads may be classified separately, as a duty-free item, and their value deducted from that of the PedEgg™ itself. That issue has not been briefed and separate classification seems inconsistent with the court's conclusion.

goods and mixtures, not relevant here, and subsequent GRIs refer to ways of classifying goods which fit into more than one heading. GRI 2–3. The Explanatory Notes to GRI 1 state that "the terms of the headings and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification" and the GRIs are to be considered in numerical order. WCO, Explanatory Note V(a) to GRI 1, HTS. The headings and relevant notes are to be exhausted before inquiries, such as those of GRI 3, are considered, e.g., specificity or essential character. The HTSUS is designed so that most classification questions can be answered by GRI 1,[4] so that there would be no need to delve into the less precise inquiries presented by GRI 3.[5] Similarly, GRI 6 requires classification among the competing subheadings according to the terms of the subheadings and related notes and in the same way and order as in the previous GRIs. Thus, only after exhausting the terms of the subheadings and related notes would one turn to GRI 3 to choose between two or more potentially applicable subheadings.

There are three hurdles for Plaintiff to overcome in order to have its merchandise classified as a pedicure set under subheading 8214.20.90, HTSUS. First, the merchandise must be classifiable under the heading 8214, HTSUS. The parties do not disagree as a primary matter that the item at issue is an item of cutlery. The small

[4] See Edward D. Re, Bernard J. Babb, and Susan M. Koplin, *8 West's Fed. Forms*, *National Courts* § 13343 (2d ed. 2012) (gathering cases).

[5] Two provisions proposed at the Harmonized System Committee's 29th Session also indicate that GRI 1 was to be controlling if at all possible. First, Australia proposed to divide Rule 1 into (a), (b) and (c), where Rule 1(a) would "specify that where General Rule 1 was inapplicable, account should be taken of 'Rules 2, 3, and 4 in numerical sequence' rather than simply of 'the following provisions.'" Customs Co-operation Council, Harmonized System Committee, *Summary Record of the 29th Session of the Harmonized System Committee and its Working Party* ("Summary Record"), ¶¶ 15–16, Annex V Doc. 29.600E (Jan. 12, 1983). Rule 1 states, "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*." GRI 1 (emphasis added). Members rejected Australia's proposal to change the last clause of Rule 1 because considering the GRI in numerical sequence was already "a question of established practice which posed no legal problems." Summary Record ¶¶ 17–18. Because it was an understood practice, there was no need to overload "legal texts with provisions of marginal importance." *Id.* ¶ 17.

Second, Austria proposed to add a provision stating that priority for the terms of headings, Sections, and Chapter Notes should not be given "where classification could not be achieved within the framework of those headings and Notes and in cases where goods potentially classifiable in different headings were to be classified in a single heading by application of the following Rules." Summary Record ¶ 8. Austria was worried that the obligation to look at the GRI in order would restrict the scope of Rules 2–6, because "they could only be taken into account if the provisions of Rule 1 did not otherwise require." *Id.* No other Members supported this provision, *id.* ¶ 11, and therefore, the practice of considering the GRI in sequence stands.

holes in the metal part "slice" bits of skin. In other words, they cut. This is an item of cutlery, not classified previously, such as the specifically listed hair clipper. It is an other item of cutlery under heading 8214, HTSUS. The court now turns to the claimed subheading 8214.20.90, HTSUS. The two requirements of that subheading are that the item constitute a "set," as opposed to one item or instrument, and finally, the merchandise must be imported in a container normally sold with the set of instruments in retail sales.[6]

The parties do not dispute that the callus remover is for use in a pedicure, i.e., for care of the feet, toes, or toenails. *See* Pl.'s Br. 5; Def.'s Br. 2–4. Plaintiff does not contend that its callus remover is among the items specifically listed in subheading 8214.20.30, HTSUS, the original classification by Customs. Pl.'s Br. 15. In any case, the listed items appear to be exclusive of any others, as the list is not followed by words such as "among others" or "and similar items." *See* 8214.20.30, HTSUS.[7] This does not mean that pedicure sets may not include additional items used in pedicures.

The court agrees with Plaintiff that pedicure sets and the instruments contained therein are not limited to collections of the items listed in subheading 8214.20.30, HTSUS.[8] Subheading 8214.20.90, HTSUS, is a separate subheading of 8214.20 from subheading 8214.20.30 and is not limited thereby. Additionally, Statutory Note 1 of Chapter 82 makes it clear that pedicure sets may contain items beyond those otherwise covered in the chapter. It reads:

> 1. Apart from blow torches and similar self-contained torches, portable forges, grinding wheels with frameworks, manicure or pedicure sets, and goods of heading 8209, this chapter covers only articles with a blade, working edge, working surface or other working part of:
>
> (a) Base metal;
>
> (b) Metal carbides or cermets;
>
> (c) Precious or semiprecious stones (natural, synthetic or reconstructed) on a support of base metal, metal carbide or cermet; or
>
> (d) Abrasive materials on a support of base metal, provided that the articles have cutting teeth, flutes, grooves or the

[6] *See supra* note 1.

[7] The court is not called upon to decide whether the requirements of the last two digits renders the HTSUS item in conflict with the International HTS. The HTSUS governs the dispute.

[8] Defendant appears to agree with this proposition. *See* Def.'s Br. 18–19.

> like, of base metal, which retain their identity and function after the application of the abrasive.[9]

Note 1 to Section XV, HTSUS.

Here, the item at issue is either a pedicure set to be classified under subheading 8214.20.90, HTSUS, or it is some other article of cutlery to be classified under subheading 8214.90.90, HTSUS. The court rejects Plaintiff's alternative argument based on statutory Note 1 that if the merchandise is not a set, the emery board takes it out of Chapter 82. It makes no difference that the emery board is to be attached to a plastic rather than a metal back; the fact that the item at issue has a metal cutting apparatus satisfies statutory Note 1. *See supra* at 6–7.

Turning to the container issue, when the subheading following 8214.20.30 was amended to eliminate the requirement of a container, the International Trade Commission explained the problem as follows:

> Although the article description for subheading 8214.20 provides for manicure or pedicure sets, the existing language for the following 8-digit subheading restricts the scope to sets "in leather cases or other containers of types ordinarily sold therewith in retain sales." Customs has found the provision difficult to administer because of the uncertain meaning of "other containers" in this context. If the phrase is interpreted narrowly to mean only substantial containers similar to the named "leather cases," the nomenclature has no place for the sets named in the heading description. In practice, manicure and pedicure sets not imported in some container for retail sale would not be considered to be a set. The proposed change would make clear that sets, other than those in leather cases, are classified in 8214.20.90.

USITC Proposed Modification 6. The question raised by the Modification explanation is whether under the operable container requirement, the pedicure sets had to be encased in some kind of more or less permanent container in order to be classified as a set. After the statutory change, Customs was not required to assess the substantiality of the container. What it was required to do with regard to containers before the change is not particularly clear. The court,

[9] The non-binding Explanatory Note to heading 8214 of the Harmonized System Committee of the World Trade Organization describes the sets as including the specifically listed items. Explanatory Note 2 to Ch. 82. The use of the term "includes" additionally supports the notion that items other than the separately listed instruments may be part of a pedicure set.

however, is dubious that, as Plaintiff belatedly asserts, the thin cardboard box packaging is a container of the type contemplated by the subheading.[10] Plaintiff also now argues that the outer egg is the requisite container, but it is actually the functional holder of the cutting and abrading instrument. It does not appear to be its container. The court, however, need not resolve the container issue. The PedEgg™, as imported, is not a pedicure set, and the requirements of the subheading cannot be met.

As indicated, it is clear to the court that the PedEgg™ with its emery pad accessories are a pedicure cutlery item and may be classified in subheading 8214.20.90, HTSUS, if it is a "set." Whether or not a permanent case was required in order to be classified under subheading 8214.20.90, HTSUS, at the time of importation, PedEgg™ is not a set within the common meaning of that term. These are the common meanings of the term "set" as provided by Plaintiff.

> The word "set" is defined as "a number of things of the same kind that belong or are used together." Merriam-Webster online dictionary available at www.merriam-webster.com (last accessed Feb. 28, 2012). Set is also defined as "a group of things of the same kind that belong together and are so used." American Heritage on-line dictionary available at www.ahdictionary.com (last accessed Mar. 1, 2012).

Pl.'s Br. 11.

The PedEgg™, however, is one instrument. The emery pad is intended to be affixed thereto. Pl.'s Facts ¶ 18; Def.'s Resp. Statement of Facts ¶ 18. It is an accessory which completes the functioning of the PedEgg™ as a callus removing instrument. In fact, physical inspection and manipulation of the emery pads reveals that they are thin and flexible and not well-suited for use except as affixed to the PedEgg™. Plaintiff now argues that because the emery pad is affixed to the outer bottom of the egg it is used separately. Observation of the product indicates that the egg must be closed and used as one piece in order for pressure to be applied comfortably to the emery pad. Thus, the emery pad by itself or as affixed to the egg is not a separate instrument. Because the PedEgg™ is a unitary cutlery item and not a set, it is to be classified under subheading 8214.90.90, HTSUS, the basket provision for other cutlery items and their parts.

---

[10] Clam shell packaging is usually destroyed upon opening and also would be considered disposable packaging not suitable for repetitive use and not separately classifiable. *See* GRI 5(b).

CONCLUSION

Plaintiff's complaint fails. Defendant's classification of the PedEgg™ stands. Judgment will be entered for Defendant with costs.
Dated: this 6th day of September, 2012.
New York, New York.

/s/ Jane A. Restani
JANE A. RESTANI JUDGE

Slip Op. 12–116

LIFESTYLE ENTERPRISE, INC., TRADE MASTERS OF TEXAS, INC., EMERALD HOME FURNISHINGS, LLC, RON'S WAREHOUSE FURNITURE D/B/A VINEYARD FURNITURE INTERNATIONAL LLC, Plaintiffs, and DREAM ROOMS FURNITURE (SHANGHAI) CO., LTD., GUANGDONG YIHUA TIMBER INDUSTRY CO., LTD., Consolidated Plaintiffs, ORIENT INTERNATIONAL HOLDING SHANGHAI FOREIGN TRADE CO., LTD., Intervenor Plaintiff, v. UNITED STATES, UNITED STATES DEPARTMENT OF COMMERCE DEFENDANTS, AND AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE, VAUGHAN-BASSETT FURNITURE COMPANY, INC. Intervenor Defendants.

Before: Jane A. Restani, Judge
Consol. Court No. 09–00378
Public Version

[Commerce's *Remand Results* remanded in part and sustained in part.]

Dated: September 7, 2012

Jill A. Cramer, *Kristin H. Mowry*, *Jeffrey S. Grimson*, *Sarah M. Wyss*, and *Susan L. Brooks*, Mowry & Grimson, PLLC, of Washington, DC, and *John D. Greenwald*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for plaintiffs.[1]

William E. Perry, Garvey Schubert Barer, of Washington, DC, for consolidated plaintiff, Dream Rooms Furniture (Shanghai) Co., Ltd.

John D. Greenwald, Cassidy Levy Kent (USA) LLP, of Washington, DC, and *Patrick J. McLain*, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, of Washington, DC, for consolidated plaintiff, Guangdong Yihua Timber Industry Co., Ltd.

Nancy A. Noonan and *Matthew L. Kanna*, Arent Fox LLP, of Washington, DC, for intervenor plaintiff.

Stuart F. Delery, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, *Stephen C. Tosini*, Senior Trial Counsel, *Carrie A. Dunsmore*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendants. Of counsel on the brief was *Shana Hofstetter*, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for the defendants.

[1] Mowrey & Grimson, PLLC withdrew as counsel for Ron's Warehouse Furniture on January 6, 2011. The court gave Ron's Warehouse Furniture thirty days to retain counsel. It has not done so as of the date of this opinion.

J. Michael Taylor, *Joseph W. Dorn*, *Daniel L. Schneiderman*, and *Prentiss L. Smith*, King & Spalding, LLP, of Washington, DC, for intervenor defendants.

OPINION AND ORDER

Restani, Judge:

INTRODUCTION

This matter comes before the court following the court's decisions in *Lifestyle Enterprise, Inc. v. United States*, 768 F. Supp. 2d 1286 (CIT 2011) ("*Lifestyle I*"), in which the court remanded *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 41,374 (Dep't Commerce Aug. 17, 2009) ("*Final Results*") to the U.S. Department of Commerce ("Commerce" or the "Department") and *Lifestyle Enterprise, Inc. v. United States*, 844 F. Supp. 2d 1283 (CIT 2012) ("*Lifestyle II*"), in which the court remanded *Final Results of Redetermination Pursuant to Remand* (Dep't Commerce Aug. 26, 2011) (Docket No. 132) ("*First Remand Results*") to Commerce. For the reasons stated below, the court finds that Commerce complied with the court's remand instructions with regard to the selection of the surrogate value for wood input, but Commerce has not complied with the court's remand instructions regarding Orient's AFA rate. Thus, Commerce's *Second Remand Results* are sustained in part and remanded in part. *See Final Results of Redetermination Pursuant to Second Remand* (Dep't Commerce June 11, 2012) (Docket No. 183) ("*Second Remand Results*").

BACKGROUND

The facts of this case have been well-documented in the court's previous opinions. *See Lifestyle I*, 768 F. Supp. 2d at 1293 95; *Lifestyle II*, 844 F. Supp. 2d at 1286 87. The court presumes familiarity with these decisions but briefly summarizes the facts relevant to this opinion.

The plaintiffs, Lifestyle Enterprise, Inc. ("Lifestyle"), Orient International Holding Shanghai Foreign Trade Co., Ltd. ("Orient"), Guangdong Yihua Timber Industry Co., Ltd. ("Yihua Timber"), Dream Rooms Furniture (Shanghai) Co., Ltd., Ron's Warehouse Furniture, Emerald Home Furnishings, LLC, and Trade Masters of Texas, Inc., and intervnor defendants American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Company, Inc. (collectively "AFMC") challenged the *Final Results* of an administrative review of the antidumping ("AD") duty order on wooden bedroom furniture from the People's Republic of China

("PRC" or "China"), which assigned Orient a weighted average dumping margin[2] of 216.01% as part of the PRC-wide entity and Yihua Timber the dumping margin of 29.89%. *See Final Results*, 74 Fed. Reg. at 41,380; *Wooden Bedroom Furniture from the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 55,810, 55,811 (Dep't Commerce Oct. 29, 2009). Upon considering the parties' motions for judgment on the agency record, the court held, inter alia, that substantial evidence did not support denial of a separate rate for Orient and that the rate of 216.01% assigned to Orient was not corroborated. *Lifestyle I*, 768 F. Supp. 2d at 1296 99. The court also held that substantial evidence did not support Commerce's decision on the data set for wood inputs. *Id.* at 1301 02. The court remanded for reconsideration or further explanation. *Id.* at 1314 15. On remand, Commerce 1) found "that the information on the record corroborates the rate of 216.01 percent, as it relates to Orient," based on total adverse facts available ("AFA"), and 2) "continue[d] to find that it is appropriate to value wood inputs using [World Trade Atlas ("WTA")] import data." *First Remand Results* 8, 31. Despite Commerce's explanation, the court found that Commerce had not presented substantial evidence linking the source of the 216.01% AFA rate to Orient and therefore "Commerce ha[d] failed to show some relationship between the AFA rate and the actual dumping margin." *Lifestyle II*, 844 F. Supp. 2d at 1291 (internal quotation marks and citations omitted). The court also found that Commerce had "failed to support its rejection of a volume-based approach," and instructed Commerce that "unless it chooses to reopen the record to gather more evidence, to use the volume data set for wood inputs." *Id.* at 1297 98.[3]

In the *Second Remand Results*, Commerce chose not to reopen the record and recalculated the valuation of wood inputs using NSO

[2] A dumping margin is the difference between the normal value ("NV") of merchandise and the price for sale in the United States. *See* 19 U.S.C. § 1673e(a)(1); 19 U.S.C. § 1677(35). Unless nonmarket economy methodology is used, NV is either the price of the merchandise when sold for consumption in the exporting country or the price of the merchandise when sold for consumption in a similar country. 19 U.S.C. § 1677b(a)(1). An export price or constructed export price is the price that the merchandise is sold for in the United States. 19 U.S.C. § 1677a(a)-(b). Under its nonmarket economy AD methodology, Commerce calculates NV "on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). Surrogate values from market economy countries are used as a measure of these costs. *See id.*; *GPX Int'l Tire Corp. v. United States*, 715 F. Supp. 2d 1337, 1347 (CIT 2010), *aff'd*, 666 F.3d 732 (Fed. Cir. 2011).

[3] Commerce also "decided not to rely on the financial statements of Diretso Design[.]" *First Remand Results* 18. The court sustained Commerce's determination on that issue. *Lifestyle II*, 844 F. Supp. 2d at 1298.

volume-based data. *Second Remand Results* 1, 7. Commerce also calculated a new AFA rate of 130.81% for Orient. *Id.* at 9. Plaintiff Lifestyle challenges Commerce's determination regarding Orient's AFA rate. Cmts. of Lifestyle Enterprise, Inc., Trade Masters of Texas, Inc. and Emerald Home Furnishings, LLC on Department of Commerce June 11, 2012 Final Results of Redetermination Pursuant to Second Remand 12 ("Lifestyle Cmts."). Yihua Timber challenges Commerce's use of NSO volume-based data to value wood inputs.[4] Yihua's Cmts. on Commerce's Final Results of Redetermination Pursuant to Second Remand 1 ("Yihua Timber Cmts."). The Government and AFMC ask the court to sustain the *Second Remand Results*. Def.'s Resp. to Pls.' Remand Cmts. 1 ("Def.'s Resp."); AFMC's Cmts. Concerning Commerce's Final Results of Redetermination Pursuant to Second Remand 1 ("AFMC Cmts.").[5]

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will not uphold Commerce's final determination in an AD review if it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Orient's AFA Rate

Lifestyle argues that Orient's AFA rate was not reasonably reflective of Orient's commercial reality, punitive, and "aberrantly high and egregiously out of line with the rate calculated for Yihua [Timber], a comparable company." Lifestyle Cmts. 8 9, 11. Specifically, Lifestyle contends that Commerce used an insufficient percentage of Yihua Timber's sales, yielding an excessively high AFA rate.[6] *Id.* at 9 10. This claim has merit.

---

[4] Lifestyle adopts Yihua Timber's arguments. Lifestyle Cmts. 17.

[5] Yihua Timber also filed a motion for leave to file an additional motion for judgment on the agency record. Yihua's Motion for Leave to File an Additional Motion for J. on the Agency R. Under Rule 56.2, Consol. Ct. No. 09–00378, Docket No. 186, at 1 ("Yihua Timber's Mot. for Leave to File"); Consolidated Pl. Guangdong Yihua Timber Indus. Co., Ltd.'s Mem. in Support of Additional Mot. for J. on the Agency R. Under Rule 56.2 at 1. The court denied the motion and instructed the parties to "follow the comment procedures as previously ordered by the court." Order, Consol. Ct. No. 09–00378, Docket No. 187, at 1.

[6] Lifestyle offers its own methodology, which reflects Commerce's methodology in all respects except it uses 30% of Yihua Timber sales, as opposed to [[ ]] used by Commerce. Lifestyle Cmts. 13. Lifestyle's proposed methodology yields a rate of 62.94%. *Id.* The court need not consider plaintiffs' methodological proposals as the statute tasks Commerce with such efforts.

If an interested party has failed to cooperate in not providing valid data upon which Commerce can calculate an AD rate, Commerce may calculate a rate using inferences which are "adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). In doing so, Commerce may rely on information derived from the petition, a final determination in the investigation, any previous review, or any other information placed on the record. *Id.* "An AFA rate must be 'a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance.'" *Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (quoting *F.lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)). "Commerce may not select unreasonably high rates having no relationship to the respondent's actual dumping margin." *Id.* Although the exact limits of the corroboration requirement are not clear here, corroboration pursuant to 19 U.S.C. § 1677e(c) is not sought because Commerce selected a margin based on information from the current POR. The AFA rate selected by Commerce nevertheless must be supported by substantial evidence. Selection of an AFA rate based on minuscule data will not suffice. An AFA rate must not be aberrant or punitive, and should bear a rational relationship to respondent's commercial reality.[7] *See KYD, Inc. v. United States*, 607 F.3d 760, 767 68 (Fed. Cir. 2010) (Commerce's determination is not punitive where it is in accordance with statutory requirements); *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012) ("The imposition of adverse facts can be inappropriate if it is overly punitive.").[8]

In the draft *Second Remand Results*, Commerce calculated a new AFA rate for Orient based on Yihua Timber's revised dumping margin of 40.74% and "added an additional amount to ensure compliance by only selecting Yihua Timber's sales transactions that produced positive margins," thereby assigning Orient an AFA rate of 46.53%. *Second Remand Results* 1, 8. After the draft results, Commerce "determined that the 46.53 percent rate [was] not sufficiently adverse to provide respondents with an incentive to cooperate." *Id.* at 8 (internal quotation marks and footnote omitted). Commerce is likely not incorrect in this regard. The next step is more problematic. In the final

[7] Rare, if not impossible, are the facts such that a rate would reflect a respondent's commercial reality but be punitive or aberrant, or vice versa. Commerce's compliance with the statute, by supporting its determination with substantial evidence, often fulfills all of the various formulations of the hurdles established heretofore by case law.

[8] AFA rate cases are fact-specific and attempts to reduce precedent to a calculated rate or percentage of sales are likely oversimplifications. *See Qingdao Taifa Grp., Co. v. United States*, 780 F. Supp. 2d 1342, 1350 n.8 (CIT 2011) ("*Taifa IV*").

Second Remand Results, Commerce examined an invoice from Orient's section A questionnaire response, which Orient had not withdrawn. *Id.* Commerce then selected CONNUM-specific margins for Yihua Timber's sales of the same product types sold by Orient as reflected in the invoice, selected the highest specific margin for each of Yihua Timber's products (excluding margins over 216%), and then averaged those margins together for an AFA rate of 130.81%.[9] *Id.*

Here, Commerce has based Orient's AFA rate on an impermissibly small percentage of the sales of a different but cooperating respondent. In *Lifestyle II*, the court cautioned that "[s]pecific transactions are generally uninformative." 844 F. Supp. 2d at 1291 n.9; *see KYD*, 607 F.3d at 767 (stating that Commerce had validated an AFA rate in the prior review through "high-volume transaction-specific margins for cooperative companies"). Cases such as *Ta Chen* and *PAM* lie at the outer reach of an acceptable percentage of sales upon which to base an AFA rate and have additional facts that make the small percentages less troubling there. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002) (finding that 0.04% of respondent's sales reflected a partial AFA rate of 30.95% where actual sales data was "reflective of some, albeit a small portion, of [respondent's] actual sales"); *PAM, S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009) (finding that 0.5% of non-cooperating respondent's sales supported an AFA rate of 45.49%). Some of the product-specific margins Commerce relied upon here were based on a single transaction where the percentage of product-specific sales was even smaller than the percentages accepted in *Ta Chen* and *PAM*. Generally, a larger percentage of a party's sales data is needed to support a very high margin. *See Taifa IV*, 780 F. Supp. 2d at 1350 (finding Commerce provided substantial evidence for an AFA rate of 145.90% where Commerce relied on 36% of the non-cooperating respondent's verified sales data from the last year in which it cooperated); *Mid Continent Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1378 (CIT 2010) (providing that, in the context of targeted dumping, 33% is considered reasonable for establishing a pattern of

---

[9] Commerce used the following margins (with quantity and product): [[ ]] *Analysis Memorandum for the Final Redetermination Pursuant to Remand: Orient Int'l* (June 11, 2012), App. to AFMC's Cmts. Concerning Commerce's Final Results of Redetermination Pursuant to Second Remand ("AFMC App."), Tab 5, Attach. II, at 6.

The AFA rate is based on [[ ]] of Yihua Timber's sales by value and [[ ]] of Yihua Timber's sales by quantity. Lifestyle Cmts. Ex. 1, at 3. Products yielded different proportions. For example, [[ ]] sales by quantity. *See Analysis Memorandum for the Final Redetermination Pursuant to Remand: Orient Int'l* (June 11, 2012), AFMC App., Tab 5, Attach. II. at 6.

activity); *iScholar, Inc. v. United States*, Slip Op. 11–4, 2011 WL 109014, at *2 3 (CIT Jan. 13, 2011) (sustaining a rate of 72.03% based on a single transaction of around 50 units by a cooperating respondent because the transaction was "within the mainstream"). The transactions selected by Commerce, the very highest CONNUM-specific margins under 216.01%, were clearly outside the mainstream.[10]

Lifestyle also alleges that Commerce engaged in a "closed-door session with counsel to the AFMC," "gave no warning to the parties" prior to the final results, "did an about face," and "did not provide parties with an opportunity to file" comments after the final *Second Remand Results*. Lifestyle Cmts. 5 6. Although Lifestyle does not make any legal claims based on these actions, Commerce's methodology was new to the plaintiffs. In the draft *Second Remand Results*, Commerce discussed only an AFA rate of 46.53%, comprised of Yihua Timber's calculated rate of 40.74% plus an additional amount to encourage compliance. *Draft Results of Redetermination Pursuant to Second Remand*, Conf. App. to Cmts. of Lifestyle Enter., Inc., Trade Masters of Texas, Inc. and Emerald Home Furnishings, LLC on Dep't of Commerce June 11, 2012 Final Results of Redetermination Pursuant to Second Remand ("Lifestyle App."), Tab 1, at 10. In the final *Second Remand Results*, Commerce considered AFA rates of 216.01%, 130.81%, 100%, and 69%.[11] Commerce would be well-served by giving parties an equal opportunity to respond to as well as providing adequate time to comment on significant changes in methodology.

Lastly, Commerce has ignored the court's remand instructions in *Lifestyle I* and *Lifestyle II*. Commerce failed to comply with the court's remand order because Commerce did not follow the court's direction

[10] AFMC cites *KYD, Inc. v. United States*, which sustained Commerce's methodology of using the highest product-specific margins of a cooperating respondent as the basis for an AFA rate of a non-cooperating respondent. 807 F. Supp. 2d 1372, 1378 (CIT 2012). The principal issue in KYD was whether Commerce was required to use a modified version of the non-cooperating respondent's data. *Id.* at 1376 77. The court found that Commerce was not. *Id.* at 1378. Instead, the court held that "because [the non-cooperating respondents] did not provide sufficient usable information for the record, Commerce's transaction-specific margin for an adverse rate does not conflict with statutory requirements, and Commerce's selection is based on substantial evidence, the Second Remand Results will be sustained." *Id.* at 1378 (finding an AFA rate of 94.62% supported by substantial evidence). The final AFA rate in *KYD* was substantially lower than the rate in the instant case. Additionally, the court did not find that the product-specific margins used by Commerce were outside the mainstream of the cooperating respondent's normal transactions, as they are in the instant case.

[11] The methodology and the resulting rate of 130.81% were proposed by AFMC. *Excerpts from Petitioners' Cmts. on the Draft Results of Remand* (May 31, 2012), AFMC App., Tab 4, at 8.

that Commerce "should start with the highest rate calculated for a comparable respondent or respondents and then add an additional amount to ensure compliance." *Lifestyle II*, 844 F. Supp. 2d at 1291 n.13. Additionally, Commerce still has not explained why Orient's rate increased so dramatically from its prior margin. *See Lifestyle I*, 768 F. Supp. 2d at 1299; *Lifestyle II*, 844 F. Supp. 2d at 1290. "When rates are in multiples of 100%, one might assume that a bit more corroboration or record support is warranted." *Qingdao Taifa Grp., Co. v. United States*, 760 F. Supp. 2d 1379, 1386 n.7 (CIT 2010) ("*Taifa III*"). Commerce explained that "some relationship between the AFA rate and the actual dumping margin," *Lifestyle II*, 844 F. Supp. 2d at 1291, was shown because "it is: a) contemporaneous (*i.e.*, from the instant review), b) from a 'comparable' respondent based on the information on the record, and c) based on sales of the same types of merchandise sold by Orient during the same period." *Second Remand Results* at 16. If this was all the court required, then the percentage of sales and those sales' relationship to commercial reality for this respondent would be wholly irrelevant. But this is not the case and Commerce must show more. The use of contemporaneous data, particularly where data are cherry-picked and manipulated, does not obviate the necessity of Commerce to provide substantial evidence of a rational relationship between the AFA rate chosen and the commercial reality of the non-cooperating respondent. On the facts of this case, a distorted rate based on a very small percentage of a comparable company's like-product sales does not meet this threshold.

Because Commerce's task is to identify the amount necessary to deter noncompliance, Commerce must look at the relationship between the AFA rate granted in the current administrative review and the rate of past and present cooperating respondents of comparable size. *Gallant*, 602 F.3d at 1324. Absent record evidence to the contrary, the difference between these rates and the AFA rate is the deterrent. Where the AFA rate is multiples of the baseline, this indicates that the rate may not be supported by substantial evidence. *See De Cecco*, 216 F.3d at 1032. An AFA rate over 100% may be some evidence that the rate is punitive. *Taifa III*, 760 F. Supp. 2d at 1386 n.7. Unlike cases in which the rate and amount of deterrent were facially within the bounds of commercial reality, *see, e.g.*, *Ta Chen*, 298 F.3d at 1339; *PAM*, 582 F.3d at 1340, here, Commerce must provide substantial evidence for such a high AFA rate by using, in some manner, data in the mainstream of normal transactions of cooperating respondents or otherwise relying upon data reflecting commercial reality.

"Commerce need not select, as the AFA rate, a rate that represents the typical dumping margin for the industry in question." *KYD*, 607 F.3d at 765 66. But Commerce must select an AFA rate that has not been artificially constructed for the sole purpose of punishing a non-compliant respondent. By selecting a very small number of the highest product-specific margins from a different respondent, Commerce appears to have done just that. Thus Commerce's determination that Orient should receive an AFA rate of 130.81% is not supported by substantial evidence.

II. Wood Input Valuation

Yihua Timber argues that Commerce erred when it did not consider two alternatives to NSO volume-based data to value certain wood inputs. Yihua Timber Cmts. 2. No other party challenges Commerce's decision to use NSO volume-based data over WTA weight-based data in the *Second Remand Results*, and Yihua Timber's challenge is too late. Therefore, the court sustains Commerce's determination on this issue.

A party has waived an argument where it does not present the argument "until after it ha[s] filed its principal summary judgment brief . . . [because] parties must give a trial court a fair opportunity to rule on an issue . . . ." *Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002); *KYD, Inc. v. United States*, 836 F. Supp. 2d 1410, 1414 n.2 (CIT 2012). "[A]ll claims, arguments, and objections that [a plaintiff has] elected not to address in its post-remand briefs must be deemed waived." *Bond Street, Ltd. v. United States*, 774 F. Supp. 2d 1251, 1261 n.4 (CIT 2011).

In 2009, prior to the *Final Results*, Yihua Timber argued that Commerce should not rely on NSO volume-based data to calculate the surrogate values for various wood inputs, as Commerce had done in the *Preliminary Results*. *Issues and Decision Memorandum for the Antidumping Duty Administrative and New Shipper Reviews of Wooden Bedroom Furniture from the People's Republic of China*, A 570 890, POR 1/1/07–12/31/07, at 7 (Aug. 10, 2009) ("*Issues and Decision Memorandum*"), *available at* http://ia.ita.doc.gov/frn/summary/prc/E919666–1.pdf (last visited Aug. 27, 2012). Yihua Timber also argued that Commerce should not use Philippine Harmonized Tariff Schedule ("HTS") codes to value lumber and plywood. *Id.* Instead, Yihua Timber proposed that Commerce use domestic market data from the Philippines Forest and Management Bureau, export data from the United States to the Philippines, or export data from the United

States to the PRC. *Id.* Yihua Timber had placed WTA weight-based data on the record in 2008 and also proposed using NSO weight-based data which it considered "substantially the same as the Philippine import data published in the World Trade Atlas . . . ." *Case Br. of Guangdong Yihua Timber Indus. Co., Ltd.* (May 28, 2009), P.R. 557, at 12; *Yihua Timber's Submission of Surrogate Factor Values* (Nov. 4, 2008), P.R. 403, Ex. 1, at 1. Commerce rejected NSO volume-based data and also declined to use any of Yihua Timber's proposed alternatives. *Issues and Decision Memorandum* 8 9. Instead, Commerce relied on WTA weight-based data. *Id.* at 6 7. In its complaint before this court, Yihua Timber contested Commerce's use of WTA weight-based data as a surrogate value for poplar, ash, and plywood on the basis that reliable domestic market price data existed. Complaint, Consol. Ct. No. 09–00398, Docket No. 15 at 12. Yihua Timber neither moved for summary judgment on this issue nor argued against AFMC's claims regarding NSO volume-based data. Consol Court. No. 09–00398, Docket No. 62; Consol Court No. 09–00398, Docket No. 94. Fellow plaintiff Lifestyle argued that Commerce's adoption of WTA weight-based data was supported by substantial evidence. Consol. Ct. No. 09–00398, Docket No. 83, at 25 26. The court questioned Commerce's use of WTA weight-based data in *Lifestyle I* before rejecting it in *Lifestyle II*. *Lifestyle I*, 768 F. Supp. 2d at 1301 02; *Lifestyle II*, 844 F. Supp. 2d at 1292 97. When the court reviewed Commerce's *First Remand Results*, Yihua Timber filed a one-page brief asking the court to sustain Commerce's determination and declined to participate in oral argument. After significant questioning during two lengthy oral arguments, the court found that "[t]he parties agree that these are the two potentially applicable data sets." *Lifestyle II*, 844 F. Supp. 2d at 1293 n.16. At the very least Yihua Timber could have advised the court that it was maintaining an alternate argument regarding data sets.

Yihua Timber now argues that Commerce should adopt Philippine volume-based domestic market data based on species indigenous to the Philippines or export prices from the United States to the Philippines. Yihua Timber Cmts. 2. Specifically, Yihua Timber argues that NSO volume-based data are inferior to domestic data and export data because NSO data relies on HTS basket categories and reflects the use of a standard conversion ratio. *Id.* at 2 3. Yihua Timber argues that domestic data are superior in particular because Commerce has a preference for domestic over import data. *Id.* at 2. First, the domestic data for which Yihua Timber now argues were likely more favor-

able to the plaintiffs than WTA weight-based data.[12] Thus, Yihua Timber did not receive a completely favorable result and its claim was ripe after the *Final Results*. Second, whether Commerce should rely on HTS import data or domestic data is an entirely separate issue from the issue of whether Commerce should rely on weight-based or volume-based data. Yihua Timber did have an opportunity to raise this claim on a motion for summary judgment and chose not to do so there or before the court at any time before Commerce chose between the two data set options available to it. By not preserving its claim for orderly consideration by the court, Yihua Timber has waived it. Third, the court rejects Yihua Timber's arguments regarding standard conversion ratio for the same reasons the court did so in its prior opinion. *See Lifestyle II*, 844 F. Supp. 2d at 1296 97. Yihua Timber was aware of challenges to the valuation of wood inputs in 2009. After hours of oral argument and hundreds of pages of briefs, Yihua Timber cannot appear at the eleventh hour with a claim it set aside more than two years ago that was clearly related to an open issue.

Additionally, Commerce has addressed the merits of Yihua Timber's arguments regarding domestic data and export data. *See Issues and Decision Memorandum* 7 9; *Second Remand Results* 10 13. Commerce found that the domestic data were comprised entirely of tropical lumber not used by Yihua Timber. *Issues and Decision Memorandum* 12. Despite Yihua Timber's efforts to create a parallel between tropical hardwood lumber (species of Gmelina, Bagras, Binuang, Philippine Mahogany, Lauan, Narra, Apitong, Tanguile, Kalantas, and Yakal) and the relevant wood inputs, the tropical woods are simply not the same as poplar and ash. Even if the court accepts the principle that Commerce can rely on species of wood indigenous to a surrogate country as surrogate values for species of wood indigenous to China, Yihua Timber must put forth more than an article from 1907. Much has changed, even the literature of botany, over the past 100 years. Commerce also found that using U.S. export data would impermissibly treat the United States as a surrogate country for the PRC. *Issues and Decision Memorandum* 7 9. Assuming arguendo Yihua Timber's claim is not waived, Commerce's determination is supported by substantial evidence.

---

[12] The vast majority of domestic volume data for lumber were [[ ]] than import values reported by the NSO or the WTA, regardless of whether the values were derived from weight-based or volume-based data. *See Yihua's Revised Case Br. to Commerce* (June 1, 2009), C.R. 190, at 9, 16 17; *Analysis Memorandum for the Final Results* (Aug. 26, 2011), C.R. 13, at Attach. III.

For reasons stated in its prior opinion, *Lifestyle II*, 844 F. Supp. 2d at 1292 97, the court sustains Commerce's decision to value wood inputs using NSO volume-based data.[13]

CONCLUSION

For the foregoing reasons, Commerce's determination to value certain wood inputs using NSO volume-based data is sustained. Commerce's decision to grant an AFA rate of 130.81% to Orient is remanded.

Commerce shall file its remand determination with the court within 60 days of this date. The parties have 30 days thereafter to file objections, and the Government will have 15 days thereafter to file its response.

Dated: This 7th day of September, 2012.
New York, New York.

/s/ Jane A. Restani
JANE A. RESTANI
JUDGE

[13] The court recognizes that Commerce used NSO volume-based data under protest. *Second Remand Results* 1.