U.S. Court of International Trade

Slip Op. 17–57

JINXIANG HUAMENG IMP & EXP CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and HARMONI INTERNATIONAL SPICE, INC., ZHENGZHOU HARMONI SPICE CO., LTD., FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH, L.L.C., THE GARLIC COMPANY, VALLEY GARLIC, and VESSEY and COMPANY, INC., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 16–00243

[Plaintiff's motion for leave to amend its complaint is granted in part and denied in part.]

Dated: May 10, 2017

John J. Kenkel, Gregory S. Menegaz, J. Kevin Horgan, deKieffer & Horgan PLLC, of Washington, DC, for Plaintiff Jinxiang Huameng Imp & Exp Co., Ltd.

Emma E. Bond, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her were *Chad A. Readler*, Acting Assistant Attorney General, *Reginald T. Blades, Jr.*, Assistant Director, and *Jeanne E. Davidson*, Director. Of Counsel was *Emily Ruger Beline*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington DC.

MEMORANDUM AND ORDER

Choe-Groves, Judge:

This action was brought pursuant to 28 U.S.C. § 1581(c) to challenge the U.S. Department of Commerce's ("Commerce") final results in the new shipper review of Jinxiang Huameng Imp & Exp Co., Ltd. ("Plaintiff"). *See* Summons, Nov. 8, 2016, ECF No. 1. Before the court is Plaintiff's Motion to Amend Complaint. *See* Pl.'s Mot. Am. Compl., Mar. 29, 2017, ECF No. 35 ("Pl. Mot. Am. Compl."); *see also* Compl., Nov. 8, 2016, ECF No. 6 ("Compl."). Plaintiff seeks leave to amend its complaint by adding three counts pursuant to 28 U.S.C. § 1581(i) and § 1585. *See* First Am. Compl., Mar. 29, 2017, ECF No. 35–1 ("Pl. Am. Compl."). Plaintiff's motion is opposed by the United States ("Defendant"), Fresh Garlic Producers Association, Christopher Ranch, L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc. *See* Pl. Mot. Am. Compl. 2. Harmoni International Spice Inc. and Zhenghou Harmoni Spice Co., Ltd. take no position on Plaintiff's

motion. *See id.* For the reasons set forth below, Plaintiff's motion is granted in part and denied in part.

BACKGROUND

Commerce published an antidumping duty order on fresh garlic from the People's Republic of China ("China") on November 16, 1994. *See Fresh Garlic From the People's Republic of China*, 59 Fed. Reg. 59,209 (Dep't Commerce Nov. 16, 1994) (antidumping duty order). The order resulted in the imposition of antidumping duties and the suspension of liquidation on entries of fresh garlic from China. *See id.* at 59,210.

Plaintiff, an exporter and producer of the subject merchandise, requested on May 11, 2015 that Commerce conduct a new shipper review and determine an antidumping duty rate for fresh garlic produced and exported by Plaintiff. *See Fresh Garlic from the People's Republic of China*, 80 Fed. Reg. 43,062, 43,062 (Dep't Commerce July 21, 2015) (initiation of antidumping duty new shipper review; 2014–2015). Commerce initiated a new shipper review of Plaintiff's export practices for the period of November 1, 2014 through April 30, 2015. *See id.* at 43,062–63. Plaintiff produced and exported a single shipment of the subject merchandise that entered the United States during this period. *See* Conf. App. Documents Supp. Def.'s Mot. Dismiss Lack Jurisdiction Tab #4, Jan. 26, 2017, ECF No. 26 (ACE Report for New Shipper Review Entries). Commerce informed U.S. Customs and Border Protection ("Customs") on August 13, 2015 that Plaintiff's shipment was subject to a new shipper review, thereby suspending liquidation of that entry. *See* CBP Message No. 5225305, PD 22, barcode 3299703–01 (Aug. 13, 2015); *see also* 19 C.F.R. § 351.214(e) (directing that liquidation will be suspended for subject entries when Commerce initiates a new shipper review).

While the new shipper review was pending, Commerce published a notice of opportunity for interested parties to request an administrative review of the antidumping duty order covering fresh garlic from China entered into the United States from November 1, 2014 through October 31, 2015. *See Opportunity to Request Administrative Review*, 80 Fed. Reg. 67,706, 67,707 (Dep't Commerce Nov. 3, 2015). Commerce received requests to conduct an administrative review of more than forty producers and exporters of subject merchandise, which did not include Plaintiff. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 736, 737–40 (Dep't Commerce Jan. 7, 2016). Commerce initiated the administrative review, but only with respect to producers and exporters named in the administrative review requests. *See id.*

Commerce issued instructions on February 1, 2016 directing Customs to (1) liquidate all entries of subject merchandise produced and exported by all companies who were not subject to the administrative review and assess antidumping duties equal to "the cash deposit or bonding rate in effect on the date of entry," and (2) continue suspending liquidation of entries produced or exported by the companies subject to the administrative review. *See* Conf. App. Documents Supp. Def.'s Mot. Dismiss Lack Jurisdiction Tab #3 (CBP Message 6032304). Commerce's instructions did not refer to the new shipper review of Plaintiff's entry; nor did Commerce instruct Customs to continue to suspend liquidation of entries subject to any relevant new shipper reviews. *See id.* On March 11, 2016, Customs liquidated the single entry that was the subject of Plaintiff's new shipper review. *See id.* at Tab #4 (ACE Report for New Shipper Review Entries). The entry was liquidated at the PRC-wide antidumping duty rate of $4.71 per kilogram, which was the cash deposit rate in effect on the date of the entry. *See id.*

Unaware that Customs had liquidated Plaintiff's entry, Commerce proceeded with the new shipper review and issued final results on October 25, 2016. *See Fresh Garlic From the People's Republic of China*, 81 Fed. Reg. 73,378 (Dep't Commerce Oct. 25, 2016) (final rescission of the semiannual antidumping duty new shipper review of Jinxiang Huameng Imp & Exp Co., Ltd.). Commerce found in the final results that Plaintiff's single sale during the review period was not *bona fide* and rescinded the new shipper review. *See id.* at 73,379. Consequently, Commerce assessed the PRC-wide antidumping duty rate of $4.71 per kilogram for Plaintiff's entry of subject merchandise covered by the review. *See id.*

On November 8, 2016, Plaintiff commenced this action to challenge Commerce's final results in the new shipper review. *See* Summons. Plaintiff's complaint included five counts contesting Commerce's findings, determinations, and conclusions from the new shipper review. *See* Compl. ¶¶ 8–17. Plaintiff stated that, at the time of its original complaint, it was unaware that Customs had liquidated the entry subject to the new shipper review. *See* Pl. Mot. Am. Compl. 1. Plaintiff subsequently learned of the liquidation of its entry when Defendant filed its Motion to Dismiss for Lack of Jurisdiction on January 26, 2017. *See* Def.'s Mot. Dismiss Lack Jurisdiction, Jan. 26, 2017, ECF No. 25 ("motion to dismiss").[1]

[1] Defendant's motion to dismiss argues that Plaintiff's action must be dismissed as moot because Customs liquidated the single entry of subject merchandise that was subject to the new shipper review. *See id.* at 5–8. The court issues this memorandum and order solely to address Plaintiff's motion for leave to amend its original complaint. The court will issue a separate decision ruling on Defendant's motion to dismiss.

Plaintiff now requests leave to amend its complaint to add three counts challenging the liquidation. *See* Pl. Mot. Am. Compl. 1; Pl. Am. Compl. ¶¶ 25–30.[2] Plaintiff's motion seeks to add two counts pursuant to 28 U.S.C. § 1581(i), asserting that (1) Customs unlawfully liquidated the single entry of subject merchandise subject to the new shipper review and (2) Commerce unlawfully failed to exclude Plaintiff's entry from the liquidation instructions issued during the administrative review. *See* Pl. Am. Compl. ¶¶ 3, 25–28. Plaintiff's motion also seeks to add one count pursuant to 28 U.S.C. § 1585 claiming that equity requires reliquidation of the entry in order to avoid substantial injury to the importer of record, who is not a party in this action. *See* Pl. Am. Compl. ¶¶ 29–30. Defendant argues that the requested amendments should be denied as futile because the court does not possess jurisdiction over these additional counts. *See* Def.'s Reply Supp. Mot. Dismiss and Opp'n Pl.'s Mot. Am. Compl. 6–15, Apr. 12, 2017, ECF No. 41 ("Def. Resp.").

DISCUSSION

The Rules of the Court provide that, if a plaintiff seeks to amend its complaint more than 21 days after service of the complaint, the complaint may be amended "only with the opposing party's written consent or the court's leave" and "[t]he court should freely give leave when justice so requires." USCIT R. 15(a)(2). Granting a litigant leave to amend a complaint lies within the discretion of the court. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). The Supreme Court has provided the following guidance regarding the circumstances in which a plaintiff should not be afforded an opportunity to amend a complaint:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the

[2] Plaintiff filed a Partial Consent Motion to Amend Scheduling Order on March 2, 2017 to extend the time to respond to Defendant's motion to dismiss. *See* Pl.'s Partial Consent Mot. Amend. Scheduling Order, Mar. 2, 2017, ECF No. 31 ("motion to amend"). The court granted Plaintiff's motion to amend, notwithstanding the fact that the request was filed out of time and, without such a motion, Plaintiff would have been precluded from responding to the Defendant's motion to dismiss. *See* Order, Mar. 3, 2017, ECF No. 34 (amending the scheduling order).

> amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."[3]

Foman, 371 U.S. at 182.

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 Court is empowered to hear civil cases brought against the United States pursuant to specific statutory grants of jurisdiction. *See* 28 U.S.C. § 1581. In addition to the statutory grants of jurisdiction under 28 U.S.C. § 1581(a)–(h), the Court has exclusive jurisdiction over:

> any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i). It is well-settled that the Court's residual jurisdiction under 28 U.S.C. § 1581(i) "may not be invoked when jurisdiction under another subsection of 28 U.S.C. § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Ford Motor Co. v. United States*, 688 F.3d 1319, 1323 (Fed. Cir. 2012) (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)).

The first count that Plaintiff seeks to add to its complaint is a claim pursuant to 28 U.S.C. § 1581(i) that Customs unlawfully liquidated the sole entry subject to the new shipper review. *See* Pl. Am. Compl. ¶¶ 27–28. Plaintiff challenges Customs' decision to liquidate the merchandise and, as such, the court would not have residual jurisdiction

[3] The Rules of the Court are, to the extent practicable, in conformity with the Federal Rules of Civil Procedure. The Rules of the Court at times deviate from the Federal Rules of Civil Procedure where required to tailor the rules to the actions ordinarily brought before the Court. *See, e.g.*, USCIT R. 56.2. Except for minor differences in USCIT Rule 15(c)(2), USCIT Rule 15 is identical to Rule 15 of the Federal Rules of Civil Procedure. *Compare* USCIT R. 15 *with* Fed. R. Civ. P. 15.

if Plaintiff could have brought its claim under 28 U.S.C. § 1581(a). *See Ford Motor Co.*, 688 F.3d at 1323

Any party challenging a Customs' determination under 28 U.S.C. § 1581(a) must follow the statutory protest procedures before bringing a challenge in the Court. *See* 28 U.S.C. § 1581(a); 19 U.S.C. § 1514. The following parties are permitted to file a protest to challenge a decision made by Customs:

> [P]rotests may be filed with respect to merchandise which is the subject of a decision specified in subsection (a) of this section by—
>
> (A) the importers or consignees shown on the entry papers, or their sureties;
> (B) any person paying any charge or exaction;
> (C) any person seeking entry or delivery;
> (D) any person filing a claim for drawback;
> (E) with respect to a determination of origin under section 3332 of this title, any exporter or producer of the merchandise subject to that determination, if the exporter or producer completed and signed a NAFTA Certificate of Origin covering the merchandise; or
> (F) any authorized agent of any of the persons described in clauses (A) through (E).

19 U.S.C. § 1514(c)(2). Plaintiff is a foreign producer and exporter of subject merchandise and does not fit the description of any of the persons enumerated in this provision. Exporters may file a protest, but in very limited circumstances that are not present in this case. *See* 19 U.S.C. § 1514(c)(2)(E). Defendant argues that the importer of record had the opportunity to file a timely protest, *see* Def. Resp. 11, but Plaintiff is not the importer of record. There is no information suggesting that Plaintiff was acting as an agent or paid any charge or exaction on behalf of the importer of record for the liquidated entry. Nor is there any evidence that the importer of record is controlled by Plaintiff and that Plaintiff is attempting to circumvent the protest process by bringing a claim pursuant to 28 U.S.C. § 1581(i). Plaintiff could not have brought an action to challenge Customs' liquidation of the entry because Plaintiff was not entitled to file a protest. Therefore, jurisdiction under 28 U.S.C. § 1581(i) is proper and Plaintiff's proposed amendment to include a challenge to Customs' liquidation is not futile. The court grants Plaintiff's request to add this claim to the amended complaint.

The second count that Plaintiff seeks to add to its complaint is a claim that Commerce unlawfully failed to exclude Plaintiff's entry from the liquidation instructions issued during the administrative review. *See* Pl. Am. Compl. ¶¶ 25–26. Plaintiff contends that the court has jurisdiction over this claim pursuant to 28 U.S.C. § 1581(i)(4), which provides the Court with jurisdiction over a challenge to Commerce's liquidation instructions. *See Shinyei Corp. of Am. v.* United States, 355 F.3d 1297, 1304–05 (Fed. Cir. 2004); *Consolidated Bearings Co. v. United States*, 348 F.3d 997, 999–1003 (Fed. Cir. 2003). Defendant argues that 28 U.S.C. § 1581(i) does not serve as a jurisdictional basis for Plaintiff's claim because Plaintiff could have protested Customs' liquidation of the entry. *See* Def. Resp. 12. Plaintiff, as previously discussed, is an exporter and could not protest Customs' liquidation. Thus, 28 U.S.C § 1581(a) was not an avenue of relief for Plaintiff. *See* 19 U.S.C. § 1514(c)(2). Plaintiff's only recourse to challenge Commerce's liquidation instructions was to bring a claim pursuant to 28 U.S.C. § 1581(i).[4] The court has jurisdiction, therefore, over Plaintiff's challenge to Commerce's liquidation instructions issued during the concurrent administrative review. The requested amendment is not futile with respect to this claim, and the court grants Plaintiff's request to add this claim to the amended complaint.

The third count that Plaintiff seeks to add to its complaint is a claim that equity requires the reliquidation of the merchandise in order to avoid substantial harm to the importer of record. *See* Pl. Am. Compl. ¶¶ 29–30. Plaintiff alleges that the court has jurisdiction over this claim because the Court "shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585. This statute merely makes clear that the Court possesses the same plenary powers as a federal district court. *See* H.R. Rep. No. 96–1235, at 50 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3762. Section 1585 does not serve as an independent basis for subject matter jurisdiction. *See Star Sales & Distributing Corp. v. United States*, 10 CIT 709, 712, 663 F. Supp. 1127, 1130 (1986). Further, Plaintiff does not have standing to bring this claim because it concerns the legal rights or interests of a third party and Plaintiff has not explained why the general prohibition against such a claim should not apply to the circumstances of this case. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). The court does not have

[4] The statute of limitations for a claim brought pursuant to 28 U.S.C. § 1581(i) is two years. *See* 28 U.S.C. § 2636(i). Plaintiff has timely asserted its claim because less than two years have passed since the cause of action accrued, regardless of whether the date of accrual was February 1, 2016 when Commerce issued the liquidation instructions or March 11, 2016 when Customs liquidated the entry. *See St. Paul Fire & Marine Ins. Co. v. United States*, 959 F.2d 960, 964 (Fed. Cir. 1992) (discussing when a cause of action accrues).

jurisdiction, therefore, over Plaintiff's claim that equity requires reliquidation. The court finds that the requested amendment is futile with respect to this claim and denies Plaintiff's request to add this claim to the amended complaint.

CONCLUSION

Therefore, upon consideration of Plaintiff's Motion to Amend Complaint, Defendant's Reply in Support of its Motion to Dismiss and Opposition to Plaintiff's Motion to Amend Complaint, all other papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that Plaintiff's Motion to Amend Complaint is granted in part and denied in part; and it is further

ORDERED that Plaintiff is granted leave to amend its complaint to include (1) the 28 U.S.C. § 1581(i) claim challenging Customs' liquidation of the entry that was the subject of Plaintiff's new shipper review and (2) the 28 U.S.C. § 1581(i) claim challenging Commerce's liquidation instructions issued in the administrative review of the antidumping duty order on fresh garlic from China; and it is further

ORDERED that Plaintiff is denied leave to amend its complaint to add the 28 U.S.C. § 1585 claim alleging that equity requires reliquidation in order to avoid substantial injury to the importer of record; and it is further

ORDERED that Plaintiff shall refile its First Amended Complaint to conform with this Memorandum and Order on or before May 12, 2017.

Dated: May 10, 2017
New York, New York

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

Slip Op. 17–59

NEXTEEL CO., LTD., Plaintiff, and HUSTEEL CO., LTD. and HYUNDAI STEEL COMPANY, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and TMK IPSCO et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 17–00091

[Granting Plaintiff-Intervenor's motion for a preliminary injunction.]

Dated: May 15, 2017

Donald Bertrand Cameron, Julie Clark Mendoza, Rudi Will Planert, Brady Warfield Mills, Mary Shannon Hodgins, Eugene Degnan, Sarah Suzanne Sprinkle, and *Henry Nelson La Salle Smith*, Morris, Manning & Martin, LLP, of Washington, DC, for Plaintiff-Intervenor Husteel Co., Ltd.

Hardeep K. Josan, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of New York, NY, for Defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director.

OPINION AND ORDER

Kelly, Judge:

Pending before the court is Plaintiff-Intervenor Husteel Co., Ltd.'s ("Husteel") partial consent motion[1] for preliminary injunction to enjoin Defendant United States from liquidating Husteel's entries of certain oil country tubular goods ("OCTG") from the Republic of Korea ("Korea") that were produced and/or exported by Husteel and that are subject to the U.S. Department of Commerce's ("Commerce") final results of the administrative review of the antidumping duty order on OCTG from Korea covering the period July 18, 2014 to August 31, 2015. *Certain Oil Country Tubular Goods from the Republic of Korea*, 82 Fed. Reg. 18,105 (Dep't Commerce Apr. 17, 2017) (final results of antidumping duty administrative review; 2014–2015) ("*Final Results*"), and accompanying Issues and Decision Memorandum for the Final Results of the 2014–2015 Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods

[1] Prior to filing its motion for a preliminary injunction, Plaintiff-Intervenor Husteel consulted all parties in the action at that time to seek consent. *See* Partial Consent Mot. for Prelim. Injunction 2, May 8, 2017, ECF No. 24; USCIT R. 7(f). Plaintiff NEXTEEL Co., Ltd. consented to the motion, Defendant-Intervenors TMK IPSCO, Vallourec Star, L.P., and Welded Tube USA Inc. took no position on the motion, and Defendant opposed the motion. *See id.* ; *see also* Def.'s Resp. Opp.'n to Husteel Co., Ltd.'s Mot. Prelim. Injunction, May 12, 2017, ECF No. 32. On May 12, 2017, prior to Defendant's filing of its brief in opposition, Hyundai Steel Company joined the action as Plaintiff-Intervenor. *See* Consent Mot. to Intervene as of Right, May 11, 2017, ECF No. 27; Order, May 12, 2017, ECF No. 31. On May 15, 2017, Hyundai Steel Company indicated to the Court via email that it consents to Husteel's motion.

from the Republic of Korea (Apr. 10, 2017), *available at* http://ia.ita.doc.gov/frn/summary/korea-south/2017–07684–1.pdf (last visited May 15, 2017). 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) and 28 U.S.C. § 1581(c). For the reasons set forth below, the court grants Plaintiff-Intervenor's motion for preliminary injunctive relief.

BACKGROUND

Commerce published the *Final Results* on April 17, 2017. *Final Results*, 82 Fed. Reg. at 18,105. Plaintiff NEXTEEL Co., Ltd. ("NEXTEEL"), a selected mandatory respondent, commenced this action on April 27, 2017, contesting the *Final Results. See* Summons, Apr. 27, 2016, ECF No. 1. Plaintiff's complaint made four substantive challenges to Commerce's *Final Results*, arguing that the *Final Results* were neither supported by substantial evidence nor in accordance with law. Complaint, Apr. 28, 2017, ECF No. 7. The court granted NEXTEEL's motion for a preliminary injunction, enjoining the liquidation of its entries on May 3, 2017. *See* Consent Mot. for Prelim. Injunction, May 2, 2017, ECF No. 14; Order, May 3, 2017, ECF No. 16.

Husteel, a producer and exporter of OCTG from Korea subject to the *Final Results*, moved to intervene in the present action on May 2, 2017. Consent Mot. to Intervene as of Right, May 2, 2017, ECF No. 9. Husteel was not selected for individual examination by Commerce in this review, and thus is subject to the "non-examined company" antidumping duty rate based on the average of the rates calculated for the mandatory respondents. *See Final Results*, 82 Fed. Reg. at 18,106, 18,108. The court granted Husteel's motion to intervene on May 3, 2017. Order, May 3, 2017, ECF No. 15. Husteel then filed the instant motion for a preliminary injunction on May 8, 2017. Partial Consent Mot. for Prelim. Injunction, May 8, 2017, ECF No. 24. Defendant opposes Husteel's motion. Def.'s Resp. Opp.'n to Husteel Co., Ltd.'s Mot. Prelim. Injunction, May 12, 2017, ECF No. 32.

DISCUSSION

"In international trade cases, the CIT has authority to grant preliminary injunctions barring liquidation in order to preserve a party's right to challenge the assessed duties." *Qingdao Taifa Grp. Co., Ltd. v. United States*, 581 F.3d 1375, 1378 (Fed. Cir. 2009). To obtain the extraordinary relief of a preliminary injunction, the movant must establish that (1) it is likely to suffer irreparable harm without a preliminary injunction, (2) it is likely to succeed on the merits, (3) the balance of the equities favors the movant, and (4) the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S.

7, 20 (2008); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983).

Defendant does not oppose Husteel's motion on the basis of the four factor test of eligibility for injunctive relief. Defendant argues instead that Husteel's motion for preliminary injunction should be denied because the motion seeks to enlarge the issues in the case by requesting an injunction for entries not the subject of Plaintiff's complaint. Def.'s Br. 2–7. Defendant contends that that court lacks the authority to grant Husteel its requested relief, *see id.* at 6, and that granting Husteel's motion would impermissibly alter the nature of the action by enjoining entries not included in NEXTEEL's complaint. *Id.* at 4. Defendant additionally contends that, as a Plaintiff-Intervenor, Husteel's role in the litigation is inherently limited to supporting Plaintiff's positions in advancing Plaintiff's own claims. *Id.* at 2.

Defendant's arguments are unpersuasive. As explained by this Court in prior opinions, "[t]he concept of enlargement is one that is best 'reserved for situations in which an intervenor adds new legal issues to those already before the court.'" *Tianjin Wanhua Co. Ltd, v. United States*, 38 CIT __, __, 11 F. Supp. 3d 1283, 1285 (2014), quoting *NSK Corp. v. United States*, 32 CIT 161, 166, 547 F. Supp. 2d 1312, 1318 (2008); *see also Fine Furniture (Shanghai) Limited v. United States*, 40 CIT __, __, 195 F. Supp. 3d 1324, 1329–30 (2016); *Union Steel v. United States*, 33 CIT 614, 624, 617 F. Supp. 2d 1373, 1382 (2009); *Union Steel v. United States*, 34 CIT 567, 570–72, 704 F. Supp. 2d 1348, 1350–52 (2010). A Plaintiff-Intervenor's motion for a preliminary injunction which does not raise additional substantive issues does not enlarge the Plaintiff's complaint, since it simply ensures that the judicial opinion resulting from the present litigation will govern entries that are already covered by the administrative review and subject to the *Final Results* being challenged. There is no indication in Husteel's motion for preliminary injunction that Husteel is introducing new substantive issues into the litigation that were not raised in NEXTEEL's complaint. *See* Partial Consent Mot. for Prelim. Injunction, May 8, 2017, ECF No. 24. Husteel's motion for a preliminary injunction does "not, in any meaningful sense, 'compel an alteration of the nature of the proceeding.'" *Union Steel*, 33 CIT at 624, 617 F. Supp. 2d at 1382, quoting *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944).

Defendant relies upon *Vinson*, 321 U.S. at 498, and *Laizhou Auto Brake Equip. Co. v. United States*, 31 CIT 212, 213–15, 477 F. Supp. 2d 1298, 1299–1301 (2007), to support its position that an intervenor may not expand the case in which it has intervened. Def.'s Br. 2. In *Vinson* the Supreme Court held that an intervenor may not enlarge

the issues pending before a court in the action. *Vinson*, 321 U.S. at 498. The court agrees with the prior holdings of this Court that have found that "that a grant under 19 U.S.C. § 1516a(c)(2) of an injunction against the liquidation of entries does not violate the principle, expressed by the Supreme Court in [*Vinson*] that an intervenor may not enlarge the already-pending issues or compel an alteration of the nature of the proceeding." *Union Steel*, 33 CIT at 624, 617 F. Supp. 2d at 1382, quoting *NSK Corp.*, 32 CIT at 166, 547 F. Supp. 2d at 1318; *see also Fine Furniture (Shanghai) Limited*, 40 CIT at __, 195 F. Supp. 3d at 1329–30; *Tianjin Wanhua Co. Ltd, v. United States*, 38 CIT at __, 11 F. Supp. 3d at 1285–86; *Union Steel*, 34 CIT at 570–72, 704 F. Supp. 2d at 1350–52.

Upon consideration of Plaintiff-Intervenor Husteel Co., Ltd.'s Partial Consent Motion for Preliminary Injunction and all other papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that Plaintiff-Intervenor's motion is GRANTED; and it is further

ORDERED that Defendant, United States, together with its delegates, officers, agents, and servants, including employees of the U.S. Customs and Border Protection and the U.S. Department of Commerce, is enjoined during the pendency of this litigation, including any appeals and remands, from issuing instructions to liquidate or making or permitting liquidation of any entries of certain oil country tubular goods from the Republic of Korea that:

(i) were produced and/or exported by Husteel Co., Ltd.;

(ii) were the subject of the administrative determination published as *Certain Oil Country Tubular Goods from the Republic of Korea*, 82 Fed. Reg. 18,105 (Dep't Commerce Apr. 17, 2017) (final results of antidumping duty administrative review; 2014–2015); and

(iii) were entered, or withdrawn from warehouse, for consumption on or after July 18, 2014 up to and including August 31, 2015; and

(iv) remain unliquidated as of the date on which this Order is entered; and it is further

ORDERED that the entries subject to this injunction shall be liquidated in accordance with the final court decision in this action, including all appeals and remand proceedings, as provided in 19 U.S.C. § 1516a(e).

Dated: May 15, 2017
New York, New York

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

Slip Op. 17–60

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

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

[Denying Plaintiff's motion for summary judgment and granting Defendant's cross-motion for summary judgment with respect to the classification of certain models of graduated compression hosiery; Granting Plaintiff's motion for summary judgment and denying Defendant's cross-motion for summary judgment with respect to the classification of certain models of graduated compression arm-sleeves and gauntlets.]

Dated: May 17, 2017

John M. Peterson, Russell A. Semmel, and *Elyssa R. Emsellem*, Neville Peterson, LLP, of New York, NY, argued for Plaintiff Sigvaris, Inc.

Alexander J. Vanderweide, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued 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 Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

OPINION

Choe-Groves, Judge:

This case addresses whether various models of graduated compression hosiery, arm-sleeves, and gauntlets (fingerless, glove-like articles worn on the hands) are specially designed for the use or benefit of handicapped persons and are therefore duty-free under the Nairobi Protocol to the Florence Agreement on the Importation of Educational, Scientific, and Cultural Materials ("Nairobi Protocol") and the Harmonized Tariff Schedule of the United States ("HTSUS").[1] Before the court are cross-motions for summary judgment. *See* Pl.'s Mot. Summ. J., Dec. 21, 2015, ECF No. 56; Mem. Sigvaris, Inc., Supp. Pl.'s Mot. Summ. J., Dec. 21, 2015, ECF No. 56–2 ("Pl. Br."); Def.'s Cross-Mot. Summ. J. 1–2, Mar. 10, 2016, ECF No. 61; Def.'s Mem. Supp. Cross-Mot. Summ. J. 20–46, Mar. 10, 2016, ECF No. 61 ("Def. Br.").

Sigvaris, Inc. ("Plaintiff") argues that U.S. Customs and Border Protection ("Customs") improperly denied its protests that challenged the classification of its imported graduated compression merchandise. *See* Pl. Br. 1. Plaintiff contends that all of its compression products are entitled to duty free treatment because the products are classifiable under the Nairobi Protocol and HTSUS subheading 9817.00.96, which covers "[a]rticles specially designed or adapted for the use or benefit of the blind or other physically or mentally handi-

[1] All citations to the HTSUS are to the 2008–2010 versions based on the dates of the entries at issue. The relevant provisions and accompanying notes from these versions are identical.

capped persons."[2] *See* Pl. Br. 3–21. The United States ("Defendant" or "Government") maintains that Customs properly classified the imported graduated compression merchandise as not specially designed for handicapped persons. *See* Def. Br. 5–21.

For the reasons discussed below, the court (1) denies Plaintiff's motion for summary judgment and grants Defendant's cross-motion for summary judgment with respect to the classification of the models of hosiery at issue, which were properly classified by Customs under HTSUS subheading 6115.10.40 as "[o]ther graduated compression hosiery: . . . [o]f synthetic fibers"; and (2) grants Plaintiff's motion for summary judgment and denies Defendant's cross-motion for summary judgment with respect to the classification of the models of arm-sleeves and gauntlets at issue, which are classifiable under the Nairobi Protocol and HTSUS subheading 9817.00.96 as articles specially designed for the use or benefit of physically handicapped persons.

UNDISPUTED FACTS

As required by USCIT Rule 56.3, Plaintiff and Defendant submitted separate statements of material facts and responses thereto. *See* Statement of Material Facts as to Which no Genuine Issue Exists, 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, Mar. 10, 2016, ECF No. 61 ("Def. Facts Resp."); Def.'s Statement of Undisputed Material Facts, Mar. 10, 2016, ECF No. 61 ("Def. Facts"); Pl.'s Resp. Def.'s Statement of Undisputed Material Facts, June 1, 2016, ECF No. 66–1 ("Pl. Facts Resp."). The following facts are not in dispute.

A. Jurisdictional and Procedural Facts

Plaintiff imported 105 entries of graduated compression merchandise into the United States at the Port of Atlanta in Georgia between September 2008 and November 2010. *See* Pl. Facts ¶¶ 1–2; Def. Facts Resp. ¶¶ 1–2. The entries were liquidated by Customs between August 2009 and September 2011. *See* Pl. Facts ¶ 3; Def. Facts Resp. ¶ 3. Customs classified the graduated compression merchandise under various provisions of the HTSUS as follows: (1) the hosiery at a duty

[2] On February 28, 2017, the court issued an opinion *sua sponte* dismissing classification claims brought by Plaintiff regarding certain models of graduated compression products. *See Sigvaris, Inc. v. United States*, 41 CIT __, 211 F. Supp. 3d 1353, 1358–64 (2017). The court now issues this opinion to address the merits of the Parties' cross-motions for summary judgment and to rule on the classification claims concerning the imported merchandise, excluding the claims dismissed in the court's previous opinion.

rate of 14.6% *ad valorem* under HTSUS subheading 6115.10.40 as "Other graduated compression hosiery: . . . Of synthetic fibers" or duty free under HTSUS subheading 6115.10.05 as "Graduated compression hosiery (for example, stockings for varicose veins): Surgical panty home [sic] and surgical stockings with graduated compression for orthopedic treatment"; (2) the arm-sleeves under HTSUS subheading 6307.90.98 as "Other made up articles, including dress patterns: . . . Other: . . . Other" dutiable at 7% *ad valorem* ; and (3) the gauntlets under HTSUS subheading 6116.93.88 as "Gloves, mittens and mitts, knitted or crocheted: . . . Other: . . . Of synthetic fibers: . . . Other: Without fourchettes" dutiable at 18.6% *ad valorem. See* Pl. Facts ¶ 3; Def. Facts Resp. ¶ 3; *see also* Summons, Dec. 22, 2011, ECF No. 1.

Plaintiff filed timely protests contesting the classification of several models of compression products and seeking duty free treatment of its merchandise. *See* Protest Nos. 1704–10–100013, -10–100018, -10–100068, -10–100240, -10–100258, -11–100057, -11–100189, -11–100352, -11–100414. All nine of Plaintiff's protests were deemed denied by Customs on December 12, 2011.[3] *See* Summons; Compl. ¶ 4, Mar. 30, 2012, ECF No. 6. Plaintiff paid liquidated duties according to Customs' classification of the merchandise. *See* Pl. Facts ¶ 4; Def. Facts Resp. ¶ 4. Thereafter, Plaintiff commenced this action. *See* Summons.

B. Facts Regarding the Imported Compression Products

The imported merchandise consists of various models of graduated compression products, each differing in style, material, length, and compression level. *See* Def. Facts ¶¶ 1–8; Pl. Facts Resp. ¶¶ 1–8. Each model is designed to apply a fixed range of graduated compression measured in millimeters of mercury ("mmHg"). *See* Def. Facts ¶ 3–4; Pl. Facts Resp. ¶ 3–4. Graduated compression applies maximum pressure at the furthest point in the extremity and decreases gradually up the limb. *See* Pl. Facts ¶ 6; Def. Facts Resp. ¶ 6; Def. Facts ¶¶ 3–4; Pl. Facts Resp. ¶¶ 3–4. The compression products "are made on special circular knitting machines that use elasticized material to impart compression characteristics . . . [,] to ensure the product is made for the proper measurements and to exert the correct pressure." Pl. Facts ¶ 7; Def. Facts Resp. ¶ 7.

[3] The time in which Customs was given by statute to either allow or deny Plaintiff's protests elapsed, and, as a result, the protests were deemed denied by Customs on December 12, 2011. *See* 19 U.S.C. § 1515(b) (2006) ("For purposes of section 1581 of Title 28, a protest which has not been allowed or denied in whole or in part within thirty days following the date of mailing by certified or registered mail of a request for accelerated disposition shall be deemed denied on the thirtieth day following mailing of such request."); *see also* 19 C.F.R. § 174.22 (2011).

The imported graduated compression hosiery consists of products from three product lines – the 120 Support Therapy Sheer Fashion Series for women ("Series 120"), the 145 Support Therapy Classic Dress Series for women ("Series 145"), and the 185 Support Therapy Classic Dress Series for men ("Series 185"). *See* Def. Facts ¶ 2; Pl. Facts Resp. ¶ 2; Pl. Facts ¶ 5; Def. Facts Resp. ¶ 5. Series 120 hosiery is available in a variety of models, including 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; Pl. Facts Resp. ¶ 5. Series 120 models are "made of a combination of nylon and spandex, and in some products, also silicone." Def. Facts ¶ 6; Pl. Facts Resp. ¶ 6. Series 145 and Series 185 models of compression hosiery "are calf-length graduated support dress socks made of a combination of nylon and spandex." Def. Facts ¶ 7; Pl. Facts Resp. ¶ 7. All of the hosiery models at issue from these product lines exert 15–20 mmHg of compression. *See* Def. Facts ¶¶ 6–7; Pl. Facts Resp. ¶¶ 6–7; *see also* Pl. Exs. Rule 56.3 Statement of Facts and Mem. Ex. A at 000029–30, 000035, Dec. 21, 2015, ECF No. 56–4 ("Ex. A"). The compression applied by the hosiery is greatest at the ankle and gradually decreases as the stocking moves up the leg.[4] *See* Pl. Facts ¶ 6; Def. Facts Resp. ¶ 6; Def. Facts ¶ 3; Pl. Facts Resp. ¶ 3.

The imported graduated compression arm-sleeves and gauntlets are part of the 500 Medical Therapy Natural Rubber Series ("Series 500"). *See* Def. Facts ¶ 8; Pl. Facts Resp. ¶ 8. Series 500 arm-sleeves and gauntlets are available in the following models: 503A (arm-sleeve without gauntlet), 503B (arm-sleeve with gauntlet), and 503Gs2 and 503GM2 (separate gauntlets). *See* Def. Facts ¶ 8; Pl. Facts Resp. ¶ 8. These arm-sleeves and gauntlets "are made of a combination of nylon and natural latex rubber." Def. Facts ¶ 8; Pl. Facts Resp. ¶ 8. The arm-sleeves and gauntlets apply 30–40 mmHg of compression, which is greatest at the wrist and, in the case of the arm-sleeves, decreases gradually as the sleeve moves up the arm. *See* Pl. Facts ¶¶ 1, 6; Def. Facts Resp. ¶¶ 1, 6; Def. Facts ¶ 8; Pl. Facts Resp. ¶ 8.

C. Facts Regarding Chronic Venous Disease, Chronic Venous Insufficiency, and Lymphedema

Chronic venous disease ("CVD") "is a mechanical problem of the lower limbs in which the walls of veins and valves are, to relative degrees of severity, damaged, obstructed, [or] leaking." Def. Facts ¶ 9; Pl. Facts Resp. ¶ 9. The severity of CVD is graded according to the

[4] For example, full-length graduated compression hosiery would have "100% compression at the ankle, 50–80% compression at the calf, and 20–40% compression at the thigh." Def. Facts ¶ 3; Pl. Facts Resp. ¶ 3.

Clinical, Etiology, Anatomy, Pathophysiology ("CEAP") scale where no clinical signs of CVD are classified under C0, small varicose veins are classified under C1, large varicose veins are classified under C2, edema is classified under C3, skin change with no ulceration is classified under C5, and skin change with an active ulceration is classified under C6. *See* Def. Facts ¶ 11; Pl. Facts Resp. ¶ 11. A quarter of adult Americans have varicose veins, many of whom do not suffer from any discomfort or other symptoms of CVD. *See* Def. Facts ¶ 20; Pl. Facts Resp. ¶ 20. "The symptoms of CVD can be managed by graduated compression therapy, or in the case of superficial and varicose veins, treated surgically, but the underlying conditions giving rise to CVD cannot be fixed or cured." Def. Facts ¶ 10; Pl. Facts Resp. ¶ 10. Chronic venous insufficiency ("CVI") "is a subset of CVD of greater severity, which affects people with C3 or C4 to C6 conditions." Def. Facts ¶ 12; Pl. Facts Resp. ¶ 12. CVI is "a condition in which the valves in varicose arteries and veins no longer work properly to assist in pumping blood back to the heart, with the result that gravity directs blood and other fluids downward, causing painful swelling of the extremity." Pl. Facts ¶ 12; Def. Facts Resp. ¶ 12. Severe cases of CVI can interfere with and impair certain life functions, such as walking, standing, and working. *See* Pl. Facts ¶ 20; Def. Facts Resp. ¶ 20.

Lymphedema is "a chronic and incurable condition in which the patient's lymphatic system does not function efficiently to recirculate lymph out of the extremities." Pl. Facts ¶ 14; Def. Facts Resp. ¶ 14. An improperly functioning lymphatic system causes lymphatic fluid and water to pool in the extremities, causing pain, swelling, sluggishness, and skin ulcerations. *See* Pl. Facts ¶¶ 14, 23; Def. Facts Resp. ¶¶ 14, 23; *see also* Def. Facts ¶ 21; Pl. Facts Resp. ¶ 21. Lymphedema can interfere with and impair certain life functions. *See* Pl. Facts ¶ 20; Def. Facts Resp. ¶ 20. Women who have had their lymph nodes damaged or surgically removed during a mastectomy to treat breast cancer suffer from upper-limb lymphedema. *See* Def. Facts ¶ 21; Pl. Facts Resp. ¶ 21; *see also* Pl. Facts ¶ 23; Def. Facts Resp. ¶ 23. Mastectomy patients "with improperly functioning lymphatic systems suffer from extremely swollen limbs due to retained lymphatic fluid." *See* Pl. Facts ¶ 23; Def. Facts Resp. ¶ 23. People who suffer from upper-limb lymphedema may be unable, in some cases, to use the affected arm because of significant swelling. *See* Def. Facts ¶ 23; Pl. Facts Resp. ¶ 23.

If left untreated, CVI and lymphedema may cause lesions, ulcers, bleeding, and infection as the limb swells and the skin stretches to accommodate the swelling. Pl. Facts ¶ 19; Def. Facts Resp. ¶ 19.

D. Facts Regarding the Design and Use of the Imported Compression Products

The use of graduated compression can help manage and alleviate the symptoms of CVD and lymphedema. *See* Pl. Facts ¶¶ 12, 14; Def. Facts Resp. ¶¶ 12, 14. "Graduated compression forces blood and fluids (water, lymph) that have pooled in the extremity due to malfunctioning or damaged venous valves or lymphatic systems to circulate out of the extremity." Pl. Facts ¶ 11; Def. Facts Resp. ¶ 11. "Forcing blood and other fluids upward, out of the extremity, prevents venous reflux or pooling, which causes . . . varicose veins, edema, and skin ulcerations." Pl. Facts ¶ 13; Def. Facts Resp. ¶ 13.

The imported models of graduated compression hosiery impart levels of compression that can alleviate CVD symptoms. *See* Pl. Facts ¶ 21; Def. Facts Resp. ¶ 21. The compression hosiery products can be prescribed by a physician, but generally are neither covered by insurance nor provided to patients in hospitals. *See* Def. Facts ¶ 18; Pl. Facts Resp. ¶ 18. The hosiery can also be purchased over-the-counter without a prescription at durable medical supply companies, pharmacies, and over the internet. *See* Def. Facts ¶ 18; Pl. Facts Resp. ¶ 18. The compression hosiery is designed to be worn every day, except while sleeping. *See* Def. Facts ¶ 13; Pl. Facts Resp. ¶ 13. The compression hosiery does not cure CVD or lymphedema. *See* Pl. Facts ¶ 24; Def. Facts Resp. ¶ 24. The hosiery products "are not designed or intended for use as surgical compression or anti-embolism stockings following an orthopedic procedure."[5] Def. Facts ¶ 25; Pl. Facts Resp. ¶ 25.

The imported models of graduated compression arm-sleeves and gauntlets can alleviate the symptoms of upper-limb lymphedema. *See* Pl. Facts ¶ 21; Def. Facts Resp. ¶ 21. The compression arm-sleeves and gauntlets are "predominantly worn" by women who suffer from upper-limb lymphedema, which has been caused by damaged or surgically-removed lymph nodes during a mastectomy to treat breast cancer. *See* Def. Facts ¶ 21; Pl. Facts Resp. ¶ 21; *see also* Pl. Facts ¶ 23; Def. Facts Resp. ¶ 23. The arm-sleeves reduce swelling in the arm and the gauntlets reduce swelling in the hand. *See* Def. Facts ¶ 21; Pl. Facts Resp. ¶ 21. The arm-sleeves and gauntlets are prescribed as a preventative measure for people who are expected to suffer from upper-limb lymphedema or as treatment for people who already suf-

[5] "Surgical compression stockings, also known as anti-embolism stockings, are prescribed following an orthopedic surgical procedure to reduce swelling and the risk of clots and deep-vein thrombosis. Such stockings are designed to provide compression at the calf, and are worn by post-operative patients who are bed-ridden." Def. Facts ¶ 24; Pl. Facts Resp. ¶ 24.

fer from upper-limb lymphedema. *See* Def. Facts ¶ 22; Pl. Facts Resp. ¶ 22; Pl. Facts ¶¶ 8, 17; Def. Facts Resp. ¶¶ 8, 17. They can also be prescribed for temporary use by patients undergoing surgery for other conditions that cause swelling. *See* Def. Facts ¶ 22; Pl. Facts Resp. ¶ 22.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2006)[6] and 19 U.S.C. § 1515 (2006). The court will grant summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). To raise a genuine issue of material fact, a party cannot rest upon mere allegations or denials and must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing versions of the truth at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986); *Processed Plastics Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006); *Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd.*, 731 F.2d 831, 835–36 (Fed. Cir. 1984).

A two-step process guides the court in determining the correct classification of merchandise. First, the court ascertains the proper meaning of the terms in the tariff provision. *See Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1162 (Fed. Cir. 2017) (citing *Sigma-Tau HealthScience, Inc. v. United States*, 838 F.3d 1272, 1276 (Fed. Cir. 2016)). Second, the court determines whether the merchandise at issue falls within the parameters of the tariff provision. *See id.* The former is a question of law and the latter is a question of fact. *See id.* "[W]hen there is no dispute as to the nature of the merchandise, then the two-step classification analysis 'collapses entirely into a question of law.'" *Link Snacks, Inc. v. United States*, 742 F.3d 962, 965–66 (Fed. Cir. 2014) (quoting *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006)).

The court reviews classification cases *de novo. See* 28 U.S.C. § 2640(a)(1). Customs is afforded a statutory presumption of correctness in classifying merchandise under the HTSUS, *see* 28 U.S.C. § 2639(a)(1), but this presumption does not apply to pure questions of law. *See Universal Elecs. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). The court has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms," *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir.

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

2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)), and therefore must determine "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

DISCUSSION

I. Legal Framework

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation ("GRIs") and, if applicable, the Additional U.S. Rules of Interpretation, which are both applied in numerical order. *BenQ Am. Corp. v. United States* 646 F.3d 1371, 1376 (Fed. Cir. 2011) (citing *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001)). GRI 1 instructs that, "for legal purposes, classification shall be determined according to the terms of the headings and any [relevant] section or chapter notes." GRI 1. "Absent contrary legislative intent, HTSUS terms are to be 'construed [according] to their common and popular meaning.'" *Baxter Healthcare Corp. of P.R. 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)).

In construing the terms of the headings, "[a] court may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citing *Baxter Healthcare Corp. of P.R.*, 182 F.3d at 1337). The court may also consult the Harmonized Commodity Description and Coding System's Explanatory Notes ("Explanatory Notes"), which "provide a commentary on the scope of each heading of the Harmonized System . . . and are generally indicative of proper interpretation of the various provisions." H.R. Rep. No. 100–576, 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582; *see also E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004) (citing *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003)). Tariff terms are defined according to the language of the headings, the relevant section and chapter notes, the Explanatory Notes, available lexicographic sources, and other reliable sources of information.

Plaintiff contends that all of its compression products are classifiable as duty free under the Nairobi Protocol as articles specially designed for the use or benefit of physically handicapped persons. *See* Pl. Br. 3–21. Defendant contends that Customs correctly classified

Plaintiff's compression products as ordinary articles not intended for handicapped persons under HTSUS subheadings 6115.10.40, 6307.90.98, and 6116.93.88. *See* Def. Br. 5–21. The central issue presented by the cross-motions for summary judgment is whether Plaintiff's compression products meet the requirements for duty free treatment under the Nairobi Protocol as implemented by HTSUS subheading 9817.00.96.[7]

II. Analysis of the Terms Under HTSUS 9817.00.96

The court must first ascertain the proper meaning and scope of the terms under HTSUS subheading 9817.00.96 before determining whether Plaintiff's compression products are classified under that provision. *See Schlumberger Tech. Corp.*, 845 F.3d at 1162 (citing *Sigma-Tau HealthScience, Inc.*, 838 F.3d at 1276).

Congress passed the Educational, Scientific, and Cultural Materials Importation Act of 1982[8] and the Omnibus Trade and Competitiveness Act[9] to implement the Nairobi Protocol. This legislation eliminated duties for a variety of merchandise, including products covered by HTSUS subheading 9817.00.96:

9817	Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles:	
	. . .	
9817.00.96	Other	Free

Subheading 9817.00.96, HTSUS. Classification under this provision depends on whether the merchandise is "specially designed or adapted for the use or benefit of the blind or other mentally or physically handicapped persons."

The relevant subchapter note to Chapter 98 provides that the term "'*physically or mentally handicapped persons*' includes any person suffering from a permanent or chronic physical or mental impairment

[7] The tariff provisions in Chapters 1 through 97 of the HTSUS generally reflect the international nomenclature of the Harmonized Commodity Description and Coding System as developed by the World Customs Organization. Chapters 98 and 99 contain classification provisions in addition to the international nomenclature that implement special duty treatment afforded by the U.S. government pursuant to temporary legislation or trade agreements. The tariff provisions in Chapter 98 of the HTSUS are not subject to the rule of specificity as provided in GRI 3(a). *See* U.S. Note 1, Chapter 98 HTSUS. Merchandise must be afforded duty free treatment under the Nairobi Protocol if the requirements of HTSUS subheading 9817.00.96 are met, regardless of whether the merchandise is also classifiable under provisions in other chapters. *See id.*

[8] *See* Pub. L. No. 97–446, 96 Stat. 2329, 2346 (1983).

[9] *See* Pub. L. No. 100–418, 102 Stat. 1107 (1988).

which substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working." U.S. Note 4(a), Subchapter XVII, Chapter 98, HTSUS. This non-exhaustive list of activities indicates that the definition of handicapped persons should be interpreted liberally and encompasses a wide range of conditions, as long as the condition substantially inhibits a person's ability to perform essential daily tasks. Customs has also acknowledged that, "with the inclusion of activities such as breathing, this [definition of handicapped] is intended to cover a broad range of individuals." U.S. Customs Service Implementation of the Duty-Free Provisions of the Nairobi Protocol, Annex E, to the Florence Agreement, T.D. 92–77, 26 Cust. Bull. & Dec. 240, 246 (1992) (interpretive rule) ("Customs Implementation"). Neither the HTSUS nor the subchapter note clarify precisely what is considered a 'substantial limitation.' The inclusion of the word "substantially" denotes that the limitation must be "considerable in amount" or "to a large degree." *See* Webster's Third New International Dictionary 2280 (unabr. 2002).

The subchapter note specifies that the subheading does not cover "(i) articles for acute or transient disability; (ii) spectacles, dentures, and cosmetic articles for individuals not substantially disabled; (iii) therapeutic and diagnostic articles; or (iv) medicine or drugs." U.S. Note 4(b), Subchapter XVII, Chapter 98, HTSUS. Consideration of the definition for handicapped persons together with the exclusions in the subchapter note provides further insight regarding the bounds of what is considered a physical handicap under this subheading. The impairment must be permanent[10] as opposed to transient,[11] and chronic[12] as opposed to acute.[13] The article cannot be designed to impart a cosmetic[14] benefit to those who are not substantially

[10] Permanent is defined as "continuing or enduring (as in the same state, status, place) without fundamental or marked change." *See* Webster's Third New International Dictionary 1683 (unabr. 2002).

[11] Transient is defined as "passing away in time or ceasing to exist" and is synonymous with "impermanent," "short-lived," and "ephemeral." *See* Webster's Third New International Dictionary 2428 (unabr. 2002).

[12] Chronic is defined as "suffering from a disease or ailment of long duration or frequent recurrence" or "marked by long duration, by frequent recurrence over a long time, and often by slowly progressing seriousness." *See* Webster's Third New International Dictionary 402 (unabr. 2002).

[13] Acute is defined as "having a sudden onset, sharp rise, and short course." *See* Webster's Third New International Dictionary 23 (unabr. 2002).

[14] Cosmetic is defined as "relating to or making for beauty" and is synonymous with "beautifying." *See* Webster's Third New International Dictionary 514 (unabr. 2002).

disabled. The subheading does not cover therapeutic articles,[15] which have been defined as "having healing or curative powers." *See Richards Med. Co. v. United States*, 13 CIT 519, 520–21, 720 F. Supp. 998, 1000 (1989), *aff'd*, 910 F.2d 828, 830–31 (Fed. Cir. 1990).[16] Nor does the provision cover diagnostic articles,[17] which have been defined as articles that "assist a health professional to detect the signs and symptoms of a condition or disease." *Trumpf Med. Sys., Inc. v. United States*, 34 CIT 1404, 1417, 753 F. Supp. 2d 1297, 1308 (2010) (internal quotations omitted).

The HTSUS does not offer any guidance for determining whether an article is "specially designed" for handicapped persons. In the absence of a clear definition under the HTSUS, the court may consult dictionaries, scientific authorities, and other reliable information sources. *See Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 644 (Fed. Cir. 2013) (citing *Mead Corp. v. United States*, 283 F.3d 1342, 1346 (Fed. Cir. 2002)). The term "specially" is synonymous with "particularly," which is defined as "to an extent greater than in other cases or towards others." Webster's Third New International Dictionary 1647, 2186 (unabr. 2002). The dictionary definition for "designed" is something that is "done, performed, or made with purpose and intent often despite an appearance of being accidental, spontaneous, or natural." Webster's Third New International Dictionary 612 (unabr. 2002). According to these definitions, articles specially designed for handicapped persons must be made with the specific purpose and intent to be used by or benefit handicapped persons rather than the general public. *Cf. Marubeni Am. Corp.*, 35 F.3d at 534 (construing a provision with similar language that covered "motor vehicles principally designed for the transport of persons").

Additionally, it is helpful to note that Customs has considered a number of factors to determine whether a particular product is "specially designed or adapted" for handicapped persons, including the physical properties of the merchandise, whether the merchandise is solely used by the handicapped, the specific design of the merchandise, the likelihood the merchandise is useful to the general public,

[15] Therapeutic is defined as "of or relating to the treatment of disease or disorders by remedial agents or methods." *See* Webster's Third New International Dictionary 2372 (unabr. 2002).

[16] The court recognizes that *Richards Med. Co.* was decided under the Tariff Schedules of the United States, the predecessor to the HTSUS, but does not view this as a reason to depart from the definition of the term "therapeutic" used in that case.

[17] Diagnostic is defined as "serving to distinguish, identify, or determine [a] characteristic of or . . . the presence of a particular disease." *See* Webster's Third New International Dictionary 622 (unabr. 2002).

and whether the merchandise is sold in specialty stores. *See* Customs Implementation at 242–45. Customs has weighed these factors on a case-by-case basis to determine whether merchandise is specially designed for the handicapped. *See id.* at 245. The Parties rely on a number of these factors in arguing whether Plaintiff's compression products are "specially designed or adapted" for handicapped persons. The court also considers these factors useful in analyzing whether Plaintiff's compression products meet the requirements of the Nairobi Protocol and HTSUS subheading 9817.00.96.

III. Classification of Plaintiff's Graduated Compression Products

After the court ascertains the proper meaning of the terms in the tariff provision, the court must determine next whether Plaintiff's compression products fall within the parameters of the tariff provision. *See Schlumberger Tech. Corp.*, 845 F.3d at 1162 (citing *Sigma-Tau HealthScience, Inc.*, 838 F.3d at 1276). To prevail on its classification claims, Plaintiff must show that there is no genuine issue of material fact that its compression products are specially designed for the use of persons who have a physical handicap as defined by the Nairobi Protocol and implemented under HTSUS 9817.00.96.

A. Graduated Compression Hosiery (Series 120, 145, 185)

i. Nairobi Protocol and HTSUS 9817.00.96

Plaintiff contends that its graduated compression hosiery models are duty free under the Nairobi Protocol because they are specially designed for the use of individuals who suffer from the condition of CVD. *See* Pl. Br. 5–21.

As a matter of law, the court must determine first whether CVD constitutes a physical handicap under the tariff provision. A physical handicap is a permanent physical impairment that substantially limits one or more major life activities such as walking or working. *See* U.S. Note 4(a), Subchapter XVII, Chapter 98, HTSUS. The court notes that the parties are in agreement that CVD is a mechanical problem of the lower limbs that results in a deficiency in the flow of blood due to weak, damaged, or otherwise compromised veins. *See* Def. Facts ¶ 9; Pl. Facts Resp. ¶ 9. It is undisputed that the condition is incurable and worsens over time, especially when left untreated. *See* Def. Facts ¶ 10; Pl. Facts Resp. ¶ 10. The CEAP scale is used to categorize the symptoms and the severity of CVD and its progressive

stages. *See* Def. Facts ¶ 11; Pl. Facts Resp. ¶ 11. The symptoms experienced by people suffering from the early stages of CVD (CEAP grades C0–C2) include varicose veins as well as tired, heavy, and achy legs. *See* Def. Facts ¶¶ 11, 14–15; Pl. Facts ¶¶ 11, 14–15. A quarter of American adults have varicose veins, and many of those individuals do not suffer any discomfort or symptoms of CVD. *See* Def. Facts ¶ 20; Pl. Facts Resp. ¶ 20. People who suffer from symptoms associated with the more severe cases of CVD (CEAP grades C3–C6) (referred to as CVI) also experience swelling, skin damage, open wounds, or ulcers. *See* Def. Facts ¶ 12; Pl. Facts Resp. ¶ 12. The symptoms experienced in the early stages of CVD do not render a person physically handicapped within the meaning of HTSUS subheading 9817.00.96.

Although Plaintiff argues that even the early stages of CVD significantly limit a person's ability to walk, stand, or work, *see* Pl. Br. 5–10, Plaintiff's own expert provided contrary deposition testimony establishing that people who suffer from early stages of CVD symptoms under CEAP grades C0–C2 are ambulatory and are generally able to perform daily tasks without substantial limitation. *See* Def. Ex. E at 55, 73–74, Mar. 10, 2016, ECF No. 61–5 ("Dr. Labropoulos Dep."). These CVD patients may have varicose veins or tired, achy legs with some discomfort, but they are not prevented or considerably limited from walking, standing, or working. In a motion for summary judgment, "a party cannot rest upon mere allegations or denials and must point to sufficient supporting evidence." *See Anderson*, 477 U.S. at 248–49.

The court considered numerous sources in ascertaining the proper meaning of the terms in the tariff provision, including the tariff heading, subchapter notes, dictionary definitions, the Parties' submissions, documents and deposition transcripts in the record, and relevant case law. In the court's view, individuals suffering from early stages of CVD are not substantially limited in their ability to perform major life activities and are not considered physically handicapped under the tariff provision.[18]

The court must determine next whether Plaintiff's compression hosiery is specially designed for the use of physically handicapped persons. The court considered a number of factors in making this determination, including the physical properties of the merchandise, whether the merchandise is solely used by the handicapped, the

[18] The court does not need to determine whether the more severe symptoms of CVD (*i.e.*, CVI) are a physical handicap because, as explained later in the opinion, the undisputed facts and evidence before the court establish that the subject hosiery is specially designed to alleviate the symptoms of CVD in its early stages and to slow the progression of the condition.

likelihood the merchandise is useful to the general public, whether the merchandise is sold in specialty stores, and the specific design of the merchandise. The products are made of synthetic fibers and appear to be ordinary hosiery and socks. *See* Def. Facts ¶ 6–7; Pl. Facts Resp. ¶ 6–7; *see also* Ex. A at 000029–30, 000035. Plaintiff agrees that the hosiery is used by patients who suffer from CVD symptoms under CEAP grades C0–C2, indicating that the hosiery is useful to the general public and is not used solely by the physically handicapped. *See* Def. Facts ¶ 15; Pl. Facts Resp. ¶ 15. The models of compression hosiery are sold in medical supply stores and at pharmacies, but are also sold over-the-counter or over the internet with no prescription required and are generally not covered by insurance. *See* Def. Facts ¶ 18; Pl. Facts Resp. ¶ 18. The hosiery is not sold under Plaintiff's "Medical" line of compression products. *See* Def. Facts ¶¶ 2, 8, 19; Pl. Facts Resp. ¶¶ 2, 8, 19. All of the hosiery models are designed to apply 15–20 mmHg of compression to force blood out of the extremity and attempt to restore normal venous activity. *See* Pl. Facts ¶¶ 11, 13; Def. Facts Resp. ¶¶ 11, 13. The 15–20 mmHg of compression applied by the hosiery is lower than the 30–40 mmHg or higher compression levels of Plaintiff's "Medical" line products, and 15–20 mmHg is the lowest level of compression products sold by Plaintiff. *See* Def. Facts ¶¶ 6–8; Pl. Facts Resp. ¶¶ 6–8; *see also* Ex. A at 000025, 000029–30, 000035, 000268. The undisputed facts establish that Plaintiff's compression hosiery is not specially designed for the handicapped.

Despite Plaintiff's contentions that its compression hosiery products are intended to alleviate the symptoms for CVI under CEAP grades C3–C6, *see* Pl. Br. 19–21, Plaintiff's own advertising materials confirm that compression garments that exert compression of 15–20 mmHg are for (1) heavy, fatigued, tired legs; (2) prophylaxis during pregnancy; (3) prophylaxis for legs predisposed to risk; and (4) long hours of standing or sitting. *See* Ex. A. at 000268. Plaintiff's advertising materials also state that graduated compression therapy is not recommended or suitable for bedridden or non-ambulatory patients. *See id.* at 000269. This information indicates that the hosiery is recommended for patients suffering from early stages of CVD, not for patients who are bedridden or immobilized. Plaintiff's medical expert noted that the level of 15–20 mmHg of compression is only slightly greater than ordinary socks, which can apply about 5 mmHg of compression. *See* Dr. Labropoulos Dep. at 104. Plaintiff's experts indicated that the target consumers for hosiery with 15–20 mmHg of compression are "people who have a profession or live a lifestyle that

results in tired, achy, heavy feeling in their legs" and "people who are sitting for prolonged periods of time," such as people who take long flights in an airplane or drive long distances. *See* Def. Ex. C at 13, 18–19, Mar. 10, 2016, ECF No. 61–3 ("Brannan Dep."); *see also* Def. Ex. D at 21, Mar. 10, 2016, ECF No. 61–4. Mere allegations are insufficient to raise a genuine issue of a material fact on summary judgment, and Plaintiff's own evidence supports the conclusion that its compression hosiery products are not specially designed for handicapped persons.

Plaintiff attempts to argue that a patient might use 15–20 mmHg compression hosiery to alleviate severe symptoms of CVI in certain instances when the person cannot tolerate higher levels of compression or has too much difficulty putting on hosiery with greater compression. *See* Pl. Br. 20–21 (citing Joint Expert Report Ex. 1 at 163; Brannan Dep. 29, 31–33, 60; Dr. Labropoulos Dep. 16, 24–25, 106–07). Plaintiff's argument is without merit. The court's inquiry must focus on whether the product at issue is specially designed for handicapped persons according to the statutory meaning, not whether there is incidental use of the product that could assist handicapped persons in limited circumstances.

The court holds that Plaintiff's 15–20 mmHg compression hosiery products are specially designed to address symptoms of early stages of CVD, which does not fall within the parameters of the tariff provision because individuals suffering from early stages of CVD are not physically handicapped. The models of compression hosiery at issue in this case are not classifiable under HTSUS subheading 9817.00.96 and are not entitled to duty free treatment. Therefore, the court denies Plaintiff's motion for summary judgment seeking classification of its compression hosiery under HTSUS subheading 9817.00.96.

ii. HTSUS 6115.10.40

Defendant argues in its cross-motion for summary judgment that the models of compression hosiery are classifiable under HTSUS subheading 6115.10.40, which covers the following merchandise:

6115	Panty hose, tights, stockings, socks and other hosiery, including graduated compression hosiery (for example, stockings for varicose veins) and footwear without applied soles, knitted or crocheted:
6115.10	Graduated compression hosiery (for example, stockings for varicose veins):
	. . .
	Other graduated compression hosiery
	. . .

6115.10.40 Of synthetic fibers (632) 14.6%

Subheading 6115.10.40, HTSUS. The court agrees that the hosiery is properly classified under this provision.

The Explanatory Note to HTSUS subheading 6115.10 defines "graduated compression hosiery" as "hosiery in which the compression is greatest at the ankle and reduces gradually along its length up the leg, so that blood flow is encouraged." Explanatory Note to Subheading 6115.10, HTSUS. There is no dispute as to whether the hosiery imparts 15–20 mmHg of graduated compression. *See* Pl. Facts ¶ 6; Def. Facts Resp. ¶ 6; Def. Facts ¶¶ 3–4; Pl. Facts Resp. ¶¶ 3–4. Nor is there any dispute that the hosiery is knitted. *See* Pl. Facts ¶ 7; Def. Facts Resp. ¶ 7. The hosiery is made of nylon, spandex, or silicone, which are synthetic fibers. *See* Def. Facts ¶¶ 6–7; Pl. Facts Resp. ¶¶ 6–7. The court holds that the graduated compression hosiery are classifiable under HTSUS subheading 6115.10.40.[19] The court grants Defendant's cross-motion for summary judgment, therefore, seeking classification of the compression hosiery under HTSUS subheading 6115.10.40.

B. Graduated Compression Arm-Sleeves and Gauntlets (Series 500)

i. Nairobi Protocol and HTSUS 9817.00.96

Plaintiff contends that its Series 500 graduated compression arm-sleeves and gauntlets are duty free under the Nairobi Protocol because the products are specially designed for the use of individuals who suffer from upper-limb lymphedema. *See* Pl. Br. 5–21.

The court must determine first whether upper-limb lymphedema constitutes a physical handicap under HTSUS subheading 9817.00.96. A physical handicap is a permanent or chronic physical impairment that substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, or working.

[19] Customs classified a number of Plaintiff's compression hosiery products as entered under HTSUS subheading 6115.10.05, a duty free provision. *See* Pl. Facts ¶ 3; Def. Facts Resp. ¶ 3; *see also* Summons. Neither Plaintiff nor Defendant contend that the hosiery products are classifiable under this tariff provision, but the court must determine "whether the government's classification [was] correct." *Jarvis Clark Co.*, 733 F.2d at 878. HTSUS subheading 6115.10.05 covers "[s]urgical panty home [sic] and surgical stockings with graduated compression for orthopedic treatment." The court notes that the government's classification of Plaintiff's hosiery products under HTSUS subheading 6115.10.05 was incorrect because the products are not designed or intended for use as surgical compression stockings for orthopedic treatment. *See* Def. Facts ¶¶ 24–25; Pl. Facts Resp. ¶¶ 24–25.

See U.S. Note 4(a), Subchapter XVII, Chapter 98, HTSUS. The Parties agree that lymphedema is "a chronic and incurable condition in which the patient's lymphatic system does not function efficiently to recirculate lymph out of the extremities." Pl. Facts ¶ 14; Def. Facts Resp. ¶ 14. An improperly functioning lymphatic system causes lymphatic fluid and water to pool in the extremities, causing pain, swelling, sluggishness, and skin ulcerations. *See* Pl. Facts ¶¶ 14, 23; Def. Facts Resp. ¶¶ 14, 23; *see also* Def. Facts ¶ 21; Pl. Facts Resp. ¶ 21. Those with "improperly functioning lymphatic systems suffer from extremely swollen limbs due to retained lymphatic fluid." *See* Pl. Facts ¶ 23; Def. Facts Resp. ¶ 23. Lymphedema can interfere with and impair certain life functions. *See* Pl. Facts ¶ 20; Def. Facts Resp. ¶ 20. Women who have had their lymph nodes damaged or surgically removed during a mastectomy to treat breast cancer suffer from upper-limb lymphedema. *See* Def. Facts ¶ 21; Pl. Facts Resp. ¶ 21; *see also* Pl. Facts ¶ 23; Def. Facts Resp. ¶ 23. In some cases, people who suffer from upper-limb lymphedema may be unable to use the affected arm because of significant swelling. *See* Def. Facts ¶ 23; Pl. Facts Resp. ¶ 23. According to the undisputed facts, the symptoms of upper-limb lymphedema can render a person physically handicapped within the meaning of HTSUS subheading 9817.00.96.

The court does not give credible weight to the Government's assertion that a person with one arm is able to perform life's major activities without substantial limitation. *See* Def. Br. 20–21. Nor does the court agree with the Government's position that upper-limb lymphedema is not a physical handicap because only patients with severe cases of lymphedema are unable to use the affected arm. *See id.* at 20. For purposes of tariff classification under the Nairobi Protocol, it is sufficient that the condition of lymphedema physically impairs some persons to such a degree that their ability to care for themselves or perform manual tasks is substantially limited.

The court considered numerous sources in ascertaining the proper meaning of the terms in the tariff provision, including the tariff heading, subchapter notes, dictionary definitions, the Parties' submissions, documents in the record, and relevant case law. The court concludes that upper-limb lymphedema resulting from a mastectomy may render the affected arm unusable because of significant swelling and substantially limits a person's ability to care for one's self. The court holds, therefore, that upper-limb lymphedema is a physical handicap within the meaning of HTSUS subheading 9817.00.96.

The court must determine next whether Plaintiff's compression arm-sleeves and gauntlets are specially designed for the use of physically handicapped persons. To make this determination, the court

considered the physical properties of the merchandise, whether it is solely used by the handicapped, the likelihood the product is useful to the general public, whether it is sold in specialty stores, and the specific design. The undisputed facts establish that the Series 500 arm-sleeves and gauntlets are specially designed for handicapped persons within the meaning of the tariff statute. Unlike the hosiery products discussed above, the graduated compression arm-sleeves and gauntlets do not resemble any garments that are ordinarily worn by the general public. "Graduated compression forces blood and fluids (water, lymph) that have pooled in the extremity due to malfunctioning or damaged venous valves or lymphatic systems to circulate out of the extremity." Pl. Facts ¶ 11; Def. Facts Resp. ¶ 11. "Forcing blood and other fluids upward, out of the extremity, prevents venous reflux or pooling, which causes . . . varicose veins, edema, and skin ulcerations." Pl. Facts ¶ 13; Def. Facts Resp. ¶ 13. The arm-sleeves and gauntlets are designed to apply 30–40 mmHg of graduated compression to reduce swelling and force pooled lymph fluid to circulate out of the extremity. *See* Def. Facts ¶ 21; Pl. Facts Resp. ¶ 21; Pl. Facts ¶ 11; Def. Facts Resp. ¶ 11. The compression arm-sleeves and gauntlets are "predominantly worn" by women who suffer from upper-limb lymphedema, which has been caused by damaged or surgically removed lymph nodes during a mastectomy to treat breast cancer. *See* Def. Facts ¶ 21; Pl. Facts Resp. ¶ 21; Pl. Facts ¶ 23; Def. Facts Resp. ¶ 23; *see also* Brannan Dep. at 10, 51; Ex. A at 000025, 000268. Mastectomy patients "with improperly functioning lymphatic systems suffer from extremely swollen limbs due to retained lymphatic fluid." Pl. Facts ¶ 23; Def. Facts Resp. ¶ 23. The arm-sleeves reduce swelling in the arm and the gauntlets reduce swelling in the hand. Def. Facts ¶ 21; Pl. Facts Resp. ¶ 21. The arm-sleeves and gauntlets are prescribed as a preventative measure for people who are expected to suffer from upper-limb lymphedema or as treatment for people who already suffer from upper-limb lymphedema. *See* Def. Facts ¶ 22; Pl. Facts Resp. ¶ 22; Pl. Facts ¶¶ 8, 17; Def. Facts Resp. ¶¶ 8, 17. The Parties agree that the graduated compression arm-sleeves and gauntlets can alleviate the symptoms of upper-limb lymphedema. Def. Facts Resp. ¶ 21; Pl. Facts ¶ 21.

The Government argues that the graduated compression arm-sleeves and gauntlets do not qualify for duty free treatment under the Nairobi Protocol because these are articles for a transient disability, which are expressly excluded from classification under the provision. *See* Def. Br. 17–21. The Government contends that the arm-sleeves and gauntlets are transient articles when they are prescribed for people who suffer from intermittent conditions or by patients after

undergoing surgery. *See id.* at 21. The Parties agree, however, that the arm-sleeves and gauntlets are predominantly worn by women who have had their lymph nodes damaged or removed following a mastectomy to treat breast cancer, which results in lymphedema. *See* Def. Facts ¶ 21; Pl. Facts Resp. ¶ 21. Despite any incidental use by patients with transient disabilities, the arm-sleeves and gauntlets are primarily marketed and used for long-term management of lymphedema, not short-term post-surgical use. The undisputed evidence demonstrates that Plaintiff's compression arm-sleeves and gauntlets are prescribed by doctors, and are specifically designed and marketed for individuals who are physically handicapped by upper-limb lymphedema resulting from a mastectomy.

For these reasons, the court concludes that Plaintiff's compression arm-sleeves and gauntlets are specially designed for the use of women who are rendered physically handicapped due to upper-limb lymphedema following a mastectomy. The court holds that Plaintiff's Series 500 graduated compression arm-sleeves and gauntlets are classifiable under HTSUS subheading 9817.00.96 and are duty free as articles specially designed for handicapped persons. Accordingly, the court grants Plaintiff's motion for summary judgment seeking classification of its compression arm-sleeves and gauntlets under HTSUS subheading 9817.00.96.

ii. HTSUS 6307.90.98 and 6116.93.88

Defendant argues that the graduated compression arm-sleeves and gauntlets are classifiable under HTSUS 6307.90.98 and 6116.93.88, respectively. *See* Def. Br. 9–10. As explained above, Plaintiff's imported Series 500 models of graduated compression arm-sleeves and gauntlets are classifiable under HTSUS subheading 9817.00.96 as articles specially designed for the use of physically handicapped persons and are entitled to duty free treatment. Thus, the court denies Defendant's cross-motion for summary judgment seeking classification of the graduated compression arm-sleeves and gauntlets under HTSUS 6307.90.98 and 6116.93.88.

CONCLUSION

For the foregoing reasons, the court concludes that: (1) Series 120, 145, and 185 models of graduated compression hosiery were properly classified under HTSUS subheading 6115.10.40 dutiable at 14.6% *ad valorem*; and (2) Series 500 graduated compression arm-sleeves and gauntlets are classifiable under HTSUS subheading 9817.00.96 and entitled to duty free treatment.

Judgment will be entered accordingly.

Dated: May 17, 2017
New York, New York

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