U.S. Court of International Trade

Slip Op. 20–40

THE HOME DEPOT U.S.A., INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy M. Reif, Judge
Court No. 14–00061
PUBLIC VERSION

Granting Plaintiff's Rule 56 cross-motion for summary judgment and denying Defendant's Rule 56 cross-motion for summary judgment.

Dated: March 26, 2020

Wm. Randolph Rucker, Drinker Biddle & Reath LLP for Plaintiff The Home Depot U.S.A., Inc.

Edward F. Kenny, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, *Aimee Lee*, Assistant Director, and *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General and *Jeanne Davidson*, Director, Commercial Litigation Branch and Offices of Foreign Litigation and International Legal Assistance.

OPINION

This case is before this court pursuant to a remand ordered by the U.S. Court of Appeals for the Federal Circuit ("CAFC") to determine the proper classification of the imported merchandise. *Home Depot U.S.A., Inc. v. United States*, 915 F.3d 1374 (Fed. Cir. 2019). The dispute concerns the tariff classification of door entry devices imported by Plaintiff Home Depot U.S.A., Inc. ("Plaintiff"). Plaintiff challenges the classification by United States Customs and Border Protection ("Defendant" or "Customs") of the subject merchandise under subheading 8301.40.60 of the Harmonized Tariff Schedule of the United States ("HTSUS"), which covers door locks, specifically key-operated locks, and carries a 5.7 percent *ad valorem* duty. Plaintiff argues that the subject merchandise is properly classified under subheading 8302.41.60 of the HTSUS, which covers door mountings, including door knobs, and carries a 3.9 percent *ad valorem* duty. The question presented is whether the subject merchandise is properly classified in Heading 8301 of the HTSUS as locks or in Heading 8302 as knobs.

The parties filed cross-motions for summary judgment addressing the proper classification of the imported merchandise. *See* Pl.'s Mem. of Law in Supp. Of Pl.'s Mot. for Summ. J., ECF No. 79 ("Pl. Br."); Mem. in Opp. to Pl.'s Mot. For Summ. J. and in Supp. of Def. Cross-

Mot. for Summ. J., ECF No. 84 ("Def. Br."). This court has jurisdiction over this action under 28 U.S.C. § 1581(a).

For the reasons set forth below, the court determines that the subject merchandise is properly classified in Heading 8302.

BACKGROUND

Lewis Carroll's *Alice's Adventures in Wonderland and Through the Looking Glass* opens with Alice falling "down, down, down" a rabbit hole in pursuit of a White Rabbit.[1] Once she lands, "she [finds] herself in a long, low hall.... There were doors all around the hall, but they were all locked."[2]

In Walt Disney's 1951 movie adaptation, *Alice in Wonderland*, Alice enacts the scene through a conversation with a doorknob:

Doorknob: "Ohhhhh!!"

Alice: "OH! Oh, I beg your pardon."

Doorknob: "Oh, oh, it's quite all right. But you did give me quite a turn!"

Alice: "You see, I was following..."

Doorknob: "Rather good, what? Doorknob, turn?"

Alice: "Please, sir."

Doorknob: "Well, one good turn deserves another! What can I do for you?"

Alice: "Well, I'm looking for a white rabbit. So, um, if you don't mind..."

Doorknob: "Uh? Oh!"

Alice: "There he is! I simply must get through!"

Doorknob: "Sorry, you're much too big. Simply impassible."

Alice: "You mean impossible?"

Doorknob: "No, impassible. Nothing's impossible!"[3]

I. Material Facts Not in Dispute

USCIT Rule 56(a) requires that the court grant summary judgment if a moving party can show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Movants should present material facts as short and concise statements, in numbered paragraphs and cite to "particular parts of

[1] Charles Ludwidge Dodgson (aka Lewis Carroll), *Alice's Adventures in Wonderland and Through the Looking Glass*, Barnes and Noble Classics (New York 2004). *Alice's Adventures in Wonderful* was first published in 1865, in Oxford by Clarendon Press with illustrations by John Tenniel. *Through the Looking-Glass and What Alice Found There* was first published in 1871.

[2] *Id*.

[3] *Walt Disney's Alice In Wonderland, The All-Cartoon Wonderfilm* (1951), based on *Alice's Adventures in Wonderland and Through the Looking Glass*, by Lewis Carroll (1865, 1871).

materials in the record" as support. USCIT Rule 56(C)(1)(A). The opponent must, in response, "include correspondingly numbered paragraphs responding to the numbered paragraphs in the statement of the movant." USCIT Rule 56.3(b).

The Parties submitted separate statements of facts simultaneously with their respective summary judgment motions. *See generally* Pl.'s Statement of Material Facts Not in Issue ("Pl. Stmt. Facts"), ECF No. 79; Def.'s Statement of Undisputed Material Facts ("Def. Stmt. Facts"), ECF No. 84–3. The responses to these statements contained mixtures of disputed and undisputed terms, phrases, or sentences within a numbered paragraph. *See generally* Def.'s Resp. to Pl. Stmt. Facts, ECF No. 84–2; Pl.'s Resp. to Def. Stmt. Facts, ECF No. 89–1. The court reviewed each Party's separate submissions of facts to determine the undisputed facts. Upon review of Parties' respective statements of facts and supporting documents, the court finds the following undisputed and material facts regarding the subject merchandise.[4]

a. The Imported Merchandise

During the period July 2012 through December 2012, Plaintiff imported the subject merchandise into the United States through five different ports of entry. Pl. Stmt. Facts ¶ 2; Def.'s Resp. to Pl. Stmt. Facts ¶ 2. The subject articles are keyed entry devices used typically on exterior doors of residential structures but that are also used on interior doors such as basements or important storage spaces. Def. Exhibit ("Ex.") 1, Glass Deposition ("Dep.") at 49.[5] The subject merchandise is comprised of: (1) an exterior knob assembly; (2) an interior knob assembly; (3) a latch assembly; (4) a flanged strike plate; (5) a key cylinder; (6) two keys on a ring; and, (7) mounting hardware. *See* Pl. Stmt. Facts ¶ 27; Def.'s Resp. to Pl. Stmt. Facts ¶ 27. There are no material facts at issue regarding the nature of the subject merchandise. Pl. Br. at 9; Def. Br. at 15. *See also* Def.'s Resp. to Pl. Stmt. Facts. ¶ 27.

The keyed entry devices are available in four different finishes: stainless steel (SKU 154644); polished brass (SKU 154709); antique brass (SKU 154733); and, satin nickel (SKU 881996). Pl. Stmt. Facts

[4] For purposes of this discussion, citations are provided to the relevant paragraph number of the undisputed facts and response, and internal citations generally have been omitted.

[5] The parties dispute the "characterization" of Glass's testimony regarding the uses to which the subject merchandise can be put. Pl.'s Resp. to Def. Stmt. Facts ¶ 35 (arguing that the subject merchandise is sold for exterior and interior use, rather than "predominantly exterior use" as described by Defendant). The court, upon reviewing the supporting documents, has determined that the characterizations are largely similar, and that this dispute is not material. Plaintiff also asserts that this dispute is not material. Pl.'s Resp. to Def. Stmt. Facts ¶ 35.

¶ 3; Def.'s Resp. to Pl. Stmt. Facts ¶ 3. These decorative variations have identical components, operate in the same manner, have equivalent functions, and are made by the same manufacturer. Def. Stmt. Facts ¶ 6; Pl.'s Resp. to Def. Stmt. Facts. ¶ 6.

The exterior and interior knob assemblies of the subject merchandise include the door knobs and escutcheons (protective and decorative trims around the door handles). Pl. Br. at 15; Def. Br. at 8. These knob assemblies provide the grasping ability for opening and closing the door. Pl. Stmt. Facts ¶ 29; Def.'s Resp. to Pl. Stmt Facts ¶ 29. The exterior knob assembly provides a keyhole into which an individual can insert a key to lock and unlock the door. The interior knob incorporates a thumb turn to lock and unlock the door from the inside. Def. Stmt. Facts ¶ 19; Pl.'s Resp. to Def. Stmt. Facts ¶ 19. The key cylinder contains a keyway and a tumbler mechanism. The exterior knob incorporates the key cylinder into its assembly. The keys fit into the cylinder. Pl. Ex. 1, Pl. First Resp. to Def.'s Interrog. ¶ 7. The flanged strike plate is a metal plate attached to the door frame with two screws. Pl. Br. at 16; Def. Br. at 9. The latch assembly contains a beveled latch bolt that projects out of the side of the door into the strike plate when the door is closed. Pl. Stmt. Facts ¶ 30 (citing Pl. Ex. 1, Pl. First Interrog. Resp. ¶ 7); Def.'s Resp. to Pl. Stmt. Facts ¶ 30. The flat end of the beveled latch bolt also contains a deadlocking latch bolt that does not project into the strike plate when the door is closed. Def. Stmt. Facts ¶ 14; Pl.'s Resp. to Def. Stmt. Facts ¶ 14. The use of the knobs while unlocked retracts the latch bolt. Def. Stmt. Facts ¶ 15; Pl.'s Resp. to Def. Stmt. Facts ¶ 15.

Plaintiff is a home improvement retailer that sells a variety of door hardware, including deadbolts, the subject merchandise and three related door devices: viz., "privacy," "passage," and "dummy" devices. Pl. Stmt. Facts ¶¶ 9, 18; Def.'s Resp. to Pl. Stmt. Facts ¶¶ 9, 18. Only the keyed entry device[6] is at issue in this case.

b. Other Similar Devices Sold by Plaintiff

The characteristics of the related door devices, although not at issue in this case, provide helpful comparisons to keyed entry devices.[7] Each of the related door devices contains exterior and interior

[6] The parties dispute whether to refer to the imported merchandise as an "entry door knob" or a "keyed entry device." Def. Resp. to Pl. Stmt. Facts ¶ 3. The parties similarly dispute the proper naming conventions of the related door devices of the subject merchandise. Def. Resp. to Pl. Stmt. Facts ¶ 18. A disagreement as to the name of the imported merchandise does not create an issue of material fact, and the court proceeds by referring to the subject merchandise as a "keyed entry device." The other door devices, in similar fashion, will be referred to as dummy devices, passage devices, and privacy devices.

[7] This court has previously compared the subject merchandise to other products not in dispute in a customs classification case. *See, e.g., Link Snack, Inc. v. United States*, 37 CIT

knob assemblies. Pl. Stmt. Facts ¶ 18; Def.'s Resp. to Pl. Stmt. Facts ¶ 18. A privacy device has a latching mechanism along with a lock mechanism on the interior side. Pl. Stmt. Facts ¶ 18; Def.'s Resp. to Pl. Stmt. Facts ¶ 18; Pl. Ex. 10, Mounted Door Hardware Ex. The interior lock mechanism is typically in the form of a thumb turn where an individual can manually lock and unlock the door by hand. Pl. Ex. 10, Mounted Door Hardware Ex; Transcript of Oral Argument at 20. The exterior knob of a privacy device contains an emergency release that can override the interior lock with a coin or other similarly shaped device. *Id*. Bathroom and bedroom doors typically use a privacy device. Pl. Stmt. Facts ¶ 18; Def.'s Resp. to Pl. Stmt. Facts ¶ 18. A passage device has a latching mechanism, but no locking mechanism. Pl. Stmt. Facts ¶ 18; Def.'s Resp. to Pl. Stmt. Facts ¶ 18. This device may be used for closet, hall, bedroom or basement doors. Pl. Stmt. Facts ¶ 18; Def.'s Resp. to Pl. Stmt. Facts ¶ 18. A dummy device has knob components but no latching or locking mechanism. Closet doors typically incorporate a dummy device. Pl. Stmt. Facts ¶ 18; Def.'s Resp. to Pl. Stmt. Facts ¶ 18.

In Home Depot's internal database, keyed entry, privacy, passage and dummy devices are categorized in the same group. Pl. Stmt. Facts ¶ 19; Def.'s Resp. to Pl. Stmt. Facts ¶ 19. Privacy and passage devices are classified in Heading 8302. *See* Pl. Br. at 13; Def. Br. at 31. Because dummy devices have no latching mechanism, the court will not include them in the comparative analysis.

The court also compares keyed entry devices to deadbolts. The primary function of a deadbolt is to lock and secure a door; however, a deadbolt does not have a handle or knob with which to open and close a door from the outside. Pl. Ex. 10, Mounted Door Hardware Ex.; Pl. Ex. 5, Colvin Exp. Rep. at 3, 9. Defendant asserts that the primary function of the subject merchandise is also to lock and secure a door. Def. Br. at 13, 16–17, 19, 21, 30. Deadbolt locks are classified in Heading 8301, because Heading 8302 excludes key-operated bolts. *See* HTSUS 8302, Explanatory Note (D)(2).

STANDARD OF REVIEW

Customs' protest decisions are reviewed *de novo* by the court. 28 U.S.C. § 2640(a)(1). USCIT Rule 56 permits summary judgment when "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). "[A]ll

___, ___, 901 F.Supp.2d 1369, 1374 (2013), *aff'd* 742 F.3d 962 (Fed. Cir. 2014) (comparing the subject merchandise of cured beef jerky to other meats such as ham, bacon and hot dogs); *Infantino, LLC v. United States,* Slip Op. 14–155, 2014 Ct. Intl. Trade LEXIS 164 (CIT December 24, 2014) (comparing the subject merchandise play mat to other toys).

evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable factual inferences should be drawn in favor of the nonmoving party." *Dairyland Power Coop. v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994) (citations omitted). 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 version of the truth at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). "A genuine factual dispute is one potentially affecting the outcome under the governing law." *Id.* at 248.

Where, as here, cross-motions for summary judgment are before the court, "each party carries the burden on its own motion to show entitlement to judgment as a matter of law after demonstrating the absence of any genuine disputes over material facts." *Am. Fiber & Finishing, Inc. v. United States*, 39 CIT ___, ___, 121 F. Supp. 3d 1273, 1279 (2015) (quoting *Massey v. Del Labs.*, 118 F.3d 1568, 1573 (Fed. Cir. 1997)).

Summary judgment in a classification case is appropriate "when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citing *Nissho Iwai Am. Corp. v. United States*, 143 F.3d 1470, 1472–73 (Fed. Cir. 1998)). The court reviews classification cases on "the basis of the record made before the court." 28 U.S.C. § 2640(a). The court has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms." *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)). Customs is afforded a statutory presumption of correctness in classifying merchandise under the HTSUS. *See* 28 U.S.C. § 2639(a)(1). Plaintiff bears the burden to show that the government's classification is incorrect. *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). If that burden is met, the court then has the responsibility to determine the correct classification. *Id.*

"The ultimate question in a classification case is whether the merchandise is properly classified under one or another classification heading," which is "a question of law." *Bausch & Lomb v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). The determination of whether an imported item has been properly classified involves a two-step analysis. *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994); *see also Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006). First, the court must construe

the proper meaning of specific terms of the tariff provision. *See Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997). Second, the court must determine whether the merchandise at issue comes within the description of such terms as properly construed. *Id.* The first step is a question of law, while the second is one of fact. *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999). When the parties do not dispute any facts regarding the merchandise, then resolution of the classification depends solely on the first step. *Cummins Inc.*, 454 F.3d at 1363.

Every new entry of goods into the United States constitutes a new cause of action because every classification involves both the interpretation of the relevant statute as well as questions of fact regarding the merchandise. *Stare decisis* binds the court to prior legal determinations and bars the relitigation of issues decided in those actions. *United States v. Mercantil Distribuidora, S.A.*, 45 CCPA 20, 23–24 (1957). However, "circumstances justify limiting the finality of the conclusion in customs controversies to the *identical* importation." *United States v. Stone & Downer Co.*, 274 U.S. 225, 236 (1927) (emphasis supplied). Since *stare decisis* "deals only with law," *Mendenhall v. Cedarapids, Inc.*, 5 F.3d 1557, 1570 (Fed. Cir. 1993), judicial precedent holds weight only with respect to the legal construction of specific terms or provisions, not questions of fact. *Id.*

PROCEDURAL HISTORY AND LEGAL FRAMEWORK

Customs classified the products under HTSUS subheading 8301.40.6030. Subheading 8301.40.6030 provides as follows:

8301	Padlocks and locks (key, combination or electrically operated), of base metal; clasps and frames with clasps, incorporating locks, of base metal; keys and parts of any of the foregoing articles, of base metal:
8301.40	Other locks:
8301.40.60	Other:
8301.40.6030	Door locks, locksets and other locks suitable for use with interior or exterior doors (except garage, overhead or sliding doors).

Plaintiff asserts that the products should have been classified under HTSUS subheading 8302.41.6045. Subheading 8302.41.6045 provides as follows:

8302	Base metal mountings, fittings and similar articles suitable for furniture, doors, staircases, windows, blinds, coachwork, saddlery, trunks, chests, caskets or the like; base metal hat racks, hat-pegs, brackets and similar fixtures; castors with mountings of base metal; automatic door closers of base metal; and base metal parts thereof:

	Other mountings, fittings and similar articles, and parts thereof:
8302.41	Suitable for buildings:
	Other:
8302.41.60	Of iron or steel, of aluminum or of zinc:
8302.41.6045	Other

Customs denied the protests, leading Plaintiff to file an action in this court. *See* Complaint, *Home Depot U.S.A., Inc. v. United States,* 41 CIT ___, 269 F. Supp. 3d 1306 (2017). On cross-motions for summary judgment, this court held for Defendant and denied Plaintiff's motion for summary judgment. *Home Depot U.S.A., Inc. v. United States*, 41 CIT ___, 269 F. Supp. 3d 1306 (2017). This court concluded that the subject merchandise was described "in whole" by Heading 8301, and not by Heading 8302. *Id.*

On appeal, the CAFC determined that the subject merchandise is a composite good consisting of a "[keyed] lock component," which "functions to lock and unlock [a] door," and a "doorknob component," which "functions to allow [a] door to be grasped, opened, closed and latched." *Home Depot U.S.A., Inc. v. United States*, 915 F.3d at 1380. Regarding each heading as equally specific, the CAFC found that "[H]eading 8301 refers to the lock component" while "[H]eading 8302 refers to the door knob component." *Id*. The CAFC further concluded that subsection 3(b) of the General Rules of Interpretation ("GRI") of the HTSUS governs the classification of the subject merchandise and remanded the case to this court to determine the proper classification of the subject merchandise. *Id.*

HTSUS GRI 3(b) provides, in pertinent part, that "...composite goods ...made up of different components... shall be classified as if they consisted of the material or component which gives them their *essential character*." HTSUS, GRI 3(b) (emphasis supplied). Accordingly, to apply GRI 3(b) in this case, the court is required to determine which component—lock or the knob—gives the subject merchandise its "essential character" and, based on that decision, whether the product is appropriately classified in Heading 8301 or Heading 8302. *Home Depot,* 915 F.3d at 1380–81.

The essential character of an article is "the component which is indispensable to the structure, core, or condition of the article, *i.e.,* the attribute which strongly marks or serves to distinguish what it is." *Home Depot USA, Inc. v. United States*, 30 CIT 445, 460, 427 F. Supp. 2d 1278, 1293 (2006), *aff'd*, 491 F.2d 1334 (Fed. Cir. 2007) (citing *A.N. Deringer, Inc. v. U.S.*, 66 Cust. Ct. 378, 383 (Cust. Ct. 1971)). The CAFC further established that the essential character inquiry is

factual in nature. *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1376 (Fed. Cir. 1999).

The court may also consult the Explanatory Notes ("ENs") to the Harmonized Commodity Description and Coding System, developed by the World Customs Organization, for additional direction on the scope and meaning of tariff headings and chapter and section notes, including the "essential character" of a product. Explanatory Notes are "generally indicative of the proper interpretation of a tariff provision." *Agfa Corp. v. United States*, 520 F.3d 1326, 1239 (Fed. Cir. 2008) (citation omitted). "Unlike Chapter Notes, Explanatory Notes are not legally binding." *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1367 n. 1 (Fed. Cir. 2013). However, "the Explanatory Notes are persuasive authority for the court when they specifically include or exclude an item from a tariff heading." *H.I.M. / Fathom Inc. v. United States*, 21 CIT 776, 779, 981 F. Supp. 610, 613 (1997); *see also BASF Corp. v. United States*, 30 CIT 227, 232 F. Supp. 2d 1200, 1205 n.6 (2006), *aff'd*, 497 F.3d 1309 (Fed. Cir. 2007).

In a GRI 3(b) analysis, "[t]he factor which determines essential character will vary as between different kinds of goods." HTSUS, GRI 3(b), EN Rule 3 at (VIII). The list of possible factors set forth in the ENs that could determine essential character is not exhaustive, and no factor is necessarily conclusive. *Structural Indus. v. United States*, 29 CIT 180, 185, 360 F. Supp. 2d 1330, 1336 (2005); *Home Depot*, 30 CIT at 459, 427 F. Supp. 2d at 1293 (2006).

Factors listed by the ENs that the CAFC and this court have examined are "the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods." HTSUS, GRI 3(b), EN Rule 3 at (VIII). *See, e.g., Home Depot U.S.A. Inc. v. United States,* 491 F.3d 1334, 1336 (Fed. Cir. 2007); *Swimways Corp. v. United States*, 42 CIT ___, ___, 329 F. Supp. 3d 1313, 1322 (2018). The court may also consider the article's "name... other recognized names... invoice and catalogue descriptions... size, primary function, uses... ordinary common sense," *Home Depot* at 459–460 (citing *United China & Glass Co. v. U.S.*, 61 Cust. Ct. 386, 389 (1968)), *aff'd*, 491 F.3d 1334 (Fed. Cir. 2007), "the respective indispensability of the properties of the components of the merchandise, the respective cost of the components of the merchandise, the basis for a consumer's decision to purchase the merchandise, the respective duration and/or frequency of the use of the components, and the manner in which the merchandise is invoiced." *Toy Biz, Inc. v. United States,* 26 CIT 816, 828 n.15, 219 F. Supp. 2d 1289, 1301 n.15 (2002) (citing *Better Home Plastics Corp. v. United States,* 20 CIT 221, 224–25, 916 F. Supp. 1265, 1267–68

(1996), *aff'd,* 119 F.3d 969 (Fed.Cir. 1997)). One component can impart the article's essential character even if two components are both indispensable to the use of the article. *Alcan Food Packaging (Shelbyville) v. U.S.*, 771 F.3d 1364, 1367 (Fed. Cir. 2016).

Goods must be "classified in the form in which they are imported." *The Pomeroy Collection, Ltd., v. United States*, 336 F.3d 1370, 1372 (Fed. Cir. 2003) (internal citations omitted). In further clarifying *Pomeroy,* the CAFC stated that "[a]lthough the 'essential character' inquiry focuses on an individual component of the goods, the goods are not classified as though they were composed exclusively of that component." *Structural Industries v. United States,* 356 F.3d 1330, 1369 (Fed. Cir. 2005).

In sum, it is the responsibility of this court to consider the totality of the evidence put before it in conducting an "essential character" analysis under GRI 3(b). *Structural Indus.,* 29 CIT at 185. The CAFC has found "no error" in a GRI 3(b) analysis when this court has "carefully considered all of the facts" and conducted a "reasoned balancing of all the facts" to determine essential character. *Better Home Plastics Corp. v. United States*, 119 F.3d 969, 971 (Fed. Cir. 1997).

DISCUSSION

Based on the record before the court, the court focuses on four factors to assess the essential character of the subject merchandise and determine its appropriate classification: (1) commercial standards; (2) marketing materials; (3) quantitative data; and, (4) the primary function of the subject merchandise.

In brief, and as discussed below, the court determines that neither of the first two factors – commercial standards or marketing materials – weighs in favor of classifying the subject merchandise under one tariff provision or the other. The third – quantitative data – provides limited support for the conclusion that the knob component, rather than the lock component, imparts the essential character to the subject merchandise. The court further determines that the primary function of a keyed entry device is to grasp, open and close the door, a function provided by the knob component. On this basis, the court concludes that the essential character of the subject merchandise is its knob component and should be classified under Heading 8302.

I. Commercial Standards

The court's examination of commercial standards is comprised of an evaluation of the (1) product descriptions in standards set out by the American National Standards Institute ("ANSI") and (2) relevance of the dead-locking latch bolt, latch assembly and U.S. Patent No.

6,186,562 ("562 Patent"), which covers the latch assembly of the subject merchandise. Both parties acknowledge that both the ANSI Standards and the 562 Patent apply to the subject merchandise. *See* Def. Stmt. Facts. ¶ 8; Pl.'s Resp. to Def. Stmt. Facts. ¶ 8; Def. Ex. 7, "Patents specific to Entry Locks at issue"; Pl. Resp. Br. at 10–11. Defendant asserts that the ANSI standards demonstrate that the subject merchandise is a "lock" classifiable in Heading 8301, and that the deadlocking latch bolt in the subject merchandise along with the 562 Patent support this conclusion. Def. Br. at 19–20, 24. Plaintiff asserts that Defendant misinterprets the information found in the ANSI standards, and that the patent does not provide additional support. Pl. Resp. Br. at 10–12, 16.

The court concludes that neither the dead-locking latch bolt, latch assembly and 562 Patent, nor the ANSI standards weigh in favor of classifying the subject merchandise under one tariff provision or the other.

a. Product Descriptions Contained in ANSI Standards

ANSI and the Builders Hardware Manufacturers Association ("BHMA") maintain criteria by which all door hardware is evaluated.[8] The ANSI/BHMA standards contain descriptions of various door devices, including the subject merchandise, at ANSI/BHMA standard A156.2–2011.[9] *See* Pl. Ex. 17, ANSI/BHMA A156.2–2011 at 9–12. Both the CAFC and this court have previously relied on ANSI standards when interpreting HTSUS terms. *See, e.g., Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1361 (Fed. Cir. 2001) ("Standards promulgated by industry groups such as ANSI . . . are often used to define tariff terms . . . "). *See also THK America, Inc. v. United States*, 17 CIT 1169, 1173, 837 F. Supp. 427, 432 (1993) ("This Court finds that the most authoritative set of definitions in regard to the terms involved in this case are contained in the [trade association] ... and accepted by [ANSI]").

[8] ANSI is a standards organization and the BHMA is a trade association. Together, the organizations publish standards, conduct tests and certify certain hardware-related products.

[9] The nomenclature "ANSI/BHMA A156.2–2011" denotes the series and publication year of the ANSI/BHMA Standards. The "A156" term denotes the series that provides standards for an array of builder hardware products. ANSI/BHMA Standards, Builders Hardware Manufacturers Association (2020) available at *https://buildershardware.com/ANSI-BHMA-Standards* (last visited Mar. 12, 2020). The "A156.2" term denotes a set of standards specifically for "Bored & Preassembled Locks and Latches," including the subject merchandise. Pl. Ex. 17, ANSI/BHMA A156.2–2011. The "2011" term denotes the year that the standard was promulgated. In this case, the court reviews the 2011 publication of the A156.2 standard because it was the most recent at the time Plaintiff imported the subject merchandise.

ANSI has evaluated, rated and certified the subject merchandise in each of its varying finishes.[10] Pl. Ex. 1, Pl.'s First Interrog. Resp. ¶ 6 (a)-(c). ANSI determined that each meets the "Function Description" of an "Entry Lock" as described in the ANSI/BHMA A156.2–2011 standards. Def. Stmt. Facts ¶ 20; Pl.'s Resp. to Def. Stmt. Facts ¶ 20. The ANSI/BHMA "Function Description" of an "Entry Lock" is as follows:

> **F82B Grades 2 and 3. Entry Lock.** Dead locking latch bolt operated by lever from either side except when outside lever is locked by locking device on inside. When outside lever is locked, operating key in outside lever unlocks locking device. Locking device shall automatically release when inside lever is operated or be in the unlocked position before inside lever is operated.[11]

Pl. Ex. 17, ANSI/BHMA A156.2–2011 at 10, F82B.

Defendant asserts that the categorization of the subject merchandise as an "Entry Lock" by ANSI supports a finding that the essential character of the subject merchandise is a "lock." Def. Br. at 19–20. In fact, throughout its submissions, Defendant places heavy emphasis on the characterization of the subject merchandise as a "lock" as the reason that the subject merchandise should be classified under Heading 8301. Plaintiff asserts that Defendant misinterprets the information in ANSI, and that the Function Descriptions should not be regarded as definitions. Pl. Resp. Br. at 16–17.

The court concludes for two reasons that the use by ANSI of the term "lock" within its descriptions does not support the conclusion that the lock feature of the subject merchandise comprises its essential character. First, ANSI also describes various devices that are classified in Heading 8302 as "locks." Pl. Ex. 14, ANSI/BHMA A156.2–2011 at 9. For example, ANSI refers to a privacy device as a "Privacy *Lock*" in its description of that device. ANSI/BHMA A156.2–2011 at 9, F76B (emphasis supplied).[12] It is uncontested that

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[10] ANSI evaluates and provides different "Grade Qualifications" for products in the A156.2–2011 standards. A Grade 3 qualification meets the lowest criteria, a Grade 2 qualification meets higher criteria, and a Grade 1 qualification meets the highest criteria. The criteria set by ANSI include strength, cycles, security, quality of metal finish, etc. Pl. Ex. 17, ANSI/BHMA A156.2–2011.

[11] According to subsection 6.1 of the ANSI/BHMA A156.2–2011 standard, the bored lock descriptions of Section 6 use the term "lever" for the sake of brevity. These Section 6 descriptions apply equally to models fitted with knobs instead of levers. Pl. Ex. 14, ANSI/BHMA A156.2–2011 at 9.

[12] The ANSI Function Description of a "Privacy Lock" is as follows:

> **F76B Grades 2 and 3. Privacy, Bedroom or Bath Lock.** Latch bolt operated by lever from either side except when outside lever is locked by locking device inside. Locking device shall automatically release when inside lever is operated or be in unlocked

privacy devices are classified in Heading 8302. Second, ANSI uses the term "lock" in ANSI's Function Descriptions of products that do not contain a lock mechanism at all. *See, e.g.,* ANSI/BHMA A156.2–2011 at 12 (F111... Communicating Passage Lock).

b. Dead-locking latch bolt, Latch assembly and the 562 Patent

ANSI describes the latch assembly of a keyed entry device as a "dead locking latch bolt." Def. Stmt. Facts ¶ 13; Pl.'s Resp. to Def. Stmt. Facts ¶ 13. A dead locking latch bolt is "a type [of] latch bolt incorporating a plunger [on the flat end of the beveled latch bolt] which, when depressed, automatically locks the projected latch bolt against return by end pressure." ANSI/BHMA A156.2–2011 at 5.

By contrast, ANSI describes the latch assembly of privacy (F76B) and passage (F75) devices as simply a "latch bolt." ANSI defines a "latch bolt" as

> a lock component having a beveled end which projects from the lock front in its extended position, but is [always] forced back into the lock case by end pressure or drawn back by action of the lock mechanism. When the door is closed, the latch bolt projects into a hole provided in the strike, holding the door in a closed position.

Id. The basic difference between a latch bolt and a dead locking latch bolt is that the latter is a type of latch mechanism that prevents the beveled latch bolt from being pushed back by a screwdriver, plastic card or other similar device.

U.S. Patent No. 6,186,562 ("562 Patent") covers the latch assembly of the subject merchandise. *See* Def. Ex. 7, "Patents specific to Entry Locks at issue." Notably, the 562 Patent also covers the latch assemblies of the respective privacy and passage devices, neither of which contains a dead locking latch bolt. Pl. Ex. 11, Product Breakdown Matrix Provided by Fu Hsing Industrial.[13] An essential character analysis may include information related to a patent. *See, e.g., THK Am.,* 837 F. Supp. at 432 (stating that the description of a product in a patent can shed light on what the manufacturer believes the merchandise to be).

Defendant asserts that the dead locking latch bolt provides a "security feature only relevant with a keyed entry lock" and that the

position before inside lever is operated. Emergency release on outside shall permit outside lever to operate latch bolt.

Pl. Ex. 14, ANSI/BHMA A156.2–2011 at 9.

[13] Both Plaintiff and Defendant referred to Pl. Ex. 11, Product Breakdown Matrix Provided by Fu Hsing Industrial at Oral Argument. Transcript of Oral Argument at 37–39.

inclusion of the dead locking latch bolt in the subject merchandise supports a finding that the essential character of the subject merchandise is a "lock." Def. Br. at 24. Defendant specifically contrasts the inclusion of a dead locking latch bolt in a keyed entry device, based on ANSI's F82B description, with the lack of inclusion of a dead locking latch bolt in a privacy or passage device, based on ANSI's F76B and F75 descriptions, respectively. Defendant's Response to Plaintiff's Statement of Undisputed Material Facts ("Def. Resp. Pl. Stmt.") ¶¶ 18, 22, 25, 27, 30–31.[14] Defendant relies on the 562 Patent as support for its argument, asserting that the 562 Patent covers the dead locking latch bolt and that it provides a "security feature only relevant with a keyed entry lock." Def. Br. at 24.

Plaintiff asserts that Defendant misconstrues the ANSI standards. Pl.'s Resp. to Def.'s Cross-Mot. For Summ. J. ("Pl. Resp. Br.") at 16, 19, 20. In particular, Plaintiff argues that ANSI Function Descriptions make clear that the deadlocking latch bolt (also called a "deadlatch") feature may occur on various types of passage and privacy devices. Because these descriptions lack a keyed lock, Plaintiff maintains, they would not be classifiable in Heading 8301. Pl. Resp. Br. at 19. Plaintiff adds that "a door knob with a 'deadlocking latchbolt' may not even have a locking device." *Id* at 19. Plaintiff concludes that "the inclusion of a deadlatch feature does not support classifying the subject entry door knobs in HTSUS Heading 8301." *Id.* (internal citations omitted).

The fact that the 562 Patent covers the latch assembly of the subject merchandise does not support a conclusion that the essential character of the subject merchandise is its lock feature. That is because the 562 Patent covers latch assemblies, including those in the privacy and passage devices related to the subject merchandise, neither of which contains a dead locking latch bolt. Pl. Ex. 11, Product Breakdown Matrix Provided by Fu Hsing Industrial.

The court determines that the inclusion of the dead locking latch bolt in the subject merchandise does not support the conclusion that the subject merchandise has the essential character of a "key-operated lock" within the meaning of Heading 8301, relative to "knobs for doors" within the meaning of the Explanatory Note to Heading 8302. HTSUS 8302, EN (D)(7). The court reaches this conclusion because a variety of devices with dead locking latch bolts do not contain a key cylinder or other locking feature identified by

[14] For example, Defendant states that it: "Avers that *entry locks are also distinguishable from privacy locks, passage latches, and dummy door knobs* on the basis that entry locks or lock sets utilize a keyed lock and deadlocking latchbolt and provide security." Defendant makes similar statements in the other cited paragraphs. Def. Resp. Pl. Stmt., ¶ 18 (emphasis supplied).

Heading 8301 (*e.g.*, an electronically operated lock). *See* HTSUS Heading 8301. For example, ANSI descriptions F77A and F77B cover "Patio and Privacy Locks" and ANSI description F111 covers "Communicating Passage Locks," all of which include a "dead locking latch bolt" in their respective "Function Descriptions." ANSI/BHMA A156.2 at 9–10, 12. Yet, as noted, none of these devices contains a key cylinder or other locking feature mentioned in Heading 8301. Further, the 562 Patent, as noted by Plaintiff, covers both latch bolts in privacy and passage devices, as well as the deadlatch in a keyed entry device.

In addition, the court does not find persuasive Defendant's argument that the deadlatch provides a "security feature only relevant with a keyed entry lock." Def. Br. at 24. To start, as noted, there are products that afford the "security" of a deadlatch that do not have a keyed entry lock. Further, the term "security" or "security feature" is not used in either heading at issue or in the respective Explanatory Notes. Finally, it is notable that every device, including passage and privacy devices, provides some level of "security." For example, a passage device latches a door such that it can be closed securely until a person turns the knob or depresses the lever to unlatch the door. Similarly, a privacy device excludes others from entering the room only until someone overrides the internal locking mechanism with a coin or screwdriver. Accordingly, that the deadlatch provides some level of security is not persuasive for determining that the device should be classified in Heading 8301.

c. Conclusion — Commercial Standards

For the reasons set forth above, neither the product descriptions contained in the ANSI standards nor the presence or absence *per se* of a dead locking latch bolt weighs in favor of classifying the subject merchandise under one tariff provision or the other.

II. Marketing Materials

a. Six Elements of Marketing Materials

The court next considers how Plaintiff markets the subject merchandise to the public. The marketing by an importer or retailer of the subject merchandise is relevant to an essential character analysis. *The Pillsbury Co. v. United States,* 431 F.3d 1377, 1380 (Fed. Cir. 2005) (noting that dessert bars were marketed as "Fat Free Vanilla Frozen Yogurt Coated with Raspberry Sorbet" as support for the conclusion that yogurt provided the essential character); *Structural Indus. v. United States*, 29 CIT 180, 189, 360 F. Supp. 2d 1330, 1339 (2005) (citing *Mead Corp. v. United States*, 283 F.3d 1342, 1349 (Fed.

Cir. 2002)); *THK Am., Inc. v. United States*, 17 CIT 1169, 1175, 837 F. Supp. 427, 433 (1993). In particular, marketing can reveal how an importer or retailer regards the merchandise and which market(s) the importer or retailer is trying to reach. Both aspects are relevant considerations in an essential character analysis. *THK Am.,* 17 CIT 1169, 1175, 837 F. Supp. 427, 433 (1993).

In broad terms, Defendant claims that Plaintiff markets the subject merchandise as "locks" classifiable in Heading 8301, rather than as "knobs" classifiable in Heading 8302. Def. Br. at 17–19. Plaintiff argues that "the subject products are specifically marketed as 'knobs'" and that any reference to the subject merchandise as "'locks' or 'locksets' does not direct classification to HTSUS Heading 8301." Pl. Resp. Br. at 5.

The court examines six elements of marketing: (1) titles on product webpages; (2) descriptions in product webpages; (3) labels and phrases in physical product packaging; (4) installation instructions included in product packaging; (5) the retailer's Buying Guides; and, (6) retailer workshop written materials. Neither party disputes the content of the marketing materials that the court addresses in this section. *See, e.g.*, Pl. Resp. Br. at 5–10; Def. Br. at 17–21.

For the reasons set forth below, the court concludes that marketing materials taken as a whole do not weigh in favor of classifying the subject merchandise under one tariff provision or the other. In specific, the court determines that Plaintiff markets the subject merchandise in ways that, at times, highlight the keyed lock component, at other times, highlight the knob component, and, occasionally, highlight both aspects.

b. Website Titles of the Subject Merchandise

The first marketing element that the court examines is the way in which Plaintiff *titles* the subject merchandise on its website. Plaintiff titles the subject articles as "Keyed Entry Knob[s]" or "Keyed Entry Knobset[s]" on its webpages. *See* Pl. Ex. 2, Pl.'s First Interrog. Resp. ¶ 4(a)-(d) [hereinafter *Subject Articles Webpages*].[15]

Plaintiff's website titles of privacy and passage devices provide useful comparisons.[16] The privacy devices are listed as "Privacy

[15] Plaintiff dedicates a separate webpage to each of the four different finishes of the subject merchandise.

[16] This court has previously compared the marketing of the subject merchandise to the marketing of other products. *See, e.g.*, *Camelbak Prods., LLC v. United States,* 649 F.3d 1361, 1369 (Fed. Cir. 2011) (comparing the marketing of hydration packs to a standard backpack and remanding the case to perform a GRI 3(b) analysis); *Infantino, LLC v. United States*, Slip Op. 14–155, 2014 Ct. Intl. Trade LEXIS 164, at *14–15 (CIT December 24, 2014) (" ...though Infantino does not refer to its Shop & Play® line as "toys" like other items in the

Knob" or "Privacy Knobset." *See* Pl. Ex. 7, Pl.'s First Interrog. Resp. ¶ 14 [hereinafter *Privacy Devices Webpages*]. The passage devices are listed as "Passage Knob" or "Passage Knobset." *See* Pl. Ex. 8, Pl.'s First Interrog. Resp. ¶ 14 [hereinafter *Passage Devices Webpages*].

Plaintiff uses the term "Knob" or "Knobset" for all three devices, indicating a clear commonality among those devices on the basis that they include knobs to open and close a door. At the same time, Plaintiff also uses the term "keyed" in the title of the subject merchandise, thereby making an important distinction between a keyed entry device, on the one hand, and a privacy or passage device, on the other. Accordingly, the record demonstrates that Plaintiff uses terms such as "Knob" and "Knobset" that would support a classification under Heading 8302, as well as the term "keyed" that would support a classification under Heading 8301. As a result, Plaintiff's titling of its webpages does not weigh in favor of classifying the subject merchandise under one tariff provision or the other.

c. Website Product Descriptions

The second marketing element that the court examines is terminology used in website product *descriptions* of the subject merchandise. In the "Product Overview" section of the webpages, Plaintiff references the subject merchandise as "keyed locks". *See Subject Articles Webpages, supra* ("Defiant *keyed locks* can be re-keyed to fit our existing KW1 keyway") (emphasis supplied). By contrast, in the "Details" section of the webpages, Plaintiff lists the subject articles as "knobs" – not locks – in the "Door Locks & Knobs Product Type" field. *Id*. These descriptions reference both the keyed lock aspect and the knob aspect and, therefore, do not weigh in favor of classifying the subject merchandise under one tariff provision or the other.

d. Physical Packaging of the Products

The third marketing element that the court examines is the *physical packaging* of the products. For this subfactor, the court examines: (1) the *labeling* of the product on the packaging; and, (2) *phrases* found on the packaging.

Plaintiff *labels* the packaging of the subject merchandise as "Keyed Entry," thereby highlighting the keyed lock mechanism. Def. Ex. 2, Physical samples of SKU 154644 (Ex. 2A), SKU 154709 (Ex. 2B), SKU 154733 (Ex. 2C), and SKU 881996 (Ex. 2D). In comparison, Plaintiff labels the packaging of the privacy devices as "Bed & Bath Locking Interior," and the passage devices as "Hall & Closet Non-Locking Interior." Pl. Ex. 16, Physical samples of SKU 883624 (Exhibit 16B),

catalogue, the catalogue itself is called a "Toys and Activity Play" catalogue and does not feature Infantino's purely utilitarian travel products.")

and SKU 883767 (Exhibit 16C). In sum, the record indicates that Plaintiff labels the packaging of its passage, privacy and entry devices according to each one's respective locking capabilities. In this respect, Plaintiff's labels highlight the keyed lock component of the subject merchandise, appropriately classified in Heading 8301, suggesting an essential character that falls under that heading.

The court next turns to *phrases on the physical packaging* of the subject merchandise. The packaging of the subject merchandise contains three relevant phrases: (1) "5 pin cylinder"; (2) "Meets or exceeds ANSI Grade 3 standards";[17] and, (3) "round corner or drive-in latch options fits [sic] every door." Def. Ex. 2, Physical samples of SKU 154644 (Ex. 2A), SKU 154709 (Ex. 2B), SKU 154733 (Ex. 2C), and SKU 881996 (Ex. 2D).

Defendant asserts that the phrases "5 pin cylinder" and "Meets or exceeds ANSI Grade 3 standards" support Defendant's argument that Plaintiff emphasizes the locking feature of the subject merchandise. Defendant maintains that inclusion of the 5-pin cylinder and ANSI rating is intended to convey to a consumer that "the product has been tested for strength and security." Def. Br. at 20–21. *See also* ANSI/BHMA A156.2–2011 Appendix B, Chart 1 (charting 25 tests, four of which relate to security, to which the devices are subject). In fact, Plaintiff's website also states clearly that an ANSI "[l]ock grade ... is a reflection of the durability of the lock, not the amount of security it provides." The Home Depot, Buying Guide: Types of Door Locks available at https://www.homedepot.com/c/ab/types-of-door-locks/9ba683603be9fa5395fab90dfb1e7e6 (last visited March 23, 2020). This information would signal to a consumer that "ANSI Grade 3" is a rating of the product by a national standards-setting institution based on a variety of criteria, including, but not limited to, factors related to security.

Therefore, the evidence does not support Defendant's argument that the "5 pin cylinder" and "ANSI Grade 3" phrases on the product packaging indicate that the lock components of the subject merchandise comprise the essential character of the product.

Notably, Defendant does not address the third phrase including on the product package, "round corner or drive-in latch options fits [sic] every door." This phrase relates to the product's latching feature. The latching mechanism on a door allows it to remain in the "closed" position. This phrase highlights an aspect of the latch mechanism that is identical in passage, privacy and keyed entry devices. This phrase, therefore, highlights subcomponents of the subject merchan-

[17] ANSI/BHMA test door hardware products to grade levels, Grades 1, 2 and 3. Grade 3 offers the lowest level of strength and security. Def. Ex. 3, Colvin Dep. at 19–20.

dise appropriately classified in Heading 8302, suggesting an essential character that falls under that heading.

In sum, examining the labeling of the product packaging and phrases found on the packaging, the court concludes that these marketing elements do not weigh in favor of classifying the subject merchandise under one tariff provision or the other.

For comparison purposes, the court also examines phrases used in product packaging for privacy and passage devices. The product packaging for privacy devices contains the phrase "privacy *lock*, no *key* needed." *See* Physical Sample of SKU 883624 - Hartford Satin Nickel Privacy Knob (Ex.16B) (emphasis supplied). The first part of the phrase is an example of the varied use of the term "lock," including with respect to privacy devices that fall outside of Heading 8301. By contrast, the second part of the phrase highlights a fundamental distinction between a privacy device and an entry device: namely, the need for a key, and the fact that a key is not needed to operate a privacy device.[18]

The product packaging for passage devices contains the phrase "for use where *locked entry* is not necessary." *See* Physical Sample of SKU 883767- Hartford Satin Nickel Passage Knob (Exhibit 16C) (emphasis supplied). As with privacy and entry devices, this phrase addresses the locking capability of the product.[19] Other phrases on the product packaging of passage devices emphasize only the knob aspect: "Ideal for hall and closet doors" and "round corner or drive-in latch options fits [sic] every door." *See* Physical Sample of SKU 883767- Hartford Satin Nickel Passage Knob (Exhibit 16C).

In comparing the product packages of passage, privacy and entry devices alongside each other, the court notes that the packaging is the same in shape and structure, and the phrases are similar to each other. The packaging indicates that the three devices share a large amount of commonality and demonstrates that Plaintiff regards the three devices similarly, intentionally grouping them together. The only significant differences among the packages are in color and in the specific phrases that identify the locking capabilities of each product.

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[18] Similarly, other phrases on the product packaging of privacy devices emphasize both aspects. The phrase "Locks from inside only" emphasizes the locking capabilities, while the phrase "round corner or drive-in latch options fits every door" emphasizes the door knob aspect. *See* Physical Sample of SKU 883767- Hartford Satin Nickel Passage Knob (Exhibit 16C).

[19] Other phrases on the product packaging of passage devices emphasize only the knob aspect: "Ideal for hall and closet doors" and "round corner or drive-in latch options fits [sic] every door." *See* Physical Sample of SKU 883767- Hartford Satin Nickel Passage Knob (Exhibit 16C).

These similarities in the physical packaging of this line of products (the subject merchandise, privacy device and passage device) suggest that the knob mechanism is the essential character of the subject merchandise.

e. Installation Instructions

The fourth marketing element that the court examines is the installation instructions included in the product package. Installation instructions for passage, privacy and entry devices are identical. *See* Physical samples of SKU 881996 (Ex. 16A), SKU 883624 (Ex.16B), and SKU 883767 (16C). The instructions for all of the devices are printed in brown ink and refer to the respective devices as "locks" and "locksets." The record evidence indicates that the installation instructions are written broadly to apply to all of the various door hardware devices, regardless of whether those devices contain a keyed lock (the subject merchandise), a non-keyed lock (privacy devices) or no lock at all (passage devices). Here, Plaintiff refers to a keyed entry device as a "lock," but Plaintiff also refers to the privacy and passage devices as "locks."

This commonality in the installation instructions indicates that Plaintiff treats all three types of devices similarly in regard to this aspect of its marketing materials. This fact supports the view that the essential character is the knob feature, which is common to all of the devices, rather than the lock feature, which two of the devices contain (privacy and keyed entry), or the keyed lock feature, which is distinct to the keyed entry device.

f. Buying Guides

The fifth marketing element that the court examines is Plaintiff's Buying Guides. Defendant asserts that Plaintiff's inclusion of the keyed entry device in the Buying Guide titled "Types of Door Locks" is evidence that Plaintiff advertises the subject merchandise according to its "lock" characteristic and, therefore, supports a finding that the lock is the essential character. Def. Br. 18–19.

The court does not find this argument persuasive for three reasons. First, the court notes that the subject merchandise is actually listed in *two* guides: one titled "Types of Door *Locks*," the other titled "Types of Door *Knobs*." *See* The Home Depot, Buying Guide: Types of Door Locks available at https://www.homedepot.com/c/ab/types-of-door-locks/9ba683603be9fa5395fab90dfb1e7e6 (last visited March 23, 2020) (emphasis supplied); The Home Depot, Buying Guide: Types of Door Knobs available at https://www.homedepot.com/c/ab/types-of-door-knobs/9ba683603be9fa5395fab904c219eca (last visited March 23, 2020) (emphasis supplied). The "Types of Door Locks" Buying

Guide includes lever handlesets, entry devices, deadbolts, electronic door locks and sliding door locks. The Home Depot, Buying Guide: Types of Door Locks available at https://www.homedepot.com/c/ab/types-of-door-locks/9ba683603be9fa5395fab90dfb1e7e6 (last visited March 23, 2020). Defendant fails to mention or address the Buying Guide titled "Types of Door *Knobs*," which also includes entry devices, along with dummy, passage and privacy devices. *See* The Home Depot, Buying Guide: Types of Door Knobs available at https://www.homedepot.com/c/ab/types-of-door-knobs/9ba683603be9fa5395fab904c219eca (last visited March 23, 2020) (emphasis supplied).

Second, Plaintiff references the subject merchandise as "Entry Door Knobs" – not "Keyed Entry Door Knobs" – on the webpage cited by Defendant, thus further undermining the conclusion Defendant asks the court to draw. The Home Depot, Buying Guide: Types of Door Locks available at https://www.homedepot.com/c/ab/types-of-door-locks/9ba683603be9fa5395fab90dfb1e7e6 (last visited March 23, 2020). *See also* Pl. Resp. Br. at 7–8.

Third, the court notes that Plaintiff includes three informative sentences on its webpage titled "Types of Door Knobs." The first includes reference to "safety and security," as noted by Defendant. The Home Depot, Buying Guide: Types of Door Knobs available at https://www.homedepot.com/c/ab/types-of-door-knobs/9ba683603be9fa5395fab904c219eca (last visited March 23, 2020). The second adds that such devices "are frequently used for home entrances, including the front door and patio door." *Id*. The third sentence states, interestingly: "[entry devices] can also be used to secure other rooms in your home like your basement or an important storage space." *Id*. The fact that Plaintiff markets the product for use on an *interior* door, as well as on an *exterior* one, lends support to the view that the knob component of the device, rather than the lock component and security feature, comprises the essential character of the subject merchandise. That is because using an entry knob on an interior door suggests that a lower level of security is needed.[20]

In sum, based on the foregoing, the court concludes that the Buying Guides do not weigh in favor of classifying the subject merchandise under one tariff provision or the other.

[20] *See also* Colvin Exp. Rep. at 9 and discussion at section IV, *infra*., suggesting that when security is the priority for an exterior door, an entry device should be accompanied by a lock, such as a deadbolt, offering greater security.

g. Plaintiff's "Leader's Guide" for Customer Workshops

1. Parties' Arguments — Hearsay Objection

The sixth and final marketing element that the court examines is comprised of a document entitled "[[ ]]," which Plaintiff provides to [[ ]]. *See* Defendant Confidential Exhibit (Def. Conf. Ex.) 4, [[ ]]. The document is a [[ ]]. *See* [[ ]]. Defendant asserts that the [[ ]] reflects that Plaintiff "considers door looks [sic] to include entry locks containing keyed cylinders, much like the merchandise under consideration in this case." Def. Br. at 18.

Plaintiff objects to Defendant's use of this document in Defendant's briefs as inadmissible hearsay.[21] Pl. Resp. Br. at 3. Defendant responds that the document is not hearsay and is instead an admission or adopted admission pursuant to the Federal Rules of Evidence ("Fed. R. Evid.") 801(d)(2).[22] Def. Reply Mem. in Further Support of Cross-Mot. for Summ. J. ("Def. Reply. Br.") at 12.

The court determines that the document is not hearsay and, therefore, may be considered by the court. The court bases this determination on Plaintiff's admission or adopted admission under Federal Rules of Evidence 801(d)(2)(D) and Plaintiff's adoption of a statement under Federal Rules of Evidence 801(d)(2)(B).

Hearsay is a statement that "(1) the declarant does not make while testifying at the current trial or hearing, and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). A "statement" can include written assertions such as documents. Fed. R. Evid. 801(a).

Hearsay generally cannot be considered in the context of a motion for summary judgment, unless a federal statute, the Federal Rules of Evidence, or other rule prescribed by the Supreme Court provides otherwise. *See* Fed. R. Evid. 802. "[If] the [evidence] contains what would be hearsay testimony that would be inadmissible at trial, then it is not useable to support or defeat a motion for summary judgment." Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 6334 (1st ed. 1980).

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[21] Defendant relies (in its general statement of material facts and in its cross-motion brief in support of summary judgment) on an additional confidential document to which Plaintiff objects as well on the grounds of inadmissible hearsay: Def. Conf. Ex. 5, [[ ]]. *See* Def. Br. at 6, 20; Def. Stmt. Facts, ¶¶ 26, 29–33. However, because the court does not rely on or discuss information in that document in the court's analysis, the court does not review that document under Plaintiff's hearsay objection.

[22] Defendant also asserts that, if the court concludes that the documents are hearsay, they are admissible as a hearsay exception for business records pursuant to Fed. R. Evid. 803(6). Def. Reply Br. at 13 n.11. Because the court concludes that the document is not hearsay under Fed. R. Evid. 801(d)(2)(D), the court does not proceed to consider whether the document is hearsay subject to the business records exception of Fed. R. Evid. 803(6).

Plaintiff produced the [[ ]] document during discovery in response to one of Defendant's requests for production. The request included a total of ten documents, the other nine of which are not in dispute and have also been relied on by both parties in their briefs. *Compare* Pl. 1st Req. for Prod. Resp. ¶ 4 *to* Pl. Br.; Def. Br. Defendant requested that Plaintiff "produce all document(s) which were used in connection with the sales, merchandising and/or marketing of each of the decorative variations of the imported merchandise in the United States." Pl. 1st Req. for Prod. Resp. ¶ 4. Plaintiff's response stated that "Plaintiff *identifies and produces*" the documents. *Id.* (emphasis supplied). Plaintiff objected to the request as "ambiguous and overly broad," yet still proceeded to supply Defendant with the document in question as well as other documents in response to the request. *Id.*

The [[ ]] is one of many documents on which Plaintiff relied when it responded to Defendant's interrogatories. Pl. 1st Interrog. Resp. ¶ 1(c). Further, the document bears the Home Depot logo on every page of the document except for the pages containing the table of contents. Def. Conf. Ex. 4, [[ ]]. Finally, Plaintiff marked this document as confidential during discovery. *Id.*

The court determines that the [[ ]] is not hearsay for two reasons. First, where "the statement is offered against an opposing party, and... was made by the party's agent or employee on a matter within the scope of that relationship and while it existed," that statement is not hearsay and is to be understood as a party admission or adopted admission. Fed. R. Evid. 801(d)(2)(D). It is well established that answers to interrogatories may be admitted as admissions under this rule. *See, e.g., Bell v. A-Leet Leasing Corp.,* 863 F.2d 257, 259 (2d Cir. 1988) ("It is clear that answers to interrogatories may be utilized as admissions"); *Tamez v. City of San Marcos,* 118 F.3d 1085, 1098 (5th Cir. 1997); *Walker v. Mulvihill*, No. 94–1508, 1996 U.S. App. LEXIS 14397, at *18 (6th Cir. April 24, 1996) (a party opponent's answers to interrogatories are admissible as admissions). Plaintiff's actions in producing the Leader Guide and relying on the document when responding to interrogatories are sufficient evidence of a party admission. Fed. R. Evid. 801(d)(2)(D).

In this case, there is additional evidence of admissibility under Fed. R. Evid. 801(d)(2)(D). For example, the presence of Home Depot's logo on almost every page of the document is strong evidence of a statement adopted by Plaintiff. Fed. R. Evid. 801(d)(2)(D). *See United States v. Univar USA Inc.*, 42 CIT ___, ___, 355 F.Supp.3d 1225, 1236 (2018). In addition, Plaintiff's decision to mark the document as confidential indicates that Plaintiff recognizes the document as one of proprietary importance. Fed. R. Evid. 801(d)(2)(B).

In conclusion, the court determines that the [[ ]] is admissible under Federal Rules of Evidence 801(d)(2)(D) and 801(d)(2)(B). Accordingly, Plaintiff's hearsay objection to this document is denied.

2. Parties' Arguments — Essential Character

Turning, then, to a consideration of the [[ ]], Defendant asserts that the document includes entry devices in the [[ ]] Defendant maintains that this fact is evidence that the Plaintiff markets the subject merchandise as locks rather than knobs. Def. Br. at 18 (citing Def. Conf. Ex. 4, [[ ]]). However, it is notable that Plaintiff also refers to dummy, passage and privacy devices as [[ ]]. Def. Conf. Ex. 4, [[ ]]. Privacy devices, as discussed, have locks, but are classified in Heading 8302, while dummy and passage devices do not have locking mechanisms, and dummy devices do not even have a latch mechanism. Accordingly, the [[ ]] is over-inclusive of devices that are classified in Heading 8302. The manner in which Plaintiff references the subject merchandise in this document, therefore, does not weigh in favor of classifying the subject merchandise under one tariff provision or the other.

Defendant further asserts that Plaintiff highlights the keyed lock mechanism in the [[ ]] with the phrases (1) "[[ ]]" and, (2) "[[ ]]." Def. Br. at 18 (citing Def. Conf. Ex. 4, [[ ]]). Both phrases highlight the keyed lock component of the subject merchandise: the "[[ ]]" phrase because it [[ ]]; the second phrase because it [[ ]]." Therefore, the court concludes that these two phrases constitute evidence that Plaintiff's marketing materials highlight the keyed lock feature of the subject merchandise.

h. Conclusion — Marketing Materials

In sum, Plaintiff's marketing materials refer to the subject merchandise by various names, including "knob," "knobset," "door knob," "door knob with lock," "entry knob," "entry knobset," "entry lock," "keyed entry," "lock" and "lockset." For reasons discussed above at section II, the court does not find that the use of the term "lock," is probative of whether the essential character of the subject merchandise is its keyed lock component or its knob component. A more limited number of materials refers to the "keyed lock" component, and those materials suggest that the essential character is in fact a keyed lock within the meaning of Heading 8301. However, there are also many references to the knob feature that would suggest that the essential character is a knob within the meaning of Heading 8302.

The marketing materials, therefore, do not weigh in favor of classifying the subject merchandise either as a keyed lock mechanism or as a knob mechanism.

III. Quantitative Data

a. Subcomponents of the Subject Merchandise

The record before the court contains uncontested information concerning the weight, value and visible surface area of six subcomponents of the subject merchandise. These quantitative factors are relevant considerations for an essential character analysis. *See* HTSUS, GRI 3(b) EN Rule 3 at (VIII). *See also Alcan Food Packaging (Shelbyville) v. United States*, 37 CIT ___, ___, 929 F.Supp.2d 1338, 1349 (2013)*, aff'd,* 771 F.3d 1364 (Fed. Cir. 2014) (reviewing the weight, thickness, and value of component materials to determine the essential character of imported packaging material).

The six subcomponents of the subject merchandise are: (1) exterior knob assembly (36 percent in weight, 35 percent in value, and 34 percent in surface area); (2) interior knob assembly (23 percent in weight, 26 percent in value, and 33 percent in surface area); (3) latch assembly (21 percent in weight, 15 percent in value, and 17 percent in surface area); (4) flanged strike plate (4 percent in weight, 2 percent in value, and 10 percent in surface area); (5) key cylinder (9 percent in weight, 12 percent in value, and 1 percent in surface area); and, (6) two keys (3 percent in weight, 9 percent in value, and 2 percent in surface area).[23] Pl. Ex. 11, Product Breakdown Matrix Provided by Fu Hsing Industrial. These figures are not contested by the parties. Def. Br. at 27 ("We do not dispute the weights and costs of each subassembly set forth in Home Depot's brief.").

Plaintiff argues that the data for all subcomponents except for the key cylinder and keys – viz., the interior knob assembly, exterior knob assembly, latch assembly and strike plate – should be attributed solely to the knob mechanism. *See* Pl. Br. at 25; *see also* Transcript of Oral Argument at 121–22. Plaintiff further asserts that, under this approach, the subcomponents of the knob mechanism account for the majority of the weight, value and visible surface area of the subject merchandise. Pl. Br. at 25–27.

[23] The seventh subcomponent of the subject merchandise, mounting hardware, consists of screws. Plaintiff considers that these items are classifiable in HTSUS Heading 7318. Pl. Br. at 17 n.8. Defendant did not object to this projected classification. *See generally,* Def. Resp. Br. Therefore, the court does not consider mounting hardware in the comparison of Heading 8301 versus Heading 8302. For that reason, the percentages reported in this opinion will amount to slightly less than 100 percent.

During the course of the proceeding, Defendant took two different positions on this issue. In its briefs, Defendant argued that every subcomponent, except for the key cylinder and keys, contributes to both the keyed lock mechanism and the knob mechanism and should, therefore, be attributed to both mechanisms:

> [B]ecause the interior knob assembly, exterior knob assembly, latch mechanism, and strike plate, contribute to both the knob function described by heading [sic] 8302 and the locking function described by heading [sic] 8301, the significance of the data involving the value, weight and visible surface area are equally relevant to both headings.

Def. Br. at 27–28. Defendant added: "The key pin cylinder and the keys can only be attributable to heading 8301." Def. Br. at 28. By contrast, at oral argument, Defendant stated that the interior knob is not a subcomponent relevant to the keyed lock mechanism. *See* Transcript of Oral Argument at 59–61.

Defendant's initial argument was that all of the subcomponents of the subject merchandise, and, therefore, the entirety of the subject merchandise, is classifiable in Heading 8301. Def. Br. at 27–28.[24] This argument is no different from a GRI 1 analysis, which the CAFC expressly rejected. *Home Depot*, 915 F.3d 1374. In fact, the CAFC directed this court to conduct a GRI 3(b) analysis and, in so doing, determined that each heading covers only part of the subject merchandise:

> Even though the doorknob handle plays a role in the locking mechanism by serving as the lever that withdraws the bolt when the device is unlocked, the doorknob and lock components are nonetheless largely separate. They consist of separate physical components and serve different purposes.... The doorknob of the subject articles is not simply an improved version of a lock.

Home Depot, 915 F.3d at 1380.

At oral argument, Defendant, when pressed, changed its position to state that the interior knob was attributable solely to the knob component, and, therefore, Heading 8302. Taking Defendant's initial and revised positions together would lead to the conclusion that Defendant considers that there are three baskets of subcomponents: (1) those that are attributable only to the lock component (the cylinder and keys); (2) those attributable only to the knob component (the

[24] Defendant also allowed that some subcomponents were also classifiable in Heading 8302.

interior knob); and, (3) those attributable to both components (the exterior knob, latch, and strike plate).

Following the CAFC's remand instructions and based on the record, the court determines that three subcomponents – the exterior knob assembly, key cylinder and keys – contribute predominantly to the keyed lock mechanism. The remaining three subcomponents – the interior knob assembly, latch assembly, and strike plate – contribute predominantly to the knob component.

The exterior knob of a keyed entry device contains two substantial differences from the exterior knob of a privacy or passage device. First, the exterior knob of a keyed entry device contains a "specially designed" indentation to hold the pins from the key cylinder in place. Def. Reply Br. at 18. *See* Def. Ex. 2, Physical samples of SKU 154644, SKU 154709, SKU 154733, and SKU 881996. Indeed, Defendant relies on U.S. Patent No. 6,202,457 ("457 Patent") as support that the design of the exterior knob of a keyed entry device is distinctive. Def. Br. at 8, 23. The objective of this patent is "to provide a lock core assembly for a cylindrical lock." U.S. Patent No. 6,202,457. This design also places a back plate on the internal side of the exterior knob to cover the indentation created for the key cylinder and to prevent the exposure of the key cylinder's pins. Def. Reply Br. at 18. Neither the passage nor the privacy device is covered by the 457 Patent. Accordingly, the privacy and passage devices do not contain back plates or indentations in their respective exterior knobs since neither device contains a key cylinder. *See* Def. Reply. Br. at 21; Pl. Ex. 16, Physical samples of SKU 882996, SKU 883624 and SKU 883767.

Similarly, because only keyed entry devices contain key cylinders and keys, the court attributes these subcomponents as well to the keyed lock mechanism in assessing the quantitative data.

The interior knob assembly does not provide any function specific to a keyed entry device and is identical to the interior knob assembly found in a privacy device. Pl. Ex. 16, Physical samples of SKU 881996 (Ex. 16A), SKU 883624 (Exhibit 16B), and SKU 883767 (Exhibit 16C). Accordingly, the court attributes the interior knob for a keyed entry device to the knob component for purposes of the court's quantitative assessment. Def. Br. at 31; Pl. Ex. 3, Barbara Kaiser Deposition, May 25, 2016, at 203. The strike plate is also not unique to a keyed entry device and, therefore, contributes predominantly to the knob mechanism for the same reason. Defendant maintains that the latch assembly contributes to the keyed lock mechanism because this component contains a dead locking latch bolt. Def. Br. at 24. *See also* Transcript of Oral Argument at 59. The court disagrees with Defen-

dant's legal conclusion — ANSI standards make clear that dead locking latch bolts can be found on devices classifiable in Heading 8302 as well as Heading 8301. Pl. Ex. 3, Barbara Kaiser Deposition, May 25, 2016 at 127–128. *See also* ANSI/BHMA A156.2–2011 at 9–12. The record also demonstrates that a dead locking latch bolt can be found on non-keyed devices. *See* ANSI/BHMA A156.22011 at 9–12 for Function Descriptions F77A, F77B, F89, and F111.

Accordingly, based on the record and the analysis above, the court attributes the exterior knob assembly, key cylinder and keys to the keyed lock component of the subject merchandise, properly classifiable under Heading 8301 in assessing the quantitative data. The court attributes the interior knob assembly, strike plate, and latch bolt assembly to the knob component, properly classifiable in Heading 8302.

In section III.b, below, the court compares the weight, value and visible surface area of the subcomponents that comprise keyed lock component with the weight, value and visible surface area of the subcomponents that comprise the knob component.

In section III.c, below, the court also compares the weight and value of the subject merchandise with its respective privacy and passage counterpart devices. Privacy and passage devices are classified in Heading 8302 and will, therefore, provide useful comparisons to the subject merchandise.

b. Value, Weight and Visible Surface Area of Subcomponents

Based on the foregoing definitions, the subcomponents of the knob mechanism and the subcomponents of the keyed lock mechanism have approximately the same weights and values. The subcomponents of the knob mechanism are greater than the subcomponents of the keyed lock mechanism in visible surface area, but not to a significant extent.

In particular, the subcomponents of the keyed lock mechanism – the exterior knob assembly, key cylinder and keys – comprise, on average, 48 percent of the weight, 55 percent of the value, and 37 percent of the visible surface area of the subject merchandise.[25] The subcomponents of the knob mechanism – the interior knob assembly, latch assembly

[25] These figures reflect an average for the four metal finishes discussed above of exterior knob, key cylinder and keys. *See* Pl.'s First Response to Def.'s Request for Prod. ¶ 9(a). The precise weight, value, and surface area of the subject articles' subcomponents vary slightly among the four finishes at issue. All percentages have been rounded to the nearest percentage point.

and strike plate – comprise, on average, 49 percent of the weight, 43 percent of the value, and 60 percent of the visible surface area.[26]

When one component or subcomponent material does not *clearly predominate* over another, quantitative differences alone may not form the basis for a determination of essential character. *See, e.g.*, *Swimways Corp. v. United States*, 42 CIT ___, ___, 329 F. Supp. 3d 1313, 1322 (2018) (finding, in a quantitative comparison, that "both the textile materials and the plastic materials [were] present in significant, but not clearly predominant, proportions" so that a quantitative comparison was not persuasive).

The subcomponents of the keyed lock mechanism are greater than the subcomponents of the knob mechanism in value, but not by a significant proportion. The subcomponents of the knob mechanism prevail with respect to weight and visible surface area, but, again, not by a significant proportion. Accordingly, the court concludes that the quantitative data related to the components of the subject merchandise do not weigh in favor of classifying the subject merchandise under one tariff provision or the other

Further, the facts in the record do not support Defendant's contention that a consumer's choice to purchase an entry device over a privacy or passage device is evidence of a "price premium" reflecting the "additional security" of an entry device as Defendant contends. Def. Reply Br. at 15. In fact, the record demonstrates that the price of a keyed entry device with the most expensive finish (a satin-nickel finish), as sold by Plaintiff, actually costs *more* than the price of a basic deadbolt lock, also as sold by Plaintiff. Pl. Ex. 10, Sitkowski Affidavit, Ex. B. Yet, it is uncontested that a deadbolt provides a higher level of security than a keyed entry device. Pl. Ex. 5, Colvin Exp. Rep. at 18–19. This fact illustrates that a consumer's preference for the *appearance* of the doorknob can command a greater price premium than the level of security provided by a given device.[27]

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[26] These figures reflect an average of the four models' interior knob assembly, latch assembly and strike plate. *See* Pl.'s First Response to Def.'s Request for Prod. ¶ 9(a). The precise weight, value, and surface area of the subject articles' subcomponents vary slightly among the four models at issue. All percentages have been rounded to the nearest percentage point.

[27] This conclusion is bolstered by price data. A keyed entry device with a Satin Nickel finish costs three dollars more than an entry device with any of the other three types of finishes. Transcript of Oral Argument at 126. *See also Subject Articles Webpages; Privacy Devices Webpages; Passage Devices Webpages, supra*. By contrast, an entry device with any of the other finishes – "Polished Brass," "Antique Brass" or "Stainless Steel" costs just fifty cents more than the respective privacy device in each of those finishes. Clearly, the price premium for this line of devices reflects the value of the material and appearance more than the level of security.

In sum, the quantitative data relating, respectively, to the lock component and knob component of the subject merchandise do not weigh in favor of classifying the subject merchandise under one tariff provision or the other.

c. Weight and Value in relation to Other Door Devices

The court also compares the weight and value of each of the four metal finishes of the subject articles to the weight and value of each one's related privacy and passage devices. None of the decorative variations of the subject merchandise differs significantly from its respective privacy or passage device in weight and value.

The "Product Overview" sections of the product webpages provide the weight and value data of all three devices. *Subject Articles Webpages, Privacy Devices Webpages, Passage Devices Webpages*.[28] The contents of Home Depot's website have been admitted into evidence and are undisputed by the parties. Pl. Stmt. Facts ¶ 9 (citing to http://www.homedepot.com as a general domain); Def.'s Resp. to Pl. Stmt. Facts ¶ 9. The record demonstrates that the subject merchandise does not differ significantly in value and weight from its respective privacy and passage versions. On average, the value of the subject merchandise ($9.72) is $0.62 more than the privacy device (less than seven percent of an average retail price of $9.10) and $1.25 more than the passage device (less than 15 percent of an average retail price of $8.47).[29] The average weight of the subject merchandise (0.98 pounds) is 0.15 pounds heavier than the privacy device (approximately 18 percent) and 0.22 pounds heavier than the passage device (approximately 29 percent).[30]

The minimal difference in weight and value between the keyed entry devices and their respective privacy and passage versions in-

[28] The webpages do not provide visible surface area data for passage, privacy or entry devices, and there is no information in the record providing visible surface area data for those devices. The surface area of a solid object is a measure of the total area that the surface of the object occupies. Weisstein, Eric W, *Surface Area*, MATHWORLD. Passage, privacy and entry devices are largely similar in shape, size and structure. Pl. Ex. 16, Physical samples of SKU 881996 (Ex. 16A), SKU 883624 (Exhibit 16B), and SKU 883767 (Exhibit 16C). Based on their similarities in appearance, the court determines that the visible surface area of the subject merchandise does not differ significantly from its respective privacy and passage versions.

[29] These figures reflect the average difference in value of each model's entry device and their respective privacy and passage devices in 2015. For entry devices, *see Subject Articles Webpages, supra*. For privacy devices, *see Privacy Devices Webpages*, *supra*. For passage devices, s*ee Passage Devices Webpages, supra*.

[30] These figures reflect the average difference in weight of the entry device for each of the four finishes along with their respective privacy and passage devices found under the "Specifications" subheading of each products webpage on Plaintiff's website. For entry devices, *see Subject Articles Webpages, supra*. For privacy devices, *see Privacy Devices Webpages*, *supra*. For passage devices, s*ee Passage Devices Webpages, supra.*

dicates that the specially designed exterior knob and key cylinder do not change significantly the product's weight or value. The exterior knob and the key cylinder are the primary design differences of the subject merchandise compared to the design of the privacy device. The data indicate only small increases in weight and value and, therefore, show the high degree of commonality among the door devices. The court has not identified other cases in which quantitative data have been evaluated in this way, but here the court finds merit in such comparison. Accordingly, the court determines that the similar weights and values of the various door devices provide some, albeit limited, support for the conclusion that the knob components comprise the product's "essential character".

IV. Primary Function

The primary function of an article can be an important element of an essential character analysis and can help to inform the court's identification of the essential character of the merchandise. For example, in *La Crosse Tech., Ltd. v. United States*, 723 F.3d 1353 (Fed. Cir. 2013), the CAFC applied a GRI 3(b) analysis to the classification of electronic devices that measured and displayed atmospheric and weather conditions alongside temporal information typical of clocks. The CAFC concluded that the weather-related, meteorological capabilities of the devices were the predominant features because they were far greater in number than those related to temporal information.[31] *LaCrosse*, 723 F.3d 1353, 1360. The CAFC found, therefore, that the weather-related functions provided the essential character of the devices. *Id.*

Plaintiff argues that the primary functions of a keyed entry device – similar to a privacy or passage device – are to latch and fasten a door, provide an object to grasp and turn to open a door, close a door, and allow people to pass through a door opening. Pl. Br. at 7. Plaintiff further argues that the keyed lock mechanism of a keyed entry device is "incidental" and "optional" because the knob component can function without the lock component, but the lock component cannot perform its function without the knob component. *See* Transcript of Oral Argument at 29–32. *See* also Pl. Br. at 8.

Defendant argues that the role of the key cylinder in relation to the use of the subject merchandise demonstrates that its essential character is the product's keyed lock mechanism. Def. Br. at 16. Defendant maintains that the primary function of an entry device is to secure

[31] The CAFC uses the terms "weather related capabilities," "weather-related functions," and "weather-related features" interchangeably in the *LaCrosse* decision. *LaCrosse*, 723 F.3d 1353, 1360.

and lock a door, Def. Br. at 17, specifically to exclude those who do not have a key. Transcript of Oral Argument at 47.

Defendant relies on *Conair Corp. v. United States*, 29 CIT 888 (2005), to support its position. Def. Br. at 16. In *Conair*, this court held that tabletop fountains known as "Serenity Ponds" were properly classified as "pumps for liquids" because the pumps imparted the fountains with their essential character, notwithstanding that the fountains contained several components. *Conair Corp. v. United States,* 29 CIT 888 (2005). The Government argued that the plastic decorative sculptures, *i.e.*, the simulated rocks or plastic bamboo, imparted the essential character of the product. *Id.* at 895. However, the court found that it was the sound of the water flowing over the simulated landscape that created the "tranquil atmosphere," the "serenity," of the device. The pump, in turn, enabled the water to flow. *Id*. at 896.

Defendant further argues that because an entry device costs about a dollar more than a passage or privacy device, *see* section III.c., *supra,* consumers who purchase an entry device are paying a "price premium" for the additional security function of the key cylinder and keys. Def. Reply Br. at 15. Defendant maintains that consumers' willingness to pay this "price premium" is evidence that the keyed lock mechanism is the primary function of the subject merchandise. *Id.*

The court concludes for the following reasons that the function of the knob component of the subject merchandise provides its essential character.

First, both Parties agree that the knob component can function without the lock component, but the lock component cannot function without the knob component. *See* Transcript of Oral Argument at 29–32.[32] For example, the knob mechanism of the subject merchandise is still operational if an individual manually removes the key cylinder. Transcript of Oral Argument at 62–63. *See also* Pl. Br. at 22.

Second, the subject merchandise provides *some* security, but its more significant function is to provide a means to grasp, open and close a door. Pl. Ex. 5, Colvin Exp. Rep. at 20. As further evidence of this fact, Plaintiff's webpage for the product notes that the subject merchandise is recommended also for use on interior doors in a home, which clearly merit a lower level of security than doors to the outside. The Home Depot, Buying Guide: Types of Door Knobs available at

[32] This uncontested fact contradicts the testimony of Defendant's expert, who stated that the subject merchandise "is your basic security lock *with doorknobs attached*." Pl. Ex. 3, Kaiser Dep. at 181 (emphasis supplied). In fact, the record demonstrates that the key cylinder and other lock-related subcomponents could not function without the doorknob component. Transcript of Oral Argument at 62–63. *See also* Pl. Br. at 22.

https://www.homedepot.com/c/ab/types-of-door-knobs/9ba683603be9fa5395fab904c219eca (last visited March 23, 2020). Indeed, Defendant acknowledges that the keyed entry device is on "the lower end of security." Transcript of Oral Argument at 101. Plaintiff does not recommend an entry device for use by itself on an entry doorway. *Id.* at 17–20. In fact, Plaintiff always recommends that a consumer purchase a deadbolt, which is built for security, for use on a residential entrance in addition to purchasing a product, such as an entry device, that provides the ability "to grasp hold of and use to open and close the door." *Id*. at 9, 19.

This recommendation by Plaintiff suggests that the manufacturer designs the subject merchandise around the knob assemblies, and the key cylinder is an additional feature designed to fit into the knob assemblies. Pl. Ex. 5, Colvin Exp. Rep. at 23. The knob assemblies define the fundamental nature of the subject merchandise and show that there is more continuity among passage, privacy and entry devices than there are differences among those devices.

These considerations distinguish the present case from the analysis conducted in *Conair*, as relied on by Defendant. In *Conair*, the court concluded that the tabletop fountain would have no use without the pump that made the water flow, because the product is "intended to appeal to the consumer's visual and auditory senses." Conair, 29 C.I.T. at 896.

In this case, the knobset would in fact have utility without the key cylinder; it is the key cylinder that would have no utility without the knobset. *See* Transcript of Oral Argument at 29–32. Therefore, to the extent that *Conair* is pertinent to this case, it supports the conclusion that the function of the knob component, rather than that of the lock component, is primary and, as a consequence, imparts the product with its essential character.

A consumer does not purchase an entry device primarily, let alone predominantly, for its keyed lock component, but rather for its knob component that allows an individual to grasp, open and close a door. *See* Pl. Ex. 5, Colvin Exp. Rep. at 15, 20. *See also* Pl. Ex. 3, Kaiser Dep. at 181–82. A consumer whose predominant priority is security would purchase a different product such as a deadbolt. Pl. Ex. 5, Colvin Exp. Rep. at 17. However, a deadbolt does not provide a means for a person to grasp the door from the outside to pull it open or closed. Pl. Ex. 5, Colvin Exp. Rep. at 9; Pl. Ex. 3, Kaiser Dep. at 183. Further, without a key or key cylinder, an entry device still maintains a locking ability through the internal locking mechanism of the interior knob that is identical to the interior knob of a privacy device.

In sum, based on the record, the primary function of a keyed entry device is to grasp, open and close a door. This function is provided by the knob component. The subject merchandise also functions to provide some security through the lock component; however, the record demonstrates that this function is secondary.

CONCLUSION

Considering all of the factors discussed above and based on the totality of the evidence in the record, the court concludes that the essential character of the subject merchandise is its knob component, rather than its lock component. See *Structural Indus.,* 29 C.I.T. at 185.

> Doorknob: "Oh, no use! I forgot to tell you! I'm locked!"
>
> Alice: "Oh no!"
>
> Doorknob: "But of course, uh, you've got the key, so..."
>
> Alice: "What key?"
>
> Doorknob: "Now, don't tell me you've left it up there!"
>
> Alice: "Oh, dear! What ever will I do?"[33]

For the foregoing reasons, the court will and does grant summary judgment in favor of Plaintiff and denies Defendant's cross-motion. Customs' classification is reversed and judgment will be entered accordingly.

Dated: March 26, 2020
New York, New York

/s/ Timothy M. Reif
TIMOTHY M. REIF, JUDGE

[33] *Walt Disney's Alice In Wonderland, The All-Cartoon Wonderfilm* (1951), based on *Alice's Adventures in Wonderland and Through the Looking Glass*, by Lewis Carroll (1865, 1871).

Slip Op. 20–43

MERIDIAN PRODUCTS, LLC, Plaintiff, and WHIRLPOOL CORPORATION, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 13–00246

[Sustaining a decision construing the scope of antidumping duty and countervailing duty orders on a type of appliance door handle.]

Dated: April 6, 2020

Daniel J. Cannistra, Crowell & Moring, LLP, of Washington, D.C., for plaintiff. With him on the brief was *Alexander Schaefer*.

Donald Harrison, Gibson, Dunn & Crutcher, LLP, of Washington, D.C., for plaintiff-intervenor.

Aimee Lee, Senior Trial Counsel, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Tara K. Hogan*, Assistant Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel was *Jessica M. Link* and *Orga Cadet*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Alan H. Price and *Robert E. DeFrancesco, III*, Wiley Rein LLP, of Washington, D.C., for defendant-intervenor.

OPINION

Stanceu, Chief Judge:

Plaintiff Meridian Products, LLC ("Meridian") contested a 2013 "Final Scope Ruling" of the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department"), construing the scope of antidumping and countervailing duty orders (the "Orders") on aluminum extrusions from the People's Republic of China to include certain kitchen appliance door handles.

Before the court is the decision (the "Second Remand Redetermination") Commerce issued in response to the court's remand order following the decision of the Court of Appeals for the Federal Circuit ("Court of Appeals") in *Meridian Prods., LLC v. United States*, 890 F. 3d 1272 (Fed. Cir. 2018) ("*Meridian III*"). *Final Results of Second Redetermination Pursuant to Court Remand* (May 15, 2019), ECF No. 88–1 ("*Second Remand Redetermination*"). Neither plaintiff nor plaintiff-intervenor filed comments with Commerce or with the court objecting to the Second Remand Redetermination, which the court sustains.

I. BACKGROUND

The opinion of the Court of Appeals in *Meridian III* and the court's earlier opinions contain background on this litigation, with which the court presumes familiarity. *See Meridian III*, 890 F.3d at 1274–77; *Meridian Prods., LLC v. United States*, 39 CIT __, __, 125 F. Supp. 3d 1306, 1308–09 (2015) ("*Meridian I*"); *Meridian Prods., LLC v. United States*, 40 CIT __, __, 180 F. Supp. 3d 1283, 1284–85 (2016) ("*Meridian II*"); *Meridian Prods., LLC v. United States*, 43 CIT __, __, 357 F. Supp. 3d 1351, 1353 (2019) ("*Meridian IV*").

As of the time Commerce prepared and issued the Second Remand Redetermination, the sole issue remaining to be determined was whether a specific type of appliance door handle (a "Type B" handle) was within the scope of an antidumping duty order and a countervailing duty order (the "Orders") on certain aluminum extrusions from the People's Republic of China, both issued in May 2011. *Meridian IV*, 43 CIT at __, 357 F. Supp. 3d at 1357; *see Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Int'l Trade Admin. May 26, 2011) ("*AD Order*"); *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Int'l Trade Admin. May 26, 2011) ("*CVD Order*"). Each Type B handle is an assembly consisting of an aluminum extrusion component, plastic end caps, and screws. *See Second Remand Redetermination* 17. As directed by the Court of Appeals, the court ordered Commerce in *Meridian IV*, 43 CIT at __, 357 F. Supp. 3d at 1357, to determine whether the Type B handles fall within the "finished merchandise" exclusion in the Orders. *See AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 36,654, (excluding from the Orders "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry"). The court also directed Commerce, if concluding that the finished merchandise exclusion did not apply, to determine whether the Orders applied to a Type B handle in its entirety or only to the aluminum-extruded component of the assembly. *Meridian IV*, 43 CIT at __, 357 F. Supp. 3d at 1357.

On April 1, 2019, Commerce provided the parties, and invited comment on, a draft of a remand redetermination in which it proposed to rule that the finished merchandise exclusion did not apply to the Type B handles and that the extruded aluminum component of each Type B handle was within the scope of the Orders while the other components (plastic end caps and screws) were not. Draft Results of Second Redetermination Pursuant to Court Remand, *Meridian Prods. LLC v. United States*, Ct. No. 13–00246, Slip Op. 19–5

(Apr. 1, 2019). Only the defendant-intervenor submitted comments on the draft. *Second Remand Redetermination* at 17.

In the Second Remand Redetermination, Commerce ruled that the finished merchandise exclusion did not apply to the Type B handles and that the extruded aluminum component of each Type B handle was within the scope of the Orders while the other components (plastic end caps and screws) were not. *Second Remand Redetermination* 37. Defendant-intervenor submitted comments to the court in favor of the Second Remand Redetermination. *Def.-Int. Aluminum Extrusion Fair Trade Committee's Comments on Second Final Results of Redetermination Pursuant to Court Remand*, (June 14, 2019), ECF No. 90. On June 3, 2016, defendant replied to these comments. *Def.'s Submission in Accordance with the Court's Order of Apr. 11, 2019 and Request to Sustain Second Remand Redetermination* (June 21, 2019), ECF No. 91. No other party submitted comments to the court.

II. DISCUSSION

Neither the plaintiff nor the plaintiff-intervenor have successfully contested or may contest the Second Remand Redetermination. The court reaches this conclusion for two reasons. First, having failed to comment on the draft determination Commerce provided to the parties, the requirement to exhaust administrative remedies would have allowed the court to disregard any objection plaintiff or plaintiff-intervenor could have made to the Second Remand Redetermination in comments to the court. *See Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008). While exceptions allowing a court to waive the exhaustion requirement apply in some circumstances, no such exception is apparent from these facts and circumstances, and none is sought.

Second, the doctrine of waiver also applies to the position of the plaintiff and plaintiff-intervenor in this litigation. *See Sage Products, Inc. v. Devon Indus., Inc.* 126 F.3d 1420, 1426 (Fed. Cir. 1997). Because neither submitted comments to the court objecting to the Second Remand Redetermination, any objection these parties could have raised to the Second Remand Redetermination has been waived.

III. CONCLUSION

For the reasons set forth above, the court sustains the Second Remand Redetermination and will enter judgment accordingly.

Dated: April 6, 2020
New York, New York

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

Slip Op. 20–44

TMB 440AE, INC. (formerly known as ADVANCE ENGINEERING CORPORATION), Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 18–00095

[Commerce's Final Results of Remand Redetermination are remanded]

Dated: April 6, 2020

Ned H. Marshak, *Jordan C. Kahn*, and *David M. Murphy*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY and Washington D.C., and *Dale E. Stackhouse* and *Meghann C. T. Supino*, Ice Miller LLP, of Indianapolis, IN for Plaintiff TMB 440AE, Inc.

Elizabeth Speck, Senior Trial Counsel, Civil Division, U.S. Department of Justice, of Washington D.C., for the defendant. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Vania Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Restani, Judge:

Before the court is the United States Department of Commerce's ("Commerce") *Final Results of Remand Redetermination*, ECF No. 44–1 (Nov. 11, 2019) ("*Remand Results*") following the court's opinion and order in *TMB 440 AE, Inc. v. United States*, 399 F. Supp. 3d 1314 (CIT 2019) ("*Remand Order*"). The court ordered Commerce to reconsider its decision finding that seamless pipe imported by TMB 440AE, Inc. (formerly known as Advance Engineering Corporation) ("AEC") was within the scope of antidumping and countervailing duty orders on certain seamless pipe from the People's Republic of China ("PRC"). *Id.* at 1316; *see also Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 75 Fed. Reg. 69,052 (Dep't Commerce Nov. 10, 2010) ("ADD Order"); *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 75 Fed. Reg. 69,050 (Dep't Commerce Nov. 10, 2010) ("CVD Order") (collectively, the "Orders"). The court required Commerce to consider the sources listed in 19 C.F.R. §

351.225(k)(1)[1] ("(k)(1) sources") in making its assessment of the scope of the Orders and to proceed to consider the factors listed in 19 C.F.R. § 351.225(k)(2) ("(k)(2) factors") if these sources were not dispositive. *Remand Order* at 1322. Following remand, and after consulting those (k)(1) sources, at least in part, Commerce continues to find that AEC's pipe is within the scope of the orders. *See Remand Results* at 5. For the reasons stated below, Commerce's decision is remanded.

BACKGROUND

The court presumes familiarity with the facts of this case and will recount them only as necessary. The Orders cover certain seamless pipe from the PRC,[2] but exclude:

> (1) All pipes meeting aerospace, hydraulic, and bearing tubing specifications; (2) all pipes meeting the chemical requirements of ASTM A-335, whether finished or unfinished; and (3) unattached couplings. Also excluded from the scope of the order are all mechanical, boiler, condenser and heat exchange tubing, except when such products conform to the dimensional requirements, i.e., outside diameter and wall thickness of ASTM A-53, ASTM A-106 or API 5L specifications.

ADD Order, 75 Fed. Reg. at 69,052–53; CVD Order, 75 Fed. Reg. at 69,051. AEC was not identified by petitioning domestic industry during the underlying investigations by Commerce and the U.S. International Trade Commission ("ITC") and did not participate in the creation of the Orders. Although the Orders were issued on November 10, 2010, AEC did not receive a Notice of Action from United States Customs and Border Protection until October 3, 2016, informing AEC that it was subject to duties pursuant to the Orders. *See Remand*

[1] The sources include the "descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1).

[2] The Orders cover:

> [C]ertain seamless carbon and alloy steel (other than stainless steel) pipes and redraw hollows, less than or equal to 16 inches (406.4 mm) in outside diameter, regardless of wall-thickness, manufacturing process (e.g., hot-finished or cold-drawn), end finish (e.g., plain end, beveled end, upset end, threaded, or threaded and coupled), or surface finish (e.g., bare, lacquered or coated). Redraw hollows are any unfinished carbon or alloy steel (other than stainless steel) pipe or "hollow profiles" suitable for cold finishing operations, such as cold drawing, to meet the American Society for Testing and Materials ("ASTM") or American Petroleum Institutes ("API") specifications referenced below, or seamless carbon and alloy steel (other than stainless steel) standard, line, and pressure pipes produced to the ASTM A-53, ASTM A-106, ASTM A-334, ASTM A-589, ASTM A-795, ASTM A-1024, and the API 5L specifications, or comparable specifications, and meeting the physical parameters described above, regardless of application[.]

ADD Order, 75 Fed. Reg. at 69,053; CVD Order, 75 Fed. Reg. at 69,051.

Results at 27. AEC requested a scope ruling from Commerce on October 20, 2017. *Id.* at 3.

AEC contended that its pipe either (1) properly fell within the "aerospace exclusion" because its pipe is threaded to meet a particular aerospace threading standard following importation or (2) should be excluded because its pipe is specialized, and the Orders are intended to apply solely to commodity pipe. *See Remand Order* at 1319. Without consulting the (k)(1) sources, Commerce determined that the Orders were unambiguous and clearly included AEC's pipe. *Id.* at 1320. The court held that Commerce was required to consult these sources to determine whether AEC pipe was properly included in the scope of the Orders and remanded for reconsideration. *Id.*at 1322.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012).[3] The court has authority to review Commerce's decision that merchandise falls within an antidumping or countervailing duty order. 19 U.S.C. § 1516a(a)(2)(B)(vi). Commerce's scope determination will be upheld 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). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 968 F. Supp. 2d 1255, 1259 (CIT 2014) (internal quotation and citation omitted).

"Scope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002). Further, Commerce has the authority to clarify the scope of a prior order, but it cannot interpret an order "in a way contrary to its terms." *Whirlpool Co. v. United States*, 890 F.3d 1302, 1308 (Fed. Cir. 2018) (internal quotation and citation omitted).

DISCUSSION

By the text of the Orders alone without the context of the investigation, AEC pipe would appear to fall within their scope. On remand, Commerce considered the (k)(1) sources to ascertain the intended meaning of "aerospace specifications," *Remand Results* at 6–12, and the ASTM A-335 exclusion, *id.* at 16–18, and found that AEC's pipe was not within either. *Id.* AEC argues that the remand redetermination is not supported by substantial evidence because the (k)(1)

[3] All further citations to the U.S. Code are to the 2012 edition unless otherwise indicated.

sources do not support Commerce's narrow reading of the "aerospace specifications" exclusion and because the (k)(1) sources reveal that specialized pipe was not meant to be included in the scope of the Orders. Pl.'s Cmts. On Final Remand Redetermination, ECF No. 47 at 8–26 (Jan. 9, 2020) ("AEC Br."). In the alternative, AEC argues that the (k)(1) sources do not clarify the Orders and that Commerce was required to conduct a full scope inquiry and consider the factors listed in 19 C.F.R. § 351.225(k)(2). Finally, if AEC pipe is found within the scope of the Orders, AEC contends that the agency cannot impose antidumping and countervailing duties retroactively. *Id.* at 26–33.

I. "Aerospace Specifications" Exclusion

Commerce claims that the "aerospace specifications" exclusion originated during the investigation following a recommendation made by Salem Steel North America LLC ("Salem Steel") to exclude "aviation tubing" from the Orders. *Remand Results* at 7–8. In a subsequent letter, Salem Steel[4] elaborated that "[a]viation, or aerospace material, seamless tubing" all "must conform to certain Aerospace Material Specifications" and that this included producing tubing to the "AMS-T-6736A standard," which requires the use of "one of two specific alloys – either 4130 chromium molybdenum steel alloy or 8630 alloy." Letter from Dorsey & Whitney LLP to the Sec'y of Commerce on behalf of Salem Steel re "Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China; Response to Commerce Department's June 23 Proposal to Change Scope Language to Exclude Mechanical Tubing," A 570–956, C-570–957, at 6–7 (June 30, 2010) ("Salem Steel June 30 Letter")). Commerce further contends, based on the same documents, that the aerospace exclusion was meant to apply "only to CD mechanical tubing," which additionally requires adherence to AMS2253E, a standard defining dimensional tolerances for mechanical tubing. *Remand Results* at 8–9 & n.22 (citing Salem Steel June 30 Letter, at 7). Given the absence of other record information about aerospace specifications, Commerce states that it "implicitly accepted Salem Steel's description of aerospace standards," which meant

[4] Salem Steel is a producer of cold drawn seamless mechanical tubing ("CD Mechanical Tubing"). In arguing that CD Mechanical Tubing should be excluded, Salem Steel stated that whereas seamless pipes are "commodity products made to standard pipe sizes having a nominal outside diameter," Salem Steel products are "made to specific order and strict engineering specifications, not standard pipe sizes." Letter from Dorsey & Whitney LLP to the Sec'y of Commerce on behalf of Salem Steel North America LLC re "Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China; Request for Change in Scope Language to Exclude Mechanical Tubing," A-570–956, C-570–957, ECF No. 52–1, at 2 (May 24, 2010) ("Salem Steel May Letter"). Additionally, Salem Steel stressed that using CD Mechanical Tubing in place of standard seamless pipe would not be cost effective as it is "40 to 300% more expensive." *Id.* at 7–8.

adopting AMS-T-6736A as defining the chemical requirements and AMS2253E as defining the dimensional requirements of pipe meeting "aerospace specifications" for the purposes of the exclusion. *Id.* at 11.

According to Commerce, AEC pipe does not satisfy these requirements as it does not contain the requisite percent of molybdenum or chromium to satisfy the AMS-T-6736A standard and does not meet the "tight dimensional requirements" to meet the AMS 2253E standard. *Id.* at 12–13. Commerce rejected AEC's contention that the threading its pipe undergoes after importation, which meets aerospace threading standard SAE AS71051B, requires Commerce to find that the pipe fits within the "aerospace specification" exclusion. *Id.* at 13–15.

AEC asserts that Commerce is "invent[ing] a definition that never existed on the record" and that it is now improperly defines "aerospace specifications" too narrowly. AEC Br. at 8. It asserts that Salem Steel never purported to define the term. *Id.* at 8–9. Further, rather than implicitly accepting Salem Steel's proposal, Commerce rejected Salem Steel's proposed exclusion language, "seamless aviation tubing conforming to AMS-T-6736A and AMS 2253E," in favor of the broader standard evinced by all pipes meeting aerospace, hydraulic, and bearing tubing specifications. *See id.* at 14 (citing Salem Steel June 30 Letter, at 9). AEC continues to claim that it's pipe should fall within the aerospace exclusion because it can be threaded to certain aerospace threading standards after import. *See id.* at 14–15.

AEC's argument regarding the "aerospace specifications" exclusion fails for two primary reasons. First, AEC functionally asks the court to read the exclusion without the context of the (k)(1) sources to find that aerospace specifications means *any* aerospace specification despite that the exclusions appears to have originated at the behest of a single company, Salem Steel. The court did not order Commerce to consider the (k)(1) sources intending to discount them on review. Commerce, in fact, is required to use the (k)(1) sources to ascertain ambiguous language to determine its meaning. *See* 19 C.F.R. § 351.225(k)(1).

Although AEC is correct that there was no significant discussion of "aerospace specifications" prior to the publishing of the Orders, the relevant evidence supports Commerce's understanding of what the "aerospace specification" exclusion was meant to cover. Salem Steel's letter can be reasonably read to equate aviation and aerospace tubing and does explicitly state that such tubing is "subject to the AMS-T-6736A and AMS 2253E standards." Salem Steel June 30 Letter, at 6; *see also Viet I–Mei Frozen Foods Co. v. United States*, 839 F.3d 1099, 1106 (Fed. Cir. 2016) (noting that the possibility of drawing multiple

conclusions from the same evidence does not preclude Commerce's factual determinations from being unsupported by substantial evidence) (citation omitted). It matters not that Salem Steel did not claim to define what "aerospace specifications" meant; what matters is whether Commerce's understanding the meaning of "aerospace specifications" is reasonable, supported by the record, and does not expand the scope of the order beyond its language. *Compare Whirlpool*, 890 F.3d at 1308 (courts "grant Commerce substantial deference with regard to its interpretation of its own Orders.") *with* 19 U.S.C. § 1516a(b)(1)(B)(i) (courts uphold Commerce's scope rulings unless they are unsupported by substantial evidence or otherwise not in accordance with law). The only (k)(1) sources identified by the parties that appear to reference aerospace do so in relation to the AMST-6736A and AMS 2253E standards.[5] Thus, it was reasonable for Commerce to determine that "aerospace specifications" narrowly applied to these specific standards discussed during the investigation. *See Fedmet Res. Corp. v. United States*, 755 F.3d 912, 921 (Fed. Cir. 2014) ("[T]he reason why the (k)(1) sources are afforded primacy in the scope analysis is because interpretation of the language used in the orders must be based on the meaning given to that language during the underlying investigations."). AEC does not contend that its merchandise satisfies these chemical and dimensional standards and the record supports Commerce's finding that it does not. *See Remand Results* at 12–13.

Second, even if Commerce's clarification of the definition of "aerospace specification" were unreasonable, it is still reasonable for Commerce to set the moment of inquiry to the time of importation in this case. *See S. F. Candle Co. v. United States*, 206 F. Supp. 2d 1304, 1314 (CIT 2002) (noting that Commerce tends to look at the condition of the merchandise "at the time of importation or purchase by the consumer, not at the time of consumption."). AEC does not contend that it meets its claimed aerospace threading specification at import, but rather argues that its pipe is designed in such a way that it *can* be threaded to this specification after import. To allow AEC to prevail on this line of argumentation would likely create an unworkable standard and broaden the opportunity for potential circumvention.

[5] That Commerce did not use the specific exclusion language offered by Salem Steel does not necessarily mean, as AEC appears to argue, that Commerce wholesale rejected that language. *See* AEC Br. at 10. It is more likely that Commerce believed that the exclusion language did not have to list each of the applicable standards as the Salem Steel letter appears to indicate that *all* aviation, hydraulic, and bearing tubing must confirm to the specific standards listed in Salem Steel's proposed exclusion language. *See* Salem Steel June 30 Letter, at 6–9. Accordingly, simply stating aviation, hydraulic, and bearing implicitly meant pipes that satisfied the standards detailed in the Salem Steel June 30 Letter such that listing the specific standards might have been redundant.

Accordingly, the court sustains Commerce's finding that AEC's pipe does not fall within the "aerospace specification" exclusion.

II. The ASTM A-335 Exclusion

Prior to the court's remand, AEC argued that the rationale given for excluding ASTM A335 ("A-335") pipe from the scope of the Orders—namely its specialized nature and the unfeasibility of substituting costly A-335 pipe for "commodity pipe" subject to the Orders— supported excluding AEC pipe as well. *Remand Order* at 1322. On remand, Commerce considered the origin on the A-335 pipe exclusion and found that it narrowly applied to the chemical specifications of A-335 pipe and originated following a comment by a U.S. company, Wyman-Gordon Inc. ("Wyman-Gordon"), after A-335 pipe was initially included in the Petition. *Remand Results* at 16–17. Because AEC pipe does not satisfy the chemical requirements of A335 pipe, which allows for use at very high temperatures, Commerce asserts that AEC pipe is properly outside of that exclusion. *Id.* at 17–18.

AEC argues that Commerce misunderstood its argument. AEC Br. at 16–17. It argues that the A-335 pipe exclusion was prompted by a desire to exclude specialized pipe "made to tight tolerances and precise dimensional and chemical requirements," like AEC pipe. *Id.* at 17. AEC contends that its pipe was not included in the petition nor the investigation precisely because it, like the A-335 pipe, was not the intended target of the investigation. *Id.* AEC argues that the A-335 pipe exclusion, like the aerospace specifications exclusion, evinces an intent to exclude specialized pipe. *Id.* at 17–25.

Defendant, the United States (the "government"), acknowledges that the request to exclude A-335 pipe was made because it is "an inherently different product from seamless" pipe. Def.'s Resp. to the Parties' Cmts. On the Dep't of Commerce's Final Results of Redetermination, ECF No. 50, at 19 (Feb 11, 2020) ("Gov. Br."). It goes on to reiterate, however, the point that the narrow exclusion was made following a request by a specific domestic manufacturer and applies only to pipe meeting certain chemical specifications, which does not include AEC pipe. Gov. Br. at 19–20.

Commerce's explanation and analysis do not sufficiently address the issue at hand. In response to AEC's comments on the remand redetermination, Commerce asserts that exclusions were given to some types of specialized pipes, but not all, at the behest of certain companies during the investigation. *See Remand Results* at 24 (noting that "[v]arious types of products that are specialized to meet certain needs beyond standard A-53 usage, including specializations that AEC pipe does not meet, are included in the Orders: A-333 and

A-334 for low-temperature service, A-106 for high-temperature service, A-795 for fire protection."). AEC argues that Commerce must determine whether the rationales given for excluding some products applies with equal force to AEC's products. *See* AEC Br. at 21–23. The government responds that the exclusions were narrow and not meant to apply to specialized pipe generally. Gov. Br. at 14, 17–18. The court does not doubt that Commerce intended the exclusions to be narrow, but Commerce needs to consider whether the reasons for excluding some specialized pipe applies equally to AEC's pipe. For example, would a complete and fair review of the Petition and the ITC Investigation demonstrate that the Orders were not intended to cover AEC's type of pipe.

Commerce failed to address this court's concern regarding the A-335 pipe exclusion. The court found that AEC might be correct that excluding the A-335 pipe was indicative of an intent to exclude those types of specialized pipe that was not realistically interchangeable with the types of pipe covered by the Orders. *See Remand Order* at 1322. Commerce's cursory review of the record regarding the A-335 pipe exclusion fails to satisfactorily address AEC's, and the court's, concerns. The government admits that the reasoning prompting the A-335 pipe exclusion[6] was its inherent difference from the pipe the Orders clearly intended to cover. Gov. Br. at 19. It remains unclear if AEC pipe should also be considered inherently different from the subject pipe, albeit potentially based on somewhat different reasons than those given as to excluded pipe. Apparently, Commerce misunderstood the court's remand order. Commerce limited itself to the range of specific exclusions. It did not properly consider all (k)(1) source material, positive and negative.

The need to provide more complete analysis is further evidenced by a brief submitted by Petitioners to the U.S. International Trade Commission during the investigation, which, in relevant part states that "all parties (domestic producers, importers, and MC Tubular itself) agree that domestic seamless pipe is "like" the imported seamless pipe subject to the investigation only if it is used in standard, line and pressure pipe applications." U.S. Steel Corp., Case Br. re "Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China," A-570–956, C-570–957, ECF No. 52–1, at 61–62 (July 14, 2010). It remains unclear to the court

[6] In discussing A-335 pipe, the ITC's Final Report notes that the domestic producers admit that the interchangeability of that pipe with subject pipe would be "unusual, one-way, and costly," that A-335 is higher priced that other forms of seamless pipe. *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from China*, Investig. Nos. 701-TA-469 and 731TA-1168 (Final) ECF No. 52–1, at I-21 (U.S. Int'l Trade Comm'n Nov. 2010) ("Final ITC Report").

whether "standard, line and pressure pipe applications" includes the applications AEC purports is the use of its pipe. Commerce has not made findings as to whether AEC pipe was considered during the underlying investigations by Commerce and the ITC. Although an unpublished opinion, the Federal Circuit's reasoning in *A.L. Patterson, Inc. v. United States*, is useful here. *See* 585 F. App'x 778 (Fed. Cir. 2014) (unpublished).

In that case, the Federal Circuit held that although Patterson's steel coil rod facially fell within the language of the Order at issue, Commerce had failed to offer evidence that the merchandise fell within the domestic industry that the ITC investigated and did not address evidence demonstrating that merchandise was physically distinguishable from the merchandise the Petitioner intended to be covered by the Order. *Id.* at 783–84 (noting that that merchandise meeting the physical specification of an order "only begins the inquiry" and that when a party presents "evidence showing that [the merchandise at issue] is a distinct domestic market that the Commission did not investigate" then Commerce had to make findings on that point); *see also Trendium Pool Prods., Inc. v. United States*, 399 F. Supp. 3d 1335, 1342–44 (CIT 2019) (relying on *Patterson* to find that even though the merchandise at issue in that case was specifically mentioned in the Orders, further processing rendered that merchandise outside of the scope). Here, although AEC pipe appears to fall within the bare language of the scope in that it is "seamless carbon and alloy steel (other than stainless steel) standard, line, and pressure pipes produced to the ASTM A-53, ASTM A-106 . . . or comparable specifications," ADD Order, 75 Fed. Reg. at 69,052–53; CVD Order, 75 Fed. Reg. at 69,051, AEC has put forth evidence that, despite its product meeting the dimensional specifications of A-53, its product is specialized beyond standard A-53 pipe. *See* AEC Br. at 15–16. Accordingly, AEC pipe may well exceed the listed specifications as well as "comparable specifications" contemplated by the Orders. Commerce is not free to ignore this evidence. *See Mitsubishi Polyester Film, Inc. v. United States*, 321 F. Supp. 3d 1298, 1304 (CIT 2018) (Commerce must "analyze the 'descriptions of the merchandise contained in the petition, [and] the original investigation' on the record, *including those that fairly detract from its determination*") (emphasis added) (alteration in original) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951).

Turning to the (k)(1) sources, the petition indicates the seamless pipes intended to be covered are used "for the conveyance of water, steam, petrochemicals, chemicals: oil products, natural gas; and other liquids and gasses in industrial piping systems." U.S. Steel Corp.,

"Petition for the Imposition of Antidumping and Countervailing Duties," A-570–956 and C-570–957, ECF No. 52–1, at 5 (Sep. 16, 2009) ("Petition"). The ITC's Final Report primarily discusses the use of seamless pipe for natural gas in relation to refinery facilities, construction, and industrial applications. *See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from China*, Investig. Nos. 701-TA-469 and 731-TA-1168 (Final), ECF No. 52–1, at 6, I-3, I-10, I-18, II-1 (U.S. Int'l Trade Comm'n Nov. 2010) ("Final ITC Report"). Neither the Petition nor the Final ITC Report appear to discuss subject pipe specifically for residential use, although the Final ITC Report does state that end-use applications include "plumbing and heating systems, air condition units, [and] automatic sprinklers." Final ITC Report, at I-10.

AEC admits that its pipes are used in the conveyance of natural gas, but it notes that rather than being used for industrial purposes, its pipe is used for a "niche market," which includes producing "custom meter sets for the gas utility industry for residential use." *See* Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to the Sec'y of Commerce on behalf of AEC re "Advance Engineering Corporation Scope Request," A-570–956, C-570–957, P.R. 1–4, C.R. 1–4, at 3 (Oct. 20, 2017) ("AEC Scope Request"). AEC claims that standard ASTM A-53 pipe is not safely useable for this purpose. *Id.* at 3–5. AEC further contends that its pipe's chemical specifications, additional finishing, tighter dimensional tolerances, more exacting storing and packaging, and customization render it materially different from the pipe covered by the Orders. *Id.* at 4–13, Exhibits A–F (describing the AEC pipe Specifications as compared to subject pipe). As indicated, the Petition does not name AEC as a producer, importer, or seller of subject merchandise or in any other capacity. *See* Petition, at Exhibit I-11, I-14. Finally, AEC claims that it has been unable to domestically source its pipe. AEC Scope Request, at 8–10 (citing exhibits comparing its product to domestically available pipe).

Although before the court, the government rejects AEC's contention that the Orders were concerned with "commodity pipe," it ignores evidence from the investigation showing that domestic industry, importers, and even Commerce referred to the merchandise covered by the Orders as commodity pipe. *See, e.g.*, Salem Steel May Letter, at 2, 4–7; Letter from Steptoe & Johnson LLP to the Sec'y of Commerce on behalf of MC Tubular Products, Inc. re "Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from the People's Republic of China: Comments on Department's June 23, 2010 Proposed Scope Modification," A-570–956, C-570–957, ECF No. 52–1, at 4 (June 30, 2010); Salem Steel June 30 Letter, at 2; Mem. from Zev Primor,

Senior Int'l Trade Analyst, to the File, "U.S. Customs and Border Protection's Inquiry Regarding Mechanical Tubing," A-570–956, C-570–957, ECF No. 52–1 at 1 (June 23, 2010) (noting that Commerce issued guidance stating that "[g]enerally, the seamless standard, line and pressure pipes are commodity products"); Hearing Tr., "Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from China, Investig. Nos. 701-TA-469 and 731TA-1168 (Final)," ECF No. 52–1, at 68:2–6 (U.S. Int'l Trade Comm'n Sept. 14, 2010) (representative from domestic industry stating that "[m]ore and more customers use seamless SLP pipe as a commodity product" and that American companies cannot compete with "dumped and subsidized Chinese imports"). While these references may not be dispositive on whether the Orders were primarily or exclusively targeting "commodity pipe," Commerce cannot ignore this evidence undermining its position.

At base, Commerce's conclusion that that (k)(1) sources are dispositive on whether AEC's pipe is properly included in the scope is unsupported by substantial evidence and clear reasoning. Commerce cannot ignore the context given to the order language, both inclusive and exclusive, and whether AEC's pipe was covered by the ITC determination that certain pipe possessed material injury or threat of material injury to domestic producers. *See Remand Order* at 1322. Commerce must address AEC's claims to avoid frustrating the purpose of antidumping and countervailing duties by potentially subjecting merchandise to those duties without an injury determination. *See Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1371 (Fed Cir. 1998).

Commerce must move beyond the words of the particular exclusions found in the Orders and complete a (k)(1) analysis. If that leaves Commerce in doubt, it must proceed to consider the factors listed in 19 C.F.R. § 351.225 (k)(2).[7]

CONCLUSION

For the foregoing reasons, Commerce's *Remand Results* are remanded for further consideration. Remand results are due within 90 days of the date of this decision. Any comments on the remand results shall be submitted within 30 days of the filing of the results. Replies on the comments are due 15 days thereafter.

[7] Because the court is remanding for Commerce to reconsider its determination the court does not, at this stage of the proceedings, address AEC's arguments about Commerce's retroactive imposition of duties.

Dated: April 6, 2020
New York, New York

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

Slip Op. 20–45

BIO-LAB, INC., CLEARON CORP. AND OCCIDENTAL CHEMICAL CORP., Plaintiffs, v. UNITED STATES, Defendant, and JUANCHENG KANGTAI CHEMICAL CO., LTD. AND HEZE HUAYI CHEMICAL CO., LTD., Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 18–00155

[United States Department of Commerce's Final Results are sustained.]

Dated: April 7, 2020

James R. Cannon, Jr., Cassidy Levy Kent (USA) LLP, of Washington, DC, argued for Plaintiffs. With him on the brief was *Ulrika K. Swanson*.

Sonia M. Orfield, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Joseph H. Hunt*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Catherine Miller*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, DC, argued for Defendant-Intervenors. With him on the brief were *J. Kevin Horgan* and *Alexandra H. Salzman*.

OPINION

Eaton, Judge:

Bio-Lab, Inc., Clearon Corp., and Occidental Chemical Corp. ("Plaintiffs") are U.S. domestic producers of chlorinated isocyanurates[1] and the petitioners in this proceeding. They challenge the United States Department of Commerce's ("Commerce" or the "Department") final results published in *Chlorinated Isocyanurates From the People's Republic of China*, 83 Fed. Reg. 26,954 (Dep't Commerce June 11, 2018) ("Final Results"), and the accompanying Issues and Decision Mem. (June 5, 2018), P.R. 72 ("Final IDM").

In the Final Results, Commerce determined that Defendant-Intervenors and mandatory respondents Juancheng Kangtai Chemical Co., Ltd. ("Kangtai") and Heze Huayi Chemical Co., Ltd. ("Heze"), Chinese producers and exporters of the chemicals, received countervailable subsidies during the period of review, including through a loan program called the Export Buyer's Credit Program.[2] *See* Final

[1] Chlorinated isocyanurates, the subject chemicals, are "derivatives of cyanuric acid, described as chlorinated s-triazine triones" that are used for, among other things, water treatment. *See* Final IDM at 2; *Chlorinated Isocyanurates from the People's Rep. of China*, 79 Fed. Reg. 67,424 (Dep't Commerce Nov. 13, 2014) (countervailing duty order).

[2] The Export Buyer's Credit Program provides credit at preferential rates to foreign purchasers of goods exported by Chinese companies in order to promote exports. *See Clearon Corp. v. United States*, 43 CIT __, 359 F. Supp. 3d 1344, 1347 (2019). The program

IDM at 1. It made this determination on the basis of adverse inferences, having found that the use of adverse facts available ("AFA")[3] was warranted because the Government of China (1) failed to provide necessary information about the operation of the Export Buyer's Credit Program, and (2) failed to act to the best of its ability to cooperate with Commerce's requests for information about the program.[4] *See* 19 U.S.C. § 1677e(a), (b); Final IDM at 5–6. To determine an AFA rate for the Export Buyer's Credit Program, Commerce used a hierarchy it developed for administrative reviews. *See* 19 U.S.C. § 1677e(d).[5] Applying step two of the hierarchy, the Department selected the rate of 0.87 percent *ad valorem* as a component of the final subsidy rate calculated for Kangtai and Heze. *See* Final IDM at 12. This rate had previously been determined in an earlier segment of the same proceeding for a Chinese government loan program called the Export Seller's Credit Program. Commerce found the Export Seller's Credit Program to be "similar" to the Export Buyer's Credit Program because each conferred a similar benefit: access to government-subsidized loans. *See* Final IDM at 12; 19 U.S.C. § 1677e(d)(1)(A)(i) (emphasis added) (permitting Commerce to "use a countervailable subsidy rate applied for the same or *similar program* in a countervailing duty proceeding involving the same country").

Quite naturally, Plaintiffs do not question Commerce's finding that the use of AFA was warranted. Nor do Plaintiffs dispute the lawfulness of the hierarchy that Commerce used to select an AFA rate for the Export Buyer's Credit Program. Rather, they argue that the

has been the subject of much litigation before this Court. *See, e.g.*, *Yama Ribbons & Bows Co. v. United States*, No. 18–00054, 2019 WL 7373856, at *7 n.7 (CIT Dec. 30, 2019) (collecting cases).

[3] Before Commerce may use AFA, it must make two separate findings. First, Commerce shall use facts available "[i]f . . . necessary information is not available on the record, or . . . an interested party or any other person . . . fails to provide . . . information [that has been requested by Commerce] . . . in the form and manner requested," or "significantly impedes" a proceeding. 19 U.S.C. § 1677e(a)(1)-(2)(B), (C). Second, if Commerce determines that the use of facts available is warranted, it must make the requisite additional finding that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information" before it may use an adverse inference "in selecting from among the facts otherwise available." *Id.* § 1677e(b)(1).

[4] It is worth noting that, while the Department found that the respondents benefitted from the Export Buyer's Credit Program, based on AFA, the only evidence on the record regarding use is that the respondents' U.S. customers did not use the program. *See* Kangtai's Sec. III Quest. Resp. (Apr. 12, 2017), Ex. 15, C.R. 15; Heze's Sec. III Quest. Resp. (Apr. 12, 2017), Ex. 12, C.R. 7.

[5] In pertinent part, this subsection provides that if Commerce "uses an inference that is adverse to the interests of a party under [19 U.S.C. § 1677e(b)(1)(A)] in selecting among the facts otherwise available," Commerce "may . . . in the case of a countervailing duty proceeding . . . (i) use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country; or (ii) if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that [Commerce] considers reasonable to use." 19 U.S.C. § 1677e(d)(1).

hierarchy, as applied here, resulted in a rate for the program that is "simply too low to induce" the Government of China to cooperate with Commerce's requests for information in the future. *See* Pls.' Reply Br. Supp. Mot. J. Admin. R., ECF No. 37, 6; Pls.' Mem. Supp. Mot. J. Admin. R., ECF No. 26–1 ("Pls.' Br.") 3. Thus, for Plaintiffs, the rate fails to satisfy the purpose of the AFA statute and, therefore, is contrary to law. *See* Pls.' Br. 3; 19 U.S.C. § 1677e(b). In addition, Plaintiffs claim that substantial record evidence does not support the finding that the Export Buyer's Credit Program and the Export Seller's Credit Program are "similar." *See* Pls.' Br. 3. As a result, they ask the court to "remand [this case] to [Commerce] with instructions to reconsider [these] issues and address specifically the rationale for relying on a 0.87 percent subsidy rate rather than a higher rate and the reasons for finding that Export Buyer's Credits and Export Seller's Credits are 'similar' for purpose of applying adverse inferences pursuant to the statute." Pls.' Br. 20.

For their part, Defendant the United States ("Defendant"), on behalf of Commerce, and Defendant-Intervenors Kangtai and Heze ask the court to sustain the Final Results. *See* Def.'s Resp. Pls.' Mot. J. Agency R., ECF No. 34 ("Def.'s Br."); *see also* Def.-Ints.' Resp., ECF No. 33.

Jurisdiction is found under 28 U.S.C. § 1581(c) (2012). Because Commerce's selection of 0.87 percent as the AFA rate for the Export Buyer's Credit Program is supported by substantial evidence and otherwise in accordance with law, the Final Results are sustained.

BACKGROUND

I. The Administrative Review

In January 2017, at the request of Plaintiffs and Defendant-Intervenors, the Department commenced the second administrative review of the countervailing duty order on chlorinated isocyanurates from China. *See Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 82 Fed. Reg. 4294 (Dep't Commerce Jan. 13, 2017); *see also Chlorinated Isocyanurates From the People's Rep. of China*, 79 Fed. Reg. 67,424 (Dep't Commerce Nov. 13, 2014) (countervailing duty order). The period of review was January 1, 2015, through December 31, 2015. *See* Final IDM at 1. Three Chinese producers and exporters of the subject chemicals were selected as mandatory respondents, including Kangtai and Heze.[6]

Between February and September 2017, Commerce sent questionnaires to the Government of China, as well as to Kangtai and Heze. The Department asked the Government of China to provide informa-

[6] The third company, Hebei Jiheng Chemical Co. Ltd., is not a party to this action.

tion about, among other things, the operation of the Export Buyer's Credit Program—a government loan program administered by the state-owned China Export Import Bank. From Kangtai and Heze, the Department sought information about their U.S. customers' use of the program during the period of review. *See* Countervailing Duty Quest. (Feb. 27, 2017), P.R. 11.

Between April and October 2017, Commerce received timely responses to its questionnaires. Kangtai and Heze provided the information that Commerce asked for, including evidence that their U.S. customers did not obtain financing through the Export Buyer's Credit Program. *See* Kangtai's Sec. III Quest. Resp. (Apr. 12, 2017), Ex. 15, C.R. 15; Heze's Sec. III Quest. Resp. (Apr. 12, 2017), Ex. 12, C.R. 7. The Government of China, however, did not. Specifically, the Government of China responded that some of the information that the Department sought about the operation of the Export Buyer's Credit Program was "not applicable," because the mandatory respondents' U.S. customers did not use the program. *See* China's Initial CVD Quest. Resp. (Apr. 12, 2017), P.R. 21–24. In addition, China asserted that it was "unable" to provide the requested information, not because it did not have it, but because, in its view, the information was "not necessary" to Commerce's determination. *See* China's Second Suppl. CVD Quest. Resp. (Oct. 2, 2017), P.R. 45.

II. Preliminary Results

On December 4, 2017, the preliminary results of the administrative review were published. *See Chlorinated Isocyanurates From the People's Rep. of China*, 82 Fed. Reg. 57,209 (Dep't Commerce Dec. 4, 2017) ("Preliminary Results"), and accompanying Preliminary Decision Mem. (Nov. 27, 2017), P.R. 49 ("Prelim. Dec. Mem."). Commerce preliminarily determined that the Government of China failed to cooperate with its requests for information. In particular, Commerce found that China's questionnaire responses failed to provide necessary information regarding, *inter alia*: (1) whether the China Export Import Bank uses third-party banks to disburse or settle Export Buyer's Credits, (2) the interest rates it used during the period of review, and (3) whether, after the program was amended in 2013, the China Export Import Bank limited the provision of Export Buyer's Credits to business contracts exceeding $2 million. *See* Prelim. Dec. Mem. at 12. Finding that it could not fully analyze the operation of the program without this information, the Department concluded that necessary information was missing from the record, and that the use of facts available was warranted. *See* 19 U.S.C. § 1677e(a).

Commerce also found that the Government of China had failed to act to the best of its ability to cooperate with its information requests, and used the adverse inference that, during the period of review, Kangtai and Heze received a countervailable benefit under the Export Buyer's Credit Program. *See* Prelim. Dec. Mem. at 12; 19 U.S.C. § 1677e(b).

Having found that Kangtai and Heze used and benefitted[7] from the Export Buyer's Credit Program, Commerce determined an AFA rate for the program using a hierarchical approach. *See* 19 U.S.C. § 1677e(d); Final IDM at 5. The selected rate—0.87 percent—was included in Commerce's calculation of preliminary individual countervailable subsidy rates for Kangtai and Heze. *See* Preliminary Results, 82 Fed. Reg. at 57,210.

III. Final Results

On June 5, 2018, Commerce issued its Final IDM and found, as it had in the Preliminary Results, that Kangtai and Heze received countervailable subsidies at 0.87 percent *ad valorem* under the Export Buyer's Credit Program.[8] *See* Final IDM at 11 ("As AFA, we determine that [the Export Buyer's Credit Program] provides a financial contribution, is specific, and provides a benefit to the company respondents within the meaning of [the statute]."). Kangtai's and Heze's final net subsidy rates, inclusive of the 0.87 percent rate, were 1.53 percent and 2.84 percent, respectively. *See* Final Results, 83 Fed. Reg. at 26,954. Dissatisfied with these final rates as too low to induce the Government of China to cooperate with Commerce's requests for information, and questioning whether the Export Buyer's Credit Program and the Export Seller's Program were "similar," Plaintiffs commenced this action.

STANDARD OF REVIEW

The court will sustain a determination by Commerce 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).

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[7] Under Commerce's regulations "[i]n the case of a loan, a benefit exists to the extent that the amount a firm pays on the government-provided loan is less than the amount the firm would pay on a comparable commercial loan(s) that the firm could actually obtain on the market. 19 C.F.R. § 351.505(a)(1) (2017).

[8] Commerce calculates "an *ad valorem* subsidy rate by dividing the amount of the benefit allocated to the period of investigation . . . by the sales value during the same period of the product or products to which [it] attributes the subsidy . . ." 19 C.F.R. § 351.525(a).

LEGAL FRAMEWORK

I. Commerce's Authority to Impose Countervailing Duties

If Commerce determines that a foreign government or public entity "is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States," a duty will be imposed in an amount equal to the net countervailable subsidy. 19 U.S.C. § 1671(a). This "remedial measure . . . provides relief to domestic manufacturers by imposing duties upon imports of comparable foreign products that have the benefit of a subsidy from the foreign government." *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1368 (Fed. Cir. 2014) (citation omitted). The countervailing duty statute applies equally when the imported merchandise is from a nonmarket economy country.[9] *See* 19 U.S.C. § 1671(f)(1); *see also TMK IPSCO v. United States*, 41 CIT __, __, 222 F. Supp. 3d 1306, 1313 (2017).

In its countervailability determinations, Commerce must assess the nature of a foreign government's alleged financial contribution. *See* 19 U.S.C. § 1677(5). Thus, "Commerce often requires information from the foreign government allegedly providing the subsidy." *Fine Furniture*, 748 F.3d at 1369–70. This is because "normally, [foreign] governments are in the best position to provide information regarding the administration of their alleged subsidy programs, including eligible recipients." *Id.* at 1370 (citation omitted). "Additionally, Commerce sometimes requires information from a foreign government to determine whether a particular respondent received a benefit from an alleged subsidy." *Id.*

II. Commerce's Authority to Use Adverse Inferences

Because Commerce lacks the power to subpoena documents and information, the law authorizes it to use an adverse inference to induce cooperation with its requests for information. *See* 19 U.S.C. § 1677e; *see also BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1295 (Fed. Cir. 2019) (quoting *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1337, 1338 (Fed. Cir. 2016)) ("During an administrative review, the 'burden of creating an adequate record lies with

[9] A "nonmarket economy country" is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). China is a nonmarket economy country. *See* Prelim. Dec. Mem. 3.

interested parties and not with Commerce. . . . This is because 'the International Trade Administration, the relevant agency within Commerce, has no subpoena power.'").

If adequate information is not forthcoming, Commerce may, under the right circumstances, apply an adverse inference. First, there must be a gap in the factual record. *See* 19 U.S.C. § 1677e(a). Thus, if a party to a proceeding fails to provide, in a timely fashion, information that Commerce has asked for, then "Commerce shall fill in the gaps with 'facts otherwise available.'" *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003) (quoting 19 U.S.C. § 1677e(a)).

Second, there must be a finding that an interested party has failed to cooperate to "the best of its ability" with Commerce's request for information. *See* 19 U.S.C. § 1677e(b). "[I]f Commerce determines that an interested party has 'failed to cooperate by not acting to the best of its ability to comply' with a request for information, it may use an adverse inference in selecting a rate from these facts," pursuant to 19 U.S.C. § 1677e(b).[10] *BMW*, 926 F.3d at 1295 (quoting *Nippon Steel*, 337 F.3d at 1381).

The purpose of AFA is to provide respondents with an incentive to cooperate in Commerce's investigations and reviews. *See F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("*De Cecco*"). While Commerce may use adverse inferences to encourage future cooperation, it may not use AFA to punish respondents. *Id.* (citation omitted) ("[T]he purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins.").

A foreign government may be found to be an uncooperative party. Thus, AFA may be used to induce, or encourage, a foreign government's cooperation. *See Fine Furniture*, 748 F.3d at 1371 ("[O]n its face, the statute authorizes Commerce to apply adverse inferences when an interested party, including a foreign government, fails to provide requested information."). That is, where a foreign government is uncooperative, respondent companies from that country may receive an AFA rate, even if they themselves are cooperative. The rationale for permitting the application of AFA to cooperative respondents is that "a remedy that collaterally reaches [a cooperative respondent] has the potential to encourage the [foreign government] to

[10] When using adverse inferences, Commerce may rely upon information derived from the petition, a final determination, any previous review or determination, or any other information placed on the record. *See* 19 U.S.C. § 1677e(b)(2)(A)-(D).

cooperate so as not to hurt its overall industry." *Id.* at 1373. Though Commerce's use of adverse inferences may adversely impact a cooperating party, Commerce must take into consideration the respondent's status as a cooperating party when determining an AFA rate. Indeed, the cases indicate that, where a nonmarket economy respondent is cooperative but the government of its country is not, the court should lean toward accuracy and away from deterrence. *See Changzhou Trina Solar Energy Co. v. United States*, No. 17–00246, 2018 WL 6271653 (CIT Nov. 30, 2018) ("*Changzhou I*") (citing *Mueller Comercial de Mexico, S. de R.L. De C.V. v. United States*, 753 F.3d 1227, 1234 (Fed. Cir. 2014)).

III. Commerce's Use of a Hierarchy to Determine an AFA Countervailable Subsidy Rate

The adverse inferences statute, § 1677e, was amended in 2015 by the Trade Preferences Extension Act to add subsection (d). *See* Trade Preferences Extension Act of 2015 § 502, Pub. L. No. 114–27, 129 Stat. 362 (June 29, 2015), codified in 19 U.S.C. § 1677e(d) (Supp. III 2015). Subsection (d) addresses subsidy rates in AFA determinations. In pertinent part, this subsection provides that if Commerce "uses an inference that is adverse to the interests of a party under [19 U.S.C. § 1677e(b)(1)(A)] in selecting among the facts otherwise available," it "may . . . in the case of a countervailing duty proceeding":

> (i) use a countervailable subsidy rate applied for the *same or similar program* in a countervailing duty proceeding involving the same country; or
>
> (ii) if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that [Commerce] considers reasonable to use.

19 U.S.C. § 1677e(d)(1)(A) (emphasis added). For administrative reviews, Commerce has employed a four-step hierarchical method in an effort to satisfy the statute's "same or similar program" injunction:

> The AFA hierarchy for reviews has four steps, applied in sequential order. The first step is to apply the highest non-*de minimis* rate calculated for a cooperating respondent for the identical program in any segment of the same proceeding. If there is no identical program match within the proceeding, or if the rate is *de minimis*, the second step is to apply the highest non-*de minimis* rate calculated for a cooperating company for a similar program within any segment of the same proceeding. If there is no non-*de minimis* rate calculated for a similar program within [the] same proceeding, the third step is to apply the highest

> non-*de minimis* rate calculated for an identical or similar program in another countervailing duty proceeding involving the same country. If no such rate exists under the first through third steps, the fourth step is to apply the highest rate calculated for a cooperating company for any program from the same country that the industry subject to the investigation could have used.

Final IDM at 5.

This Court has reviewed with approval Commerce's use of hierarchical methods to determine AFA subsidy rates.[11] *See, e.g.*, *Essar Steel Ltd. v. United States*, 37 CIT __, __, 908 F. Supp. 2d 1306, 1312–13 (2013), *aff'd* 753 F.3d 1368 (Fed. Cir. 2014); *SolarWorld Americas, Inc. v. United States*, 41 CIT __, __, 229 F. Supp. 3d 1362, 1370 (2017) (upholding reasonableness of the hierarchy, stating "Commerce is entitled to devise a methodology to apply to all cases and the court cannot say that this methodology is unreasonable in general or as applied here."); *see also Essar Steel Ltd. v. United States*, 753 F.3d 1368, 1373–74 (Fed. Cir. 2014).

DISCUSSION

I. Commerce Did Not Err by Using the Hierarchy to Determine an AFA Rate for the Export Buyer's Credit Program

In the Final Results, Commerce determined that using facts available was warranted when determining a subsidy rate for the Export Buyer's Credit Program because the Government of China failed to provide requested information about the operation of the program, and thus, necessary information was missing from the record. *See* Final IDM at 5; 19 U.S.C. § 1677e(a). Additionally, Commerce used an adverse inference because, it found, the Government of China had not "cooperate[d] to the best of its ability" to comply with the Department's requests for information. *See* Final IDM at 5; 19 U.S.C. § 1677e(b).

Having determined the use of AFA was warranted, Commerce then applied its hierarchy to select an AFA rate:

> Because we have not calculated a rate for an identical program in this proceeding, we then determine, under step two of the hierarchy, if there is a calculated rate for a similar/comparable program (based on the treatment of the benefit) in the same

[11] Commerce employs a different four-step hierarchy method to determine AFA rates in countervailing duty *investigations*, which this Court has reviewed with approval. *See SolarWorld Americas, Inc. v. United States*, 41 CIT __, __, 229 F. Supp. 3d 1362, 1370 (2017).

> proceeding, excluding *de minimis* rates. In the instant review, the [Government of China] reported that the Export Buyer's Credit Program provides loan support through export buyer's credits. Based on the description of the Export Buyer's Credit Program as provided by the [Government of China], we continue to find that [the] Export Seller's Credit Program and the Export Buyer's Credit Program are similar/comparable programs as both programs provide access to loans. When Commerce selects a similar program, it looks for a program with the same type of benefit. For example, it selects a loan program to establish the rate for another loan program, or it selects a grant program to establish the rate for another grant program. Consistent with this practice, upon examination of the available above *de minimis* programs from the current review and the underlying investigation, Commerce selected the Export Seller's Credit Program because it confers the *same type of benefit* as the Export Buyer's Credit Program, as both programs are subsidized loans from the China [Export Import] Bank.

Final IDM at 12–13 (emphasis added). Thus, Commerce applied "the 0.87 percent *ad valorem* countervailable subsidy rate for the Export Seller's Credit Program," which had been previously determined in an earlier segment of the proceeding, as the AFA rate for the Export Buyer's Credit Program. Final IDM at 13. Commerce has used this approach in other cases. *See, e.g.*, *Clearon Corp. v. United States*, 43 CIT __, 359 F. Supp. 3d 1344, 1362 (2019)[12] (sustaining Commerce's selection of the 0.87 percent rate assigned to the Export Seller's Credit Program during the investigation); *Changzhou I*, 2018 WL 6271653, *5 (sustaining Commerce's use of a sufficiently similar program from an earlier administrative review).

Kangtai's and Heze's final net subsidy rates, inclusive of the 0.87 percent rate, were 1.53 percent and 2.84 percent, respectively. *See* Final Results, 83 Fed. Reg. at 26,954. Specifically, Kangtai's 1.53 percent final net subsidy rate reflects the sum of two countervailable programs: (1) 0.87 percent *ad valorem* for the Export Buyer's Credit Program; and (2) 0.66 percent *ad valorem* for electricity provided at

[12] Plaintiffs here are also the plaintiffs in *Clearon*, where the Court remanded Commerce's final results of the first administrative review of the subject countervailing duty order. As Plaintiffs acknowledge in their opening brief, the issues and arguments in the two cases overlap. *See* Pls.' Br. 1 n.1. Relevant to this case, the *Clearon* Court sustained the 0.87 percent AFA rate as supported by substantial evidence based on the record there, and in doing so, rejected many of the same arguments Plaintiffs make here. *Clearon*, 43 CIT at __, 359 F. Supp. 3d at 1360 (sustaining in part and remanding on grounds not relevant to this case).

less than adequate remuneration. *See* Final IDM at 6. Heze's 2.84 percent final net subsidy rate reflects the sum of three countervailable programs: (1) 0.87 percent *ad valorem* for the Export Buyer's Credit Program; (2) 1.22 percent *ad valorem* for electricity provided at less than adequate remuneration; and (3) 0.75 percent *ad valorem* for self-reported grants. *See* Final IDM at 6.

The domestic producer Plaintiffs' main argument is that Commerce's "rigid application" of its hierarchy, which resulted in the selection of the 0.87 percent rate, "was arbitrary and not in accordance with law because it defeated the purpose of the statute":

> The purpose of the statute is to apply an "adverse" inference in order to deter responding foreign producers and companies from withholding information or failing to cooperate in Commerce proceedings. Here, Commerce applied a net subsidy rate of only 0.87 percent to the Export Buyer's Credit Program, despite that Commerce had applied a rate of 10.54 percent to that program in prior cases and despite that a 0.87 percent rate was manifestly inadequate to deter China from refusing to supply needed information.

Pls.' Br. 3. In other words, for Plaintiffs, if the 10.54 percent rate, that was selected for the program in a different proceeding, failed to deter non-cooperation by the Government of China, a 0.87 percent rate was sure to fail in this proceeding. Although they do not argue for a specific rate, apparently Plaintiffs seek a rate in excess of 10.54 percent since they note that that rate was not sufficient to induce the Government of China to cooperate. *See* Pls.' Br. 13.

Plaintiffs acknowledge that "[i]nducement is not the only purpose of the statute," and that Commerce must balance the dual objectives of inducement and accuracy. Pls.' Br. 12. They insist, however, that here, Commerce has ignored the deterrence objective. *See* Pls.' Br. 12 ("Commerce must at least consider whether a particular AFA rate will be effective in encouraging cooperation.").

In response, Commerce urges the court to reject Plaintiffs' argument that it should have departed from its hierarchy:

> In the instant review, Commerce properly applied its review hierarchy in selecting an AFA rate. Making identical arguments as the plaintiffs in *Clearon Corp.*, Bio-Lab contends that the rate selected is not sufficiently adverse to "provide any meaningful incentive to the Government of China." . . . However, "neither the statute nor the regulations dictate how Commerce is to determine the AFA rate." . . . Thus, Commerce has "great" discretion when applying an AFA margin. . . . Here, the rate

> selected is not *de minimis*, and given that the program at issue was found to have not been used in a prior segment, the selected rate is adverse in terms of meeting the goals described above for selecting a rate in a review.

Def.'s Br. 11 (citations omitted). For the Department, "selecting a different rate from another proceeding in this segment would be a change in practice . . ., which would upset the balance between relevancy [*i.e.*, accuracy] and inducement that Commerce seeks to achieve when it applies its [countervailing duty] AFA hierarchy to non-cooperating respondents." Final IDM at 13. Thus, Commerce maintains that application of the hierarchy was in accordance with law, based on record evidence, and fair because it recognized that the Defendant-Intervenors Kangtai and Heze had cooperated in the review.

The court finds that Commerce did not err by using its hierarchy to determine an AFA rate for the Export Buyer's Credit Program in the Final Results. In *Changzhou I*, this Court rejected arguments similar to those raised by Plaintiffs, on a similar factual record. *Changzhou I* is instructive.

At issue in *Changzhou I* were the final results of an administrative review of a countervailing duty order on solar products. There, as here, Commerce found that the Government of China had failed to cooperate to the best of its ability to provide necessary information about the Export Buyer's Credit Program. As a result, Commerce found that the use of AFA was warranted. *See* 19 U.S.C. § 1677e(a), (b). It further found, based on AFA, that the cooperating Chinese respondents had received a benefit under the program, notwithstanding their claims to the contrary. Commerce, thus, applied its hierarchy and, under step two, selected an AFA rate for the program of 0.58 percent—the rate that had been previously determined for another loan program (the "Preferential Loans and Directed Credit" program) in the same proceeding. *Changzhou I*, 2018 WL 6271653, *4.

SolarWorld Americas, Inc., the U.S. petitioner, argued that while Commerce was correct to find AFA warranted, its application of the hierarchy to determine the AFA rate for the program was not in accordance with law because the resulting rate—0.58 percent—was too low to achieve the statutory goal of deterrence:

> [I]n using its established [hierarchy] methodology, Commerce arrived at an AFA rate too low to induce compliance in future proceedings. . . . SolarWorld argues that 19 U.S.C. § 1677e requires Commerce to set a rate high enough to encourage a party's future compliance in administrative reviews. . . . Solar-

> World details several proceedings in which a higher rate has failed to result in the [Government of China's] future full compliance with Commerce's reviews. . . . Based on this history of [Government of China] noncompliance, SolarWorld argues that such a low rate of 0.58 percent will not encourage compliance.

Id. (internal citations omitted). The *Changzhou I* Court rejected this argument. Central to its reasoning was that the company that would receive the adverse rate was a cooperating respondent:

> As the United States Court of Appeals for the Federal Circuit has stated "the purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." . . . What SolarWorld essentially argues is for Commerce to deviate from an established practice because the rate assessed was not high enough to be punitive. This argument fails. . . .
>
> [E]ven if Commerce, on remand, finds that the [Government of China] refused to comply with Commerce's requests such that a resort to AFA is warranted, SolarWorld fails to appreciate that [mandatory respondent] Trina is a cooperating respondent. When selecting a rate for a cooperating party, "the equities would suggest greater emphasis on accuracy" over deterrence.

Id. at *4–5 (first quoting *De Cecco*, 216 F.3d at 1032; then quoting *Mueller*, 753 F.3d at 1234).

The *Changzhou I* Court relied on principles that are well-established in this Court and the Federal Circuit, including that determining a rate that is relevant, *i.e.*, accurate, is a primary statutory objective:

> [A]lthough encouraging compliance is a valid consideration in determining an AFA rate, it is not, as SolarWorld argues "inconsistent with the statute" for Commerce to weigh other factors, such as relevancy, which ultimately result in a presumably low AFA rate. . . . As the court in *Mueller* stated, "the primary objective [is] the calculation of an accurate rate."

Id. at 5 (quoting *Mueller*, 753 F.3d at 1235); *see also SolarWorld*, 41 CIT at __, 229 F. Supp. 3d at 1366 (citing *De Cecco*, 216 F.3d at 1032) ("An AFA rate selected by Commerce must reasonably balance the objectives of inducing compliance and determining an accurate rate."). The Federal Circuit's opinion in *Mueller*, cited in *Changzhou I*, outlined principles that are applicable here:

> This Court's decision in [*De Cecco*, 216 F.3d at 1032], required that, even for a non-cooperating party, subsection [1677e](b) be applied to arrive at "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." *All the more so for a cooperating party, for which the equities would suggest greater emphasis on accuracy in the overall mix*. Moreover, this Court's decision in *Changzhou* made clear that, *in the case of a cooperating party, Commerce cannot confine itself to a deterrence rationale and also must carry out a case-specific analysis of the applicability of deterrence and similar policies*. *Changzhou Wujin Fine Chemical Factory Co., Ltd. v. U.S.*, 701 F.3d 1367, 1379 (Fed. Cir. 2012). And those principles were in no way questioned in [*Fine Furniture*, 748 F.3d at 1370–71], which simply rejected a contention that a countervailing duty rate for a cooperating importer could not be based on adverse inferences drawn against a non-cooperating foreign country (about the country's subsidizing of an input into the importer's product).

Mueller, 753 F.3d at 1234 (emphasis added); *see also Changzhou Wujin*, 701 F.3d at 1378 (questioning the relevance of deterrence "where the 'AFA rate' only impacts cooperating respondents" and noting that "applying an adverse rate to cooperating respondents undercuts [with respect to respondents] the cooperation-promoting goal of the AFA statute").

Finally, the *Changzhou I* Court found that the hierarchy was a reasonable way to effect the AFA statute. *See Changzhou I*, 2018 WL 6271653, at *5; *see also* 19 U.S.C. § 1677e(d). The Court observed that departing from the hierarchy because the resulting rate was perceived as "too low" could itself be viewed as arbitrary:

> [I]nsisting that Commerce deviate from this established practice because the rate is not seen to be a sufficient deterrent or perhaps, in this circumstance, not sufficiently punitive strikes the court as arbitrary. Commerce's hierarchy establishes both some consistency and predictability in Commerce's determinations and also attempts to guard against setting too low a rate by requiring the selected program to have a non-*de minimis* rate. In this specific instance, Commerce applied the *highest* non-*de minimis* rate for a similar program, further supporting its contention that Commerce attempted to strike a balance between relevancy and inducement.

Changzhou I, 2018 WL 6271653, at *5. Ultimately, the Court "sustain[ed] Commerce's use of its established hierarchy in assessing" the 0.58 percent rate for the Export Buyer's Credit Program in that case. *Id.*

As in *Changzhou I*, Plaintiffs would elevate deterrence over accuracy and fairness even though Kangtai and Heze were cooperating respondents. The cases, however, indicate that the respondents' status as cooperating respondents must be taken into account when determining an AFA rate. *See Clearon*, 43 CIT at __, 359 F. Supp. 3d at 1362 ("[W]hether a rate is sufficient to encourage cooperation in the future is based on Commerce's consideration of the facts."). *Clearon* was a case that involved the same plaintiffs and a similar factual record. There too, Commerce used the 0.87 percent rate for the Export Buyer's Credit Program. The plaintiffs argued there, as they do here, that if a 10.54 percent adverse subsidy rate, which was sustained by this Court in a separate case, had failed to deter non-cooperation by the Government of China, a 0.87 percent rate, likewise, would probably fail to encourage compliance. The Court rejected the argument that 0.87 percent was "unreasonably low to deter future non-cooperation," and considered the rate's impact on the accuracy of each cooperating respondent's final net subsidy rate. *Id.*, 43 CIT at __, 359 F. Supp. 3d at 1361. For example, noting that Heze's final net subsidy rate, inclusive of the 0.87 percent rate for the Export Buyer's Credit Program, was 1.91 percent, the *Clearon* Court observed that "even if the 0.87 percent rate might appear low in comparison to the 10.54 percent rate, its inclusion in the calculation of Heze's rate increased its rate by approximately 100 percent to 1.91 percent." *Id.*, 43 CIT at __, 359 F. Supp. 3d at 1362.

Although the final net subsidy rates at issue in *Clearon* and those at issue here are different, the same reasoning applies—placing greater emphasis on accuracy over deterrence is not unreasonable when dealing with cooperating respondents. *See Changzhou I*, 2018 WL 6271653, at *5 (quoting *Mueller*, 753 F.3d at 1234) ("When selecting a rate for a *cooperating* party, 'the equities would suggest greater emphasis on accuracy' over deterrence."). Here, Kangtai's and Heze's final net subsidy rates, inclusive of the 0.87 percent rate, were 1.53 percent for Kangtai and 2.84 percent for Heze. *See* Final Results, 83 Fed. Reg. at 26,954. Thus, the 0.87 percent AFA rate for the Export Buyer's Credit Program constitutes more than one-half of Kangtai's 1.53 percent rate, and approximately one-third of Heze's 2.84 percent rate. These rates reasonably emphasize accuracy over deterrence without undercutting the cooperation-promoting goal of the AFA stat-

ute. *See Changzhou Wujin*, 701 F.3d at 1378. Moreover, if Plaintiffs' argument that a rate of 10.54 percent was too low to result in cooperation were taken seriously, a rate even higher and farther away from an accurately calculated rate would be required. In any event, Plaintiffs' argument is not particularly well developed. Although they argue for "a higher rate" for the Export Buyer's Credit Program, they propose neither an alternative rate, nor an alternative method to determine one.

Finally, the primary purpose of the AFA statute is not to punish companies, but rather to calculate accurate rates. *De Cecco*, 216 F.3d at 1032; *see also Mueller*, 753 F.3d at 1235 ("[T]he primary objective [is] the calculation of an accurate rate."). So long as the AFA rate serves this objective, it is normally found to be within Commerce's sound judgment. *See, e.g.*, *Changzhou I*, 2018 WL 6271653, at *5.

While Plaintiffs would prefer that Commerce depart from its hierarchy and select a higher rate, it was not unreasonable for Commerce to decline to do so. This is especially true because the situation that resulted in Commerce using AFA was created, not by the failure to cooperate by respondents Kangtai or Heze, but that of the Government of China. This distinction matters—Commerce must balance the policies of accuracy and deterrence, or risk potentially undercutting "the cooperation-promoting goal of the AFA statute." *Changzhou Wujin*, 701 F.3d at 1378; *see also Mueller*, 753 F.3d at 1234 (citation omitted) (noting Commerce must consider, on a case-specific basis, "the applicability of deterrence and similar policies"). In other words, the normal purpose of AFA is to induce the respondents themselves to cooperate. Should the respondents find that there is no benefit to their cooperation, they might well conclude that answering Commerce's questionnaires was not worth their while.

Accordingly, the court sustains Commerce's use of its hierarchy in determining an AFA rate for the Export Buyer's Credit Program.

II. Commerce's Selection of 0.87 Percent as the AFA Rate for the Export Buyer's Credit Program Is Supported by Substantial Evidence

In the Final Results, Commerce selected an AFA rate for the Export Buyer's Credit Program using its four-step hierarchy. Under step two of the hierarchy, Commerce determined that the Export Buyer's Credit Program and the Export Seller's Credit Program were similar because both conferred a similar benefit—access to government-subsidized loans. Final IDM at 12–13 ("[U]pon examination of the available above *de minimis* programs from the current review and the underlying investigation, Commerce selected the Export Seller's Credit Program because it confers the same type of benefit as the

Export Buyer's Credit Program, as both programs are subsidized loans from the China [Export Import] Bank."). Thus, Commerce used the 0.87 percent *ad valorem* countervailable subsidy rate, which had previously been determined for the Export Seller's Credit Program in a prior segment of the proceeding, as the AFA rate for the Export Buyer's Credit Program. *See* Final IDM at 13.

Plaintiffs maintain that the 0.87 percent rate is not supported by substantial evidence because the record does not support Commerce's finding that the Export Buyer's Credit Program and the Export Seller's Credit Program are "similar":

> Commerce did not explain its decision that the Export Buyer's Credit was "similar" to China's Export Seller's Credit and cited no record evidence to support that decision. Fundamentally, a subsidy paid to buyers, unlike a subsidy to sellers, directly reduces the cost to the buyer. The terms of the Buyer's Credits limited the loans to foreign importers and other foreign entities, and permit payment in U.S. dollars. These terms contrast with the terms of the Seller's Credits. Otherwise, because the Government of China failed to provide information requested by Commerce, there was no evidence with which to determine whether Export Buyer's and Export Seller's Credits were similar in terms and conditions, amount of the credits, interest rates, duration, or any other measurable criteria. As such, the determination that these credits were similar was not based on substantial evidence.

Pls.' Br. 3. Put another way, for Plaintiffs, "similarity" requires more than a finding that the two programs are government-subsidized loan programs. They contend that because the terms and conditions of each program are different Commerce has not demonstrated that the programs are similar. Pl.'s Br. 4.

Based on the record, the court finds that Commerce has supported with substantial evidence, and adequately explained, its similarity finding. Here, Commerce found, using information provided by the Government of China, that the Export Seller's Credit Program "confers the same type of benefit as the Export Buyer's Credit Program, as both programs are subsidized loans from the China [Export Import] Bank." Final IDM at 12–13. There is no dispute that the record shows that both programs provide loans at preferential rates from the Government of China through the China Export Import Bank to support Chinese exports.

This Court has upheld Commerce's finding that the Export Buyer's Credit Program is "similar" to other programs that confer subsidized

loans. In *Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1316, 1328 (2018) ("*Changzhou II*"), the Court reviewed Commerce's finding that the Export Buyer's Credit Program and a preferential lending program aimed at the renewable energy industry (the "Lending Program") were similar because both provided access to loans at preferential rates. *Changzhou II*, 42 CIT at __, 352 F. Supp. 3d at 1328 (noting that "Commerce predicated [its] finding of similarity on both the [Export Buyer's Credit Program's] and the [Lending] Program's distribution of loans."). The Court reached its decision even though the plaintiffs argued that the program at issue here, the Export Seller's Credit Program, was more similar to the Export Buyer's Credit Program than the Lending Program. In other words, the plaintiffs in *Changzhou II* argued that Commerce erred by failing to examine whether the Export Seller's Credit Program or the Lending Program was "more similar" to the Export Buyer's Credit Program. Relying on the plain language of the statute, the Court rejected this argument: "Under Commerce's established [hierarchy] methodology and consistent with the plain text of the statute, Commerce selects a *similar* program, not necessarily the *most similar* program." *Changzhou II*, 42 CIT at __, 352 F. Supp. 3d at 1328 (citing 19 U.S.C. § 1677e(d)(1)(A)(i)).

The *Changzhou II* holding applies equally here. To apply step two of its hierarchy, Commerce must select a program that is similar to the one with respect to which information is missing from the record. To make this selection, Commerce is not required to compare multiple programs to determine which is the "most similar" to the program. *Id.*, 42 CIT at __, 352 F. Supp. 3d at 1328–29. Selecting a program that is similar is enough to satisfy the statute.

The plaintiffs in *Changzhou II* also argued, as Plaintiffs do here, that Commerce had failed to explain adequately its rationale underlying its similarity finding. As summarized by the Court, Commerce stated how it arrived at its similarity finding:

> After finding no program identical to the [Export Buyer's Credit Program] in the same administrative review, Commerce identified a similar program in the same proceeding to use as a basis for calculating the rate for the [Export Buyer's Credit Program]. . . . . Commerce calculated a rate of 5.46 percent *ad valorem*, for the [program] by utilizing the rate "calculated for company respondent Lightway Green New Energy Co., Ltd.'s usage of the [Lending Program] in the 2012 administrative review of this proceeding." . . . . Commerce explained that the [Lending Program] . . . was similar because both it and the Export Buyer's Credit Program provided access to loans.

Changzhou II, 42 CIT at __, 352 F. Supp. 3d at 1327 (record citations omitted). The Court found that Commerce was not required to provide a more detailed explanation of its similarity finding, and that substantial evidence supported its decision: "Although a more detailed description [of why the Export Buyer's Credit Program and the Lending Program were "similar"] might be helpful, it is not required." *Id.*, 42 CIT at __, 352 F. Supp. 3d at 1329.

This Court also found adequate Commerce's explanation of its similarity finding in *Solarworld Americas, Inc. v. United States*, 40 CIT __, __, 182 F. Supp. 3d 1372, 1377–78 (2016), which again involved the Export Buyer's Credit Program and the Lending Program. There, the parties disagreed as to whether Commerce had adequately explained its similarity finding. As summarized by the Court, Commerce stated the basis for its finding:

> [N]oting that it lacked a calculated rate for the Export Buyer's Credit Program from another responding company, Commerce applied the second level of its AFA rate selection hierarchy for administrative reviews. . . . Thus, it selected the rate calculated for the [Lending Program] in this same administrative review to the Export Buyer's Credit Program after determining that the two programs were similar. . . . Commerce supported its determination that the programs were similar, noting that both programs call for financial institutions to provide *loans at preferential rates*.

Solarworld Americas, Inc. v. United States, 40 CIT __, __, 182 F. Supp. 3d 1372, 1377–78 (2016) (emphasis added) (record citations omitted). The Court found that "Commerce's logic in considering the programs similar [was] reasonably discernible because both loan programs perform similar functions in support of Chinese industry by offering lower interest rates on loans than would otherwise be available to these companies." *Id.*, 40 CIT at __, 182 F. Supp. 3d at 1377 n.8. Considering the similar purposes of the programs it is fair to presume that the subsidy provided would be about the same and that the benefit conferred by each program would be about the same.

As in *Changzhou II* and *SolarWorld*, Commerce's rationale for finding that the Export Buyer's Credit Program and the Export Seller's Credit Program were similar is reasonably discernible. Plaintiffs point to the dearth of information on the record regarding the specific terms and conditions of the two programs, insisting that Commerce could not reasonably have compared them. While programmatic details might be useful, in this case what is needed is a way to find the size of the benefit that the respondents could reasonably be said to

have received, so that a percentage can be added to the amount of the countervailing duty. Thus, the details of the program are less important than the benefit conferred. *See* Final IDM at 12–13 ("Commerce selected the Export Seller's Credit Program because it confers the same type of benefit as the Export Buyer's Credit Program, as both programs are subsidized loans from the China [Export Import] Bank."); *see also Clearon*, 43 CIT at __, 359 F. Supp. 3d at 1347 (discussing both programs).

As their names indicate, each program's purpose is to support Chinese industry by promoting exports. *See* Heze's Sec. III Quest. Resp., Ex. 10 at Art. 2 (Rules Governing Export Buyers' Credit, dated Nov. 20, 2000) (English trans.) ("The Export Buyer's Credit refers to the medium and long-term credit offered by the [China Export Import] Bank to creditworthy foreign borrowers to support the export of Chinese capital goods, services."); *Chlorinated Isocyanurates From the People's Rep. of China*, 79 Fed. Reg. 10,097 (Dep't Commerce Feb. 24, 2014), and accompanying Preliminary Decision Mem. (Feb. 11, 2014), subsec. XII.A.3 ("The purpose of [the Export Seller's Credit Program] provided by [the China Export Import Bank] is to support the export of [Chinese] products and improve their competitiveness in the international market. The export seller's credit [i]s a loan with a large amount, long maturity, and preferential interest rate."). Given their common purpose, it is not unreasonable to conclude that the interest rate charged for the loans would be about the same. That is, each is a program initiated by the Government of China to provide below-market-rate loans to benefit Chinese producers. While additional information, had it been provided by the Government of China, may have allowed Commerce to make a more detailed comparison of the two programs, Commerce's conclusions regarding the rate of subsidization (and hence the benefit conferred) are adequately supported by the record. *See Clearon*, 43 CIT at __, 359 F. Supp. 3d at 1360–61 (upholding the 0.87 percent rate as supported by substantial evidence).

Accordingly, Commerce's selection of 0.87 percent as the AFA rate for the Export Buyer's Credit Program is sustained.

CONCLUSION

Based on the foregoing, Commerce's use of its hierarchy and the resulting 0.87 percent rate for the Export Buyer's Credit Program are supported by substantial evidence and otherwise in accordance with law. Judgment shall be entered accordingly.

Dated: April 7, 2020
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON, JUDGE