

U.S. Customs and Border Protection



REQUEST FOR INFORMATION (CBP FORM 28)

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 30-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than March 30, 2022 to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, telephone number 202-325-0056, or via email CBP_PRA@cbp.dhs.gov. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at <https://www.cbp.gov/>.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (Volume 86 FR Page 72612) on December 22, 2021, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Request for Information.

OMB Number: 1651–0023.

Form Number: CBP Form 28.

Current Actions: Extension with a decrease in burden previously reported, no change to the information being collected.

Type of Review: Extension (with change).

Affected Public: Businesses.

Abstract: Under 19 U.S.C. 1500 and 1401a, Customs and Border Protection (CBP) is responsible for appraising merchandise by ascertaining or estimating its value; fixing the final classification of such merchandise under the tariff schedule; and fixing a rate of duty and final amount of duty to be paid on such merchandise. On occasions when the invoice or other documentation does not provide sufficient information for appraisal or classification, including for import compliance with trade agreements, preference treatment, or special provisions, CBP may request additional information using CBP Form 28, *Request for Information*. This form is sent by CBP personnel to importers, exporters, producers, or their agents, as applicable, requesting additional information. U.S. Customs and Border Protection (CBP) is authorized to collect the information

requested on this form pursuant to U.S.C. 1509, 19 CFR 142.3, 19 CFR 151.11, and 19 CFR 181.72. CBP Form 28 is provided for by 19 CFR 151.11.

Type of Information Collection: Request for Information (CBP Form 28).

Estimated Number of Respondents: 13,415.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 13,415.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 26,830.

Dated: February 23, 2022.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

[Published in the Federal Register, February 28, 2022 (85 FR 11082)]



GLOBAL BUSINESS IDENTIFIER (GBI)

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 30-Day notice and request for comments; this is a new collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted no later than April 1, 2022 to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border

Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email CBP_PRA@cbp.dhs.gov. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at <https://www.cbp.gov/>.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (Volume 86 FR Page 55629) on October 06, 2021, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Global Business Identifier (GBI).

OMB Number: 1651–0NEW.

Form Number: N/A.

Current Actions: This is a new information collection.

Type of Review: New Information Collection.

Affected Public: Businesses.

Abstract: U.S. Customs and Border Protection (CBP) is launching a Global Business Identifier (GBI) Evaluative Proof of Concept (EPoC) which aims to determine a single identifier

solution that will uniquely discern main legal entity and ownership; specific business and global locations; and supply chain roles and functions. Entry filers must signal their intent to participate in the GBI EPoC, by email as discussed in the **Federal Register** notice announcing the test, and must obtain and submit (or indicate that they are in the process of obtaining) all three GBI identifiers for their shippers, manufacturers and sellers, as part of their email. The identifiers provide additional information about trade entities and supply chain locations associated with U.S. imports, to CBP for enrollment into the GBI EPoC and, if selected, during the Entry process. The three identifiers are:

- Legal Entity Identifier (LEI)—managed and made available by the Global Legal Entity Identifier Foundation (GLEIF)
- Global Location Number (GLN)—owned and managed by GS1
- Data Universal Numbering System (DUNS)—owned and managed by Dun & Bradstreet (D&B)

GBI EPoC participants will also provide applicant information: Company/entity legal name, legal entity headquarters and/or manufacturing site address, business phone number (associated with provided address), company website, Manufacture/Shipper Identification Code (MID), and Authorized Economic Operator (AEO) identification number (optional).

Automated Broker Interface (ABI) filers (including brokers and self-filers) will be required to complete a GBI enrollment process, via ABI, prior to submitting the identifiers on an electronic entry (CBP Form 3461). Filers are responsible for the associated costs to obtain all three identifiers and will submit each identifier for the following supply chain roles:

- Manufacturer/Producer (required)
- Shipper (required)
- Seller (required)
- Exporter (optional)
- Distributer (optional)
- Packager (optional)

Section 484 of the Tariff Act of 1930, as amended (19 U.S. Code 1484) and part 141, Code of Federal Regulations, title 19 (19 CFR part 141), pertain to the entry of merchandise and authorize CBP to require information that is necessary for CBP to determine whether merchandise may be released from CBP custody. Provisions of the

U.S. Code and CBP regulations, in various parts and related to various types of merchandise, specify information that is required for entry. For reference, part 163, Code of Federal Regulations, Title 19 (19 CFR part 163 appendix A) refers to a wide variety of regulatory provisions for certain information that may be required by CBP.

By testing the identifiers CBP will take its first step in determining whether to amend regulations to mandate the GBI solution. Furthermore, CBP will understand the utility of collecting and/or combining the identifiers' data and will be able to make an informed decision on whether to mandate the use of the GBI solution as an alternative for the Manufacturer/ Shipper Identification Code (MID).

Type of Information Collection: Electronic Submission of GBI Data and Enrollment Information.

Estimated Number of Respondents: 100.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 100.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 17.

Dated: February 24, 2022.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

[Published in the Federal Register, March 2, 2022 (85 FR 11727)]



ENTRY/IMMEDIATE DELIVERY APPLICATION AND ACE CARGO RELEASE

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 30-Day notice and request for comments; revision of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted no later than April 1, 2022 to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email CBP_PRA@cbp.dhs.gov. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at <https://www.cbp.gov/>.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (Volume 86 FR Page 55628) on October 06, 2021, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Entry/Immediate Delivery Application and ACE Cargo Release.

OMB Number: 1651-0024.

Form Number: CBP Forms 3461 and 3461 ALT.

Current Actions: Revision.

Type of Review: Revision.

Affected Public: Businesses.

Abstract: All items imported into the United States are subject to examination before entering the commerce of the United States. There are two procedures available to effect the release of imported merchandise, including “entry” pursuant to 19 U.S.C. 1484, and “immediate delivery” pursuant to 19 U.S.C. 1448(b). Under both procedures, CBP Forms 3461, Entry/Immediate Delivery, and 3461 ALT are the source documents in the packages presented to Customs and Border Protection (CBP). The information collected on CBP Forms 3461 and 3461 ALT allow CBP officers to verify that the information regarding the consignee and shipment is correct and that a bond is on file with CBP. CBP also uses these forms to close out the manifest and to establish the obligation to pay estimated duties in the time period prescribed by law or regulation. CBP Form 3461 is also a delivery authorization document and is given to the importing carrier to authorize the release of the merchandise.

CBP Forms 3461 and 3461 ALT are provided for by 19 CFR 142.3, 142.16, 141.22, and 141.24. The forms and instructions for Form 3461 are accessible at: <https://www.cbp.gov/newsroom/publications/forms?title=3461&=Apply>.

Ace Cargo Release (formerly referred to as “Simplified Entry”) is a program for ACE entry summary filers in which importers or brokers may file ACE Cargo Release data in lieu of filing the CBP Form 3461. This data consists of 12 required elements: Importer of record; buyer name and address; buyer employer identification number (consignee number), seller name and address; manufacturer/supplier name and address; Harmonized Tariff Schedule 10-digit number; country of origin; bill of lading; house air waybill number; bill of lading issuer code; entry number; entry type; and estimated shipment value. The four optional data elements are: The container stuffing location, consolidator name and address, ship to party name and address, and the three Global Business Identifier (GBI) identifiers: (20-digit Legal Entity Identifier (LEI), 9-digit Data Universal Numbering System (DUNS), and 13-digit Global Location Number (GLN)) for the entry filer and the manufacturer/producer, seller and shipper, and option-

ally, for the exporter, distributor and packager. The GBI identifiers are the new optional data elements that are being collected to better identify the legal entity that is interacting with CBP. The data collected under the ACE Cargo Release program is intended to reduce transaction costs, expedite cargo release, and enhance cargo security. ACE Cargo Release filing minimizes the redundancy of data submitted by the filer to CBP through receiving carrier data from the carrier. This design allows the participants to file earlier in the transportation flow. Guidance on using ACE Cargo Release may be found at <http://www.cbp.gov/trade/ace/features>.

It should be noted that ACE Cargo Release was previously called Simplified Entry.

Type of Information Collection: Form 3461 Entry/Immediate Delivery (Paper Only).

Estimated Number of Respondents: 12,307.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 12,307.

Estimated Time per Response: 15 minutes (0.25 hours).

Estimated Total Annual Burden Hours: 3,077.

Type of Information Collection: ACE Cargo Release: Form 3461, 3461ALT (Electronic Submission).

Estimated Number of Respondents: 9,810.

Estimated Number of Annual Responses per Respondent: 2,994.

Estimated Number of Total Annual Responses: 29,371,140.

Estimated Time per Response: 10 minutes (0.166 hours).

Estimated Total Annual Burden Hours: 4,875,609.

Dated: February 24, 2022.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

**COPYRIGHT, TRADEMARK, AND TRADE NAME
RECORDATIONS****(NO. 01 2022)**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

SUMMARY: The following copyrights, trademarks, and trade names were recorded with U.S. Customs and Border Protection in January 2022. A total of 134 recordation applications were approved, consisting of 7 copyrights and 127 trademarks.

Corrections or updates may be sent to: Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street, NE., 10th Floor, Washington, D.C. 20229-1177, or via email at *iprrquestions@cbp.dhs.gov*.

FOR FURTHER INFORMATION CONTACT: Christopher Hawkins, Paralegal Specialist, Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade at (202) 325-0295.

ALAINA VAN HORN

Chief,

*Intellectual Property Enforcement Branch
Regulations and Rulings, Office of Trade*

CBP IPR RECORDATION — JANUARY 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
COP 02-00056	01/25/2022	01/25/2042	Mario Tennis	Nintendo of America, Inc., & Camelot Company, Ltd.	No
COP 22-00001	01/06/2022	12/15/2041	Poncho Villa Graphic	Civilian Lab LLC. Address	No
COP 22-00002	01/26/2022	01/26/2042	ANIMAL CROSSING amiibo CARDS - SERIES 5.	Nintendo of America Inc.	No
COP 22-00003	01/26/2022	01/26/2042	Nintendo Switch OLED Model Webpage	Nintendo of America Inc.	No
COP 22-00004	01/26/2022	01/26/2042	Pokemon Brilliant Diamond.	The Pokemon Company	No
COP 22-00005	01/26/2022	01/26/2042	Pokemon Shining Pearl	The Pokemon Company	No
COP 22-00006	01/28/2022	10/19/2022	Tu Tirla Xyahka Ne Myqut	Lavar Otruth	No
TMK 02-00342	01/03/2022	06/27/2031	DEVIL RAYS	TAMPA BAY RAYS BASEBALL LTD.	No
TMK 02-01017	01/03/2022	11/13/2031	ROBITUSSIN	PF CONSUMER HEALTHCARE 1 LLC	No
TMK 03-00010	01/25/2022	05/05/2032	DESIGN (STYLIZED D)	Detroit Tigers, Inc.	No
TMK 05-00119	01/12/2022	10/24/2031	CIRCLE WITH T AND FLAME DESIGN	TENNESSEE FOOTBALL, INC.	No
TMK 05-01036	01/28/2022	05/15/2032	RANGE ROVER	JAGUAR LAND ROVER LIMITED PRIVATE COMPANY	No
TMK 06-00323	01/11/2022	04/22/2031	Design of a Guitar Headstock	Ernie Ball, Inc. CORPORATION	No
TMK 06-00490	01/03/2022	03/14/2025	BLUETOOTH	BLUETOOTH SIG, INC.	No
TMK 08-00650	01/18/2022	02/13/2032	GC FUJICEM	TRADEMARK HOLDINGS OF ILLINOIS LLC	No
TMK 11-00799	01/14/2022	09/14/2031	AB ROCKET TWISTER	E. Mishan & Sons, Inc.	No
TMK 11-00893	01/03/2022	10/14/2031	WELLBUTRIN	GLAXOSMITHKLINE LLC	No
TMK 11-00983	01/18/2022	04/30/2032	KEN	MATTEL, INC.	No
TMK 12-00002	01/03/2022	10/26/2031	GARRETT QUALITY MADE IN USA ISO 9001 CERTIFIED	Garrett Electronics, Inc.	No

CBP IPR RECORDATION — JANUARY 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Trm	Owner Name	GM Restricted
TMK 12-00168	01/10/2022	11/02/2031	IDHAYAM	MEENAKSHI OVERSEAS LLC	No
TMK 12-00256	01/07/2022	10/09/2031	GLIADEL	EISAI INC. CORPORATION	No
TMK 12-00602	01/31/2022	11/06/2031	PHILIPS	KONINKLIJKE PHILIPS N.V.	No
TMK 12-00706	01/28/2022	08/24/2031	John Deere Green and Yellow Trade Dress	Deere & Company CORPORATION	No
TMK 12-00870	01/03/2022	10/19/2031	SCREAMIN' EAGLE AND DESIGN	H-D U.S.A., LLC	No
TMK 12-00891	01/11/2022	01/15/2032	BAZOOKA	Southern Audio Services, Inc.	No
TMK 12-00912	01/14/2022	11/20/2031	HD	H-D U.S.A., LLC	No
TMK 12-01369	01/26/2022	02/01/2032	RB (STYLIZED) LOGO	Rag & Bone Holdings, LLC	No
TMK 12-01400	01/03/2022	05/01/2031	SAFETY ACT CERTIFIED	United States Department of Homeland Security	No
TMK 13-00158	01/21/2022	11/30/2031	SAMSUNG GALAXY TAB	Samsung Electronics Co., Ltd.	No
TMK 13-01025	01/20/2022	11/04/2031	REI	RECREATIONAL EQUIPMENT INC	No
TMK 13-01334	01/21/2022	10/10/2031	RED BIRD DESIGN	Rovio Entertainment Corporation	No
TMK 14-00208	01/14/2022	10/19/2031	COVIDIEN	Covidien AG CORPORATION SWITZERLAND	No
TMK 14-00440	01/14/2022	02/15/2032	CREED & DESIGN	FONTAINE LIMITEESWITZERLAND	No
TMK 14-01182	01/03/2022	11/28/2031	YAKULT & DESIGN	KABUSHIKI KAISHA YAKULT HONSHA CORPORATION JAPAN	No
TMK 15-00587	01/21/2022	11/23/2031	F-35	Lockheed Martin Corporation	No
TMK 15-00813	01/21/2022	08/10/2031	BKR	Tali Corp. CORPORATION	No
TMK 15-00852	01/03/2022	05/26/2028	B & Design	BLUETOOTH SIG, INC.	No
TMK 15-01034	01/20/2022	10/19/2032	WYBOROWA	Wyborowa S.A.	No
TMK 15-01260	01/03/2022	11/02/2031	ROUND BOTTLE WITH DOME TOP (DESIGN)	Societe Parisienne de Parfums et Cosmetiques FRANCE	No

CBP IPR RECORDATION — JANUARY 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Tm	Owner Name	GM Restricted
TMK 16-00185	01/18/2022	02/15/2032	ALE	PANDORA A/S AKTIESELSKABDEN-MARK	No
TMK 17-00043	01/21/2022	02/01/2032	UPSHER-SMITH	UPSHER-SMITH LABORATORIES, LLC	No
TMK 17-00309	01/12/2022	04/10/2032	ROADIE	YETI COOLERS, LLC	No
TMK 17-00316	01/12/2022	04/10/2032	TUNDRA	YETI COOLERS, LLC	No
TMK 17-01206	01/10/2022	10/12/2031	MARTELL	MARTELL & CO. FRANCE	No
TMK 17-01321	01/03/2022	12/25/2031	FRESH F21C	Fresh, Inc. CORPORATION	No
TMK 18-00844	01/28/2022	01/12/2032	MOTORCRAFT	FORD MOTOR COMPANY CORPORATION	No
TMK 19-00311	01/26/2022	10/26/2032	SEATTLE LOGO WITH BASEBALL AND COMPASS	THE BASEBALL CLUB OF SEATTLE, LLLP	No
TMK 19-00505	01/28/2022	12/06/2031	SWIFT	Top Tobacco LP	No
TMK 19-00671	01/03/2022	01/04/2032	RUBBER B	RUBBER B, LLC	No
TMK 19-00861	01/03/2022	10/26/2031	TRIUMFQ	VIIV HEALTHCARE COMPANY	No
TMK 19-00998	01/12/2022	04/26/2030	A O SMITH INNOVATION HAS A NAME (STYLIZED) & COLOR DESIGN	A. O. Smith Corporation	No
TMK 20-00254	01/21/2022	01/18/2032	E & DESIGN	Bora Creations S.L.	No
TMK 20-01085	01/14/2022	05/01/2031	DB (STYLIZED)	AZPB Limited Partnership	No
TMK 20-01185	01/20/2022	10/19/2031	HAPPY NAPPERS	JAY AT PLAY INTERNATIONAL HONG KONG LIMITED DBA Jay At Play	No
TMK 21-00114	01/11/2022	05/14/2032	XELJANZ	Pfizer Inc. CORPORATION	No
TMK 21-00210	01/21/2022	02/27/2032	NATURE'S BEAUTY	GARGOA, INC.	No
TMK 22-00001	01/03/2022	03/07/2032	FRAG OFF	Microtech Knives, Inc.	No
TMK 22-00002	01/03/2022	03/21/2032	Universal Flag Design	Allah, Saladin Quanaah	No

CBP IPR RECORDATION — JANUARY 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 22-00003	01/03/2022	08/28/2023	ARTEROSIL	CALROY HEALTH SCIENCES, LLC	No
TMK 22-00005	01/03/2022	07/13/2031	OSCAR MASSIN	OSCAR MASSIN INC.	No
TMK 22-00006	01/06/2022	07/14/2030	DIEHARD	TRANSFORM SR BRANDS LLC	No
TMK 22-00007	01/06/2022	04/17/2026	VEINLITE	Translite, LLC	No
TMK 22-00008	01/06/2022	03/14/2032	TAVIS	Aurora Multimedia Corp.	No
TMK 22-00009	01/06/2022	02/24/2031	PPC & Design	PAYMENT PROCESSING CONSULTANTS, INC.	No
TMK 22-00010	01/07/2022	06/29/2026	BANG	BANG HOLDINGS CORP.	No
TMK 22-00011	01/07/2022	11/28/2031	J-50	Gibson Guitar Corp. CORPORATION	No
TMK 22-00013	01/07/2022	06/16/2031	DBOZE	Shubozeman Wholesale & Retail Trade LLC	No
TMK 22-00014	01/10/2022	04/01/2029	NOVATTO	NOVATTO, INC. CORPORATION	No
TMK 22-00015	01/10/2022	12/28/2030	KEEPCOOL	KEEPCOOL USA LLC	No
TMK 22-00016	01/10/2022	01/26/2032	OUT OF THE WOODS	KEEPCOOL USA LLC	No
TMK 22-00017	01/10/2022	10/09/2029	OUT OF THE WOODS	KEEPCOOL USA LLC	No
TMK 22-00018	01/10/2022	03/26/2028	MICROMEND	KitoTech Medical, Inc. CORPORATION	No
TMK 22-00019	01/10/2022	10/06/2031	CHILISLEEP	Kryo, Inc. CORPORATION	No
TMK 22-00020	01/10/2022	08/21/2029	CHILI TECHNOLOGY	Kryo, Inc.	No
TMK 22-00021	01/10/2022	05/19/2029	OOLER	KRYO, Inc.	No
TMK 22-00022	01/12/2022	02/02/2032	HAUL	YETI COOLERS, LLC	No
TMK 22-00023	01/14/2022	10/13/2031	PRINGLES	KELLOGG NORTH AMERICA COMPANY	No
TMK 22-00024	01/14/2022	02/09/2032	AISHETU	AISTHETU BEAUTY INC. CORPORATION	No

CBP IPR RECORDATION — JANUARY 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/TmK/TmM	Owner Name	GM Restricted
TMK 22-00025	01/14/2022	02/16/2032	DAMN RIGHT COCKTAILS	D. R. Cocktails LLC	No
TMK 22-00026	01/14/2022	04/04/2032	GENESIS BY MLILY	Healthcare Co. Ltd. CORPORATION CHINA	No
TMK 22-00027	01/14/2022	01/23/2028	TRAVATAN Z	NOVARTIS AG CORPORATION SWIT- ZERLAND	No
TMK 22-00028	01/14/2022	03/28/2032	Cinnova & Design	Cinnova Technologies, LLC	No
TMK 22-00029	01/14/2022	12/21/2031	GIZMO KIDS	Mondottica USA, LLC	No
TMK 22-00030	01/14/2022	09/30/2025	WISEPAD	BBPOS Limited LIMITED LIABILITY COMPANY HONG KONG	No
TMK 22-00031	01/18/2022	12/28/2031	SAMSON	Samsong Equipment, Inc.	No
TMK 22-00032	01/18/2022	11/28/2027	SPIEGLER PERFORMANCE PARTS	Spiegler Brake Systems USA, LLC	No
TMK 22-00033	01/19/2022	04/12/2031	HONEYWELL	Honeywell International Inc.	No
TMK 22-00034	01/19/2022	03/20/2027	STERN INGREDIENTS	Stern Ingredients, Inc.	No
TMK 22-00035	01/20/2022	03/21/2032	SPEED DEMON	Dhillon, Gurinder	No
TMK 22-00036	01/20/2022	05/18/2031	FLTR Pure Protection & DESIGN	FLTR, Inc.	No
TMK 22-00037	01/20/2022	05/11/2030	STONEY CLOVER LN	STONEY CLOVER LANE, LLC	No
TMK 22-00038	01/20/2022	04/26/2031	SCLN	STONEY CLOVER LANE, LLC	No
TMK 22-00039	01/20/2022	04/26/2031	SCLN & Design	STONEY CLOVER LANE, LLC	No
TMK 22-00040	01/20/2022	04/27/2025	COOKIE COUNTRY	Exclusive Trading Company CORPORA- TION	No
TMK 22-00041	01/21/2022	09/11/2022	DELPHI	DELPHI TECHNOLOGIES IP LIMITED	No
TMK 22-00042	01/21/2022	04/28/2030	STONEY CLOVER LN & DESIGN	STONEY CLOVER LANE, LLC	No
TMK 22-00043	01/21/2022	02/12/2030	ROZLYTREK	Genentech, Inc. CORPORATION	No
TMK 22-00044	01/21/2022	02/19/2030	POLIVY	Genentech, Inc. DBA Genentech, Inc.	No

CBP IPR RECORDATION — JANUARY 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/k/Tm	Owner Name	GM Restricted
TMK 22-00045	01/21/2022	01/20/2031	EVYRSDI	Genentech, Inc.	No
TMK 22-00046	01/21/2022	12/01/2030	PHESGO	Genentech, Inc.	No
TMK 22-00047	01/24/2022	09/25/2023	LUNDIA	The Recom Group, Inc. CORPORATION	No
TMK 22-00049	01/25/2022	12/21/2031	Pournader & Company & DESIGN	Pournader & Company, Inc. CORPORATION	No
TMK 22-00050	01/26/2022	03/24/2030	LYRES SONG	Star City Meadworks LLC	No
TMK 22-00051	01/26/2022	04/11/2032	RENNOU	Thecorp Holding Company, LLC	No
TMK 22-00052	01/26/2022	02/24/2031	NEZKA	Top Value Distributors LLC	No
TMK 22-00053	01/26/2022	02/24/2031	NEZKA	Top Value Distributors LLC	No
TMK 22-00054	01/26/2022	03/29/2031	STYLIZED delta TRIANGLE LOGO	Delta Cycle Corporation	No
TMK 22-00055	01/26/2022	10/06/2031	Apple Design (STYLIZED)	AIME LEON DORE HOLDINGS LLC	No
TMK 22-00056	01/26/2022	06/25/2024	BEYOND Design (STYLIZED)	I Am Beyond LLC	No
TMK 22-00057	01/26/2022	09/01/2030	LOTUS LOGO DESIGN	I Am Beyond LLC	No
TMK 22-00058	01/26/2022	09/22/2030	BEYOND YOGA	I Am Beyond LLC	No
TMK 22-00059	01/26/2022	07/12/2025	BEYOND YOGA	I AM BEYOND LLC LIMITED LIABILITY COMPANY CALIFORNIA	No
TMK 22-00060	01/27/2022	06/02/2030	I AM BEYOND	I AM BEYOND LLC	No
TMK 22-00061	01/27/2022	03/28/2025	LOTUS logo	I AM BEYOND LLC	No
TMK 22-00062	01/27/2022	11/23/2031	RUGGABLE	RUGGABLE LLC	No
TMK 22-00063	01/27/2022	09/10/2024	BEYOND THE BUMP	I Am Beyond LLC	No
TMK 22-00064	01/27/2022	08/01/2028	DANCE FOAM POWDER	Partymachines.com, Inc.	No
TMK 22-00065	01/27/2022	09/26/2028	PARTYMACHINES	Partymachines.com, Inc.	No
TMK 22-00066	01/27/2022	02/24/2031	BOXABL	BUILD IP LLC	No
TMK 22-00067	01/28/2022	04/26/2031	BOX BL & DESIGN	BUILD IP LLC	No

CBP IPR RECORDATION — JANUARY 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 22-00068	01/28/2022	05/05/2032	BASKETBALL PLAYER DESIGN	NBA Properties, Inc.	No
TMK 22-00069	01/28/2022	12/20/2023	COBAS	ROCHE DIAGNOSTICS OPERATIONS, INC.	No
TMK 22-00070	01/28/2022	08/17/2031	FIREFLY	EV TRANSPORTATION SERVICES, INC.	No
TMK 22-00071	01/28/2022	01/16/2023	FIREFLY ESV	EV TRANSPORTATION SERVICES, INC.	No
TMK 22-00072	01/28/2022	11/18/2028	ELECSYS	ROCHE DIAGNOSTICS GMBH GER-MANY	No
TMK 22-00073	01/28/2022	10/26/2025	COBAS	ROCHE DIAGNOSTICS OPERATIONS, INC.	No
TMK 22-00074	01/28/2022	03/14/2025	COBAS	ROCHE DIAGNOSTICS OPERATIONS, INC.	No
TMK 22-00075	01/28/2022	03/21/2025	COBAS	ROCHE DIAGNOSTICS OPERATIONS, INC.	No
TMK 22-00076	01/28/2022	09/15/2031	SCORE VALUE LANGUAGE	Joseph Walsh INDIVIDUAL	No
TMK 22-00077	01/31/2022	08/25/2031	P100	U.S. Department of Health and Human Services agency of the United States government UNITED STATES	No
TMK 22-00078	01/31/2022	08/25/2031	N100	U.S. Department of Health and Human Services	No
TMK 22-00079	01/31/2022	02/23/2032	N99	U.S. Department of Health and Human Services	No
TMK 22-00080	01/31/2022	02/28/2028	JOHNNY APPLE PEELER	Victorio, LLC	No
TMK 22-00081	01/31/2022	09/30/2030	STARSCOPE	DFO Global Performance Commerce Limited	No

U.S. Court of International Trade

Slip Op. 22–17

CYBER POWER SYSTEMS (USA) INC., Plaintiff, v. UNITED STATES,
Defendant.

Before: Leo M. Gordon, Judge
Court No. 20–00124

[Denying parties' cross-motions for summary judgment.]

Dated: February 24, 2022

John M. Peterson, Richard F. O'Neill, and Patrick B. Klein, Neville Peterson LLP, of New York, N.Y., for the Plaintiff Cyber Power Systems (USA) Inc.

Brandon Kennedy, Trial Counsel, and *Beverly A. Farrell*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With them on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Justin R. Miller*, Attorney-in-Charge. Of counsel was *Yelena Slepak*, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION and ORDER

Gordon, Judge:

This action began with a prior disclosure about a “Made in Philippines” over-label on packaging that was also marked “Made in China.” U.S. Customs and Border Protection (“Customs” or “CBP”) determined that the country of origin was China, not the Philippines. In response, Plaintiff, Cyber Power Systems (USA) Inc. (“Cyber Power”), advised its customs broker that it would continue marking all items as “Made in Philippines.” Customs subsequently detained the subject entry for inspection. Customs sent Cyber Power and its customs broker a notice of detention accompanied by a notice to mark and/or redeliver. After Cyber Power refused to change the marking on the merchandise, it was deemed excluded by operation of 19 U.S.C. § 1499(c)(5). Cyber Power filed a protest challenging Customs’ deemed exclusion, arguing that the processes performed in the Philippines resulted in a “substantial transformation” of its merchandise into Philippine origin, having a name, character, and use different from its Chinese components. Customs denied the protest, concluding that “[i]nsufficient documentation was provided by the protestant to change the country of origin from China to the Philippines for mark-

ing and classification purposes. All information, both verbal and written, was considered by this office. The country of origin marking for this shipment should remain ‘made in China’.” *See* Protests & Entries from the Port of Minneapolis, MN at p. 2, ECF No. 20–1.

Cyber Power then commenced this action. The subject entry covers five models of uninterruptible power supplies (“UPS”) and one model of surge voltage protector (“SVP”). With respect to four of the UPS products, and with regard to the single SVP product, it is undisputed that the majority of components, including the printed circuit board assemblies (“PCBAs”), were produced in China. In the case of one UPS unit—UPS Model No. CP600LCDa—Plaintiff maintains, and Defendant disputes, that its printed circuit board was produced in the Philippines, although the parties agree that various other components are made in China. Additionally, Plaintiff maintains that all of the subject merchandise is assembled, connected, and tested at its facility in the Philippines.

Cyber Power sought a preliminary injunction that the court denied because it requested the ultimate relief. *See* Slip Op. & Order, ECF No. 30. Plaintiff subsequently moved to compel depositions of two Government officials, as well as to compel the production of any notes or reports made by those officials regarding their July 23, 2020 inspection of the Cyber Power Philippines plant. *See* Pl.’s Mot. to Compel, ECF No. 31. In response, the Government moved for a protective order based on the investigatory files privilege to prevent disclosure of the materials and depositions. *See* Def.’s Resp. to Mot. to Compel & Cross-Mot. for Protective Order, ECF No. 36. Finding no basis for the Government’s assertion of an investigatory files privilege, the court summarily denied the Government’s motion for a protective order and granted Cyber Power’s motion to compel. *See* Mem. & Order, ECF No. 46. Presently before the court are the parties’ cross-motions for summary judgment. *See* Pl.’s Mot. for Summ. J., ECF No. 48 (“Pl.’s MSJ”); Pl.’s R. 56.3 Stmt. of Material Facts Not in Dispute, ECF No. 48–5 (“Pl.’s 56.3 Stmt.”); Def.’s Cross-Mot. for Summ. J. & Mot. to Strike, ECF No. 60 (“Def.’s XMSJ”); Def.’s R. 56.3 Stmt. of Material Facts as to Which There Are No Genuine Issues to be Tried, ECF No. 60–1 (“Def.’s 56.3 Stmt.”); *see also* Def.’s Resp. to Pl.’s R. 56.3 Stmt., ECF No. 60–2; Pl.’s Reply & Resp. in Opp’n to Def.’s Cross-Mot. for Summ. J. & Mot. to Strike, ECF No. 67 (“Pl.’s Reply”); Pl.’s Resp. to Def.’s R. 56.3 Stmt., ECF No. 67–5; Def.’s Revised Reply, ECF No. 87 (“Def.’s Reply”).

I. Standard of Review

USCIT Rule 56 permits summary judgment when “there is no genuine issue as to any material fact.” USCIT R. 56(c); *see also*

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). On the question of genuineness, the standard for determining a genuine issue “mirrors the standard for a directed verdict[,] ... which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.... In essence, ... the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 248–52; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23. (1986) (Rule 56 “mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”). In considering whether material facts are genuinely in dispute, the evidence must be considered in the light most favorable to the non-moving party, drawing all reasonable inferences in its favor. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 261 n.2.

II. Discussion

A. Background

In this action involving country of origin marking, Plaintiff must establish by a preponderance of the evidence that its subject merchandise is substantially transformed in the Philippines and not made in China. *See* 28 U.S.C. § 2639(a)(1); *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492 n.2 (Fed. Cir. 1997) (plaintiff bears burden of proof on contested factual issues arising from underlying protest decision).

A “substantial transformation” occurs “when an article emerges from a manufacturing process with a name, character, or use which differs from those of the original material subjected to the process.” *Torrington, Co. v. United States*, 764 F.2d 1563, 1568 (Fed. Cir. 1985) (citing *Texas Instruments, Inc. v. United States*, 681 F.2d 778, 782 (C.C.P.A. 1982)); *see also Gibson-Thomsen Co., Inc. v. United States*, 27 C.C.P.A. 267, 273 (1940) (clarifying that marking statute did not “require that an imported article, which is to be used in the United States as material in the manufacture of a new article having a new name, character, and use, and which, when so used, becomes an integral part of the new article, be so marked as to indicate to the retail purchaser of the new article that such imported article or material was produced in a foreign country”). “Substantial transformation” determinations are fact-specific and made on a case-by-case basis. It is a disjunctive test; only a change in one of the three

criteria—name, character, or use—is required. See *Koru N. Am. v. United States*, 12 CIT 1120, 1126, 701 F. Supp. 229, 234 (1988). However, a change in name is generally considered the least persuasive factor. See *id.* (citing *Nat'l Juice Prods. Ass'n v. United States*, 10 CIT 48, 59–60, 628 F. Supp. 978, 989 (1986)).

In the most recent iterations of the substantial transformation test, the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) has required that there be a “new and different” article which emerges from a manufacturing process. See, e.g., *Acetris Health LLC v. United States*, 949 F.3d 719 (Fed. Cir. 2020); *Zuniga v. United States*, 996 F.2d 1203 (Fed. Cir. 1993); *Azteca Milling Co. v. United States*, 890 F.2d 1150 (Fed. Cir. 1989). Some courts have also considered additional factors in evaluating whether a change in name, character, or use has occurred, such as the cost or value added by specified processes, see, e.g., *Ferrostaal Metals Corp. v. United States*, 11 CIT 470, 664 F. Supp. 535 (1987); *Superior Wire Inc. v. United States*, 11 CIT 608, 669 F. Supp. 472 (1987); *Uniroyal, Inc. v. United States*, 3 CIT 220, 542 F. Supp. 1026 (1982); or whether there has been a transformation from a “producer’s good” to a “consumer good,” see, e.g., *SDI Techs. Inc. v. United States*, 21 CIT 895, 977 F. Supp. 1235, 1240 (1997); *Midwood Indus. Inc. v. United States*, 64 Cust. Ct. 499, 313 F. Supp. 951 (1970), *appeal dismissed*, 57 C.C.P.A. 141 (1970).

As the court noted previously and as this brief summary of relevant precedent illustrates, the substantial transformation test is not straightforward to apply. See Slip Op. & Order at 9–11, ECF No. 30. To facilitate the application of that test in this matter, the court encouraged the parties to focus their arguments regarding substantial transformation in light of the “underlying statutory and regulatory purposes” at issue, and whether those purposes would be served by a finding of substantial transformation. *Id.* at 11.

B. Analysis

1. Marking Statute

The parties dispute the underlying statutory purpose of the marking statute at issue. The court must resolve this dispute before turning to whether Plaintiff has demonstrated that the subject merchandise has undergone a “substantial transformation” in the Philippines. Section 304(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1304(a), requires that all merchandise imported into the United States be marked permanently, legibly, indelibly, and in a conspicuous place, to indicate to the ultimate purchaser the English name of the product’s country of origin. 19 C.F.R. § 134.1(b) defines the term

“country of origin” as “the country of manufacture, production, or growth of any article of foreign origin entering the United States.” Section 134.1(b) explains that “[f]urther work or material added to an article in another country must effect a *substantial transformation* in order to render such other country the ‘country of origin’ within the meaning of this part.” (emphasis added).

Simply stated, imported merchandise originates for marking purposes in the last country it underwent a “substantial transformation” prior to importation into the United States. Merchandise not properly marked with country of origin is considered “restricted” and may be excluded by Customs from entry into the United States. *See* 19 U.S.C. § 1304(j); *see also* 19 C.F.R. § 134.3(a). Additionally, effective July 6, 2018, the Office of the United States Trade Representative imposed an additional tariff on certain products from China that are classified in the subheadings enumerated in Section XXII, Chapter 99, Subchapter III U.S. Note 20(b), Harmonized Tariff Schedule of the United States (“Section 301 tariffs”). “When determining the country of origin for purposes of applying current trade remedies under Section 301, Section 232, and Section 201, the substantial transformation analysis is applicable.” Def.’s XMSJ at 24 (quoting HQ H301619 (Nov. 6, 2018)). The merchandise at issue here would be covered by those Section 301 tariffs if they originate in China as opposed to the Philippines.

Cyber Power argues that the consumer disclosure provisions of the marking statute, 19 U.S.C. §1304(a), are to advise a retail purchaser where a UPS or SVP were made. “The consumer is interested in knowing the country where the workmanship was put into the product to create it, where the electrical testing and quality control processes were performed, where UL certification experts examined it and held it to be in compliance with its consumer safety standard.” Pl.’s MSJ at 17.

The Government argues that the main purpose of the country-of-origin marking statute is to inform the consumer where the majority of an article’s parts are manufactured. *See* Def.’s XMSJ at 23–25 (“The consumer of a good would likely be surprised that a product marked as a product of country X is comprised almost entirely of parts manufactured in country Y.”). The Government also contends that the Section 301 tariffs “would be thwarted if almost all the parts of an article could be manufactured in China, then sent to a non-Section 301 country for assembly and processing into the article to be exported, and then have the country of origin of such article be the country of assembly.” *Id.*

Cyber Power argues, however, that disclosure of the origin of an article's parts is not required by 19 U.S.C. § 1304(a), and that where Congress wishes to direct a merchant to identify the country of origin of components or materials used in production of an article, it knows how to craft legislation for that purpose. *See* Pl.'s MSJ at 9–10 (citing The American Automotive Labeling Act, 49 U.S.C. § 32304; 49 C.F.R. Part 583; and Section 13(p) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.*, as amended by Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act).

Furthermore, the purpose of the imposition of the Section 301 tariffs was to promote a change in the “government of China’s acts, policies and practices related to technology transfer, intellectual property and innovation.” *See* Pl.’s Reply at 20 (citing *Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 28,711 (U.S.T.R. June 20, 2018)). Additionally, the Section 301 tariffs were intended to encourage a partial de-coupling of China’s economy from that of the United States, by discouraging investment in, and trade with, China. *See id.*

Here, Plaintiff, a Taiwanese company, appears to have in fact de-coupled from China, moving some of its production from China to the facility established in the Philippines in 2018, when the Section 301 tariffs were first imposed. *Id.* Plaintiff emphasizes that it “moved significant capital equipment from China to the Philippines, expanding and integrating its production with the establishment of the Phisonic facility to manufacture PCBAs, and using Philippine labor instead of Chinese labor (all the foregoing at significantly higher cost).” *Id.* Plaintiff persuasively argues that “[d]isregarding this investment, the extensive manufacturing operations being conducted in the Philippines and the creation of new articles of commerce in the Philippines, and focusing solely on the source of parts, rather than the place where the finished article is produced, sets the Section 301 policy on its ear, and would produce enormous trade distortions.” *Id.*

In consideration of the above, the court does not agree with Defendant that the purpose of the marking statute is to inform the consumer about the country-of-origin as to the component parts of the merchandise. *See* U.S. Customs & Border Protection, Marking of Country of Origin on U.S. Imports, Informed Compliance Publication, Pub. No. 1150–0620 (non-binding guidance stating, “**What is the purpose of marking?** To inform the ultimate purchaser in the United States of the country in which the imported article was made.”). The court also does not agree with Defendant that the purpose of the Section 301 tariffs imposed on imports from China would

be frustrated by concluding that goods with components made in China that are assembled, connected, tested, and finished in the Philippines are made in the Philippines for country-of-origin marking purposes. To the contrary, Cyber Power’s deliberate de-coupling from China, and its development of Philippine facilities used to make the subject merchandise, appears to be precisely in line with the intended consequences of the Section 301 tariffs. Given this background and understanding of the underlying statutory provisions, the court turns to the parties’ arguments as to whether the Chinese-origin components are “substantially transformed” by Plaintiff’s Philippine operations such that the country-of-origin of the subject merchandise should be for purposes of applying the marking statute and assessing the applicability of Section 301 duties.

2. Substantial Transformation

There is no dispute that a “simple assembly” does not substantially transform merchandise. *See, e.g., Ran–Paige Co., Inc. v. United States*, 35 Fed. Cl. 117, 121–122 (1996) (attaching handles to pans); *Uniroyal, Inc. v. United States*, 3 CIT at 226, 542 F. Supp. at 1031 (imported shoe upper attached to outsole); *SDI Techs., Inc. v. United States*, 21 CIT 895, 900, 977 F. Supp. 1235, 1241 (1997), *aff’d*, 155 F.3d 568 (Fed. Cir. 1998) (incorporation of stereo chassis into stereo rack system). There is dispute, however, as to what constitutes a “simple assembly.” *Compare* Def.’s XMSJ at 24 (arguing that “where all the materials needed to produce a particular article are manufactured in one country, simply exporting them to another country to produce the article will not result in that article being a product of the second country where less than substantial or significant work or additional materials are added in that second country”), *with* Pl.’s Reply at 18–21 (highlighting that Government’s position is contradicted by its regulations, including 19 C.F.R. § 102.1(p), which defines “simple assembly” in another context to involve “five or fewer” component parts).

The court does not agree with the Government’s suggestion that the Philippine operations regarding the subject merchandise constitute “simple assembly” since such a definition of “simple assembly” appears to be overbroad and conflicts with CBP regulations in other circumstances. However, Defendant highlights that its position is supported by a couple of prior decisions by this Court. *See* Def.’s XMSJ at 22 (citing *Nat’l Hand Tool Corp. v. United States*, 16 CIT 308 (1992), *aff’d per curiam*, 989 F.2d 1201 (Fed. Cir. 1993) and *Energizer Battery Inc. v. United States*, 40 CIT ___, 190 F. Supp. 3d 1308 (2016)). The subject merchandise consists of various models of UPS and one SVP, which are each comprised of at least a dozen components (and in

many cases, several dozens). See Pl.'s 56.3 Stmt. at ¶¶ 23–89. Beyond mere assembly of these components, Plaintiff also maintains that it programs the subject UPS devices with firmware and performs final function testing on all of the subject merchandise as part of its Philippine operations. *Id.* Taking the totality of the above into consideration, the court cannot conclude at this stage that Plaintiff's Philippine operations regarding the subject merchandise constitute a "simple assembly" rather than "substantial transformation."

Defendant suggests that the court's substantial transformation analysis should focus on the PCBAs of the subject merchandise, maintaining that "[t]he critical component of the subject merchandise is its main board PCBA because it provides the device with its principal function or the essence of the finish article." See Def.'s XMSJ at 10; see also *id.* at 20–21 (arguing that "[s]ome courts will consider 'the 'essence' of a completed article to determine whether an imported article has undergone a change in character as a result of post-importation processing." (quoting *Energizer*, 190 F. Supp. 3d at 1318)). Plaintiff disagrees, contending that there is no legal basis for Defendant's suggested "essence" test, and that such a test appears to have been rejected in a prior decision. See Pl.'s Reply at 12–14 (quoting *Ferrostaal Metals Corp.*, 11 CIT at 474, 664 F. Supp. at 538 ("The Court finds that there is no basis in caselaw for the essence test as offered by defendant. Defendant cites no case where the name, character and use criteria were satisfied, yet no substantial transformation was found to have occurred."))).

Plaintiff also emphasizes that even in the hypothetical application of a "critical component" or "essence" test, the Government's position has no merit as the PCBA cannot provide the "principal function" of a UPS device, namely the provision of an emergency source of power. See *id.* at 13 ("The 'principal function' of a UPS device is to supply battery electrical power to a connected device in the event a power source fails. This is a function the main PCBA cannot perform. For one thing, it lacks a battery, which is the source of emergency power. For another thing, it is incapable of connecting either to (1) a power source; or (2) a device to be protected."). The court agrees with Plaintiff that Defendant's proposed focus on the PCBA and the application of an "essence" or "critical component" test here is without merit. The Government's suggestion to focus solely on the PCBA components of the subject merchandise may well undermine the objective of the "substantial transformation" test, namely to focus on a change in name, character, or use. Accordingly, the court will consider the to-

tality of the evidence, without a focus on any particular “critical component,” in evaluating whether Plaintiff has substantially transformed the subject merchandise.

Defendant also argues that “[w]hen constituent parts are assembled without a change in the shape or material composition of those components, and the components do not lose their individual names, then the completed article does not undergo a substantial transformation when those components are combined for their pre-determined end use.” Def.’s XMSJ at 22. Defendant further maintains that, in considering the “use” factor, to determine whether substantial transformation has occurred, “courts find a change in use where the end-use of an imported article is not interchangeable with the end-use of the article after post-importation processing.” Def.’s Reply at 15 (citing *Energizer & Nat’l Hand Tool*). The court disagrees as the very authority on which Defendant relies undercuts its argument. See *Nat’l Hand Tool*, 16 CIT at 312 (“The fact that there was only one predetermined use of imported article does *not* preclude the finding of substantial transformation.” (emphasis added) (citing *Torrington Co. v. United States*, 764 F.2d 1563 (Fed. Cir. 1985))). While the intended use of components may provide some insight as to whether the assembly of those components into the finished merchandise accomplishes a change in use that indicates a “substantial transformation,” such a consideration is but one of many for the court to consider as part of the “totality of the evidence.” See *id.* (citing *Ferrostaal Metals Corp.*, 11 CIT at 478, 664 F. Supp. at 541; *National Juice Prods. Ass’n*, 10 CIT at 61, 628 F. Supp. at 991). Here, the court is not convinced by Defendant’s argument that the pre-determined use of the Chinese PCBAs for inclusion in Plaintiff’s UPS and SVP products precludes a finding that subject merchandise underwent a substantial transformation as a result of Plaintiff’s Philippine operations.

As the court noted in its prior decision denying Plaintiff’s motion for a preliminary injunction, there is conflicting precedent by this Court and the Federal Circuit as to whether a component-by-component analysis is appropriate for determining whether substantial transformation has occurred. See Slip Op. & Order at 10–12, ECF No. 30 (citing *Acetris Health*, 949 F.3d at 731 and *Uniden Am. Corp. v. United States*, 24 CIT 1191, 1195–98, 120 F. Supp. 2d 1091, 1095–1099 (2000)). As explained above, the court does not agree that a component-by-component analysis assists in the determination of whether the subject merchandise at issue here underwent a substantial transformation in the Philippines for purposes of determining the country of origin under 19 U.S.C. § 1304(a). If, as Defendant argues,

components assembled for a pre-determined use may *never* constitute substantial transformation, then, for all practical purposes, there can never be a substantial transformation because there will always be a pre-determined use. There would be no *Belcrest Linens v. United States*, 741 F.2d 1368, 1372 (Fed. Cir. 1984) (substantial transformation resulted from cutting bolt of cloth, scalloping, and sewing into pre-determined use of pillowcases); or *Ferrostaal Metals Corp.*, 11 CIT at 471, 664 F. Supp. at 536 (substantial transformation as result of continuous hot-dip galvanizing process into pre-determined use for resulting product). It is one thing to say that the attachment of a handle to a pan, or a sole to a shoe, is too mundane for a substantial transformation; it is another to suggest that all parts (however many) assembled into a “pre-determined” product may never result in a substantial transformation. That is not, and cannot be, the law.¹

Here, Plaintiff explains the production process at its Philippine facility for each of the subject merchandise, detailing their component parts, assembly, and finishing processes. See Pl.’s 56.3 Stmt. ¶¶ 23–92. Defendant, for its part, fails to demonstrate that Plaintiff’s Philippine operations constitute a “simple assembly” that cannot qualify as a substantial transformation. Defendant’s witness, Karl Moosbrugger, offers little more than his opinions on the ultimate issue. See ECF No. 61–6. While Plaintiff presents compelling and detailed evidentiary support for its motion, given the parties’ dispute as to certain factual issues, the court is unable to conclude at this stage that the subject merchandise undergoes a substantial transformation in the Philippines.

The fact-intensive nature of the substantial transformation analysis in this matter is clear from any attempt to evaluate whether Plaintiff’s Philippine operations result in a change in the name, character, or use of the subject merchandise. See *Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267. With respect to the “name” criterion, there does not appear to be any dispute that all of the subject merchandise at issue undergoes a change in “name” as none of the components share a name with the finished subject merchandise. See Pl.’s Reply at 11 (citing Def.’s XMSJ at 26). There is also no dispute that under the

¹ Even if the court accepted Defendant’s argument that assembly of components with a pre-determined use should not qualify as substantial transformation under the rationale of *Energizer*, the court notes that *Energizer* acknowledged that exceptions may exist and that substantial transformation may be found where the operations at issue were “sufficiently complex.” See *Energizer*, 40 CIT at ___, 190 F. Supp. 3d at 1318. While *Energizer* did not offer guidance as to what the phrase “sufficiently complex” may mean, it would seem that making such a determination in this matter would require analyzing contested issues of material fact. Accordingly, even if this Court adopted the component-by-component analysis applied in *Energizer*, it does not appear that the Government would be entitled to prevail on summary judgment.

“name, character, and use” analysis, a change in name is generally considered to be the least compelling factor in support of a finding of substantial transformation. See Def.’s XMSJ at 20 (citing *Sassy, Inc. v. United States*, 24 CIT 700, 704 (2000), and *Ferrostaal Metals Corp.*, 11 CIT at 478, 664 F. Supp. at 541 (“The name criterion is generally considered the least compelling of the factors which will support a finding of substantial transformation.”)). While the satisfaction of the name criterion in this matter lends some support to Plaintiff’s claim, this change in name alone does not appear sufficient to constitute a “substantial transformation” of the subject merchandise. The court must therefore consider whether changes in the “character” and/or “use” of the merchandise as part of Plaintiff’s Philippine operations have effected a “substantial transformation” of the subject merchandise. See *Precision Specialty Metals, Inc. v. United States*, 24 CIT 1016, 1029–30, 116 F. Supp. 2d 1350, 1364 (2000) (noting that courts generally focus on character and use criteria in assessing whether substantial transformation has occurred).

Without objective standards, such as cost, or a working definition of “simple assembly,” the court is left to arbitrarily apply its own subjective standards. Without workable, objective standards, one court’s “mere assembly”, see, e.g., *Nat’l Hand Tool*, 16 CIT at 311–312; *Energizer*, 40 CIT at ___, 190 F. Supp. 3d at 1324–25, can just as easily be another court’s complex process. Moreover, there are factual disputes as to the extent of Plaintiff’s Philippine operations that are critical for determining whether the subject merchandise undergoes a change in “character” and “use.” Compare Pl.’s MSJ at 14–16 (arguing that Philippine firmware instillation changes the character of the subject USP devices), with Def.’s XMSJ at 29–30 (arguing that “documents produced in this litigation undermine plaintiff’s claim that firmware is installed on the PCBAs in the Philippines”); see also *infra* at 18 (highlighting genuine issue of material fact as to country of manufacture of the PCBA for subject Model No. CP600LCDa devices). For purposes of resolving the present matter, the court concludes that a determination as to the resulting “character” and “use” of the subject merchandise after production at Plaintiff’s Philippine facility requires analysis and adjudication of contested issues of material fact. Accordingly, the court cannot conclude at this stage that Plaintiff’s Philippine operations do not effect a “substantial transformation” for purposes of determining country of origin, and consequently denies Defendant’s cross-motion for summary judgment.

The court now turns to the question of whether Plaintiff may prevail on its own motion for summary judgment. Plaintiff has submitted

detailed documentary and testimonial evidence as to the nature and extent of its Philippine operations and the production of subject merchandise. *See* Pl.'s 56.3 Stmt.; *see also* Affidavits in Support of Pl.'s Mot., ECF No. 48–4; Supplemental Exhibits for Pl.'s R. 56.3 Stmt., ECF No. 49. Defendant challenges not only the merits of Plaintiff's position, but also a variety of evidentiary and admissibility issues. *See* Def.'s XMSJ at 14–15 (arguing that “Plaintiff's Evidence Has Not Been Authenticated And/Or Is Inadmissible”); Def.'s Resp. to Pl.'s R. 56.3 Stmt., ECF No. 60–2. Plaintiff, for its part, maintains that Defendant's “evidentiary and technical objections lack merit,” and argues that the submission of additional affirmations by Plaintiff's witnesses resolve Defendant's evidentiary objections such that the court can adjudicate this matter in Plaintiff's favor on summary judgment. *See* Pl.'s Reply at 2–6.

Taking all reasonable factual inferences in favor of the non-movant, the court concludes that there remain genuine issues of material fact that preclude the entry of summary judgment for Plaintiff. If the underlying facts as to the nature and extent of Plaintiff's operations on the subject merchandise in the Philippines were not in dispute, the court would be inclined to grant summary judgment for Plaintiff; however, that is not the situation here as the parties dispute several critical facts. One example of a triable issue of fact here is the parties' dispute as to the country of manufacture for the printed circuit board used in the UPS Model No. CP600LCDa. As described above, the PCBA is a critical component in the subject merchandise, and the factual details as to where this component is manufactured, as well as where and how it is assembled and installed into the subject merchandise, may assist the court in its substantial transformation determination. While Plaintiff contends that the printed circuit board for the UPS Model No. CP600LCDa is manufactured in the Philippines, Defendant maintains that Plaintiff cannot prove this factual claim. *Compare* Pl.'s MSJ at 3, *with* Def.'s Reply at 14.

More generally, the factual details as to the extent and nature of Cyber Power's operations regarding the subject merchandise in the Philippines also remain in dispute. *See* Pl.'s Reply at 21–23 (responding to “speculative declaration” from CBP witness that called into question extent of Cyber Power's Philippine operations). While Plaintiff argues that its representations as to the nature and extent of its operations in the Philippines are supported by documentary evidence and statements by witnesses with personal knowledge, the court cannot conclude that the subject merchandise was “substantially transformed” in the Philippines without finding facts or assessing the credibility of witnesses. Given that determinations of issues of fact

and credibility are inappropriate at summary judgment, Plaintiff's motion for summary judgment is denied.

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that Plaintiff's motion for summary judgment and Defendant's cross-motion for summary judgment are denied; and it is further

ORDERED that the parties shall submit a proposed scheduling order on or before March 7, 2022 at 2:00 PM that includes (1) a date for submission of the order governing preparation for trial, (2) a date for the submission of the pretrial order, (3) a date for the pretrial conference, and (4) a proposed trial date.

Dated: February 24, 2022

New York, New York

/s/ Leo M. Gordon

JUDGE LEO M. GORDON

Index

Customs Bulletin and Decisions
Vol. 56, No. 10, March 16, 2022

U.S. Customs and Border Protection

General Notices

	<i>Page</i>
Request for Information (CBP Form 28)	1
Global Business Identifier (GBI)	3
Entry/Immediate Delivery Application and ACE Cargo Release	6
Copyright, Trademark, and Trade Name Recordations (No. 01 2022)	10

U.S. Court of International Trade

Slip Opinions

	<i>Slip Op. No.</i>	<i>Page</i>
Cyber Power Systems (USA) Inc., Plaintiff, v. United States, Defendant.	22-17	21