U.S. Court of International Trade

Slip Op. 17–20

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

Before: Jennifer Choe-Groves, Judge
Court No. 11–00532

[*Sua sponte* dismissing Plaintiff's claims concerning the classification of (1) certain models of graduated compression hosiery for which the court lacks subject matter jurisdiction, and (2) certain models of graduated compression arm-sleeves and gauntlets that were protested properly but Plaintiff has waived.]

Dated: February 28, 2017

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Alexander J. Vanderweide, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Beth C. Brotman*, Attorney, Office of the Chief Counsel International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

OPINION

Choe-Groves, Judge:

Sigvaris, Inc. ("Plaintiff") filed a complaint pursuant to 28 U.S.C. § 1581(a) (2006)[1] claiming that U.S. Customs and Border Protection ("Customs") improperly denied its protests, which challenged Customs' classification of various models of graduated compression hosiery, arm-sleeves, and gauntlets. *See* Summons, Dec. 22, 2011, ECF No. 1; Compl., Mar. 30, 2012, ECF No. 6. Plaintiff and Defendant subsequently filed cross-motions for summary judgment concerning the correct classification of several models of Plaintiff's imported compression products. *See* Pl.'s Mot. Summ. J., Dec. 21, 2015, ECF No. 56; Def.'s Cross-Mot. Summ. J. 2, Mar. 10, 2016, ECF No. 61. Before addressing the merits of the Parties' cross-motions for summary judgment, the court issues this opinion to address jurisdictional matters. For the reasons set forth below, the court finds that it lacks subject matter jurisdiction to hear Plaintiff's claim for certain models

[1] Further citations to Title 28 of the U.S. Code are to the 2006 edition.

of hosiery and that Plaintiff has waived its claim regarding certain models of arm-sleeves and gauntlets. The court accordingly dismisses these claims *sua sponte*. The court will render judgment on the cross-motions for summary judgment in a separate opinion, which will exclude those claims that the court dismisses here.

BACKGROUND

Plaintiff imported 105 entries of graduated compression merchandise into the United States at the Port of Atlanta between September 2008 and November 2010. *See* Summons; Statement of Material Facts as to Which no Genuine Issue Exists ¶ 2, Dec. 21, 2015, ECF No. 56–1 (“Pl. Facts”); Def.’s Resp. Pl.’s Statement of Material Facts as to Which No Genuine Issues Exists ¶ 2, Mar. 10, 2016, ECF No. 61 (“Def. Facts Resp.”). The entries imported by Plaintiff consist of graduated compression hosiery, arm-sleeves, and gauntlets. *See* Def.’s Statement of Undisputed Material Facts ¶ 1, Mar. 10, 2016, ECF No. 61 (“Def. Facts”); *see also* Pl.’s Resp. Def.’s Statement of Undisputed Material Facts ¶ 1, June 1, 2016, ECF No. 66–1 (“Pl. Facts Resp.”). Each product is designed to apply a fixed range of graduated compression measured in millimeters of mercury (“mmHg”). *See* Def. Facts ¶ 3; Pl. Facts Resp. ¶ 3.

Plaintiff imported various models of its graduated compression products, each differing in style, material, length, and compression level. *See* Def. Facts ¶¶ 1–8; Pl. Facts Resp. ¶¶ 1–8. The graduated compression hosiery at issue includes models from the following product lines: 120 Support Therapy Sheer Fashion Series for women (“Series 120”),[2] 145 Support Therapy Classic Dress Series for women (“Series 145”), 180 Support Therapy Classic Ribbed Series for men (“Series 180”), 185 Support Therapy Classic Dress Series for men (“Series 185”), 400 Sports Performance Series (“Series 400”), 500 Medical Therapy Natural Rubber Series (“Series 500”), and 900 Medical Therapy Traditional Series (“Series 900”). Plaintiff’s product catalogue indicates that Series 120, 145, 180, and 185 models exert 15–20 mmHg of compression, *see* Pl. Exs. Rule 56.3 Statement of Facts and Mem. Ex. A at 000029–30, 000035–36, Dec. 21, 2015, ECF No. 56–4 (“Ex. A”). Plaintiff alleges that Series 400, 500, and 900 models apply compression of 20 mmHg or greater. *See* Letter in Resp. to Information Requested 3–4, Nov. 8, 2016, ECF No. 75 (“Pl. Letter”). The graduated compression arm-sleeves and gauntlets involved in this matter include models from the 500 Medical Therapy Natural Rubber

[2] Series 120 is available in the following varieties: 120P (pantyhose), 120M (maternity pantyhose), 120N (thigh-high hosiery), 120C (calf-length hosiery), and 120CO (calf-length hosiery with open toe). *See* Def. Facts ¶ 5.

Series ("Series 500 arm-sleeves and gauntlets")[3] and 900 Medical Therapy Traditional Series ("Series 900 arm-sleeves and gauntlets").[4] Series 500 arm-sleeves and gauntlets exert 30–40 mmHg of compression and Series 900 arm-sleeves and gauntlets are available in models with either 20–30 mmHg or 30–40 mmHg of compression. *See* Ex. A at 000025–26.

Customs classified and liquidated the graduated compression merchandise under various provisions of the Harmonized Tariff Schedule of the United States (2010) ("HTSUS") as follows: (1) the graduated compression hosiery at a duty rate of 14.6% ad valorem under HTSUS subheading 6115.10.40 or duty free under HTSUS subheading 6115.10.05; (2) the graduated compression arm-sleeves under HTSUS subheading 6307.90.98 dutiable at 7% ad valorem; and (3) the graduated compression gauntlets under HTSUS subheading 6116.93.88 dutiable at 18.6% ad valorem. *See* Pl. Facts ¶ 3; Def. Facts Resp. ¶ 3; *see also* Summons. Plaintiff filed nine protests that challenged Customs' classification of several models of graduated compression merchandise. *See* Protest Nos. 1704–10–100013, -10–100018, -10–100068, -10–100240, -10–100258, -11–100057, -11–100189, -11–100352, -11–100414. Plaintiff's protests sought, *inter alia*, to have Customs classify all of the merchandise duty free under HTSUS subheading 9817.00.96 as "[a]rticles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons," or alternatively to classify the compression hosiery as duty free under HTSUS subheading 6115.10.05 as "[s]urgical panty home [sic] and surgical stockings with graduated compression for orthopedic treatment." *See, e.g.*, Protest No. 1704–10100018. Plaintiff's protests were deemed denied on December 12, 2011.[5]

On December 22, 2011, Plaintiff commenced its action to contest the denial of its protests, invoking the court's jurisdiction under 28 U.S.C. § 1581(a). *See* Summons. Plaintiff's complaint alleged that Customs misclassified several models of graduated compression merchandise

[3] Series 500 arm-Sleeves and gauntlets are available in the following varieties: 503A (arm-sleeve without gauntlet), 503B (arm-sleeve with gauntlet), 503Gs2 (separate gauntlet), and 503GM2 (separate gauntlet). *See* Def. Facts ¶ 8.

[4] Series 900 arm-sleeves and gauntlets are available in the following varieties: 901B11 (arm-sleeve with gauntlet at 20–30 mmHg), 902B11 (arm-sleeve with gauntlet at 30–40 mmHg), 901A11 (arm-sleeve without gauntlet at 20–30 mmHg), 902A11 (arm-sleeve without gauntlet at 30–40 mmHg), and 902A11+size/S (arm-sleeve with grip-top at 30–40 mmHg). *See* Ex. A at 000026.

[5] By statute, "a protest which has not been allowed or denied in whole or in part within thirty days following . . . a request for accelerated disposition shall be deemed denied on the thirtieth day following mailing of such request." 19 U.S.C. § 1515(b) (2006); *see also* 19 C.F.R. § 174.22 (2011).

and improperly denied the protests. *See* Compl. ¶¶ 32–66. Plaintiff moved for summary judgment contending that certain models of graduated compression hosiery, arm-sleeves, and gauntlets were entitled to duty free treatment under HTSUS subheading 9817.00.96. *See* Mem. Sigvaris, Inc., Supp. Pl.'s Mot. Summ. J. 3–21, Dec. 21, 2015, ECF No. 56–2 ("Pl. Br."). The motion contended alternatively that models of compression hosiery applying compression of 20 mmHg or greater were classified under HTSUS subheading 6115.10.05 and not subject to duties. *See id.* at 21–24. Defendant filed a cross-motion for summary judgment arguing that the models of compression hosiery, arm-sleeves, and gauntlets were properly classified under HTSUS subheadings 6115.10.40, 6307.90.98, and 6116.93.88, respectively. *See* Def.'s Mem. Supp. Cross-Mot. Summ. J. 5–21, Mar. 10, 2016, ECF No. 61 ("Def. Br.").

In a letter dated November 2, 2016, the court informed the Parties of potential jurisdictional issues that might prevent the court from ruling on the classification of certain models of graduated compression merchandise, namely Series 180 hosiery, models of hosiery that apply pressure of 20 mmHg or greater, and Series 900 arm-sleeves and gauntlets. *See* Letter, Nov. 3, 2016, ECF No. 74. The court questioned jurisdiction because the record before the court did not establish that Plaintiff protested Customs' classification of these specific models, which is a prerequisite to filing a classification lawsuit. *See id.* at 1–2. The court requested clarification of whether the entries included these models of graduated compression merchandise and whether Customs' classification of such models was properly protested. *See id.*

In response to the court's request, Plaintiff averred that the subject entries included the models in question and that the denied protests challenged Customs' classification of these products. *See* Pl. Letter 1–4. Plaintiff also stated that graduated compression hosiery with compression of 20 mmHg or greater refers to Series 400, 500, and 900 models of compression hosiery. *See id.* at 3–4. Defendant responded that 28 U.S.C. § 1581(a) does not provide the court with jurisdiction over these classification claims because, "[w]hile . . . the entries identified on the exhibits to Sigvaris's response to the Court's Letter contain series 180 compression hosiery, 900 series arm-sleeves, and hosiery products of greater than 20 mmHg of compression, Sigvaris never protested the classification of such product models." *See* Def.'s Resp. Court's Nov. 2, 2016 Letter 1–6, Nov. 10, 2016, ECF No. 78 ("Def. Resp."). Defendant noted that Plaintiff's complaint, responses to written discovery requests, and motion for summary judgment failed to articulate that the classification of these specific models were

at dispute in the cross-motions for summary judgment. *See id.* at 6–13. Plaintiff rejected Defendant's assertions as "unfounded and erroneous" because Plaintiff purportedly filed valid protests that challenged Customs' classification of the merchandise and timely filed a summons to contest the denials of these protests. *See* Pl.'s Reply Def.'s Resp. Pursuant Court's Nov. 10, 2016 Letter 2–10, Nov. 14, 2016, ECF No. 80 ("Pl. Reply").

DISCUSSION

A. Jurisdictional Framework

The U.S. Court of International Trade, like all federal courts, is one of limited jurisdiction and is "presumed to be 'without jurisdiction' unless 'the contrary appears affirmatively from the record.'" *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) (quoting *King Iron Bridge & Mfg. Co. v. Otoe Cty.*, 120 U.S. 225, 226 (1887)). The party invoking jurisdiction must "allege sufficient facts to establish the court's jurisdiction" independently for each claim asserted, *id.* at 1318–19 (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936)), and therefore "bears the burden of establishing it." *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). A court may and should raise the question of its jurisdiction *sua sponte* any time it appears in doubt. *Arctic Corner, Inc. v. United States*, 845 F.2d 999, 1000 (Fed. Cir. 1988) (citation omitted); *see also* USCIT R. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

The U.S. Court of International Trade has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a). Jurisdiction under 28 U.S.C. § 1581(a) is conditioned upon the denial of a protest challenging a decision made by Customs that is filed in accordance with Section 1514 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514 (2006).[6] The following Customs decisions are protestable:

> [A]ny clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in an electronic transmission, adverse to the importer, in any entry, liquidation, or reliquidation, and, decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to--

[6] Further citations to the Tariff Act of 1930, as amended, are to the relevant provision under Title 19 of the U.S. Code, 2006 edition.

(1) the appraised value of merchandise;
(2) the classification and rate and amount of duties chargeable;
(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
(5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof, including the liquidation of an entry, pursuant to either section 1500 of this title or section 1504 of this title;
(6) the refusal to pay a claim for drawback; or
(7) the refusal to reliquidate an entry under subsection (d) of section 1520 of this title.

19 U.S.C. § 1514(a). A protest must satisfy statutory and regulatory requirements regarding form and content.[7] *See* 19 U.S.C. § 1514(c); 19 C.F.R. § 174.13(a). Once a valid protest is filed, Customs must timely review the protest and determine whether to grant or deny the protest in whole or in part. 19 U.S.C. § 1515(a). If an importer does not avail itself of the protest process, the decision made by Customs "shall be final and conclusive upon all persons," 19 U.S.C. § 1514(a), and judicial review is statutorily precluded. *See* 28 U.S.C. § 1581(a); *see also Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1292 (Fed. Cir. 2008).

B. Plaintiff's Protests Before Customs

Plaintiff contends that the court has jurisdiction pursuant to 28 U.S.C. § 1581(a) to rule on the classification of the imported models of compression products. *See* Compl. ¶ 2. The court has jurisdiction pursuant to § 1581(a) only over claims previously subject to protest.

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[7] According to 19 U.S.C. § 1514(c)(1),

[a] protest must set forth distinctly and specifically--
(A) each decision described in subsection (a) of this section as to which protest is made;
(B) each category of merchandise affected by each decision set forth under paragraph (1);
(C) the nature of each objection and the reasons therefore; and
(D) any other matter required by the Secretary by regulation.

19 U.S.C. § 1514(c)(1). The implementing regulation further clarifies that a protest must include, among other requirements, "[a] specific description of the merchandise affected by the decision as to which protest is made" and "[t]he nature of, and justification for the objection set forth distinctly and specifically with respect to each category, payment, claim, decision, or refusal." 19 C.F.R. § 174.13(a)(5)–(6).

Each of Plaintiff's protests included a completed protest form and an attached supporting memorandum of points and authorities.[8] *See, e.g.*, Protest No. 1704–10–100018. Plaintiff provided the reasons for its protests as follows:

> *Decision Protested*: Classification of graduated compression hosiery under HTS subheading 6115.10. Classification of compression arm sleeves under HTS subheading 6307.90.9889. Classification of compression gauntlets under HTS subheading 6116.93.99. Assessment of duty on products pursuant to these subheadings.
> *Protest Claim*: The merchandise is properly classifiable under HTS subheading 9817.00.96 as articles specially designed for the use of the blind or physically handicapped, entitled to duty free entry, or, alternatively under HTS subheading 6115.10.05, duty free.
> *Reasons in Support of Protest*: A *Memorandum of Points and Authorities* is attached.

See, e.g., id.[9] The protests indicated that the categories of merchandise subject to protest were graduated compression hosiery, arm-sleeves, and gauntlets.

Plaintiff attached a memorandum to supplement each of its protests. *See, e.g., id.* at Attach. Mem. P. & A. in Supp. Protest ("Suppl. Memo").[10] Each memorandum specified which models of graduated compression hosiery, arm-sleeves, and gauntlets were subject to protest. For hosiery, the memorandum specified that the goods at issue consisted of the following styles of graduated compression hosiery:

> SIGVARIS Support Therapy, Sheer Fashion graduated support pantyhose (**Model 120P**) n sizes A, B, C, D, E and F and in colors 00, 10, 12, 29, 33, 36, 41, 73 and 99;
>
> SIGVARIS Support Therapy, Sheer Fashion graduated support Maternity Panty hose (**Model 120M** in sizes A, B, C, D, E and in colors 33, 36, and 99;

[8] Per regulation, "[a] written protest against a decision of CBP must be filed in quadruplicate on CBP Form 19 or a form of the same size clearly labeled 'Protest' and setting forth the same content in its entirety, in the same order, addressed to CBP. All schedules or other attachments to a protest (other than samples or similar exhibits) must also be filed in quadruplicate." 19 C.F.R. § 174.12(b).

[9] A number of Plaintiff's protests forms additionally protested Customs' classification of "cloth accessories for compression hosiery under HTS subheading 6117.90.9090" and "compression braces, garters under 6212.90.0030," *see* Protest Nos. 1704–11–100189, -11–100352, -11–100414, however, these products are not involved in this action.

[10] The memoranda attached to each of Plaintiff's protest are virtually identical. For ease of reference, the court will cite to the memorandum attached to Protest Number 1704–10–100018.

> SIGVARIS Support Therapy, Sheer Fashion graduated support Thigh-High hosiery (**Model 120N**) in sizes A, B, C and in colors 00, 10, 12, 29, 33, 36, 41, 73, and 99;
>
> SIGVARIS Support Therapy, Sheer Fashion graduated support Calf-length hosiery (**Model 120C**) in sizes A, B, C and in colors 00, 10, 12, 29, 33, 36, 41, 73, and 99
>
> SIGVARIS Support Therapy, Sheer Fashion graduated support Calf length open toe hosiery (**Model 120CO**) in sizes A, B, C and in colors 29, 33 and 36.
>
> SIGVARIS Support Therapy, Classic Dress graduated support sock for women (**145C**) in sizes A, B, C and in colors 00, 10, 12, 30 and 99;
>
> SIGVARIS Support Therapy, Classic Dress graduated support sock for men (**185C**) in sizes A, B, and C and colors 00, 10, 11, 12, 30, and 99.

See id. at 2–3 (emphases added). The memorandum clarified that the protest involved models of graduated compression hosiery that exert between 15 and 20 mmHg of compression. *See id.* at 1, 3, 5–6. For arm-sleeves and gauntlets, the memorandum specified that the goods at issue consisted of the following eight styles of graduated compression arm-sleeves and gauntlets:

> SIGVARIS Medical Therapy, Natural Rubber Armsleeve with gauntlet (**503B**) in sizes S1, S2, M1, M2, L1 and L2 in color beige;
>
> SIGVARIS Medical Therapy, Natural Rubber Armsleeve without gauntlet (**503A**) in sizes S1, S2, M1, M2, L1 and L2 in color beige
>
> SIGVARIS Medical Therapy, Separate gauntlet (**503Gs2** and **503GM2**) in color beige
>
> . . .
>
> SIGVARIS Medical Therapy, Traditional Series Armsleeve (20–30 mmHg) with gauntlet (**901B11**) in sizes 1S, 2S, 1M, 2M, 1L, 2L in color beige
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> SIGVARIS Medical Therapy, Traditional Series Armsleeve (30–40 mmHg) with gauntlet (**902B11**) in sizes 1S, 2S, 1M, 2M, 1L, 2L in color beige
>
> SIGVARIS Medical Therapy, Traditional Series Armsleeve (20–30 mmHg) without gauntlet (**901A11**) in sizes 1S, 2S, 1M, 2M, 1L, 2L in color beige

> SIGVARIS Medical Therapy, Traditional Series Armsleeve (30–40 mmHg) without gauntlet (**902A11**) in sizes 1S, 2S, 1M, 2M, 1L, 2L in color beige
>
> SIGVARIS Medical Therapy, Traditional Series Armsleeve (30–40 mmHg) with grip-top (**902A11**–size/S) in sizes 1S, 2S, 1M, 2M, 1L, 2L in color beige

See id. at 3–4 (emphases added). The remainder of the memorandum set forth the reasons in support of classifying these models of compression products under HTSUS subheading 9817.00.96.

C. Jurisdiction Over Plaintiff's Classification Claims

Plaintiff's complaint states that it seeks "judicial review of CBP's denial of Plaintiff's protests concerning the classification . . . of certain graduated compression accessories." Compl. ¶ 1. The complaint alleges that the merchandise in this action "consists of two principal classes of graduated compression accessories: (a) hosiery; and (b) sleeves, worn on the arms, and gauntlets, worn on the hands." Compl. ¶ 5. Plaintiff's primary claim is that the subject graduated compression hosiery, arm-sleeves, and gauntlets are properly classified under HTSUS subheading 9817.00.96. *See* Compl. ¶¶ 39–66. The complaint does not define, however, the entire universe of product models captured by the references to "subject graduated compression hosiery" and "subject graduated compression sleeves and gauntlets." Id. Plaintiff's subsequent filings with the court clarify that "subject graduated compression hosiery" refers to Series 120, 145, 180, 185, 400, 500, and 900 models of hosiery and that "subject graduated compression sleeves and gauntlets" refer to Series 500 and 900 arm-sleeves and gauntlets. *See* Compl. ¶¶ 7, 22; Pl. Facts ¶ 5; Pl. Facts Resp. ¶ 8; Pl. Letter 1–4.

As explained below, the court finds that § 1581(a) does not provide the court with subject matter jurisdiction to hear Plaintiff's classification claim insofar as it includes Series 180, 400, 500, and 900 graduated compression hosiery, and that Plaintiff waived its classification claim with respect to Series 900 arm-sleeves and gauntlets during the course of this action.

a. Graduated Compression Hosiery

The court does not have jurisdiction pursuant to 28 U.S.C. § 1581(a) to rule on the classification of Series 180, 400, 500, and 900 graduated compression hosiery. Plaintiff submits that it protested Customs' classification of Series 120, 145, 180, 185, 400, 500, and 900 models of

graduated compression hosiery. *See* Pl. Reply 1–8. Upon reviewing the protests and supporting memoranda submitted by Plaintiff, it is clear that Plaintiff only protested certain models of graduated compression hosiery, which did not include Series 180, 400, 500, and 900 hosiery. *See* Suppl. Memo 2–3 (itemizing the hosiery products subject to protest). Plaintiff also made it clear that the protests only concerned compression hosiery that applies 15–20 mmHg of compression, but Plaintiff represents that Series 400, 500, and 900 hosiery apply greater than 20 mmHg of compression. *See id.* at 1 ("protests the decision of the Port Director of Customs to classify imported compression hosiery, having a compression of between 15 and 20 millimeters of mercury (mmHg)"), 5 ("this protest focuses on hosiery having a compression range of between 15–20 mmHg"), 6 ("[a]t issue is the classification of the subject merchandise in the 15–20 mmHg range"). Plaintiff's complaint acknowledges that "[h]osiery having higher compression (20 mmHg or more) . . . are not involved." Compl. ¶ 19. Plaintiff's motion for summary judgment nevertheless attempts to claim that Customs misclassified hosiery that applies compression of 20 mmHg or greater. *See* Pl. Br. 21–24.

A review of the protest documentation confirms that Plaintiff sufficiently challenged Customs' classification of Series 120, 145, and 185 graduated compression hosiery, but failed to challenge the classification of Series 180, 400, 500, and 900 hosiery models. Because of this jurisdictional failure, Customs' classification of Series 180, 400, 500, and 900 hosiery became final and conclusive. *See* 19 U.S.C. § 1514(a). The court does not have jurisdiction, therefore, over Plaintiff's claim concerning the classification of the models of graduated compression hosiery in Series 180, 400, 500, and 900.

Plaintiff argues that denying jurisdiction "'is a severe action which should be taken only sparingly.'" Pl. Reply 5 (quoting *XL Specialty Ins. Co. v. United States*, 21 CIT 858, 867 (2004)). Congress has expressly limited the court's jurisdiction to the issues preserved for appeal in a protest that is subsequently denied, and the court's jurisdiction is confined to the objections made in such a protest. Plaintiff itemized each model of merchandise it wished to protest, yet failed to challenge the classification of Series 180, 400, 500, and 900 graduated compression hosiery. Plaintiff was required to make such a challenge at the time of its initial protests to preserve its right to appeal. *See Computime, Inc. v. United States*, 8 CIT 259, 261, 601 F. Supp. 1029, 1030 (1984) ("If plaintiff could have made such protests at that time, it was required to make them."), *aff'd* 772 F.2d 874 (Fed. Cir. 1985). Plaintiff does not provide any reason for why it could not have challenged Customs' classification of these models of graduated compres-

sion hosiery at the time of its original protests. The court recognizes that dismissal for lack of jurisdiction is a severe consequence. "[H]owever, the [jurisdictional] requirements are straightforward and not difficult to satisfy." *Koike Aronson, Inc. v. United States*, 165 F.3d 906, 909 (Fed. Cir. 1999).

Defendant asserts that the court cannot exercise jurisdiction over an additional aspect of Plaintiff's classification claim in this action. Plaintiff claims that the imported models of graduated compression hosiery are properly classified under HTSUS subheading 9817.00.96, which encompasses hosiery that was classified by Customs under HTSUS subheading 6115.10.05 and 6115.10.40. Defendant questions the court's jurisdiction over this claim to the extent that it includes hosiery classified under HTSUS subheading 6115.10.05. Defendant argues that this aspect of Plaintiff's claim does not present a justiciable controversy given that HTSUS subheading 6115.10.05 and 9817.00.96 are both duty free provisions. *See* Def. Br. 2 n.3; Def. Resp. 5–6. Under Article III of the Constitution, the Court is only empowered to decide claims that present live cases or controversies. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 395 (1988); *Flast v. Cohen*, 392 U.S. 83, 94 (1968). Generally, a classification dispute concerning two tariff provisions with the same duty rate is a moot issue and does not constitute a justiciable controversy because there is no monetary harm or injury resulting from Customs' classification. *See 3V, Inc. v. United States*, 23 CIT 1047, 1048–1052, 83 F. Supp. 2d 1351, 1352–55 (1999) (dismissing an action for failing to meet the Article III case or controversy requirement because the two putative classification provisions carried the same duty rate). The fact that the competing tariff provisions in this case are duty free does not render Plaintiff's claim moot here. Plaintiff's claim presents a justiciable controversy because, unlike HTSUS subheading 6115.10.05, merchandise classified under HTSUS subheading 9817.00.96 is exempt from certain merchandise processing fees. *See* 19 C.F.R. § 24.23(c)(1)(i). Merchandise classified under HTSUS subheading 6115.10.05 is not afforded such treatment.[11] The government would be required to refund the assessed merchandise processing fees if Plaintiff were to prevail on this claim. Because Plaintiff's claim alleges monetary harm resulting from Customs' classification, the Article III case or controversy requirement is satisfied.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) over Plaintiff's classification claim regarding Series 120, 145, and 185

[11] The entry papers indicate that merchandise classified under HTSUS subheading 6115.10.05 was subject to a 0.21% ad valorem merchandise processing fee. *See* Entries.

models of graduated compression hosiery that were classified under HTSUS subheadings 6115.10.05 and 6115.10.40.

b. Graduated Compression Arm-Sleeves and Gauntlets

Plaintiff established the basis for the court's jurisdiction pursuant to 28 U.S.C. § 1581(a) by protesting Customs' classification of Series 500 and 900 arm-sleeves and gauntlets. The depositions conducted during discovery, Plaintiff's responses to Defendant's interrogatories, and Plaintiff's motion for summary judgment demonstrate, however, that Plaintiff has waived its classification claim with respect to Series 900 arm-sleeves and gauntlets.

While initial pleadings are designed to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Bell Atlantic v. Twombly*, 550 U.S. 544, 545 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)), it is the information obtained during discovery that reveals the true nature of the claims and fills in the details of the dispute. *See Hickman v. Taylor*, 329 U.S. 495, 500–01 (1947) (discussing the interplay between pleadings and the pre-trial discovery tools under Rules 26 to 37); *see also United States v. Procter & Gamble Co.*, 356 U.S. 677, 682–83 (1958). The third count in Plaintiff's complaint can be construed to include a claim regarding the classification of both Series 500 and 900 arm-sleeves and gauntlets.[12] There is no reference to Series 900 arm-sleeves and gauntlets in the three depositions conducted during discovery. *See* Def.'s Cross-Mot. Summ. J. Ex. C–E, Mar. 10, 2016, ECF Nos. 61–3–5. Plaintiff was asked to clarify through written discovery which models of arm-sleeves and gauntlets were subject to this action:

> (a) Please correlate, precisely and specifically, each and every invoice description of the goods in issue with the catalog description of each such article, as that article was sold in the United States during the time of the entries in issue in this case.

Pl.'s First Set of Discovery Responses to Def. 12, Mar. 10, 2016, ECF No. 61–1 ("Pl. Interrogatory Resps."). Plaintiff provided the following response:

[12] The third count in Plaintiff's complaint alleges that it is entitled to relief because "[t]he subject graduated compression sleeves and gauntlets" are properly classified under HTSUS subheading 9817.00.96. Compl. ¶¶ 53–66.

Invoice Description	**Catalog Description**
503 CL.2 ARMSLEEVE WO.MITTEN A ...	Natural Rubber Armsleeve, without gauntlet
503 CL.2 ARMSLEEVE W. MITTEN B ...	Natural Rubber Armsleeve, with gauntlet
MITTEN G ...	Natural Rubber Armsleeve, separate gauntlet

Pl. Interrogatory Resps. 12–13. Plaintiff was asked to "produce each and every document, catalog, brochure and/or specification that relates to your response to subpart (a), above." *See* Pl. Interrogatory Resps. 13. Plaintiff responded by referring to the page in its catalogue that provides product information for Series 500 arm-sleeves and gauntlets. *See id.* Notably absent from Plaintiff's interrogatory responses are any references to models of Series 900 arm-sleeves and gauntlets. The court must presume that Plaintiff's answers to Defendant's interrogatories were complete. *See Hickman*, 329 U.S. at 509. By failing to include Series 900 arm-sleeves and gauntlets in the depositions and interrogatory responses, the court must conclude that Plaintiff waived its claim with respect to such merchandise.

The absence of any reference to Series 900 arm-sleeves and gauntlets in Plaintiff's submissions in connection with its motion for summary judgment also supports that Plaintiff waived its classification claim regarding such models of arm-sleeves and gauntlets. It is "well established that arguments not raised in the opening brief are waived." *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) (citing *Cross Med. Prods., Inc. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293, 1320–21 n.3 (Fed. Cir. 2005); *see also Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002). In its USCIT Rule 56.3 statement of facts, Plaintiff states that the merchandise subject to this action "include[s] Series 120, 145, 180, and 185 in compression hosiery, and Series 500 arm compression sleeves." Pl. Facts ¶ 5. Plaintiff's motion for summary judgment does not refer to specific models of graduated compression arm-sleeves and gauntlets. Nothing in Plaintiff's statement of facts or opening brief evinces that Customs' classification of Series 900 arm-sleeves and gauntlets is at issue. The only direct references to Series 900 arm-sleeves and gauntlets in this action are found in documents submitted after Plaintiff filed its opening brief. *See* Pl. Facts Resp. ¶ 8; Pl. Letter 2; Pl. Reply 4. The court concludes that Plaintiff's failure to include Series 900 arm-sleeves and gauntlets in its motion, pleadings, and discovery responses constituted a waiver of its classification claim for those models of merchandise.

CONCLUSION

For the foregoing reasons, (1) the court lacks subject matter jurisdiction over Plaintiff's claim concerning the classification of Series 180, 400, 500, and 900 graduated compression hosiery, and (2) Plaintiff has waived its claim with respect to the classification of Series 900 arm-sleeves and gauntlets. Plaintiff's classification claims regarding these models of merchandise are dismissed. The graduated compression products that remain subject to this action are Series 120, 145, and 185 models of graduated compression hosiery and Series 500 arm-sleeves and gauntlets.

Judgment on the dismissed classification claims will be entered accordingly.

Dated: February 28, 2017
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 17–21

WWRD U.S., LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 11–00238

[The court finds that U.S. Customs and Border Protection correctly classified the subject imports. Accordingly, the court denies Plaintiff's motion for summary judgment and grants Defendant's cross-motion for summary judgment.]

Dated: March 1, 2017

Daniel J. Gluck, Christopher M. Kane, and *Mariana del Rio Kostenwein*, Simon Gluck & Kane LLP, of New York, NY, for plaintiff.

Beverly A. Farrell, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With her on the brief were *Benjamin C. Mizer,* Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Amy M. Rubin,* Assistant Director.

OPINION

Barnett, Judge:

Before the court are cross-motions for summary judgment. Pl.'s Mot. for Summ. J., ECF No. 33–7; Pl.'s Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Mem."), ECF No. 33; Def.'s Cross-Mot. for Summ. J. and Def.'s Mem. of Law in Opp'n to Pl.'s Mot. for Summ. J. and in Supp. of Def.'s Cross-Mot. for Summ. J. ("Def.'s Mem."), ECF No. 43. Plaintiff WWRD U.S., LLC, ("Plaintiff" or "WWRD") contests

the denial of several protests[1] challenging U.S. Customs and Border Protection's ("Customs") classification of the subject imports[2] according to their constituent materials and dutiable at rates ranging from three to six percent *ad valorem. See generally* Summons, ECF No. 1; Compl., ECF No. 15; *see also* Pl.'s Mem. at 3–5.[3] Plaintiff contends that the subject imports qualified for duty free treatment pursuant to subheading 9817.95.01 of the Harmonized Tariff Schedule of the United States ("HTSUS")[4] as "Utilitarian articles of a kind used in the home in the performance of specific religious or cultural ritual celebrations for religious or cultural holidays, or religious festive occasions, such as Seder plates, blessing cups, menorahs or kinaras." *See generally* Compl.; *see also* Pl.'s Mem. at 4, 6–7. Defendant United States ("Defendant" or "the Government") contends that Customs correctly classified the subject imports. *See* Def.'s Mem. at 1, 3–4.

There is no genuine issue of material fact regarding the properties of the subject imports that would preclude summary judgment. The sole issue before the court is whether, as a matter of law, the subject imports are properly classified under subheading 9817.95.01 in addition to the tariff provisions corresponding to their constituent materials. For the following reasons, the court finds that Customs properly classified the subject imports according to their constituent materials and not under HTSUS 9817.95.01.

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[1] WWRD contests the denial of protest numbers 4601–11–100133, 4601–11–100149, 4601–11–100150, 4601–11–100152, 4601–11–100153, 4601–11–100363, and 4601–11–100364. Summons at 4.

[2] The merchandise consists of dinnerware from Plaintiff's "Old Britain Castles" Christmas collections, dinnerware from Plaintiff's "His Majesty" line of Thanksgiving dinnerware, and crystalware from Plaintiff's "12 Days of Christmas" collection. Pl.'s Statement of Material Facts as to Which No Genuine Issue Exists ("Pl.'s SOF") ¶ 10, ECF No. 33–1; Def.'s Resp. to Pl.'s Statement of Material Facts as to Which No Genuine Issue Exists ("Def.'s Resp. to Pl.'s SOF") ¶ 10, ECF No. 47 (admitting the above as material facts but denying that self-designation by Plaintiff of "Christmas" or "Thanksgiving" merchandise qualifies it for duty free treatment). Plaintiff has withdrawn its claim concerning "Wedding Heirloom Bowls." *See* Pl.'s Mem. at 1 n.3; *see also* Compl. ¶¶ 27–37. For a summary of the subject imports and their respective tariff classifications assigned by Customs, *see infra* p. 7.

[3] Seven entries are at issue: Entry Numbers 31670184352, 31670186480, 31670180012, 31670179998, 31670180004, 31670210579, and 31670219208. Summons at 4; Compl., Ex. 1.

[4] All citations to the HTSUS are to the 2009 and 2010 versions, which are identical in all relevant respects, as determined by the date of importation of the merchandise. All items from Plaintiff's "Old Britain Castles" and "His Majesty" collections, and the flutes from Plaintiff's "12 Days of Christmas" collection, entered on several dates in 2009. Decl. of Daniel J. Gluck, Esq. in Supp. of Pl.'s Mot. for Summ. J. ("Gluck Decl."), Ex. G, ECF No. 33–2. The hurricane lamps and punchbowls from Plaintiff's "12 Days of Christmas" collection entered on January 15, 2010. Gluck Decl., Ex. G.

BACKGROUND

I. Material Facts Not in Dispute

The party moving for summary judgment must show "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." United States Court of International Trade ("USCIT") Rule 56(a). Movants should present material facts as short and concise statements, in numbered paragraphs, and cite to "particular parts of materials in the record" as support. USCIT Rule 56(c)(1)(A); *see also* USCIT Rule 56.3(a)("factual positions described in Rule 56(c)(1)(A) must be annexed to the motion in a separate, short and concise statement, in numbered paragraphs"). In responsive papers, the nonmovant "must include correspondingly numbered paragraphs responding to the numbered paragraphs in the statement of the movant." USCIT Rule 56.3(b). Parties filed cross motions for summary judgment and submitted separate statements of undisputed material facts with their respective motions and responses to the opposing party's statements. *See* Pl.'s SOF; Def.'s Resp. to Pl.'s SOF; Def.'s Statement of Facts as to Which There Are No Genuine Issues to be Tried ("Def.'s SOF"), ECF No. 43–2; Pl.'s Resp. to Def.'s Statement of Material Facts as to Which No Genuine Issue Exists ("Pl.'s Resp. to Def.'s SOF"), ECF No. 44–2. Upon review of the parties' facts (and supporting exhibits), the court finds the following undisputed and material facts.[5]

Plaintiff WWRD is the importer of record. Pl.'s SOF ¶ 2; Def.'s Resp. to Pl.'s SOF ¶ 2. The subject imports comprise decorative ceramic plates and mugs from WWRD's "Old Britain Castles" dinnerware collections; decorative ceramic plates and gravy boats from WWRD's "His Majesty" dinnerware collection; and crystal flutes, punch bowls, and footed hurricane lamps from WWRD's "12 Days of Christmas" collection.[6] Def.'s SOF ¶ 1; Pl.'s Resp. to Def.'s SOF ¶ 1; *see also* Pl.'s Mem., Ex.'s A-E (physical samples of plates from Plaintiff's "Old Britain Castles" and "His Majesty" lines of dinnerware, and flutes from Plaintiff's "12 Days of Christmas" line of crystalware); Gluck Decl. ¶¶ 2–6 (verification of manual filing of exhibits). The "Old Britain Castles" Christmas plates and mugs and the "12 Days of

[5] Citations are provided to the relevant paragraph number of the undisputed facts and response; internal citations generally have been omitted.

[6] In their briefs, both parties refer to the plates as ceramic without citing support in the record. Pl.'s Mem. at 1, 11; Def.'s Mem. at 3. While the underlying classification of the subject merchandise according to its constituent material is not in dispute, the court reviewed the physical samples provided and confirmed that the plates are ceramic. Pl.'s Mem., Ex.'s A-E (physical samples of plates from Plaintiff's "Old Britain Castles" and "His Majesty" lines of dinnerware).

Christmas" crystal flutes and punch bowls are "designed to be used to serve food and beverages at Christmas . . . dinner." Pl.'s SOF ¶ 14; Def.'s Resp. to Pl.'s SOF ¶ 14.[7]

The "Old Britain Castles Pink Christmas" plates and mugs feature a Christmas tree motif. Aff. of Michael Craig ("Craig Aff.") ¶¶ 5–8, ECF No. 33–3;[8] Craig Aff., Ex's. 1–4, ECF No. 33–4; Pl.'s Mem., Ex.'s A, B. The plates measure 22cm and 27cm in diameter. Craig Aff. ¶¶ 5–6; Gluck Decl., Ex. G (summary of subject merchandise). Mugs in the "Old Britain Castles Christmas" collection feature a Christmas tree and Santa Claus motif. Craig Aff. ¶ 9, Ex. 5.

The plates and gravy boat in Plaintiff's "His Majesty" collection feature a "regal tom turkey" surrounded by "nuts, fruits, berries, and vegetables." Craig Aff. ¶¶ 10–14, Ex.'s 6–10; Pl.'s Mem., Ex. C. The plates measure 20cm in diameter. Craig Aff. ¶¶ 10–13; Gluck Decl., Ex. G.

The "Eileen" flute in WWRD's "12 Days of Christmas" collection features "the figure of a lady surrounded by hollies and berries symbolizing the 'Nine Ladies Dancing' portion of the 'Twelve Days of Christmas' song lyrics." Craig Aff. ¶ 15, Ex. 11; Pl.'s Mem., Ex. D. The "Glenmore" flute features "the figure of a lord surrounded by hollies and berries symbolizing the 'Ten Lords A-Leaping' portion of the 'Twelve Days of Christmas' song lyrics." Craig Aff. ¶ 16, Ex. 12; Pl.'s Mem., Ex. E. The footed hurricane lamp and punchbowl depict various figures from the "Twelve Days of Christmas" song. Craig Aff. ¶¶ 17, 18, Ex.'s 13, 14.

II. Procedural History

As noted above, this case involves seven entries of merchandise. Summons at 4; Compl., Ex. 1. The subject imports entered at the Ports of Newark, New Jersey, and New York, New York, on several dates in 2009 and 2010, and Customs liquidated the entries between August 20, 2010, and January 3, 2011. Summons at 4; Compl., Ex. 1;

[7] Defendant denies the "His Majesty" plates and gravy boats, which feature a turkey motif, were designed to be used as part of Thanksgiving dinner. Def.'s Resp. to Pl.'s SOF ¶ 14. Defendant neither admits nor denies Plaintiff's assertion that the "12 Days of Christmas" hurricane lamps "provide light and ambiance to the holiday dinner table." *See id.* ; Pl.'s SOF ¶ 14.

[8] The Craig Affidavit contains duplicate paragraphs numbered three through eight. *See* Craig. Aff., pp.1–2 (page one contains paragraphs numbered one to eight, and a subsequent paragraph numbered three; page two continues with paragraphs numbered four onwards). The paragraphs cited to in connection with the court's description of the subject merchandise are those numbered paragraphs beginning on page 2.

see also Entry Documents in Court File.[9] The following table summarizes the subject imports and their respective tariff provisions assigned by Customs based upon the items' constituent materials:

Subject Import	Customs' Classification	Dutiable Rate (percentage *ad valorem*)
Old Britain Castles - Pink Christmas (Pink and Green) plates and mugs	6912.00.3910[10]	4.5
Old Britain Castles - Pink Christmas (Pink) plates and mugs	6912.00.3910	4.5
Old Britain Castles - Christmas coffee mugs	6912.00.3910	4.5
His Majesty dinnerware plates	6912.00.3910	4.5
His Majesty gravy boats	6912.00.3950	4.5
12 Days of Christmas crystal flutes	7013.22.5000[11]	3.0
12 Days of Christmas punch bowls	7013.41.5000[12]	6.0
12 Days of Christmas footed hurricane lamps	9405.50.4000[13]	6.0

See Pl.'s SOF ¶¶ 19–23; Def.'s Resp. to Pl.'s SOF ¶¶ 19–23; Def.'s SOF ¶¶ 6(b)-10; Pl.'s Resp. to Def.'s SOF ¶¶ 6(b)-10.[14] WWRD timely and properly protested, which protests Customs denied. Summons at 1; Compl. ¶ 4; Answer ¶ 4, ECF No. 19; Def.'s SOF ¶¶ 3–4; Pl.'s Resp. to Def.'s SOF ¶¶ 3–4. WWRD challenges the denial of its protests.

[9] See *supra* note 4 regarding which products entered in 2009 and 2010.

[10] Subheading 6912.00.39 covers "Ceramic tableware, kitchenware, other household articles and toilet articles, other than of porcelain or china: Tableware and kitchenware: Other: Other: Available in specified sets: In any pattern for which the aggregate value of the articles listed in additional U.S. note 6(b) of this chapter is over $38...4.5 [percent]."

[11] Subheading 7013.22.50 covers: "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purpose (other than that of heading 7010 or 7018): Stemware drinking glasses, other than of glass-ceramics: Of lead crystal: Valued over $5 each...3 [percent]."

[12] Subheading 7013.41.50 covers: "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purpose (other than that of heading 7010 or 7018): Glassware of a kind used for table (other than drinking glasses) or kitchen purposes other than that of glass-ceramics: Of lead crystal: Valued over $5 each...6 [percent]."

[13] Subheading 9405.50.40 covers: "Lamps and light fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included: Non-electrical lamps and lighting fittings: Other...6 [percent]."

[14] Defendant's statement of facts contains two paragraphs numbered six. *See* Def.'s SOF at 1–2. Plaintiff's response duplicates Defendant's numbering. *See* Pl.'s Resp. to Def.'s SOF at 2–3, 4. For ease of identification, the court cites to the second paragraph numbered six as paragraph 6(b).

Parties have fully briefed the issues. The court now rules on the cross-motions for summary judgment.

JURISDICTION AND STANDARD OF REVIEW

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(a). Jurisdiction is uncontroverted in this case. Compl. ¶ 2; Answer ¶ 2; Pl.'s SOF ¶ 1; Def.'s Resp. to Pl.'s SOF ¶ 1.

The Court may grant summary judgment when "there is no genuine issue as to any material fact," and "the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 247 (1986); USCIT Rule 56(a).[15] The court's review of a classification decision involves two steps. First, it must determine the meaning of the relevant tariff provisions, which is a question of law. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citation omitted). Second, it must determine whether the merchandise at issue falls within a particular tariff provision, as construed, which is a question of fact. *Id.* (citation omitted). When no factual dispute exists regarding the merchandise, resolution of the classification turns solely on the first step. *See id.* at 1365–66; *see also Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999).

The court reviews classification cases *de novo. See* 28 U.S.C. § 2640(a). While the court accords deference to Customs classification rulings relative to their "power to persuade," *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), it has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms," *Jedwards Int'l, Inc. v. United States*, 40 CIT ___, ___, 161 F. Supp. 3d 1354, 1357 (2016) (quoting *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005)).[16] It is "the court's duty to find the correct result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

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[15] When parties have filed cross-motions for summary judgment, the court generally must evaluate each party's motion on its own merits, drawing all reasonable inferences against the party whose motion is under consideration. *JVC Co. of America, Div. of US JVC Corp. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000); *Specialty Commodities Inc. v. United States*, 40 CIT ___, ___, 19 F. Supp. 3d 1277, 1282 (2016). Here, the material facts are undisputed.

[16] According to Plaintiff, Customs issued a summary denial "without detailed analysis" and parties have not otherwise provided the court with a Customs ruling. *See* Pl.'s Mem. of Law in Resp. to Def.'s Cross-Mot. for Summ. J. and Pl.'s Reply in Further Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Resp.") at 3, ECF No. 44.

DISCUSSION

I. Legal Framework

The General Rules of Interpretation ("GRIs") provide the analytical framework for the court's classification of goods. *See N. Am. Processing Co. v. United States,* 236 F.3d 695, 698 (Fed. Cir. 2001). "The HTSUS is designed so that most classification questions can be answered by GRI 1." *Telebrands Corp. v. United States,* 36 CIT ___, ___, 865 F. Supp. 2d 1277, 1280 (2012), *aff'd* 522 Fed. App'x 915 (Fed. Cir. 2013). GRI 1 states that, "for legal purposes, classification shall be determined according to the terms of the headings and any [relevant] section or chapter notes." GRI 1, HTSUS. The court considers chapter and section notes of the HTSUS in resolving classification disputes because they are statutory law, not interpretive rules. *See Arko Foods Intern., Inc. v. United States*, 654 F.3d 1361, 1364 (Fed. Cir. 2011) (citations omitted); *see also Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 929 (Fed. Cir. 2003) (chapter and section notes are binding on the court).

"Absent contrary legislative intent, HTSUS terms are to be 'construed [according] to their common and popular meaning.'" *Baxter Healthcare Corp. v. United States,* 182 F.3d 1333, 1337 (Fed. Cir. 1999) (quoting *Marubeni Am. Corp. v. United States,* 35 F.3d 530, 533 (Fed. Cir. 1994)). Courts may rely upon their own understanding of terms or consult dictionaries, encyclopedias, scientific authorities, and other reliable information. *Brookside Veneers, Ltd. v. United States,* 847 F.2d 786, 789 (Fed. Cir. 1988); *BASF Corp. v. United States,* 35 CIT ___, ___, 798 F. Supp. 2d 1353, 1357 (2011).[17]

II. Overview of Plaintiff's Proposed Classification

The relevant chapter is Chapter 98, titled "Special Classification Provisions." Plaintiff contends the subject imports are properly classified under subheading 9817.95.01. *See generally* Pl.'s Mem.; Pl.'s Resp. Subheading 9817.95.01 covers:

> 9817.95 Articles classifiable in subheadings 3924.10, 3926.90, 6307.90, 6911.10, 6912.00, 7013.22, 7013.28, 7013.41, 7013.49, 9405.20, 9405.40 or 9405.50, the foregoing meeting the descriptions set forth below:
>
> 9817.95.01 Utilitarian articles of a kind used in the home in the performance of specific religious or cultural ritual celebrations for religious or cultural holidays, or religious festive occasions, such as Seder plates, blessing cups, menorahs or kinaras .... Free.

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[17] For additional guidance on the scope and meaning of tariff headings and chapter and section notes, the court also may consider the Explanatory Notes ("EN") to the Harmonized Commodity Description and Coding System, developed by the World Customs Organization. *See Deckers Outdoor Corp. v. United States,* 714 F.3d 1363, 1367 n. 1 (Fed. Cir. 2013). However, Chapter 98 and its associated subheadings do not have ENs.

Subheading 9817.95.01 went into effect on February 3, 2007. *See Michael Simon Design, Inc. v. United States*, 609 F.3d 1335, 1337, 1340–44 (Fed. Cir. 2010) (discussing the President's authority to modify tariff rates by proclamation in response to a challenge to Proclamation 8097, which, *inter alia*, adopted the International Trade Commission's ("ITC") recommended amendment to the HTSUS establishing subheading 9817.95.01); *see also Proclamation 8097*, 72 Fed. Reg. 453 (Jan. 4, 2007) ("Proclamation 8097"). Before then, utilitarian items associated with a holiday or festive occasion were classified under heading 9505, HTSUS, which covers "Festive, carnival or other entertainment articles," as interpreted by the Federal Circuit in a line of cases beginning with *Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423 (Fed. Cir. 1997). *See Michael Simon Design, Inc. v. United States*, 33 CIT 1003, 1004–07, 637 F. Supp. 2d 1218, 1220–23, (2009), *aff'd* 609 F.3d 1335 (Fed. Cir. 2010).

In 2007, pursuant to Proclamation 8097, Chapter 95[18] was amended to add Note 1(v), which excludes from Chapter 95 "Tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles having a utilitarian function (classified according to their constituent material)." *See* Note 1(v) to Chapter 95; *see also Michael Simon Design*, 33 CIT at 1006–07, 637 F. Supp. 2d at 1222–23; Proclamation 8097. A footnote to Note 1(v) refers readers to subheading 9817.95. *See* Note 1(v) to Chapter 95. According to Plaintiff, subheading 9817.95.01 was added so that certain items remained eligible for duty free treatment in compliance with domestic obligations pursuant to the International Convention on the Harmonized Commodity Description and Coding System ("Convention"). *See* Pl.'s Mem. at 10.[19]

Subheading 9817.95 contains two relevant provisions: (1) subheading 9817.95.01, defined above; and (2) subheading 9817.95.05, which covers "Utilitarian items in the form of a three-dimensional representation of a symbol or motif clearly associated with a specific holi-

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[18] Chapter 95 covers "Toys, games and sports equipment; parts and accessories thereof."

[19] The HTSUS constitutes domestic implementation of the Convention. *See Faus Group, Inc. v. United States*, 28 CIT 1879, 1881 n.5, 358 F. Supp. 2d 1244, 1248 n.5 (2004) (citing the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 1217, 102 Stat. 1107, 1147 (1988)). ITC-proposed modifications to the HTSUS generally must "ensure substantial rate neutrality," i.e., no significant changes in duties, unless the changes are "consequent to, or necessitated by, nomenclature modifications that are recommended under [§ 3005]." 19 U.S.C. § 3005(d)(1)(C), (d)(2) (2012); *see also Michael Simon Design*, 33 CIT at 1005–06 & n.5, 637 F. Supp. 2d at 1221 & n.5. While substantial rate neutrality is to guide the ITC's exercise of its responsibilities in proposing modifications to the HTSUS pursuant to 19 U.S.C. § 3005(d)(1)(C), it is not an interpretive rule that guides or constrains the court in determining the correct classification of a good after that modification has been proclaimed by the President. *See infra* pp. 20–21.

day in the United States." Although Plaintiff originally claimed classification under both subheadings (as alternatives), Plaintiff now limits its argument to subheading 9817.95.01. *See* Compl. ¶¶ 24–25, 34–35; Pl.'s Mem. at 10–20.

III. The Subject Imports Are Not Classifiable Under Subheading 9817.95.01

1. Parties' Contentions

In order to be classifiable under subheading 9817.95.01, the subject imports must be: (1) classifiable in subheading 3924.10, 3926.90, 6307.90, 6911.10, 6912.00, 7013.22, 7013.28, 7013.41, 7013.49, 9405.20, 9405.40 or 9405.50; (2) utilitarian; (3) of a kind used in the home; and (4) used in the performance of specific religious or cultural ritual celebrations for religious or cultural holidays, or religious festive occasions. Parties agree the subject imports meet the first three requirements;[20] however, Parties dispute whether the subject imports meet the fourth requirement. *See* Pl.'s Mem. at 11–16; Pl.'s Resp. at 4; Def.'s Mem. at 9; Def.'s Reply at 5.

Parties disagree about the scope of the term "ritual," and whether the dinner meals on Thanksgiving and Christmas, during which Plaintiff contends the merchandise is used, constitute "specific cultural ritual celebrations." *See* Pl.'s Mem. at 14–15; Def.'s Mem. at 11–14. Plaintiff asserts that Thanksgiving and Christmas dinners "are specific cultural ritual celebrations." Pl.'s Mem. at 15. Defendant counters that "there is nothing ritualistic about Christmas or Thanksgiving dinner"; rather, they are "opportunities for friends and families to get together and share a meal." Def.'s Mem. at 13, 14.

Parties also disagree about the test the court should use to determine whether the subject imports are "*of a kind* . . . used in the performance of specific . . . cultural ritual celebrations."[21] However, because resolution of the first issue disposes of this case, the court does not reach this second issue.

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[20] Parties do not dispute that, for purposes of classifying the merchandise in question, Thanksgiving and Christmas are "cultural holidays." *See* Pl.'s Resp. at 5; Def.'s Reply Mem. of Law in Opp. to Pl.'s Mot. for Summ. J. and in Further Supp. of Def.'s Cross-Mot. for Summ. J. ("Def.'s Reply") at 3, ECF No. 48 (arguing the merchandise is not classifiable under subheading 9817.95.01 because it is not "used in the performance of a ritual celebration," not because Thanksgiving and Christmas are not cultural holidays); Def.'s Reply at 6 (referring to Thanksgiving and Christmas as holidays). While Christmas also is a religious holiday, Plaintiff does not assert that the merchandise in question is used in connection with a specific religious ritual celebration. *See* Pl.'s Mem. at 1, 14–16. Moreover, the decorations on the goods are secular in nature – Christmas trees, Santa Claus, and depictions tied to the song "The Twelve Days of Christmas." *See, e.g.*, Craig Aff. ¶¶ 5–18.

[21] Plaintiff contends that subheading 9817.95.01 is a "use provision" requiring application

2. The Scope of "Specific Cultural Ritual Celebrations"

As discussed above, classification is generally determined according to chapter headings and relevant section or chapter notes. GRI 1, HTSUS. Section XXII[22] does not contain any section notes, and the only allocable chapter note does not inform the meaning of the relevant tariff terms.[23] Chapter 98 does not contain four-digit headings, but rather, is a collection of eight- or ten-digit subheadings covering a diverse array of articles. Accordingly, the court considers the common meaning of the phrase "specific ... cultural ritual celebration" and, in particular, the term "ritual." *See Baxter Healthcare Corp.*, 182 F.3d at 1337.

Plaintiff offers several definitions of the term "ritual." Plaintiff points to *Merriam Webster's Collegiate Dictionary*, which defines "ritual" as "a customarily repeated often formal act or series of acts." Pl.'s Mem. at 15 (citing *Merriam Webster's Collegiate Dictionary* 1011 (10th Ed.)). Plaintiff also cites various books and journal articles. First, Plaintiff relies on a 1973 article, "Symbols in African Ritual," which defines "ritual" as "a stereotyped sequence of activities involving gestures, words, and objects, performed in [sic] sequestered place." Pl.'s Mem. at 14 (citing Victor W. Turner, Symbols in African Ritual at 123, in Annual Editions: Readings in Anthropology '75-'76 (1975)); *see also* Gluck Decl., Ex. I (copy of the article). Next, Plaintiff offers that a "ritual" is "a type of expressive, symbolic, activity con-

of Additional U.S. Interpretive Rule ("AUSIR") 1(a). Pl.'s Mem. at 16. Pursuant to AUSIR 1(a),

> [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 goods of that class or kind to which the imported articles belong, and the controlling use is the principal use[.]

Thus, Plaintiff contends, the court must apply the factors stated in *United States v. Carborundum Co.*, 63 C.C.P.A. 98 (1976), to determine whether the subject imports are used in the performance of a specific cultural ritual celebration. Pl.'s Mem. at 17–20; Pl.'s Resp. at 14–15. Defendant contends that classification under subheading 9817.95.01 requires the merchandise to meet the "Federal Circuit Festive Article Test," developed pursuant to the line of cases interpreting heading 9505, beginning with *Midwest of Cannon Falls, Inc*. Def.'s Mem. at 7–11 (citing *Midwest of Cannon Falls*, 122 F.3d at 1423, *Park B. Smith, Ltd.*, 347 F.3d at 922, and *Michael Simon Design*, 501 F.3d at 1303, as collectively forming the "Federal Circuit Festive Article Test"); Def.'s Reply at 6–8. Defendant also relies on the exemplars in subheading 9817.95.01 to argue that items classifiable under that provision must be "integral" to the ritual cultural celebration. Def.'s Mem. at 13 (merchandise must be "necessary and integral" to the ritual); Def.'s Reply at 9 (merchandise "must be clearly identifiable with and integral to performing the ritual").

[22] Section XXII includes "Special Classification Provisions; Temporary Legislation; Temporary Modifications Established Pursuant to Trade Legislation; Additional Import Restrictions Established Pursuant to Section 22 of the Agricultural Adjustment Act, As Amended."

[23] Pursuant to Note 1 to Chapter 98, subheading 9817.95 "[is] not subject to the rule of relative specificity in [GRI] 3(a)." There are no subchapter notes applicable to subheading 9817.95.01.

structed of multiple behaviors that occur in a fixed, episodic sequence, and that tend to be repeated over time. Ritual behavior is dramatically scripted and acted out and is performed with formality, seriousness, and inner intensity." Pl.'s Mem. at 14–15 (citing Dennis W. Rook, *The Ritual Dimension of Consumer Behavior*, 12 J. of Consumer Behavior 251, 252 (1985)). Plaintiff also proposes that "rituals" are "characterized by formalism, traditionalism, invariance, rule-governance, sacral symbolism, and performance." Pl.'s Mem. at 15 (citing Catherine Bell, Ritual: Perspective and Dimensions 138–69 (1997)).

Plaintiff seeks to establish that "Christmas and Thanksgiving dinners are specific cultural ritual celebrations, involving the same motifs, themes and celebrations each year." Pl.'s Mem. at 15. Plaintiff contends that Christmas is a "vigorous ritual occasion . . . prescrib[ing] the consumption of special food and drink at ceremonious occasions." Pl.'s Mem. at 15 (quoting Rook, *supra*). Plaintiff asserts that "[p]reparing or attending Christmas dinner has been recognized as an unwritten rule," Pl.'s Mem. at 15 (citing Theodore Caplow, *Rule Enforcement Without Visible Means: Christmas Gift Giving in Middletown*, 89 Am. J. of Sociology 1306, 1312–13 (1984)), and that Thanksgiving and Christmas dinners "often involve festive table settings." Pl.'s Mem. at 15 (citing *A Thanksgiving Tablescape with a View* (Sept. 28, 2016, 1:02 PM), http://betweennapsontheporch.net/thanksgiving-tablescape-with-johnson-brothers-hismajesty-dishware/); *see also* Gluck Decl., Ex. H (copy of the webpage).

Though proposing similar definitions of the term "ritual," Defendant argues that the dinners associated with Thanksgiving and Christmas lack "formal actions and words that are repeated every year in the same fashion by everyone who celebrates those events," and instead are opportunities to share a meal. Def.'s Mem. at 13. Defendant points to *Webster's New Collegiate Dictionary*, which defines "ritual" as (1) "the established form for a ceremony," such as "the order of words prescribed for a religious ceremony," and (2) "a ritual observance," such as "a system of rites," "a ceremonial act or action," or "any formal and customarily repeated act or series of acts." Def.'s Mem. at 11–12 (quoting *Webster's New Collegiate Dictionary* 992 (1979)). Defendant also relies on an online dictionary defining "ritual" as "[a] ceremony in which the actions and wording follow a prescribed form and order." Def.'s Mem. at 12 (quoting *Ritual*, http://www.thefreedictionary.com/ritual).

Plaintiff responds that Defendant has interpreted the term "ritual" too narrowly, and the sources Plaintiff supplied "define the term[] in

less religious and more general terms." Pl.'s Resp. at 12. Plaintiff cites to an online dictionary in support of its argument that "customary, traditional, annual dinners" are "central and important" to Thanksgiving and Christmas. Pl.'s Resp. at 12 (citing *Ritual*, https://www.vocabulary. com/dictionary/ritual); *see also* Decl. of Daniel J. Gluck, Esq. in Supp. of Pl.'s Resp. to Def.'s Cross-Mot. for Summ. J. and Pl.'s Reply in Further Supp. of Pl.'s Mot. for Summ J. ("Gluck Suppl. Decl."), Ex. M (copy of webpage containing the dictionary definition), ECF No. 44–1. That definition suggests an interpretation that roughly equates "ritual" with "routine" or "tradition." *See* Gluck Suppl. Decl., Ex. M (defining "ritual" as "a ceremony or action performed in a customary way," and providing the example of a family "hav[ing] a Saturday night ritual of eating a big spaghetti dinner and then taking a long walk to the ice cream shop") (emphasis omitted). It further suggests that the term "ritual" can describe "any time-honored tradition, like the Superbowl, or Mardi Gras, or Sunday morning pancake breakfast." Gluck Suppl. Decl., Ex. M

There is little question that Thanksgiving and Christmas are both cultural holidays and the dinners associated with them are widely-observed cultural celebrations performed on or around those holidays. That, however, is not the question before the court. The subheading in question requires the performance of a "*specific* ... cultural *ritual* celebration." As discussed by both parties, rituals generally encompass specific scripted acts or series of acts that are customarily performed in an often formal or solemn manner. The plain language of subheading 9817.95.01 does not support broadly interpreting the term "ritual" as any event that occurs on a regular basis.

Thanksgiving and Christmas — like other cultural or religious holidays — recur annually, as do the celebrations associated with them. However, if subheading 9817.95.01 was intended to cover utilitarian items used in the home during religious or cultural celebrations, whenever they routinely occur, and whatever they might entail, the term "ritual" could have been omitted altogether. It is well settled "that a statute must, if possible, be construed in such a fashion that every word has some operative effect." *United States v. Nordic Village Inc.*, 503 U.S. 30, 36 (1992); *see also China Diesel Imports, Inc. v. United States*, 18 CIT 1086, 1090, 870 F. Supp. 347, 351 (1994) ("Courts are required to give effect to each word of a statute, whenever possible."). The term "ritual" only serves a purpose in this subheading when interpreted to mean the performance of prescribed cultural or religious acts.

Indeed, subheading 9817.95.01 speaks of "the performance of *specific* . . . cultural ritual celebrations." In support of its argument that Thanksgiving and Christmas dinners involve ritualistic performance, Plaintiff offers nothing more than the highly *nonspecific* "consumption of special food and drink," and, perhaps, the use of "festive table settings." *See* Pl.'s Mem. at 15 (citations omitted). Plaintiff's examples do not persuade that Thanksgiving and Christmas dinners are "*specific* cultural *ritual* celebrations."

The exemplars included in the subheading support this interpretation. Subheading 9817.95.01 covers "[u]tilitarian articles of a kind used in the home in the performance of specific religious or cultural ritual celebrations . . ., *such as Seder plates, blessing cups, menorahs or kinaras*." In classification cases, the statutory construction rule of *ejusdem generis* ("of the same kind") requires that the subject imports "possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* in order to be classified under the general terms." *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994) (citation omitted). As Defendant explains, a Seder plate is used during Passover to hold six symbolic foods, a menorah is a candelabrum used during Hanukkah, both Jewish celebrations, and a kinara is a candelabrum used during Kwanzaa, which is a "secular seven-day festival in celebration of the African heritage of African Americans." Def.'s Mem. at 12–13 (citations omitted).[24] Unlike the subject imports, which are merely decorative items used to serve food and beverages or provide lighting, *see* Def.'s SOF ¶ 1; Pl.'s Resp. to Def.'s SOF ¶ 1; Pl.'s Mem., Ex.'s A-E, the exemplars play a particular role within the sequence of activities that form the respective religious or cultural ritual celebrations, *see* Def.'s Mem. at 12–13.[25] Although the exemplars do not necessarily indicate the limits of subheading 9817.95.01, they are consistent with, and, therefore, support, the court's consideration of "ritual" as determinative here.

[24] Blessing cups appear to refer to the four cups of wine that participants consume during Passover Seder, each of which corresponds to a significant phrase in the Torah, *see* Samuel J. Levine, *Second Annual Holocaust Remembrance Lecture at Washington University* [:] *Jewish Law From Out of the Depths: Tragic Choices in the Holocaust*, 10 Wash. U. Global Stud. L. Rev. 133, 139–40 (2011), and/or the cup that is used to hold wine during Eucharistic prayer, *see* Albert S. Thayer, *Sacramental Features of Ancient and Modern Law*, 14 Harv. L. Rev. 509, 516–517 (1901).

[25] Plaintiff, without elaboration, appears to suggest that Thanksgiving and Christmas are similar to Passover because each involves "a holiday dinner ritual." Pl.'s Mem. at 16. The fact of dinner, however, is insufficient to rise to the level of a ritualistic celebration. Thanksgiving and Christmas dinners do not involve a particular sequence of events, or even particular foods, unlike Passover, which involves the ordered consumption of six symbolic foods during which "the narrative of the Exodus is recited." *See* Def.'s Mem. at 12 (citations omitted).

One final point merits attention. Plaintiff suggests that classifying the merchandise according to its constituent materials and not under subheading 9817.95.01 results in a "breech [sic] [of the Government's] treaty obligations under the [Convention]" because they would no longer be eligible for duty free treatment. Pl.'s Mem. at 10. Assuming *arguendo* the merchandise would have qualified for duty free treatment prior to February 2007, the requirement for substantial rate neutrality applies to the ITC when it is recommending changes to the HTSUS. *See supra* note 19; 19 U.S.C. § 3005(d)(1)(C). Substantial rate neutrality does not factor into this court's mandate to apply the GRIs to determine the correct classification. *See N. Am. Processing Co.,* 236 F.3d at 698.

Moreover, had the intention been to cover articles under subheading 9817.95.01 that previously would have qualified as "festive articles" under heading 9505 and the Federal Circuit's interpretation thereof, subheading 9817.95.01 could have been drafted to more closely parallel subheading 9817.95.05.[26] *See* Subheading 9817.95.05, HTSUS (covering "[u]tilitarian items in the form of a three-dimensional representation of a symbol or motif *clearly associated with a specific holiday* in the United States") (emphasis added); *Park B. Smith*, 347 F.3d at 927 ("Chapter 95 requires that the article satisfy two criteria: (1) it must be *closely associated with a festive occasion* and (2) the article is *used or displayed* principally during that festive occasion.") (citing *Midwest of Cannon Falls*, 122 F.3d at 1429) (emphasis added). The plain language of subheading 9817.95.01 requires more than that the article is "closely associated" with a holiday or that it is "used" in some capacity during the celebrations; rather, subheading 9817.95.01 requires that the article is "used . . . in the *performance of specific . . . cultural ritual celebrations*." Accordingly, the court is not persuaded by Plaintiff's appeal to substantial rate neutrality.

In sum, the court finds that the dinners associated with Thanksgiving and Christmas are not "specific . . . cultural ritual celebrations" within the meaning of subheading 9817.95.01. Accordingly, the subject imports are not classifiable under subheading 9817.95.01. Upon

[26] The ITC, later, expressly rejected Customs' proposal to amend the HTSUS to replace subheading 9817.95.05 with proposed subheading 9817.95.02, which would cover "utilitarian articles 'incorporating a symbol and/or motif that is closely associated with a festive occasion,'" whether three-dimensional or not. *See Certain Festive Articles: Recommendations for Modifying the Harmonized Tariff Schedule of the United States*, USITC Pub. No. 4224, Inv. No. 1205–9 at 3–4, 9–10 (Apr. 2011); *see also id.* App. A (Customs' Request Letter). Customs proposed the change on the basis that Note 1(v) to Chapter 95 had resulted in increased duties on festive utilitarian articles that formerly would have been entitled to duty free treatment under Chapter 95 pursuant to Federal Circuit case law. *See id.* at 3, App. A.

review of Parties' statements of undisputed facts and supporting exhibits, the court holds that Customs correctly classified the subject imports according to their constituent materials.

CONCLUSION

For the foregoing reasons, the court holds that Customs correctly classified the subject imports. The court denies Plaintiff's motion for summary judgment and grants Defendant's cross-motion for summary judgment. Judgment will be entered accordingly.

Dated: March 1, 2017
New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT, JUDGE

Slip Op. 17–23

APEX FROZEN FOODS PRIVATE LIMITED et al., Plaintiffs, v. UNITED STATES, Defendant, and AD HOC SHRIMP TRADE ACTION COMMITTEE, Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 15–00282
PUBLIC VERSION

[Sustaining U.S. Department of Commerce's final determination in the ninth administrative review of the antidumping duty order covering certain frozen warmwater shrimp from India.]

Dated: March 2, 2017

Robert Lewis LaFrankie, II, Crowell & Moring, LLP, of Washington, DC, argued for plaintiffs.

Kara Marie Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief were *Henry Joseph Loyer* and *Mercedes C. Morno*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Nathaniel Jude Maandig Rickard, Picard, Kentz & Rowe, LLP, of Washington, DC, argued for defendant-intervenor. With him on the brief was *Roop Kiran Bhatti*.

OPINION

Kelly, Judge:

This action comes before the court on Plaintiffs' motion for judgment on the agency record pursuant to USCIT Rule 56.2. *See* Pls.' Rule 56.2 Mot. J. Agency R., Apr. 19, 2016, ECF No. 36 ("Pls.' 56.2

Mot."). Plaintiffs, Apex Frozen Foods Private Limited, et al.,[1] challenge various aspects of the Department of Commerce's ("Department" or "Commerce") application of its differential pricing analysis in its antidumping duty margin calculations in the final determination in the ninth administrative review of the antidumping duty order on certain frozen warmwater shrimp from India for the period of February 1, 2013 through January 31, 2014. *See id.; see generally Certain Frozen Warmwater Shrimp From India*, 80 Fed. Reg. 54,524 (Dep't Commerce Sept. 10, 2015) (final results of antidumping duty administrative review; 2013–2014) ("*Final Results*") and accompanying Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from India, A-533–840, (Sept. 2, 2015), ECF No. 22–3 ("Final Decision Memo"); *Certain Frozen Warmwater Shrimp from India*, 70 Fed. Reg. 5,147 (Dep't of Commerce Feb. 1, 2005) (amended final determination of sales at less than fair value and antidumping duty order) ("*Order*").

Plaintiffs challenge three aspects of Commerce's differential pricing analysis and resultant application of the A-to-T methodology to all U.S. sales. *See* Mem. Support Pls.' Rule 56.2 Mot. J. Agency R. Confidential Version 13–37, Apr. 18, 2016, ECF No. 35 ("Pls.' Br."). First, Plaintiffs challenge Commerce's use of annual and quarterly weighted-average prices in the differential pricing analysis for administrative reviews generally and specifically as applied in this review. Pls.' Br. 14–22. Second, within Commerce's meaningful differences test, Plaintiffs challenge Commerce's inclusion of all U.S. sales and Commerce's decision to offset positive dumping margins with negative dumping margins in the average-to-average ("A-to-A") comparison methodology but not in the average-to-transaction ("A-to-T") comparison methodology. Pls.' Br. 22–35. Third, Plaintiffs challenge Commerce's application of the A-to-T methodology to all U.S. sales for

[1] Apex Frozen Foods Private Limited, et al. includes the following parties: Apex Frozen Foods Private Limited, Amulya Seafoods, Ananda Group (Ananda Aqua Applications, Ananda Aqua Exports (P) Limited, and Ananda Foods), Asvini Fisheries Private Limited, Avanti Feeds Limited, Choice Canning Company, Choice Trading Corporation Private Limited, Devi Fisheries Group (Devi Fisheries Limited, Satya Seafoods Private Limited, and Usha Seafoods), Liberty Group (Devi Marine Food Exports Private Ltd., Kader Exports Private Limited, Kader Investment and Trading Company Private Limited, Liberty Frozen Foods Pvt. Ltd., Liberty Oil Mills Ltd., Premier Marine Products Private Limited, and Universal Cold Storage Private Limited), Falcon Marine Exports Limited and its affiliate K.R. Enterprises, Jagadeesh Marine Exports, Jayalakshmi Sea Foods Private Limited, Nekkanti Sea Foods Limited, Nila Sea Foods Pvt. Ltd., Sagar Grandhi Exports Private Limited, Sai Marine Exports Pvt. Ltd., Sai Sea Foods, Sandhya Marines Limited, Sprint Exports Pvt. Ltd., Suryamitra Exim Pvt. Ltd., and Wellcome Fisheries Limited. *See* Am. Summons, Attach. A, Oct. 16, 2015, ECF No. 9. These parties are referred collectively herein as "Plaintiffs."

both mandatory respondents in this review. Pls.' Br. 35–36. For the reasons set forth below, the court sustains the final determination in all respects.

BACKGROUND

On February 1, 2005, Commerce issued the underlying antidumping duty ("ADD") order covering certain frozen warmwater shrimp from India. *See Order*, 70 Fed. Reg. at 5,147. On April 30, 2014, Commerce initiated the ninth administrative review of the *Order* for the period of February 1, 2013 through January 31, 2014 for 211 respondent companies. *See Certain Frozen Warmwater Shrimp from India and Thailand*, 79 Fed. Reg. 24,398 (April 30, 2014) (initiation of antidumping and countervailing duty administrative reviews and request for revocation in part); *Certain Frozen Warmwater Shrimp from India and Thailand*, 79 Fed. Reg. 18,510 (April 2, 2014) (notice of initiation of ADD administrative review).

Commerce selected Devi Fisheries Limited ("Devi Fisheries") and Falcon Marine Exports Limited (and its affiliate K.R. Enterprises) ("Falcon Marine") as mandatory respondents in this administrative review. *See Certain Frozen Warmwater Shrimp From India: Preliminary Results of Antidumping Duty Administrative Review; 2013–2014*, 80 Fed. Reg. 12,147 (Dept. of Commerce March 6, 2015) (preliminary results of ADD administrative review) ("*Prelim. Results*") and accompanying Decision Memorandum for the Preliminary Results of the 2013–2014 Administrative Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from India, A-533–840, at 2, PD 151, bar code 3262269–01 (Mar. 2, 2015) ("Prelim. Decision Memo"); *see also* 19 U.S.C. § 1677f-1(c)(2)(B); *Final Results*, 80 Fed. Reg. at 54,524. Commerce found a pattern of significant price differences among purchasers, regions, or time periods for both mandatory respondents' U.S. sales of comparable merchandise during the period of review. Prelim. Decision Memo at 7. Commerce preliminarily determined that the weighted-average dumping margins for both mandatory respondents should be calculated by applying the A-to-T methodology to all U.S. sales because more than 66% of both mandatory respondents' U.S. sales passed the Cohen's d test. *Id.* Commerce also determined that its A-to-A methodology[2] could not account for these patterns of differentially priced sales because the dumping margin calculated using the A-to-A methodology was below the *de minimis* dumping threshold and the dumping margin calcu-

[2] The A-to-A methodology is the methodology that Commerce ordinarily uses to calculate antidumping duty margins. *See* 19 C.F.R. § 351.414(c)(i). The A-to-A methodology compares the weighted-average of the normal value price in the home market to the weighted-average export price in the U.S. market. *See* 19 U.S.C. § 1677f-1(d)(1)(A).

lated using the A-to-T methodology was above the *de minimis* threshold for both mandatory respondents. *Id.* Commerce thus preliminarily applied the A-to-T methodology to all sales and determined that both respondents had U.S. sales at less than fair value during the period of review. *See Prelim. Results*, 80 Fed. Reg. at 12,147. Commerce preliminarily assigned Devi Fisheries a weighted-average dumping margin of 3.28% and Falcon Marine a weighted-average dumping margin of 2.63%. *Id.* at 12,148.

Commerce published the final results on September 10, 2015, in which Commerce continued to find that both mandatory respondents had sold subject merchandise at less than fair value during the period of review. *See Final Results*, 80 Fed. Reg. at 54,524; Final Decision Memo at 1. Commerce also continued to find that its A-to-A methodology could not account for the pattern of significant price differences found among comparable merchandise for both mandatory respondents and accordingly applied its A-to-T methodology to all U.S. sales for both mandatory respondents to calculate the weighted-average dumping margins.[3] Final Decision Memo at 3.

On April 18, 2016, Plaintiffs moved for judgment on the agency record pursuant to USCIT Rule 56.2, *see* Pls.' 56.2 Mot., arguing that Commerce's findings are unsupported by substantial evidence and otherwise not in accordance with law. *See* Pls.' Br. 13–37.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to Section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012)[4] and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. The court will uphold Commerce's determination unless 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. Commerce's Use of Annual and Quarterly Average Prices

Plaintiffs argue that Commerce's use of annual and quarterly weighted-average prices in the Cohen's d test during the differential

[3] Consistent with the preliminary determination, in the final determination Commerce calculated a weighted-average dumping margin of 3.28% for Devi Fisheries and 2.63% for Falcon Marine, from which Commerce assigned a rate of 2.96% to the other exporters and producers covered by the review. *Final Results*, 80 Fed. Reg. at 54,525.

[4] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

pricing analysis for administrative reviews is contrary to law and is not supported by substantial evidence. Pls.' Br. 14–22. Specifically, Plaintiffs first incorporate by reference the argument they unsuccessfully made before this court in previous litigation that the statute precludes Commerce's methodology, *id.* at 15–16, n.3; *see Apex Frozen Foods Private Ltd. v. United States*, 40 CIT __, __, 144 F. Supp. 3d 1308, 1324–1326 (Feb. 2, 2016) ("*Apex II*"), and additionally contend that the use of annual and quarterly weighted-averages is unreasonable and distortive because Commerce uses monthly weighted-averages to calculate dumping margins in reviews under the standard A-to-A methodology. *Id.* at 14–18. Defendant responds first that Plaintiffs have waived any argument that the statute precludes Commerce's methodology by failing to fully develop the argument in the body of its moving brief. Def.'s Resp. Opp'n Pls.' Rule 56.2 Mot. J. Agency R. 15, Aug. 5, 2016, ECF No. 43 ("Def.'s Resp."). Defendant argues that the use of annual and quarterly weighted-average prices in the differential pricing analysis is a reasonable exercise of Commerce's discretion. *Id.* at 14–23. For the reasons that follow, the court concludes that Commerce's use of annual and quarterly weighted-averages in the Cohen's d stage of the differential pricing analysis during administrative reviews is in accordance with law and supported by substantial evidence.

As a preliminary matter, the court exercises its discretion to consider Plaintiffs' argument that the use of annual and quarterly weighted-averages conflicts with the statute, although Plaintiffs made this argument primarily in a footnote. *See* Pls.' Br. 15–16, n.3. As a general rule, when an argument is raised primarily in a footnote and referenced perfunctorily in the main body of an opening brief, the argument is not preserved. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006). However, the court retains discretion to consider improperly raised arguments, *Becton Dickinson and Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990), which courts have specifically recognized to include the discretion to consider arguments raised only in footnotes. *See, e.g., Smithkline Beecham Corp.,* 439 F.3d at 1320, n.9; *Otsuka Pharmaceutical Co., Ltd. v. Sandoz, Inc.*, 678 F.3d 1280, 1294 (Fed. Cir. 2012).

Plaintiffs stated above the line in their moving brief that they "do not concede the statute is silent" with regard to determining the existence of a pattern of significant price differences, Pls.' Br. 15–16, and expanded upon this statement in a footnote:

> Plaintiffs have repeatedly challenged Commerce's assertion that the statute does not address this issue, or is otherwise silent on this point. Plaintiffs acknowledge that this Court recently ruled

> otherwise. Nevertheless, Plaintiffs recently appealed *Apex II* to the Federal Circuit. Plaintiffs continue to assert that the statutory language as well as the underlying purpose of the statute do not permit Commerce to use annual weighted-averages for this purpose. Plaintiffs specifically preserve that argument here and cla[i]m it is unreasonable and otherwise contrary to the statute (upon which Commerce relies for authority in [ADD] reviews) and contrary to congressional intent to use annual weighted-averages to determine the existence of [significant price differences] in all instances without regard to the facts and circumstances.

Id. at 16, n.3 (internal citations omitted). Plaintiffs aver that, although this argument has been rejected by a prior decision of this court, they are appealing that decision and wish to "preserve that argument" here as well. *Id.; see* Pls.' Reply Br. Confidential Version 6, n.4, Oct. 12, 2016, ECF No. 54 ("Pls.' Reply").

The court exercises its discretion to review Plaintiffs' argument because it was previously fully developed and squarely addressed, *see Apex II*, 40 CIT at __, 144 F. Supp. 3d at 1324–1326, and, as Plaintiffs referenced this argument in the main body of its moving brief, the court finds that Defendant was on notice of the argument. *See* Pls.' Br. 15–16. Accordingly, it is not unfair to allow Plaintiffs to preserve this argument for appeal. *See Becton Dickinson and Co.*, 922 F.2d at 800 (noting that the practice to consider as waived an issue not properly raised in an opening brief is "not governed by a rigid rule but may as a matter of discretion not be adhered to where circumstances indicate that it would result in basically unfair procedure.").

Nonetheless, Plaintiffs' argument that the statute precludes Commerce's use of annual and quarterly weighted-average prices in the Cohen's d test during the differential pricing analysis for administrative reviews is unpersuasive. Commerce has broad authority under the statute to craft an appropriate methodology to discern whether there is in fact a pattern of prices that differ significantly. *Apex II*, 40 CIT at __, 144 F. Supp. 3d at 1324–1326 (noting that "Congress has granted Commerce considerable discretion to construct a methodology to apply in a review," and that Commerce is not required by statute to use individual rather than weighted-average export prices or to use monthly rather than annual and quarterly weighted-average export prices.)

Likewise unavailing is Plaintiffs' argument that the use of annual and quarterly weighted-averages in the Cohen's d test in the differential pricing analysis for administrative reviews is unreasonable

generally and as applied in this review. *See* Pls.' Br. 14–20. According to Plaintiffs, Commerce's use of annual and quarterly, rather than monthly, weighted-average prices in the Cohen's d test for administrative reviews is unreasonable because it conflicts with the purpose of the Cohen's d test and leads to distorted results. *Id.* Defendant responds that it is reasonable to use annual and quarterly weighted-average prices when comparing prices of the test and comparison groups in the Cohen's d test because the purpose of the Cohen's d test is to conduct an overview assessment of a respondent's pricing behavior. Def.'s Resp. 15–19.

Commerce ordinarily uses the A-to-A methodology to calculate dumping margins. 19 U.S.C. § 1677f-1(d)(1)(A); 19 C.F.R. § 351.414(c)(i).[5] Where Commerce determines that there is "a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time" and finds that its A-to-A methodology cannot account for those differences, Commerce calculates dumping margins using the alternate A-to-T methodology in investigations. *See*19 U.S.C. § 1677f-1(d)(1)(B)(i)–(ii). Commerce has, through practice, adopted the same basis for applying its A-to-T methodology in administrative reviews as is permitted by statute for investigations. *See JBF RAK LLC v. United States*, 790 F. 3d 1358, 1364 (Fed. Cir. 2015).[6]

In the absence of statutory or regulatory guidance instructing Commerce how to determine whether a pattern of significant price differences exists, Commerce is afforded broad discretion to select a methodology to make that determination. *See Fujitsu General Ltd.*, 88 F.3d 1034, 1039 (Fed. Cir. 1996); *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995); *Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). In situations involving complex and technical methodological choices, such as here, Commerce is given a wide level of discretion and the court need only address whether Commerce's methodological choice is reasonable. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983) ("[A]n agency must cogently explain why it has exercised its discretion in a given manner."); *Fujitsu Gen. Ltd.*, 88 F.3d at 1039 (granting Commerce significant deference in determinations "involv[ing] complex economic and accounting decisions of a technical nature"); *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–405, 636 F.

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[5] Further citations to Title 19 of the Code of Federal Regulations are to the 2014 edition.

[6] The Court of Appeals for the Federal Circuit has held that it is reasonable for Commerce to apply the alternate A-to-T method in administrative reviews by practice as it does in investigations by statute. *See JBF RAK LLC v. United States*, 790 F. 3d 1358, 1364 (Fed. Cir. 2015).

Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137, 1139 (Fed. Cir. 1987).

Commerce has chosen to determine whether a pattern of significant price differences exists by applying the differential pricing analysis. *See* Prelim. Decision Memo at 5–7; Final Decision Memo at 15–17. The Cohen's d test is the first stage of the differential pricing analysis, and Commerce uses the Cohen's d test to measure the degree of price disparity between two groups of sales. Prelim. Decision Memo at 6; Final Decision Memo at 20. The Cohen's d test calculates the number of standard deviations by which the weighted-average net prices of U.S. sales for a particular purchaser, region, or time period (the "test group") differ from the weighted-average net prices of all other U.S. sales of comparable merchandise (the "base group").[7] *See* Prelim. Decision Memo at 6.

It is reasonably discernible that Commerce intends the Cohen's d test, its first examination into whether a pattern of prices that differ significantly among purchasers, regions, or time periods exists, to be an overview assessment of pricing behavior over the course of the one-year period being reviewed. *See* Final Decision Memo at 19–20; Def.'s Resp. 17–18. Although Commerce's explanation is less robust than the court would like, it is reasonably discernible that Commerce developed a methodology using weighted-averages because the "A-to-A comparison method also uses weighted-average CONNUM-specific[8] export prices." Final Decision Memo 20. It is reasonably discernible that, because Commerce is searching for a pattern of prices over the course of the entire period of review, Commerce compares annual average prices for customers and regions and quarterly average prices for time periods. Given that Commerce seeks to identify a pattern of prices for customers, regions, and time periods for each CONNUM, the court cannot say that it is unreasonable to choose the least burdensome time frames for each comparison it must make. Commerce did not act unreasonably in choosing to use annual and quarterly weighted-averages to make this initial pattern assessment in the Cohen's d test. The reasonableness of using annual or quarterly weighted-averages in this first stage of the differential pricing analysis is tied to the purpose of this first stage. The Cohen's d test is designed to determine whether conditions exist that may serve to

[7] As Commerce explained, purchasers are identified by "the reported consolidated customer codes. Regions are defined using the reported destination zip code and are grouped into regions based upon standard definitions published by the U.S. Census Bureau. Time periods are defined by the quarter within the [period of review] being examined based upon the reported date of sale." Prelim. Decision Memo at 6.

[8] "CONNUM" is short for "control number," and is a product code consisting of a series of numbers reflecting characteristics of a product in the order of their importance used by Commerce to refer to particular merchandise. *See* Final Decision Memo at 17; Def.'s Resp. 11, n.2.

mask dumping, not to determine whether the masked dumping is sufficient to warrant applying its A-to-T methodology and to what extent to do so. Final Decision Memo at 19–20; Def.'s Resp. 17–18. Whether masked dumping is a factor that may warrant application of Commerce's A-to-T methodology is addressed when examining whether the A-to-A method "can account for" such a condition. Final Decision Memo at 24; Def.'s Resp. 17–18. Thus, placed in context, it is not unreasonable for Commerce to first check for a pattern of price differences using what Defendant calls a "10,000 foot overview" assessment of the entire period of review, Oral Argument at 00:32:11–00:32:22, Jan. 9, 2017, ECF No. 68 ("Oral Argument"), before comparing monthly weighted-average prices in subsequent stages of the differential pricing analysis. *See* Prelim. Decision Memo at 6–7; 19 C.F.R. §§ 351.414(d)(3), (e). As annual and quarterly weighted-averages reasonably provide such an overview assessment, the choice to use annual and quarterly weighted-averages appears tailored to effectuate the statutory directive, as implicated by Commerce's practice, and is therefore reasonable. *See* Final Decision Memo at 21; *Ceramica Regiomontana, S.A.*, 636 F. Supp. at 966, aff'd, 810 F.2d at 1139 (affording deference to Commerce's methodology so long as it reasonably effectuates the statutory purpose and is supported by substantial evidence).

Plaintiffs' argument against the use of annual and quarterly weighted-averages in the Cohen's d test mischaracterizes the objective of the Cohen's d test. Plaintiffs characterize the Cohen's d test as an examination, for significant price differences, of the weighted-average prices that would ultimately be used to calculate dumping margins using A-to-A prior to actually calculating dumping margins with those averages.[9] *See* Pls.' Br. 17–18; Oral Argument at 00:06:34–00:09:22 (quoting Final Decision Memo at 20). Plaintiffs

[9] According to Plaintiffs, the purpose of Commerce's use of annual weighted-averages in its differential pricing methodology in investigations is to "screen" those averages for significant price differences prior to their use in the A-to-A methodology. Pls.' Br. 17–18. Plaintiffs argue that, accordingly, "Commerce should follow the 'screening' logic of its investigation practice in reviews, but modify it to fit the monthly A-to-A comparison used in reviews[, . . .] by using monthly averages as part of its [significant price differences] testing as the screen for the monthly averages used in the [A-to-A] comparison." *Id.* at 17. Defendant objects to Plaintiffs' "'screening logic' argument," contending that Plaintiffs did not exhaust the argument below and that, in any event, "Commerce has no such ["screening logic"] practice." Def.'s Resp. 19. Plaintiffs respond that exhaustion is not applicable, as this point is "a summary of Commerce's policy" rather than an argument in its own right, Oral Argument at 00:20:59–00:21:12, but argue in the alternative that this argument was properly raised before Commerce. *Id.* at 00:21:18–00:21:42. Although Plaintiffs concede that they did not use the same "screening" terminology below, Plaintiffs emphasize that they "addressed the same basic concept, talked about Commerce's policy for identifying sales, [. . . and] pointed out the interrelationship between those two steps." *Id.* The court concludes that Commerce was on notice of this argument. *See* Case Brief on Behalf of Respondents at 22–25, CD 156, bar code 3270673–01 (Apr. 15, 2015).

contend that Commerce erred by "simply borrow[ing]" the differential pricing methodology developed for investigations and applying it to reviews without adjusting for the fact that, in investigations, Commerce typically uses annual and quarterly weighted-averages to calculate dumping margins using A-to-A and, in reviews, typically uses monthly weighted-averages to calculate dumping margins using A-to-T. Pls.' Br. 16–18. Plaintiffs reason that, as monthly weighted-averages are used in the calculation of dumping margins for reviews, it would be unreasonable for Commerce to use annual and quarterly weighted-averages in the Cohen's d test because, in their view, the Cohen's d test should search for patterns within the same time frame over which the dumping margins will be calculated. *Id.* Their theory supposes that if masking as envisioned by Congress in 19 U.S.C. § 1677f-1(d)(1)(B) occurs, it will occur within that time frame, *i.e.*, monthly in reviews.[10] *See id.*; 19 C.F.R. § 351.414(d)(3). Plaintiffs' theory fails to confront the fact that 19 U.S.C. §1677f-1(d)(1)(B)(i) itself authorizes Commerce to search for patterns of prices that differ significantly by purchasers, regions, or time periods. *See* 19 U.S.C. § 1677f-1(d)(1)(B)(i); *cf.* Final Decision Memo at 6.[11] Therefore, it is not unreasonable for Commerce to develop a methodology that reflects the fact that masking as contemplated by the statute may be occurring across time periods.

Further, the objective of the Cohen's d test, according to Commerce, is to obtain an overview of prices for the entire period of review before conducting a more precise comparison of monthly weighted-average prices. *See* Prelim. Decision Memo at 6–7; Final Decision Memo at 20. Only in later stages does Commerce actually compare monthly weighted-average prices. Plaintiffs incorrectly infer that Commerce's

[10] Plaintiffs base this argument on section 19 C.F.R. § 351.414(d)(3), which provides that annual weighted-averages are normally to be used to calculate dumping margins for investigations while monthly weighted-averages are normally to be used to calculate dumping margins for reviews. Pls.' Br. 16–17. Plaintiffs contend this regulation demonstrates that monthly averages should also be used in the differential pricing analysis for reviews. *Id.*

[11] Responding to Plaintiffs' argument that the limited use of monthly averaging in reviews sufficiently combats masked dumping, Commerce explained its rationale in light of the objectives of the statute upon which its practice is based:

> The Department's differential pricing analysis identified a pattern of prices that differ significantly not only by time period, but also by region and purchaser. Thus, even if the use of monthly averaging periods addressed potential implicit masking of dumping by time within period-wide averaging groups (albeit insufficiently as there may still be implicit masking of dumping within the monthly averaging groups), it does nothing to unmask dumping by purchaser or region, as provided for under section 777A(d)(1)(B) of the Act. As a result, we find that the mere usage of monthly weighted-average normal values and U.S. prices is insufficient to unmask the full amount of the respondents' dumping in either an investigation or an administrative review as provided for by the statute.

Final Decision Memo at 6.

use of annual and quarterly weighted-average prices in Commerce's Cohen's d analysis is improperly imported from Commerce's practice in investigations. *See* Pls.' Br. 16–18; Oral Argument at 00:12:50–00:13:00, 00:53:25–00:53:39. But, as discussed, Commerce's use of annual and quarterly weighted-average prices in its Cohen's d analysis flows from the Cohen's d test's purpose. Commerce has reasonably grounded its determination to use annual and quarterly weighted-averages in conducting its Cohen's d analysis, and monthly weighted-averages in comparing prices at later stages of its differential pricing analysis, by distinguishing the purposes of the various stages of its methodology. Plaintiffs offer no reason why annual and quarterly weighted-averages are not tailored to the purpose of obtaining an overview of prices for the entire period of review.

Highlighting a passage from Commerce's final determination, Plaintiffs note that Commerce indicated it "divided the weighted-average price used in the calculation of individual dumping margins into [the test group and the comparison group] in order to examine whether there is a pattern of prices that differ significantly among purchasers, regions or time periods." Oral Argument at 00:48:47–00:49:07 (quoting Final Decision Memo at 20). Plaintiffs contend that Commerce's use of the phrase "used in the calculation of individual dumping margins" indicates Commerce's intention to use monthly weighted-averages in the differential pricing analysis because it uses monthly averages to calculate individual dumping margins. *See id.* Read in the context of the Final Decision Memo as a whole, Plaintiffs' reading of Commerce's language is not persuasive. Commerce does not indicate an intention to apply the same weighted-averages that would be used in the A-to-A margin calculation in this first stage of the analysis. After considering Plaintiffs' suggestion to use monthly weighted-averages in the Cohen's d portion of its methodology, Commerce affirmatively chose to continue to use annual and quarterly weighted-averages, *see* Final Decision Memo at 21, despite the fact that Commerce uses monthly weighted-averages in reviews to calculate dumping margins. *See* 19 C.F.R. §§ 351.414(d)(3), (e). As already discussed, the court considers that determination reasonable because it effectuates the purpose of the Cohen's d test and Commerce highlights a reasonable basis for using different averaging at different stages of its methodology. *See* Final Decision Memo at 19–20. Plaintiffs point to no reason why the use of annual and quarterly averages in the Cohen's d test is inconsistent with the purpose of the Cohen's d test to identify patterns of significant price differences over the overall annual period of review. *See id.*; Def.'s Resp. 17–18.

Plaintiffs also claim that Commerce's use of annual and quarterly weighted-averages in the Cohen's d test in this review is distortive as applied, such that Commerce's determination was unsupported by substantial evidence.[12] Pls.' Br. 18–20. Plaintiffs have not demonstrated that Commerce's use of annual and quarterly weighted-averages is distortive. Plaintiffs present calculations which show that the application of annual and quarterly weighted-averages results in a different outcome for both mandatory respondents than would result from the application of monthly weighted-averages.[13] *Id.*; Oral Argument at 00:17:28–00:18:22. However, a difference does not necessarily reflect a distortion. Whether a practice is distortive is inextricably intertwined with whether that practice is reasonable. An unreasonable practice may or may not be distortive but, logically, a

[12] Defendant-Intervenor argues that the court should disregard Plaintiffs' calculations presented to demonstrate distortion because Plaintiffs did not provide this "evidence challenge" at the administrative level. Def.-Intervenor Ad Hoc Shrimp Trade Action Committee's Resp. Pls.' R. 56.2. Mot. J. Agency R. 18–19, Aug. 5, 2016, ECF No. 42 ("Def-Intervenor Resp."); Oral Argument at 00:46:15–00:46:44. Defendant-Intervenor concedes that Plaintiffs did suggest in their administrative brief that Commerce should use monthly averages because "a larger averaging period tends to amplify distortions," Def.-Intervenor Resp. 18, but contends that Commerce was nonetheless not on notice of Plaintiffs' substantial evidence argument regarding distortion because the evidentiary support for the distortion argument was not presented at the administrative level. *Id.* at 18–19 (citing Case Brief on Behalf of Respondents at 25, CD 156, bar code 3270673–01 (Apr. 15, 2015) ("Apex Admin. Br.").

Although Plaintiffs did not provide the actual calculations to support their argument regarding distortion at the agency level, Plaintiffs did raise to Commerce their objection to the use of annual averages as distortive. Apex Admin. Br. at 17–20, 24–25. Plaintiffs' failure to provide actual calculations to support its argument that the use of annual averages is distortive did not deprive the agency of the opportunity to review the contested procedures and decisions and correct any errors prior to judicial review and intervention. *See Parisi v. Davidson*, 405 U.S. 34, 37 (1972). Commerce was aware of the thrust of Plaintiffs' objection and had an opportunity to correct errors even without being provided with examples of particular distortions. Therefore, Plaintiffs' argument is not barred by the exhaustion doctrine.

[13] Plaintiffs argue that the use of annual and quarterly averages results in a higher percentage of sales passing the Cohen's d test for both mandatory respondents than monthly averages would, and that this higher passing sales rate in turn significantly affects both mandatory respondents' overall dumping margins. Pls.' Br. 18–20. Specifically, Plaintiffs argue that using monthly weighted-averages in the differential pricing analysis would decrease Devi Fisheries' passing sales from the 73.78 percent calculated using annual averages to [[ ]] percent and would decrease Falcon Marine's passing sales from the 83.79 percent calculated using annual averages to [[ ]] percent. *Id.* at 19. Plaintiffs argue that, for both mandatory respondents, the decrease in passing sales is significant because it lowers the passing sales rate below the 66 percent threshold under which Commerce applies A-to-T only to passing sales and over which Commerce applies A-to-T to all sales. *Id.; see* Final Decision Memo at 30. Plaintiffs further argue that this change in methodology would lead to a lower overall antidumping margin calculation for both mandatory respondents. Pls.' Br. 19. Plaintiffs calculate that Devi Fisheries' overall antidumping rate would decrease from 3.28 percent when A-to-T is applied to all sales to 2.47 percent when A-to-T is applied only to sales passing the Cohen's d test, and Falcon Marine's overall antidumping rate would similarly decrease from 2.63 percent to 1.89 percent. *Id.*

reasonable practice cannot be distortive. A reasonable practice that leads to different results is simply different.

II. The Meaningful Differences Test

Plaintiffs argue that Commerce acted unreasonably and unlawfully in applying the meaningful differences test to determine whether the standard A-to-A methodology could account for the price differences uncovered by the differential pricing analysis. Pls.' Br. 22–35. The court first discusses the reasonableness of Commerce's inclusion of all sales in its assessment of whether the A-to-A methodology can account for price differences (*i.e.*, the meaningful differences test).[14] Second, the court addresses the reasonableness of Commerce's decision not to offset positively dumped sales with negatively dumped sales in the meaningful differences test. For the reasons that follow, Commerce's application of the meaningful differences test is reasonable.

A. Commerce's Inclusion of All U.S. Sales in the Meaningful Differences Test

Plaintiffs challenge Commerce's comparison of an A-to-A margin calculation for all of the mandatory respondents' sales to an A-to-T calculation for all of those same sales. Pls.' Br. 24–31. Plaintiffs contend that it was unreasonable for Commerce to apply the meaningful differences test to U.S. sales not exhibiting significant price differences.[15] *See id.*

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[14] In the meaningful differences test, Commerce compares the overall weighted-average dumping margin for all of a respondent's U.S. sales using the A-to-A methodology to the overall weighted-average dumping margin for all of a respondent's U.S. sales using the A-to-T methodology. *See* Final Decision Memo at 23–25; Prelim. Decision Memo at 6–7. Plaintiffs argue that Commerce's meaningful differences test is flawed, as "Commerce should have confined the comparison of [A-to-A] and [A-to-T] margins only to the masking of positive dumping on targeted sales to comply with the statutory requirement whether [A-to-A] can account for 'such differences.'" Pls.' Br. 29. Accordingly, Plaintiffs would instead have Commerce disaggregate the overall dumping margins calculated using A-to-A and A-to-T into, for each methodology, a margin for sales that passed the Cohen's d test and a margin for sales that did not pass the Cohen's d test, and then disaggregate each of those margins further into sales with positive dumping margins and sales with negative dumping margins. *Id.* at 26–31. Plaintiffs suggest Commerce then conduct its meaningful differences test by comparing only the A-to-A and A-to-T margins for the subset of sales that passed the Cohen's d test and have a positive dumping margin. *Id.* at 27. According to Plaintiffs, only this subset of sales is relevant to determining whether the A-to-A methodology can account for the significant price differences found, and including all other sales is unreasonable. *Id.*

[15] Plaintiffs also refer to the use of all sales in the meaningful differences test as unlawful, Pls.' Br. 24, though Plaintiffs acknowledge that 19 U.S.C. § 1677f-1(b)(ii) applies only to investigations. *Id.* at 23. To the extent that Plaintiffs argue that the use of all sales in the meaningful differences test is unreasonable, nothing in the statute precludes Commerce from using all sales to assess whether the A-to-A methodology can account for the pattern of significant price differences found, and, further, it is reasonable for Commerce to make

According to Plaintiffs, the language of 19 U.S.C. § 1677f-1(d)(1)(B)(ii), which applies directly to investigations and which Commerce has adopted by practice in reviews, suggests that only sales exhibiting significant price differences should be analyzed to determine whether A-to-A accounts for those price differences, as "'such differences' ties to and directly relates to the export sales that demonstrated significant price differences." Pls.' Br. 24; *see* Pls.' Reply 10–12. The statutory language of 19 U.S.C. § 1677f-1(d)(1)(B)(ii) does not suggest that only sales exhibiting significant price differences should be included in the meaningful differences test. *See* 19 U.S.C. § 1677f-1(d)(1)(B)(ii). The statute upon which the practice is based provides that Commerce may determine if "there is a pattern of export prices . . . that differ significantly among purchasers, regions, or periods of time, and [. . . Commerce] explains why such differences cannot be taken into account using [the standard A-to-A methodology]." *See* 19 U.S.C. § 1677f-1(d)(1)(B)(i)–(ii). It is unclear from the language of the statute what the impact of such differences may be. Plaintiffs assume that the only impact is the significant price differences themselves. But, as Commerce has explained, the pattern identified may include higher or lower priced sales, Final Decision Memo at 24, and the impact of such differences may not lie only in the sales forming the pattern but may also lie outside the pattern. *Id.* at 24–25. Therefore, the language of the statute does not implicitly or explicitly preclude application of the meaningful differences test to all sales. *See id.*

Plaintiffs further argue that it is unreasonable to base the meaningful differences test on a comparison of an A-to-A margin calculation for all of a respondent's U.S. sales to an A-to-T margin calculation for all of those same sales, as "[t]he whole point of applying the alternative [A-to-T] remedy is to unmask dumping on [sales exhibiting significant prices differences]. Thus, the question whether Commerce's normal [A-to-A] methodology can 'account' for 'such differences' relates only to those sales demonstrating 'such differences' and not to all sales." Pls.' Br. 24.

Commerce uses the meaningful differences test to determine whether the standard A-to-A methodology can account for the pattern of significant price differences found in the differential pricing analysis, prior to using the alternate A-to-T methodology to calculate the overall dumping margin. *See* Final Decision Memo at 23–25; Prelim. Decision Memo at 6–7; *see also* 19 U.S.C. §§ 1677f-1(d)(1)(B)(i)–(ii). In the meaningful differences test, Commerce compares the respon-

this determination using all sales because doing so allows Commerce to compare the results of the A-to-A and A-to-T margin calculations, as they would be applied, prior to applying the remedy.

dent's overall weighted-average dumping margin calculated for all U.S. sales using the alternative methodology[16] to the respondent's overall weighted-average dumping margin for all U.S. sales calculated using the A-to-A methodology. *See* Final Decision Memo at 24; Prelim. Decision Memo at 6–7. Commerce uses the meaningful differences test to assess whether the margins that would be calculated using each methodology differ meaningfully. Prelim. Decision Memo at 7. The difference between the margins is considered meaningful if: (1) there is at least a 25 percent relative change in the dumping margins calculated by the two methodologies where both margins are above the *de minimis* threshold (0.5%), or (2) the dumping margin is below the *de minimis* threshold for one method and above the *de minimis* threshold for the other method. *Id.* at 7; *see* Final Decision Memo at 24. Commerce considers a meaningful difference to demonstrate that the standard A-to-A method cannot account for the significant price differences found, such that the use of the alternate methodology is justified to calculate an accurate margin. Final Decision Memo at 24; Prelim. Decision Memo at 7. In calculating the margins, Commerce offsets sales with negative dumping margins when applying the A-to-A methodology and does not offset sales with negative margins when applying the A-to-T methodology. *See* Final Decision Memo at 26–28.

Here, Commerce's ratio test revealed that more than 66% of both mandatory respondents' U.S. sales passed the Cohen's d test and Commerce accordingly determined it was appropriate to apply the A-to-T methodology to all U.S. sales for both respondents. Final Decision Memo at 25. When comparing the margins calculated by the two methodologies in the meaningful differences test, Commerce included all sales in the overall margin calculations. *See id.* at 24–25. In accordance with its practice, Commerce offset sales with negative dumping margins for the A-to-A methodology but did not offset sales with negative dumping margins in calculating its A-to-T margin for purposes of the meaningful difference test. *See id.* at 28. For both mandatory respondents, the A-to-A methodology yielded an overall dumping margin below the *de minimis* threshold and the A-to-T

[16] In the meaningful differences test, Commerce applies either the A-to-T methodology to all U.S. sales or to only those sales found to pass the Cohen's d test, based on the results of the ratio test. Where the ratio test reveals that more than 33% but less than 66% of a respondent's U.S. sales passed the Cohen's d test, Commerce applies A-to-T to the sales that passed the Cohen's d test and A-to-A to the sales that did not pass the Cohen's d test. Final Decision Memo at 30; Prelim. Decision Memo at 7. Where the ratio test reveals that 66% or more of a respondent's U.S. sales passed the Cohen's d test, Commerce applies A-to-T to all U.S. sales, including those not passing the Cohen's d test. *Id.*Where the ratio test reveals that less than 33% of a respondent's U.S. sales passed the Cohen's d test, Commerce finds that the application of A-to-T is not justified and applies A-to-A to all U.S. sales. *See id.*

methodology yielded an overall dumping margin above the *de minimis* threshold. Prelim. Decision Memo at 7; *see* Final Decision Memo at 24–25. Commerce therefore determined that a meaningful difference existed for both mandatory respondents, demonstrating that A-to-A could not account for the pattern of significant price differences for either mandatory respondent, and applied A-to-T to all U.S. sales for both mandatory respondents. Prelim. Decision Memo at 7; *see* Final Decision Memo at 3, 24–25, 30.

According to Commerce, sales not exhibiting patterns of significant price differences are relevant to assessing whether the A-to-A method can accurately measure a respondent's dumping margin because "the purpose of considering an alternative comparison method is to examine whether the A-to-A method is appropriate to measure each respondent's amount of dumping, some of which may be hidden because of masked dumping." Final Decision Memo at 24. Commerce further explained:

> The existence of both dumped and non-dumped sales is necessary to have the potential for masked dumping, and one must consider both low-priced and high-priced sales when determining whether a pattern of prices that differ significantly exists and whether masking is occurring. When the Department looks for a pattern of prices that differ significantly, a pattern can involve prices that are lower than the comparison price or higher than a comparison price. Lower, higher, or both are all possibilities for establishing a pattern consistent with section 777A(d)(1)(B)(i) of the Act.

Id. at 24. Commerce includes all sales in the meaningful differences test because masked dumping requires the presence of higher and lower priced sales. Commerce considers that those which are not differentially priced may still nonetheless be dumped, which can be ascertained by applying A-to-T to all sales. Def.'s Resp. 26 (noting that the SAA "explains that so-called 'targeted dumping' may be occurring with the sales that constitute a pattern of prices that differ significantly, with the possibility that so-called 'targeted' or masked dumping may be occurring elsewhere, too."). This rationale is reasonable given the objective of the meaningful differences test to compare the effect of the two calculation methodologies prior to applying either as a remedy.

By arguing that the meaningful differences test should be applied only to sales exhibiting differential pricing rather than to all sales, Plaintiffs mistake the objective of the test. Plaintiffs claim that "[t]he whole point of applying the alternative [A-to-T] remedy is to unmask

dumping *on targeted sales*." Pls.' Br. 24 (emphasis in original). But the purpose of the meaningful differences test is not to uncover masked dumping, but rather to assess whether the standard A-to-A methodology would yield a dumping margin that accurately reflects the differences uncovered. Final Decision Memo at 24–25. Commerce makes this assessment by comparing the overall dumping margin that would be calculated using the standard A-to-A methodology to the overall dumping margin that would be calculated using the alternate A-to-T methodology. *Id.* at 24. The overall dumping margin (*i.e.*, the remedy) will be calculated for all sales, without regard to whether sales are dumped or differentially priced. Therefore, Commerce considers all sales, rather than a subset of the sales, in its analysis to determine whether A-to-A would capture the masked dumping activity and yield an accurate overall margin for all sales. *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370, 1379 (Fed. Cir. 2013) ("An overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible.").[17]

Plaintiffs also argue that applying the meaningful differences test to all U.S. sales was not supported by substantial evidence under the facts of this case. Pls.' Br. 27–31. Specifically, Plaintiffs present the results of an alternate meaningful differences test, in which they disaggregated the mandatory respondents' sales into differentially priced and non-differentially priced sales and conducted the meaningful differences test only on the differentially priced sales with positive dumping margins. *Id.* This alternate test results in *de minimis* dumping margins for both mandatory respondents using both A-to-A and A-to-T.[18] *Id.* Plaintiffs argue that, because this alternate meaningful differences test would lead to the determination that A-to-A in fact does account for the significant price differences found, Commerce's inclusion of all sales in the meaningful differences test led to the erroneous conclusion that A-to-A could not account for the

[17] Plaintiffs additionally argue that "Commerce's rationale for using 'all sales' is flawed because it justified its actions[ ]based on the use of 'higher' and 'lower' priced sales, and not based on the wrongful use of [sales that passed the Cohen's d test and sales that did not pass the Cohen's d test]." Pls.' Reply 12–13 (citing Final Decision Memo at 25). According to Plaintiffs, Commerce has "still not explained why it includes non-targeted sales for [the meaningful differences test]." *Id.* at 13. However, Commerce noted specifically that it "disagree[s] with the respondents that we incorrectly included both targeted and non-targeted sales in the analysis of meaningful differences," Final Decision Memo at 25, reiterating prior CIT decisions' analyses regarding the use of "non-targeted" sales and emphasizing that the statute does not specify that only "targeted" sales are to be included in the A-to-T methodology. *Id.*

[18] Plaintiffs argue that their data shows that, when comparing only differentially priced sales, A-to-T unmasked an additional [[ ]] percent of total export value for Devi Fisheries than A-to-A unmasked, Pls.' Br. 28, and A-to-T unmasked an additional [[ ]] percent of total export value for Falcon Marine than A-to-A unmasked. *Id.* at 32.

significant price differences.[19] *Id.*; Pls.' Reply 15–17.

Plaintiffs have simply presented an alternate methodology that leads to different results. As discussed above, Commerce reasonably compared an A-to-A margin calculation for all of each respondent's U.S. sales to an A-to-T margin calculation for all of those same sales to assess whether A-to-A would reflect each respondent's overall pricing behavior, because "[t]he purpose of considering an alternative comparison method is to examine whether the A-to-A method is appropriate to measure each respondent's amount of dumping, some of which may be hidden because of masked dumping." Final Decision Memo at 24. The inclusion of all sales to examine whether the overall dumping margin calculated using A-to-A accurately reflects the differential pricing uncovered is reasonable, and Plaintiffs have not demonstrated that including all sales led to results that are unsupported by substantial evidence.

B. Commerce's Decision to Offset Negative Dumping Margins Under A-to-A But Not A-to-T in the Meaningful Differences Test

Plaintiffs also claim that it is unlawful, unreasonable, and arbitrary for Commerce to offset positive dumping margins with negative dumping margins under A-to-A but not under A-to-T in the meaningful differences test. Pls.' Br. 31–35. Plaintiffs contend that, by offsetting margins for only one method in the comparison, Commerce creates distinctions between the margins not otherwise present, Pls.' Br. 32; Pls.' Reply 20–21, "lead[ing] to the erroneous conclusion that A-to-A failed to 'account' for any dumping on 'such differences' for both [respondent] companies." Pls.' Br. 32. Plaintiffs argue that Commerce must therefore either offset or not offset margins consistently across both methods in order to accurately determine whether A-to-A can account for significant price differences found.[20] Pls.' Reply 21; Oral Argument at 01:05:38–01:05:55.

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[19] Specifically, Plaintiffs disaggregated the margins under A-to-A and A-to-T into margins for sales that exhibited patterns of significant price differences and those that did not, and then disaggregated the margins for those two subsets again into margins for sales that were dumped and not dumped. Pls.' Br. 27. Doing so isolated the targeted sales which, according to Plaintiffs, reveals that "[n]on-targeted sales did not mask any dumping on the targeted sales." *Id.* at 27.

[20] Plaintiffs support their argument with data demonstrating that, if the dumping margins for both methods were calculated without offsets (and using only sales that passed the Cohen's d test), the A-to-A and A-to-T margin calculations would differ only insignificantly. Pls.' Br. 32–35. Plaintiffs' position is that, as the margins generated using A-to-A with offsets differed significantly from the margins generated using A-to-T without offsets, "nearly the entire difference in the margins that Commerce found 'meaningful' for both the respondents is attributable to the offsetting of negative margins against positive margins." Pls.' Br. 32.

Plaintiffs' argument is unavailing. Commerce applies the two methodologies in the meaningful differences test as they would be applied when calculating the overall dumping margins; that is, A-to-A with offsets and A-to-T without offsets. Final Decision Memo at 27–28. Commerce applies A-to-A with offsets when calculating the overall dumping margins because the A-to-A "methodology relies on averaging groups of sales, and so inherently allows higher-priced sales to offset lower-priced ones." *Id.* at 27. In contrast, the A-to-T calculation is a tool provided to Commerce specifically to uncover dumping in instances in which certain transactions are dumped and certain transactions are not dumped. *Id.* Allowing the non-dumped sales to offset the dumped sales in this methodology would defeat the purpose of this alternative methodology because it would allow for low-priced sales to offset high-priced sales, which would mask the dumping that the A-to-T methodology is specifically designed to uncover. *See id.* at 27–28. The use of offsets in A-to-A and not in A-to-T is thus reasonable given the distinct objectives of the two methodologies.

Plaintiffs do not contest Commerce's authority to not allow offsets by negative sales when applying A-to-T at the remedy stage to calculate the dumping margin, Pls.' Br. 34, and limit their challenge to Commerce's not offsetting by negative sales in the A-to-T margin calculation during the meaningful differences test. *Id.* However, the purposes behind not allowing offsets in both stages is the same. The meaningful differences test is a tool to assess the A-to-A and A-to-T methodologies' margins prior to application to determine whether A-to-T is a necessary remedy, and it would be illogical to make this assessment using a different version of the methodology than would ultimately be applied as the remedy.

III. Commerce's Application of A-to-T to All U.S. Sales for Both Mandatory Respondents

Plaintiffs challenge Commerce's application of the A-to-T methodology to all U.S. sales, including sales that did not pass the Cohen's d test, when calculating the overall dumping margin for both mandatory respondents. Pls.' Br. 35–36; Pls.' Reply Br. 21–25. Plaintiffs challenge both the statutory basis for and the reasonableness of Commerce's application of A-to-T to all sales. Pls.' Br. 35–36; Pls.' Reply 21–25. Both challenges are unpersuasive.

A. The Statutory Basis for A-to-T

Plaintiffs argue that the application of A-to-T to all U.S. sales is contrary to law, because 19 U.S.C. § 1677f-1(d)(1)(B) creates a "specific statutory requirement that Commerce only use the alternative [A-to-T] remedy to 'account' for the significant 'differences' in export

prices." Pls.' Reply 22; *see* Pls.' Br. 36; 19 U.S.C. §§ 1677f-1(d)(1)(B)(i)–(ii). Plaintiffs argue that the "differences" referenced in the statute are the significant price differences in the sales that passed the Cohen's d test, such that Commerce should have applied A-to-T only to the sales that passed the Cohen's d test because the statutory exception for A-to-T is only applicable to the sales within the pattern of differential pricing. Pls.' Reply 22; *see* 19 U.S.C. §§ 1677f-1(d)(1)(B)(i), (ii). Defendant responds that the statute does not limit its authority to apply A-to-T to all sales. Def.'s Resp. 29–31.

The statute upon which Commerce has modeled its practice in reviews provides that Commerce may use the alternate A-to-T methodology to calculate a respondent's dumping duty margin if Commerce finds that there is "a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and [. . . Commerce] explains why such differences cannot be taken into account using [A-to-A]." 19 U.S.C. §§ 1677f-1(d)(1)(B)(i)–(ii), 1677f-1(d)(2). Commerce explained that, since "[n]either the Act nor the SAA provides any guidance in determining how to apply the A-to-T method once the requirements of [19 U.S.C. §§ 1677f-1(d)(1)(B)(i) and (ii)] have been satisfied," the Department "created a framework to determine how the A-to-T method may be considered as an alternative to the standard A-to-A method based on the extent of the pattern of prices that differ significantly as identified by the Cohen's d test." Final Decision Memo at 30. Commerce employs the ratio test to determine when, and to what degree, A-to-T should be used. In the ratio test, Commerce calculates the percentage of each respondent's U.S. sales that passed the Cohen's d test. *See id.* at 30; Prelim. Decision Memo at 6. Commerce uses that percentage to implement A-to-T in proportion to the degree of significant price differences uncovered, based on a series of thresholds.[21] Final Decision Memo at 30; Prelim. Decision Memo at 6. There is no limiting language in the statute upon which Commerce based its practice in reviews restricting the application of A-to-T only to those sales that passed the Cohen's d test, where Commerce finds a pattern of significant price differences and determines the alternate methodology is warranted. *See* 19 U.S.C. §§ 1677f-1(d)(1)(B)(i)–(ii).

[21] As previously stated, where less than 33% of a respondent's U.S. sales pass the Cohen's d test, Commerce determines the significant price differences are not sufficiently pervasive to trigger application of A-to-T so A-to-A is applied to all U.S. sales, including any passing sales. Final Decision Memo at 30. Where more than 33% but less than 66% of a respondent's U.S. sales pass the Cohen's d test, Commerce applies A-to-T to passing sales and A-to-A to non-passing sales. *Id.* Finally, where 66% or more of a respondent's U.S. sales pass the Cohen's d test, Commerce applies A-to-T to all of the respondent's U.S. sales, including any sales that did not pass the Cohen's d test. *Id.*

B. The Reasonableness of Commerce's Methodology

Plaintiffs also argue that it was unreasonable for Commerce to apply A-to-T to all U.S. sales in this review. Pls.' Br. 35–36; Pls.' Reply 23–25. Plaintiffs contend that the application of A-to-T to all sales was "beyond the remedy necessary to unmask dumping on targeted sales presumably masked by [A-to-A]" because any "masked dumping" occurred only within the subset of sales that passed the Cohen's d test. Pls.' Br. 36; Pls.' Reply 23–24. Defendant responds that applying A-to-T to all sales was reasonable here, as more than 66% of each respondent's sales passed the Cohen's d test and given Commerce's interest in ensuring a remedy proportionate to the degree of masked dumping found. Def.'s Resp. 29–31. Plaintiffs have not demonstrated that Commerce's application of A-to-T to all sales where more than 66% of a respondent's sales pass the Cohen's d test is unreasonable.

Commerce has determined that, in cases where more than 66% of a respondent's sales pass the Cohen's d test, significant price differences are pervasive to a degree that indicates that masked dumping could be occurring outside of the sales that passed the Cohen's d test, rendering it prudent to check each individual transaction for dumping. *See* Final Decision Memo at 25 (explaining, by quoting *Apex II*, that "Commerce applied [Ato-T] across the board to reveal dumping hidden by sales that were neither targeted nor dumped" (internal quotation omitted)); *see* Def.'s Resp. 13–14, 29. In such instances in which differential pricing is so widespread, the Department reasonably considers it necessary to look individually at each transaction for additional dumping. Commerce has explained that the ratio test is calibrated to ensure that the alternate methodology is applied as a remedy proportionate to the targeted dumping activity the remedy aims to correct. Final Decision Memo at 30. As A-to-T allows for a more precise margin calculation, it is not unreasonable for Commerce to identify levels of behavior and then apply the A-to-T remedy proportionately, thus ensuring an accurate calculation in instances of such a widespread pattern of differential pricing.

CONCUSION

For the foregoing reasons, the U.S. Department of Commerce's final determination in the ninth administrative review of the antidumping duty order covering certain frozen warmwater shrimp from India is sustained. Judgment will enter accordingly.

Dated: March 2, 2017
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE

Slip Op. 17–24

SHANGHAI WELLS HANGER CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 15–00103

[Commerce's final results remanded.]

Dated: March 2, 2017

Jonathan M. Freed, Trade Pacific PLLC of Washington, DC, for Plaintiffs Shanghai Wells Hanger Co., Ltd., Hong Kong Wells Ltd., Hong Kong Wells Ltd. (USA), and Fabriclean Supply, Inc.

Courtney D. Enlow, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, for Defendant United States. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Henry J. Loyer*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

OPINION AND ORDER

Gordon, Judge:

This action involves the fifth administrative review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering steel wire garment hangers from the People's Republic of China ("PRC"). *See Steel Wire Garment Hangers from the PRC*, 79 Fed. Reg. 65,616 (Dep't Commerce Nov. 5, 2014) (prelim. results admin. rev.) ("*Preliminary Results*") and accompanying Decision Mem. for the Prelim. Results of the 2012–2013 Antidumping Duty Admin. Rev., A–570–918, (Oct. 31, 2014), PD 178[1] at bar code 3238876–01, ECF No. 21 *("Preliminary Decision Memo"); see also Steel Wire Garment Hangers from the PRC*, 80 Fed. Reg. 13,332 (Dep't Commerce Mar. 13, 2015) (final results admin. rev.) ("*Final Results*") and accompanying Issues and Decision Mem. for Steel Wire Garment Hangers from the PRC, A–570–918, (Mar. 6, 2015), PD 197 at bar code 32631490–01, ECF No. 21 ("*Final Decision Memo*").

Before the court is the USCIT Rule 56.2 motion for judgment on the agency record of Plaintiffs Shanghai Wells Hanger Co., Ltd., Hong Kong Wells Ltd., Hong Kong Wells Ltd. (USA), and Fabriclean Supply, Inc. (collectively, "Plaintiffs" or "Shanghai Wells"). *See* Rule 56.2 Mem. Supp. Mot. J. Agency R. of Pls. Shanghai Wells Hanger Co., Ltd., Hong Kong Wells Ltd., Hong Kong Wells Ltd. (USA), and Fabriclean Supply, Inc., ECF No. 41 ("Pls.' Br."); *see also* Def.'s Mem. Opp'n Pls.' Rule 56.2 Mot. J. Agency R., ECF No. 49 ("Def.'s Opp'n");

[1] "PD" refers to a document contained in the public administrative record.

Pls.' Reply Def.'s Opp'n, ECF No. 54 ("Pls.' Reply"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[2] and 28 U.S.C. § 1581(c) (2012).

Plaintiffs challenge (1) Commerce's selection of Thailand as the primary surrogate country, (2) Commerce's valuation of Shanghai Wells' labor factor of production ("FOP"); (3) Commerce's calculation of surrogate financial ratios, (4) Commerce's valuation of Shanghai Wells' corrugated paperboard input; and (5) Commerce's valuation of Shanghai Wells' brokerage and handling costs. For the reasons that follow, the court remands this matter to Commerce to reconsider its surrogate country selection. The court reserves judgment on the remaining issues, which may become moot.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the 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). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2016). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2016).

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

II. Discussion

In an antidumping duty administrative review, Commerce determines whether subject merchandise is being, or is likely to be, sold at less than fair value in the United States by comparing the export price and the normal value of the merchandise. 19 U.S.C. §§ 1675(a)(2)(A), 1677b(a). In the non-market economy ("NME") context, Commerce calculates normal value using data from surrogate countries to value respondents' FOPs. 19 U.S.C. § 1677b(c)(1)(B). Commerce must use the "best available information" in selecting surrogate data from "one or more" surrogate market economy countries. 19 U.S.C. § 1677b(c)(1)(B), (4). The surrogate data must "to the extent possible" be from a market economy country or countries that are (1) "at a level of economic development comparable to that of the [NME] country" and (2) "significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). Commerce has a stated regulatory preference to "normally . . . value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2) (2013). Commerce utilizes a four-step process to select a surrogate country:

> (1) the Office of Policy . . . assembles a list of potential surrogate countries that are at a comparable level of economic development to the NME country; (2) Commerce identifies countries from the list with producers of comparable merchandise; (3) Commerce determines whether any of the countries which produce comparable merchandise are significant producers of that comparable merchandise; and (4) if more than one country satisfies steps (1)–(3), Commerce will select the country with the best factors data.

Vinh Hoan Corp. v. United States, 39 CIT ___, ___, 49 F. Supp. 3d 1285, 1292 (2015) (internal quotation marks omitted) (quoting Import Admin., U.S. Dep't of Commerce, Non-Market Economy Surrogate Country Selection Process, Policy Bulletin 04.1 (2004) *("Policy Bulletin"), available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited this date)). *See also* 19 C.F.R. § 351.408(c)(2); *Policy Bulletin* at 4 ("[D]ata quality is a critical consideration affecting surrogate country selection."). When choosing the "best available" surrogate data on the record, Commerce, to the extent practicable, seeks data that are publicly available, product-specific, reflective of a broad market average, and contemporaneous with the period of review. *Qingdao Sea–Line Trading Co v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014).

Here, Commerce issued a non-exhaustive list of potential surrogate countries. *See* Letter Regarding Deadlines for Surrogate Country and Surrogate Value Comments, Attach. 1, PD 14 at bar code 3175386–01 (Jan. 23, 2014). Commerce identified six potential surrogate countries that were at a level of economic development comparable to the PRC and were significant producers of comparable merchandise. *Id.* Commerce's surrogate country determination therefore turned on the issue of data quality, *i.e.*, which country had the best available data. The choice soon narrowed from among six to between two, Thailand and the Philippines. Commerce appeared to address the relative quality of Thai and Philippine import data, labor data, and financial statements to determine which country provided the "best available" information. *See Final Decision Memo* at 12 (Comment 2, "Selection of Surrogate Country"). For import and labor data, Commerce determined that Thailand had the better quality data. *Id.* at 10–11.

For the financial statements, however, Commerce did not compare the available Philippine and Thai statements. Commerce simply concluded that the Thai financial statements were "usable" and relied on a regulatory preference to value all factors of production in a single country. *Id.* at 15 ("[B]ecause we have useable financial statements from Thailand, the primary surrogate country in this review, and because it is the Department's preference to stay within the primary surrogate country, we are not considering the Philippine financial statements.").

The problem here is straightforward. Plaintiffs argue that Commerce never compared the Philippine and Thai financial statements to determine which was best, and that by sidestepping this comparison (one Commerce made for import and labor data), Commerce failed to apply its surrogate country selection criteria reasonably. *See* Pls.' Br. 13–14. The court agrees. Implicit in Commerce's "finding" that the Thai financial statements are merely "usable" is a tacit concession that the Philippine financial statements are actually superior, a fact borne out by the record. Plaintiffs explain that the four Philippine surrogate companies "produced comparable merchandise by drawing wire rod to wire and making various wire products," *id.* at 13–14, which closely resembles Shanghai Wells' production process. *Id.* at 21. Plaintiffs contrast the Thai financial statements, noting that the two of the three Thai companies – Sahasilp and Monkgol Fasteners – did not produce comparable merchandise and did not draw wire from wire rod in the production process. *Id.* 21–22. According to its public financial statements, Sahasilp manufactured and sold "all kinds of nuts, rivets, screws, pressed components of shoe[] decoration and related accessories," and its web site described the following product

categories: "Furniture Part, Automotive Part, Machines, Springs, Standard Stainless Steel Chemical Elements, and Cold Forming Carbon Steel," which, Plaintiffs note, are not comparable to garment hangers. *Id.* 21 (quoting M&B Metal Prods. Co.'s Surrogate Value Submission, Ex. 1, P.D. 170 at barcode 3232295–01 (Oct. 1, 2014) & Ex. 3, P.D. 172 at barcode 3232295–03 (Oct. 1, 2014)). Plaintiffs also note that the record shows that Mongkol Fastener produced fasteners for "various applications such as construction part, machinery part, automobile part, electrical appliance part, [and] medical implant part," using over fifteen types of machinery, none of which included wire drawing machinery. *Id.* 22 ("Nothing in this record indicated that Mongkol Fastener engage[d] in drawing wire from steel wire rod, but the record contains abundant evidence regarding its forging and die-casting operations for manufactured products dissimilar to steel wire garment hangers."). Defendant and Defendant-Intervenor do not offer a compelling or persuasive response to Plaintiffs' analysis of the record.

Given the importance of wire drawing for the production of the subject merchandise, and the relative weakness of the Thai companies on this characteristic when compared to those of the Philippines, the court cannot understand how a reasonable mind would conclude that the Thai financial statements are superior to the Philippine financial statements. Rather than acknowledge the apparent superiority of the Philippine financial statements, and incorporate that fact into its surrogate country selection analysis, Commerce instead settled for "usable" Thai statements because it preferred to "stay within the primary surrogate country." *Id.* at 15. That though puts the proverbial cart before the horse. Commerce may not select Thailand as the surrogate country by ignoring a step in its process. It must first reasonably evaluate the available data sets, which includes an acknowledgment that on this record a reasonable mind would not select the Thai financial statements as better than the Philippine statements.

Be aware, however, that this does not mean that the Philippines must, and Thailand cannot, be the surrogate country. It simply means that Commerce's process of selecting Thailand was unreasonable. The court expresses no opinion on whether either country may constitute a reasonable choice on this administrative record. It may be that the import and labor data carry more weight in the margin calculation for wire hangers. It may be that the financial statements are the relatively more important factor. It may even be that this is a case where sourcing surrogate data from more than one country (despite the

attendant headaches and difficulty that entails) yields the most accurate dumping margin. Commerce and the parties will have to sort that out on remand.

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that the *Final Results* are remanded to Commerce to reconsider its selection of Thailand as the primary surrogate country; it is further

ORDERED that Commerce shall file its remand results on or before May 2, 2017; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Commerce files its remand results with the court.

Dated: March 2, 2017
New York, NY

/s/ Leo M. Gordon
JUDGE LEO M. GORDON