U.S. Customs and Border Protection

WITHDRAWAL OF PROPOSED MODIFICATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF WOVEN UPHOLSTERY FABRICS

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

ACTION: Notice of withdrawal of proposed modification of one ruling letter and revocation of treatment relating to the classification of woven upholstery fabrics.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is withdrawing its proposal to modify one ruling letter pertaining to the tariff classification of woven upholstery fabrics and to revoke any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed revocation was published in the Customs Bulletin, Vol. 56, No. 40 (October 12, 2022). No comments were received in response to that notice. CBP is withdrawing its proposed action.

EFFECTIVE DATE: This action is effective immediately.

FOR FURTHER INFORMATION CONTACT: Tanya Secor, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at Tanya.J.Secor@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section

484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 40, on October 12, 2022, proposing to modify New York Ruling Letter ("NY") N319028, dated April 30, 2021, pertaining to the tariff classification of woven upholstery fabrics. Upon careful consideration, CBP is withdrawing the aforementioned notice of proposed modification in order to further consider the classification of the woven upholstery fabrics, including whether all the fabrics are visibly coated with plastic.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

19 CFR PART 177

REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A WOMAN'S TOP

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

ACTION: Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of a woman's top.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning the tariff classification of a woman's top under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 40, on October 12, 2022. Four comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 18, 2023.

FOR FURTHER INFORMATION CONTACT: Tanya J. Secor, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0062.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 40, on October 12, 2022, proposing to revoke one ruling letter pertaining to the tariff classification of a woman's top. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In New York Ruling Letter ("NY") N324185, CBP classified a woman's top in heading 6211, HTSUS, specifically in subheading 6211.42.10, HTSUS, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, women's or girls': Of cotton: Other." CBP has reviewed NY N324185 and has determined the ruling letter to be in error. It is now CBP's position that the woman's top is properly classified in heading 6206, HTSUS, specifically in subheading 6206.30.30, HTSUS, which provides for "Women's or girls' blouses, shirts and shirt-blouses: Of cotton: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N324185 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H326573, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H326573
March 31, 2023
OT:RR:CTF:FTM H326573 TJS
CATEGORY: Classification
TARIFF NO.: 6206.30.30

MS. CELESTE AGUIRRE-FERNANDEZ
GAP INC.
2 FOLSOM STREET, 6TH FLOOR
SAN FRANCISCO, CA 94105

RE: Revocation of NY N324185; Tariff classification of a woman's top from India

DEAR MS. AGUIRRE-FERNANDEZ,

This is in reference to New York Ruling Letter ("NY") N324185, dated February 18, 2022, concerning the tariff classification of a woman's top under the Harmonized Tariff Schedule of the United States ("HTSUS"). In that ruling, U.S. Customs and Border Protection ("CBP") classified the top at issue under subheading 6211.42.10, HTSUS, which provides for "Track suits, ski-suits and swimwear; other garments: Other garments, women's or girls': Of cotton: Other." Upon additional review, we determined the classification of this product under subheading 6211.42.10, HTSUS, to be incorrect. For the reasons set forth below, we hereby revoke NY N324185.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice proposing to revoke NY N324185 was published on October 12, 2022, in Vol. 56, No. 40 of the Customs Bulletin. Four comments were received in response to the notice and will be addressed below.

FACTS:

NY N324185 described the garment at issue as follows:

> Style 3322 is a woman's top constructed from 100% cotton woven fabric. The top has a right over left full front opening with seven button closures, a pointed collar, long sleeves with button cuffs, a single chest pocket, an inside pocket below the waist, and a curved hemmed bottom.

Along with the ruling request, you submitted a sample of the garment to the National Commodity Specialist Division, which forwarded the sample to our office. The sample's inside pouch[1] measures two inches by two inches, has an overlap opening of approximately ¾ inch, and is sewn along one edge to the garment's inner seam.

Images of the sample are provided below:

[1] Referred to as "an inside pocket below the waist" in NY N324185.

ISSUE:

What is the tariff classification of the woman's top at issue?

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The 2022 HTSUS headings under consideration are as follows:

6206	Women's or girls' blouses, shirts and shirt-blouses:
6211	Track suits, ski-suits and swimwear; other garments:

* * *

Note 4 to Chapter 62, HTSUS, provides:

> 4. Headings 6205 and 6206 do not cover garments with pockets below the waist, with a ribbed waistband or other means of tightening at the bottom of the garment. Heading 6205 does not cover sleeveless garments. "Shirts" and "shirt-blouses" are garments designed to cover the upper part of the body, having long or short sleeves and a full or partial opening starting at the neckline. "Blouses" are loose-fitting garments also designed to cover the upper part of the body but may be sleeveless and with or without an opening at the neckline. "Shirts", "shirt-blouses" and "blouses" may also have a collar.[2]

* * *

[2] Note 4 to Chapter 61, HTSUS, contains the equivalent exclusionary language for knit and crocheted garments.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. *See* T.D. 89–80, 54 Fed. Reg. 35127 (Aug. 23, 1989).

The ENs to heading 6206, HTSUS, provide in pertinent part:

> This heading covers the group of women's or girls' clothing, not knitted or crocheted, which comprises blouses, shirts and shirt-blouses (see Note 4 to this Chapter).
>
> This heading does not cover garments with pockets below the waist or with a ribbed waistband or other means of tightening at the bottom of the garment.

* * *

The issue before us is whether the small inside pouch constitutes a "pocket" such that Note 4 to Chapter 62, HTSUS, precludes the garment from being classified in heading 6206, HTSUS. We find that it does not.

The term "pocket" is not defined in the HTSUS or the ENs. In the absence of a definition of a term in the HTSUS or ENs, the term's correct meaning is its common and commercial meaning. *Nippon Kogasku (USA), Inc. v. United States*, 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. *C.J. Tower & Sons v. United States*, 69 CCPA 128, 673, F.2d 1268 (1982). According to dictionary definitions, a "pocket" is a pouch or small bag sewn into or on clothing used for carrying small items.[3] Here, the small pouch is sewn into the inner seam of the woman's top. Hence, the pouch will be considered a "pocket" if the wearer uses it to carry small items.

CBP has previously considered various factors that make a pocket capable of use. For example, in Headquarters Ruling Letter ("HQ") 964737, dated January 4, 2001, CBP determined that a small flat pocket on a plush cartoon character head was not sufficient to find that the article's primary use was as a novelty coin purse or similar container of heading 4202, HTSUS. Although the issue in that ruling concerned the article's primary use as ornamental, CBP noted that the articles were stuffed so full that the pockets were rendered useless except for the possibility of inserting very small, flat articles. Thus, the capacity to hold very small, flat articles does not necessarily make a pocket functional. Functional pockets must also be accessible. In HQ

[3] Dictionary definitions include:

- A pouch sewn into or on clothing, for carrying a purse or other small articles Oxford English Dictionary, https://www.oed.com/view/Entry/146402.
- A small bag sewn into or on clothing so as to form part of it, used for carrying small articles. Lexico Dictionary, https://www.lexico.com/en/definition/pocket.
- A small bag for carrying things in, made of cloth and sewn into the inside or onto the outside of a piece of clothing. Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/pocket.

Merriam-Webster Dictionary defines "pocket" as "a small bag that is sewed or inserted in a garment so that it is open at the top or side." https://www.merriam-webster.com/dictionary/pocket. A "bag" is "a usually flexible container that may be closed for holding, storing, or carrying something." https://www.merriam-webster.com/dictionary/bag.

080047, dated August 26, 1988, CBP determined that a rear pocket was primarily decorative rather than functional since the position of the pocket (approximately halfway down the back of a shirt) made it difficult for the wearer to have access to it.

In our opinion, the pouch in the garment at issue does not function as a coin pocket. As discussed in HQ 080047, a crucial element of a functional pocket is accessibility. Here, the pouch's position at the garment's lower inner seam is impractical. Accessing the pouch would require the wearer to either reach inside the garment or turn the bottom inside out. Given the pouch's size and construction, inserting, and retrieving articles into and from the pouch would require even more dexterity. The pouch measures two inches by two inches and can hardly fit a single key or two quarter coins. Although it is possible to fit very small items into the pouch, we find that the wearer would not likely rely on the pouch to securely hold items. The pouch is flimsy, lacks any means of secure closure, and is predominantly unattached to the top since it is sewn onto the garment by a mere two-inch seam. We find that the construction and position of the pouch renders it futile and that a consumer would not reasonably utilize it to hold or carry articles. Accordingly, the pouch is not a pocket for purposes of applying Note 4 to Chapter 62, HTSUS.

Since the pouch is not a pocket, Note 4 to Chapter 62, HTSUS, does not preclude the subject garment from classification in heading 6206, HTSUS. Accordingly, the women's top, Style 3322, is classified in heading 6206, HTSUS. Specifically, the subject top, which is made of 100% cotton, is classified in subheading, 6206.30.30, HTSUS, which provides for "Women's or girls' blouses, shirts and shirt-blouses: Of cotton: Other: Other."

CBP received four comments opposing the notice of the proposed revocation. All of the commenters argue that the term "pouch" is synonymous with "pocket" and that this ruling's use of the term "pouch" is confusing. The commenters assert that a pouch is a functional object used to carry items and, therefore, the "pouch" in the subject top meets the dictionary definitions of "pocket." Three commenters express concern that CBP is applying a subjective "actual use" determination.

We understand that the terms "pocket" and "pouch" are sometimes used interchangeably. At issue is the application of Note 4 to Chapter 62, which specifically refers to a "pocket." This ruling uses the term "pouch" to indicate that the article is not a "pocket" as contemplated by Note 4 to Chapter 62, HTSUS. The term "pouch" is used as a distinguishing term and is not to be construed as synonymous of "pocket" for purposes of applying Note 4 to Chapter 62, HTSUS, in this ruling. Furthermore, this ruling relies on the plain-language definitions of "pocket." Based on the dictionary definitions, "pockets" are "for carrying." The term "for" indicates purpose. Thus, a pocket must not only be capable of carrying objects but have the purpose of carrying objects. This ruling does not apply an actual use test because we do not require the wearer to actually use a pocket to carry objects. The determinative question is whether a pocket is capable of and intended for holding or carrying objects. As discussed above, the pocket's futile design in its entirety indicates that it is not intended to hold or carry objects.

One of the commenters further notes that in HQ 964737, which this ruling cites, the pocket on the plush head distinguished the article from toys of heading 9503, HTSUS, which must be primarily designed for the amusement of children or adults. The ruling stated, "The manufacturer has expended additional cost and effort to create the instant articles with the pocket. The

articles were designed to provide a space for a child to keep small objects." Although the manufacturer designed the article with a pocket, CBP ultimately found the pocket remained useless due to the article's design and construction. Similarly, here, that the top contains an inner "pouch" does not make the "pouch" a pocket functional for carrying objects. The commenter also cites to several rulings classifying garments with inner or rear pockets. However, none of the rulings cited by the commenter discuss the utility of the pockets as it was not a determinative issue. Therefore, we do not find those rulings to be informative to the discussion.

Another commenter notes the higher duty implications associated with shirts without pockets below the waist of heading 6206, HTSUS. In this regard, we reiterate that CBP's classification decisions are made in accordance with the GRIs and not duty rates. The third commenter also states that it is common for outdoor apparel to contain similar small pockets and provides examples including small pockets on shorts' inner waistbands and rear pockets on a bike shirt. Those examples however differ from the top at issue since shorts are a distinct garment and the bike shirt pockets are large enough to carry water bottles.

The determinative factor is whether the woman's top has a below-the-waist pocket capable of and intended for carrying small objects. In culmination of the factors described above (i.e., accessibility, size, location, and construction), we find that the article does not function to carry objects. Therefore, the woman's top does not have a pocket below the waist for purposes of Note 4 to Chapter 62, HTSUS.

HOLDING:

Based on the information provided, by application of GRIs 1 and 6, the woman's top at issue in NY N324185 is classified under heading 6206, HTSUS, and specifically under subheading 6206.30.30, HTSUS, which provides for "Women's or girls' blouses, shirts and shirt-blouses: Of cotton: Other: Other." The 2022 general, column one, general rate of duty is 15.4% *ad valorem*.

Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS are the accompanying duty rates are provided at https://hts.usitc.gov/current.

EFFECT ON OTHER RULINGS:

NY N324185, dated February 18, 2022, is hereby REVOKED.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Slip Op. 23–44

UNITED STATES, Plaintiff, v. ZHE "JOHN" LIU, GL PAPER Distribution, LLC, Defendants,

Before: Jane A. Restani, Judge
Court No. 22–00215

[Motion to dismiss Customs Penalty Action denied.]

Dated: March 31, 2023

William George Kanellis, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, for plaintiff United States of America. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Steven J. Holtkamp*, Staff Attorney, U.S. Customs and Border Protection, Office of the Assistant Chief Counsel, of Chicago, IL.

David John Craven, Craven Trade Law LLC, of Chicago, IL, for defendant Zhe "John" Liu.

OPINION AND ORDER

Restani, Judge:

Defendant Zhe "John" Liu ("Liu") moves for dismissal of this action pursuant to U.S. Court of International Trade Rule 12(b). *See* Def.'s Br. in Supp. of its Mot. to Dismiss at 1, ECF No. 16 (Dec. 13, 2022) ("Liu Br."). Liu contends that (1) the action was untimely filed and is barred by the statute of limitations, and (2) the Government failed to state a claim upon which relief can be granted.[1] For the reasons stated below, the court denies the motion.

BACKGROUND

As this is a motion to dismiss, the facts alleged in the complaint are taken as true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Government alleges as follows: Liu and GL Paper Distribution,

[1] In his reply brief, Liu raised, for the first time, an additional argument that the government failed to exhaust administrative remedies. Reply to Pl.'s Resp. to Def. John Liu's M. to Dismiss at 9–17, ECF No. 18 (Feb. 7, 2023) ("Liu Reply Br."). Liu did not properly raise this argument before the court, as Liu failed to raise it in his initial motion to dismiss, and wrongly argues that the argument is in response to a novel argument made in the Government's response. The court will not waive the waiver. The defendants were named in the administrative notices and there appears to be at least the minimal process specified in 19 U.S.C. § 1592(b). Further, justice is served as a court of competent jurisdiction must resolve the dispute. Thus, any harm is mitigated.

LLC ("GL Paper") evaded antidumping duties and violated 19 U.S.C. § 1592(a)(1)(A) & (B) by negligently reporting a false country of origin for steel wire hangers that were imported into the United States. *See* Compl. at ¶ 30, ECF No. 2 (July 21, 2022) ("Compl.");[2] *see also* Answer at ¶ 30, ECF No. 7 (Aug. 19, 2022) ("Answer"). Between 2004 and 2020, Liu directed and caused the formation of six companies, including GL Paper, for the purpose of importing steel wire hangers from the People's Republic of China ("PRC"). *See* Compl. at ¶ 3–14. These wire hangers were transshipped through India, Malaysia, or Thailand, to avoid an antidumping duty rate of 186.98 percent imposed on steel wire hangers imported from the PRC.[3] Compl. at ¶ 13. In May 2017 a domestic wire-hanger manufacturer in Alabama filed an Enforce and Protect Act ("EAPA") allegation against GL Paper. Compl. at ¶ 19. U.S. Customs and Border Protection ("CBP") conducted a site visit in Malaysia in July 2017 and discovered that the "purported manufacturers" were not in fact manufacturing wire hangers. *Id.* Less than three weeks after the site visit, GL Paper dissolved as a corporation. Compl. at ¶ 20.

At issue here are entries of steel wire hangers that were imported by GL Paper in 2017 which allegedly falsely listed Malaysia as the country of origin. Compl. at ¶ 1, 31; Answer at ¶ 31. Both parties agree that GL Paper was the official importer of record and Liu's name does not appear on the documents forming GL Paper; nevertheless, the Government alleges that from February to August 2017, Liu caused GL Paper to introduce steel wire hangers into the United States. *See* Compl. at ¶ 18. Liu Br. at 2; *see also* Pl.'s Resp. in Opp'n to the Mot. to Dismiss at 14, ECF No. 17 (Jan. 17, 2023) ("Gov't Br."). On March 23, 2022, CBP issued pre-penalty notices to both Liu and GL Paper at the culpability level of negligence for the 2017 entries. Compl. at ¶ 23; Answer at ¶ 23. GL Paper did not reply. Compl. at ¶ 24. Liu, however, responded that he had no involvement with GL Paper's operations. *Id.* at ¶ 25; Answer at ¶ 25. On May 2, 2022, CBP issued penalty notices to Liu and GL Paper. Compl. at ¶ 26. Liu filed a petition with CBP seeking cancellation of the penalty, arguing that his company only purchased these hangers from GL Paper, but CBP denied the petition. Compl. at ¶ 27, 28; Answer at ¶ 27, 28. After the denial, Liu filed a supplemental petition, which CBP denied on June 28, 2022. Compl. at ¶ 28; Answer at ¶ 28.

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[2] The Government has moved to amend the complaint to add an additional party. That motion is not ripe for adjudication and does not affect the issues addressed here.

[3] The duty rate, first set in August 2008, was later increased to 187.25 percent. *Notice of Antidumping Duty Order: Steel Wire Garment Hangers from the People's Republic of China*, 73 Fed. Reg. 58,111, 58,112 (Dep't Commerce Oct. 6, 2008). The entries at issue in this case were subject to a 187.25 percent duty rate. *See* Liu Reply Br. Headquarter Decision on Penalty Notice in Case No. 2022–4601–300560–01, at 2; *see also* Compl. Ex. A.

On July 21, 2022, the Government filed its complaint alleging that Liu and GL Paper violated 19 U.S.C. § 1592(a)(1)(A) & (B) but limited its claim to penalties for entries made during the five year period prior to the day of the Government's filing of the complaint. *See* Compl.; *see* Answer. These entries, dated July 24, 2017 to August 8, 2017, carry a penalty of $977,569.10, which is equal to the domestic value of the entries. *See* Compl. at ¶ 31. The complaint contends that Liu and GL Paper are jointly and severally liable to the United States for these penalties but does not indicate that the parties are responsible for the $556,808.48 loss of revenue associated with the entries.[4] *Id.*

On December 13, 2022, Liu filed a USCIT R. 12(b) motion to dismiss, raising the affirmative defense that the statute of limitations has run, or, in the alternative, that the Government failed to state a claim.

JURISDICTION & STANDARD OF REVIEW

At the pleading stage, a motion to dismiss may be granted if a complaint fails "to state a claim upon which relief can be granted[.]" USCIT R. 12(b)(6) (2023). The complaint must allege sufficient factual allegations to "raise a right to relief above the speculation level . . . on the assumption that all the allegations in the complaint are true . . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). Moreover, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). Yet, the court accepts that the complaint's factual allegations must be construed in a light favorable to the nonmoving party, which here is the Government. *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009) (citing *Papasan v. Allain*, 478 U.S. 265, 283 (1986); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)).

DISCUSSION

I. Statute of Limitations for Negligently Violating 19 U.S.C. § 1592(a)(1)(A)

At issue here is whether the statute of limitations has expired on a violation of 19 U.S.C. § 1592(a)(1)(A). *See* Liu Br. at 1; Gov't Br. at 1. Liu argues that the statute of limitations has expired because it began to run on the date of his alleged involvement in the importation

[4] Under 19 U.S.C. § 1592(d), the United States may recover both penalties and loss of revenue, assuming the revenue is still owed.

of merchandise and not on the date of the merchandise's entry. *See* Liu Br. at 7–8. Liu claims that if any violation took place, it occurred when he allegedly formed or caused the formation of GL Paper in 2016. *See* Liu Br. at 4. Alternatively, he claims that the violation took place when he allegedly caused GL Paper to introduce or attempt to introduce wire hangers into the United States, which happened at some undefined time before the transmission of forms to CBP. *See* Liu Br. at 8. The Government argues that the violation took place at the time the merchandise entered the United States, so the statute of limitations for the entries at issue had not run as of July 21, 2022, when the Government filed its complaint. *See* Gov't Br. at 1; *see also* Compl.

Allegations of violations of § 1592 due to negligence are subject to a five-year statute of limitations that commences on "the date of the alleged violation." 19 U.S.C. § 1621. The text of § 1592(a)(1)(A) states that a party violates the statute when the party "enter[s], introduce[s], or attempt[s] to enter or introduce any merchandise into the commerce of the United States . . . ." 19 U.S.C. § 1592(a)(1)(A). The text indicates that a violation of the statute is predicated upon actual entry, introduction, or attempted entry or introduction of the merchandise. § 1592(a)(1)(A)(i), (ii). This action is not based on attempted entry of merchandise. Thus, assuming arguendo that some transmission of documents, data, or information occurred on a date before entry, the date of said transmission is not determinative in this matter. Here, a plain reading of the statute as applied to this action leads to the conclusion that the "date of the alleged violation" of the statute is the date the merchandise entered the United States.

This reading of § 1621 has been adopted by the court in several cases in which litigants violated § 1592(a)(1) due to negligent misconduct. In *United States v. Optrex America, Inc.*, the court stated: "Congress specifically established a statute of limitations of five years from the date of entry of subject merchandise for negligence and gross negligence claims." 29 CIT 1494, 1502 (2005). Similarly, the court has previously stated that the statute of limitations for negligent violations of § 1592(a)(1)(A), as enumerated in § 1621, begins to run when the subject merchandise enters the United States. *See United States v. Rockwell Intern. Corp.*, 10 CIT 38, 41, 628 F. Supp. 206, 209 (1986); *see also United States v. Thorson Chem. Corp.*, 14 CIT 550, 551, 742 F. Supp. 1170, 1171 (1990) (utilizing but not explicitly approving CBP's calculation of the statute of limitation period based on the "date of entry of the subject merchandise"). Liu distinguishes *Rockwell* and *Optrex* as cases in which the defendants were also the

importers of record. *See* Liu Reply Br. at 4–5. Yet, neither the statutes nor precedent supports a different application of the statute of limitations for a defendant who is not the importer of record.[5]

For the purposes of § 1592(a)(1)(A), the statute of limitations for a violation due to negligence begins when the subject merchandise enters the customs territory of the United States. That is when the injury due to negligence is presumed to occur. Thus, the Government's claims regarding merchandise that entered the United States after July 24, 2017, are not time-barred by the five-year statute of limitations. *See* 19 U.S.C. §1621.

II. Statute of Limitations for Violating 19 U.S.C. § 1592(a)(1)(B)

The Government also contends that Liu violated 19 U.S.C. § 1592(a)(1)(B) for aiding and abetting a violation of § 1592(a)(1)(A). Liu argues that the statute of limitations bars any claim under § 1592(a)(1)(B) because any alleged activity that would have amounted to aiding and abetting took place before July 21, 2017. *See* Liu Br. at 4, 6–7. The Government contends that the statute of limitations for the claim under § 1592(a)(1)(B) began to run when merchandise entered the United States. *See* Gov't Br. at 15–16.

The Supreme Court has defined a statute of limitations as generally beginning when "the plaintiff has a 'complete and present cause of action,'" unless Congress dictates otherwise. *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)). The Court further held that "a complete and present cause of action" begins when the "plaintiff can file suit and obtain relief." *Id.* (citing *Reiter v. Cooper*, 507 U.S. 258, 267 (1993)). The text of § 1592(a)(1)(B) reads: "[no person] may aid or abet any other person to violate subparagraph (A)." 19 U.S.C. § 1592(a)(1)(B). By the plain language of the statute, a cause of action under § 1592 (a)(1)(B) can only accrue once there has been a violation of § 1592(a)(1)(A), which, in turn, accrues once the subject merchandise enters the United States.[6] *See* 19 U.S.C. § 1592(a)(1)(B). Ergo, the statute of limitations for aiding and abetting violations of § 1592(a)(1)(B) due to negligence begins to

[5] See Section III for a discussion of whether a party other than the importer of record can violate § 1592(a)(1)(A).

[6] *See supra* Section I. As indicated, this action does not involve an attempted entry.

run on the date of entry.[7] The Government's claims against Liu for aiding and abetting a violation of § 1592(a)(1)(B) for merchandise that entered the United States after July 21, 2017, are not time-barred by the five-year statute of limitations.

III. Failure to State a Claim under 12(b)(6)

Liu argues that because he was not the importer of record on the entries and had no official role in GL Paper, the Government has failed to allege sufficient facts or evidence to state a claim under § 1592(a)(1)(A) or § 1592(a)(1)(B). *See* Liu Br. at 9, 12. To the contrary, under § 1592(a) a defendant need not be the importer of record to be liable for a violation due to negligence.[8] *See U.S. v. Matthews*, 31 CIT 2075, 2082–83, 533 F. Supp. 2d 1307, 1313–14 (2007). For example, corporate officers acting in the scope of their employment have been held jointly and severally liable for violating § 1592(a). *See id.* at 1314; *see also U.S. v. Golden Ship Trading*, 22 CIT 950, 953–4 (1998) (reading the plain language of § 1592(a) to allow corporate officers to be liable for negligently violating the statute).

For allegations against an individual in his or her personal capacity, a complaint must demonstrate a basis on which the person incurred liability for violating § 1592(a). *See United States v. Tip Top Pants, Inc.*, 34 CIT 17 (2010). In *Tip Top Pants*, the court found that a complaint for negligence under 19 U.S.C. § 1592(a) failed to state a claim upon which relief could be granted against the Chairman and Chief Executive Officer of a corporation that had imported goods. *See id.* at 29–30. The complaint failed to allege that the defendant had knowledge of the day-to-day operations and that there was a

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[7] This conclusion is further buttressed by general notions of tort law. The statute of limitations for aiding and abetting a breach of fiduciary duty due to negligence, for example, begins at the same time as the statute of limitations for the breach of fiduciary duty due to negligence. *See* Restatement (Second) of Torts § 876 (1979); *see also Osborn v. Griffin*, 865 F.3d 417, 440 (6th Cir. 2017). The Federal Circuit has previously examined the Restatement (Second) of Torts § 876 with respect to determining the statute of limitations on a claim brought under 19 U.S.C. § 1592(a)(1)(B) in *U.S. v. Hitachi America, Ltd.*, 172 F.3d 1319, 1338 (Fed. Cir. 1999). *Hitachi*, however, addressed whether a party could negligently aid and abet a violation, or if the party must have the intent to aid and abet a violation, even if the underlying violation of § 1592(a)(1)(A) was done negligently. *U.S. v. Hitachi Am., Ltd.*, 172 F.3d 1319, 1338 (Fed. Cir. 1999); *accord U.S. v. Trek Leather, Inc.*, 724 F.3d 1330, 1338 (Fed. Cir. 2013); *U.S. v. Action Prod. Intern., Inc.*, 25 CIT 139, 144–45, (Feb. 27, 2001). Thus, *Hitachi* does not run afoul of the Restatement (Second) of Torts as to the statute of limitations for aiding and abetting negligence.

[8] Although Liu contends that the pleading standard articulated in *United States v. Greenlight Organic, Inc.*, is appropriate, he misconstrues precedent. 43 CIT __, __, 419 F. Supp. 3d 1305 (2019); *see* Liu Br. at 12. The matter at hand concerns negligence instead of fraud and thus a different pleading standard applies. *See* 19 U.S.C. § 1592(e)(4) (The United States has the burden to establish the violation; if it does so the defendant has the burden to show negligence was not the cause.).

demonstrable basis for the defendant to have incurred liability for the corporation's actions. *See id.* at 30.

Here, the Government alleges that Liu "formed or caused the formation of GL Paper" and that Liu "controlled and directed the operations of the company and its entry of steel wire hangers into the United States." *See* Compl. at ¶ 18. The Government also alleges a pattern of behavior by Liu of establishing companies for the purpose of importing wire hangers from PRC and transshipping these hangers through Malaysia to avoid paying antidumping duties. *See id.* at ¶ 3–10. These allegations "raise a right to relief above the speculation level . . . on the assumption that all the allegations in the complaint are true." *See Bell Atl. Corp. v. Twombly*, 550 U.S. at 555. While the degree of Liu's involvement in the entry of the merchandise by GL Paper remains an issue of fact, the Government has met the pleading standard for liability not based on fraud. *See* USCIT R. 12(b)(6).

CONCLUSION

For the foregoing reasons, the court DENIES Liu's motion to dismiss.

Dated: March 31, 2023
New York, New York

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

Slip Op. 23–45

MID CONTINENT STEEL & WIRE, INC., Plaintiff and Consolidated Defendant-Intervenor, v. UNITED STATES, Defendant, and PT ENTERPRISE, INC. et al., Defendant-Intervenors and Consolidated Plaintiffs.

Before: Claire R. Kelly, Judge
Consol. Court No. 15–00213

[Remanding the U.S. Department of Commerce's third remand redetermination in its antidumping duty investigation of certain steel nails from Taiwan.]

Dated: April 3, 2023

Adam H. Gordon, *Jennifer M. Smith*, and *Lauren Fraid*, The Bristol Group PLLC of Washington, D.C., for plaintiff and consolidated defendant-intervenor Mid Continent Steel & Wire, Inc.

Ned H. Marshak, *Andrew T. Schutz*, and *Max F. Schutzman*, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP of Washington, D.C., and New York, N.Y., for consolidated plaintiffs and defendant-intervenors PT Enterprise, Inc., Pro-Team Coil Nail Enterprise Inc., Unicatch Industrial Co., Ltd., WTA International Co., Ltd., Zon Mon Co., Ltd., Hor Liang Industrial Corp., President Industrial Inc., and Liang Chyuan Industrial Co., Ltd.

Mikki Cottet, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. Also on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel was *Vania Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce") third remand redetermination in the antidumping duty investigation of certain steel nails from Taiwan, in accordance with the mandate of the Court of Appeals for the Federal Circuit in *Mid Continent Steel & Wire, Inc. v. United States*, 31 F.4th 1367 (Fed. Cir. 2022) *rev'g in part* 945 F. Supp. 3d 1298 (Ct. Int'l Tr. 2021). The Court of Appeals vacated and remanded for Commerce to reconsider or further explain its use of a simple average as the denominator of the Cohen's *d* test, as part of Commerce's differential pricing analysis. *See* Mandate, June 13, 2022, ECF No. 177; Remand Order, June 14, 2022, ECF No. 178. On remand, Commerce again asserts that its use of simple averaging is supported by statistical literature. *See* Final Results of Redetermination Purs. Ct. Remand, Nov. 10, 2022, ECF No. 186–1. For the following reasons, the court remands Commerce's third remand redetermination for further explanation or reconsideration.

BACKGROUND

The court presumes familiarity with the facts of this case from this court's previous opinions, as well as the Court of Appeals' decision in *Mid Continent V*, and now recounts only the facts relevant to the court's review of the Remand Results. On June 25, 2014, Commerce initiated an antidumping duty investigation of certain steel nails from six countries, including Taiwan. *See Certain Steel Nails from India, the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam*, 79 Fed. Reg. 36,019 (Dep't Commerce June 25, 2014) (initiation of less-than-fair-value investigations). On May 20, 2015, Commerce issued its final determination, which resulted in an antidumping duty order on subject nails from Taiwan. *See Certain Steel Nails from Taiwan*, 80 Fed. Reg. 28,959 (Dep't Commerce May 20, 2015) (final determination of sales at less than fair value) ("*Final Results*") and accompanying Issues and Decision Memorandum, May 13, 2015, ECF No. 17 ("Final Decision Memo.").

On March 23, 2017, this court sustained Commerce's determination, including its decision to use a simple average in the denominator of Cohen's *d* test. *See Mid Continent Steel & Wire, Inc. v. United States*, 219 F. Supp. 3d 1161 (Ct. Int'l Tr. 2017) ("*Mid Continent I*"). On October 3, 2019, the Court of Appeals vacated this court's judgment and remanded in part to Commerce for further explanation of its decision to use the simple average in Cohen's *d* test. *See Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662 (Fed. Cir. 2019) ("*Mid Continent III*"). On remand, Commerce defended its decision to use the simple average, explaining that its use of the simple average was both accurate and in accord with statistical literature. *See* Final Results of Redetermination Purs. Ct. Remand, June 16, 2020, ECF No. 144–1 ("Second Remand Results"). On January 8, 2021, this court again sustained, concluding that Commerce had adequately explained how its use of simple averaging was more accurate, and thus a reasonable choice of methodology. *See Mid Continent Steel & Wire, Inc. v. United States*, 945 F. Supp. 3d 1298 (Ct. Int'l Tr. 2021) ("*Mid Continent IV*"). On April 21, 2022, the Court of Appeals again vacated this court's judgment, remanding to Commerce for further explanation of its decision to use the simple average. *See Mid Continent Steel & Wire, Inc. v. United States*, 31 F.4th 1367 (Fed. Cir. 2019) ("*Mid Continent V*").

On remand, Commerce again defends its decision to use the simple average with the Cohen's *d* test, explaining that its usage is consistent with statistical literature. *See* Final Results of Redetermination Purs. Ct. Remand, Nov. 10, 2022, ECF No. 186–1 ("Remand Results").

Consolidated Plaintiffs and Defendant-intervenors PT Enterprise, Inc., et al. ("PT") submitted comments asserting that Commerce's use of the simple average is not supported by literature and resulted in increased dumping margins, as well as challenging Commerce's decision to exclude certain of its submissions from the record. *See* [PT's] Cmts. on Remand Results, Dec. 13, 2022, ECF No. 188 ("PT's Cmts."). Plaintiff and Consolidated Defendant-intervenor Mid Continent Steel & Wire, Inc. ("Mid Continent") submitted comments supporting Commerce's use of simple averaging. *See* [Mid Continent's] Cmts. Supp. Remand Results, Feb. 13, 2023, ECF No. 191 ("Mid Continent's Cmts."). On February 27, 2023, PT moved for oral argument, *see* [PT's] Mot. Oral Arg., Feb. 27, 2023, ECF No. 198, and on March 21, 2023, Mid Continent submitted its response in opposition to oral argument. *See* Resp. Opp. Oral Arg., March 21, 2023, ECF No. 200.[1]

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2018), which grants the court authority to review actions initiated under 19 U.S.C. § 1516a(a)(2)(B)(i)[2] contesting the final determination in an antidumping duty order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture Co. v. United States*, 968 F. Supp. 2d 1255, 1259 (Ct. Int'l Tr. 2014).

DISCUSSION

PT's Rejected Submissions

As a preliminary matter, PT argues that Commerce improperly rejected portions of its case brief as new factual information. PT's Cmts. at 31. Commerce rejected a report authored by a statistical consultant for PT, which was submitted together with PT's comments on the draft remand results. *See* Rejection Ltr., ECF No. 195, A-583–854, PRRD 15, bar code 4304452–01 (Oct. 25, 2022) ("Rejection Ltr."); *see also* W.A. Huber Decl. Concerning Draft Results of Redetermination Pursuant to Court Remand, ECF No. 195, A-583–854, PRRD 11, bar code 4290765–02 (Sept. 30, 2022) ("Huber Decl.").

[1] In light of the court's decision on the merits, PT's motion for oral argument will be denied as moot.

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

Commerce properly rejected the Huber Declaration. Commerce's regulations require that it reject untimely-filed factual information unless the record is reopened or, where appropriate, an extension is sought. 19 C.F.R. § 351.302(d). "Factual information" includes, among other things, data or statements of fact in support of allegations. 19 C.F.R. § 351.102(b)(21)(ii). Expert reports submitted to Commerce "analyzing reported information clearly assume[] the weight of evidence and, as such, amount[] to [d]ata or statements of fact in support of allegations, i.e., factual information." *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 760 (Fed. Cir. 2012) (internal quotation and citation omitted). Commerce did not reopen the record for new submissions on remand, *see* Defendant's Resp. Cmts. on Remand Redetermination, 29–30, Feb. 13, 2023, ECF No. 192 ("Def.'s Reply"), and the Huber Declaration contains both the analysis and conclusions of PT's statistical expert as to the validity of the remand results. *See generally* Huber Decl. Therefore, the report constitutes new factual information, which was properly rejected by Commerce.

PT also challenges Commerce's rejection of certain pages it submitted from Cohen, and references in its comments to two non-record academic sources. PT's Cmts. at 32–33; Rejection Ltr. at 3. PT argues that these sources are not factual information, but are only references to information in the public realm. PT's Cmts. at 32–33. Defendant counters that academic literature is factual information which must be submitted as part of the record for Commerce to consider. Def.'s Reply at 31. Again, factual information includes "data or statements of fact in support of allegations," 19 C.F.R. § 351.102(b)(21)(ii), and PT's academic sources contain statistical information which PT cites to support its argument in favor of weighted averaging. *See* PT's Cmts. at 32. Therefore, as with the Huber declaration, Commerce did not reopen the record for new submissions on remand, so Commerce properly rejected PT's untimely submissions.

Cohen's *d* Test and the Simple Average

In *Mid Continent V*, the Court of Appeals remanded to Commerce to further explain or reconsider its use of the simple average in the Cohen's *d* test, in light of statistical literature suggesting that only use of a weighted average is appropriate. *Mid Continent V*, 31 F.4th at 1381. Commerce makes two arguments to support its use of the simple average. First, it argues that the literature supports using the simple average when the "full population" of data is considered. Remand Results at 14. Second, it argues that sample sizes are irrel-

evant, because they only affect "statistical significance." *Id.* at 14–16.[3] PT counters that the literature only supports weighted averaging, and that for Commerce's purposes, analysis of full populations is no different from analysis of a sample. PT's Cmts. at 5–18. For the following reasons, the court remands Commerce's determination.

When investigating whether merchandise is being sold at less than fair value, Commerce typically compares the weighted average of normal values with the weighted average of export prices for comparable merchandise, unless it determines another method is appropriate. 19 U.S.C. § 1677f-1(d)(1)(A)(i); 19 C.F.R. § 351.414(c)(1). To address concerns over "targeted dumping,"[4] Congress amended 19 U.S.C. § 1677f-1 to allow Commerce to compare "the weighted average of the normal values to export prices . . . of individual transactions for comparable merchandise if (i) there is a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions or periods of time, and (ii) [Commerce] explains why such differences cannot be taken into account [with another method]." 19 U.S.C. § 1677f-1(d)(1)(B)(i)–(ii). Congress has not specified how Commerce should determine whether a "pattern of significantly different prices" exists.[5] Therefore, the court determines whether Commerce's methodology is reasonable in light of considerations that run counter to its decision. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 966 (Ct. Int'l Tr. 1986), *aff'd*, 810 F.2d 1137, 1139 (Fed. Cir. 1987). *See also, e.g., Stupp Corporation v. United States*, 5 F.4th 1341, 1354 (Fed. Cir. 2021) (standard for reviewing components of Commerce's differential pricing methodology is reasonableness) (citing *Mid Continent III*, 940 F.3d at 667).

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[3] Commerce also argues against the alternative weighting proposals advanced by PT and the Court of Appeals. Remand Results at 16–23. Because Commerce has not elected to use either method on remand, the court does not reach the relative merits of using either a single standard deviation or PT's proposed equation. Moreover, even if the alternate proposals were fully supported by the literature, this support would not necessarily detract from Commerce's choice of the simple average. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[4] Targeted dumping occurs when an exporter sells at a lower, "dumped" price to particular customers or regions, while selling at higher prices to other customers or regions, such that the higher-priced products mask the dumped products by increasing the overall average price. *See Apex Frozen Foods Priv. Ltd. v. United States*, 862 F.3d 1337, 1341 (Fed. Cir. 2017).

[5] The Statement of Administrative Action of the Uruguay Round Agreements Act explains that Commerce should proceed "on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 842–43 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4178.

To implement § 1677f-1(d)(1)(B) Commerce performs a "differential pricing analysis" of a respondent's sales. *See* Differential Pricing Analysis; Request for Comments, 79 Fed. Reg. 26,720, 26,722 (Dep't of Commerce May 9, 2014). This analysis contains three tests—the Cohen's *d* test, the ratio test, and the meaningful difference test. Only the Cohen's *d* test, which determines whether there is a "pattern of significantly different prices," is at issue in this case.

As applied by Commerce, the Cohen's *d* test involves comparing the prices of "test groups" of a respondent's sales to a "comparison group" by region, purchaser, and time period. *See id.* at 26,722. For each category, Commerce segregates sales into subsets, with one subset becoming the test group, and the remaining subsets being combined as the comparison group. *Id.* Commerce then calculates the means and standard deviations of the test and comparison groups. *Id.* Commerce finally calculates a *d* coefficient by dividing the difference in the groups' means by the square root of the average of the squared standard deviations of each group.[6] *See, e.g.*, Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 78 Fed. Reg. 33,350 (Dep't of Commerce June 4, 2013). Commerce finds the average of the squared standard deviations by adding them together and dividing by two, referring to the result as a "simple average." *See id.* Commerce does not account for the differences in the size of each group, i.e., use a "weighted average."

Commerce tests each subset against the remaining subsets across each category, and assigns a *d* coefficient by dividing the difference in the groups' means by the square root of the average of the squared standard deviations of each group. If the *d* value of a test group is equal to or greater than the "large threshold," or 0.8, the observations within that group are said to have "passed" the Cohen's *d* test. Differential Pricing Analysis; Request for Comments, 79 Fed. Reg. 26,720, 26,722 (Dep't of Commerce May 9, 2014). If a sufficient quantity of sales by volume pass Cohen's *d* test, Commerce may compare the export prices of individual transactions to normal value, instead of comparing the average export prices to normal value. *Id.* at 27,622–23.

In *Mid Continent V*, the Court of Appeals held that Commerce inadequately explained its choice of the simple average over the

[6] Thus, $d = |m_A - m_B| \,/\, \sqrt{(\sigma_A^2 + \sigma_B^2)/2}$, where $|m_A - m_B|$ is the absolute value of the difference in means between the test and comparison groups, and $\sigma_A^2 + \sigma_B^2$ is the sum of the squared standard deviation of both groups. Standard deviation squared (σ^2) is also referred to as "variance." Commerce's formulation of what it calls the Cohen's *d* test is also known as Cohen's equation (2.3.2). *See* Cohen, Jacob, *Statistical Power Analysis for the Behavioral Sciences*, 44, (2nd ed. 1988), A-580–876, PRRD 8, bar code 4181776–01 (Nov. 12, 2021) ("Cohen").

weighted average in constructing the Cohens' *d* denominator, given that the literature relied upon by Commerce only supports weighted averaging. *Mid Continent V*, 31 F.4th at 1378–81. Although Commerce is not ordinarily bound to follow published literature, because it justified its methodology by relying on that literature, the Court held that Commerce needed to justify its departure from established statistical practice.[7] *Id.* As the Court of Appeals explained, Commerce's methodology must reasonably implement its statutory mandate of determining when prices of certain groups differ significantly. *Id.* at 1580–81; *see also Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29, 43; *Ceramica Regiomontana*, 636 F. Supp. 961, 966. The Court of Appeals concluded that Commerce's methodology departed from the acknowledged literature. *See Mid Continent V*, 31 F.4th at 1381.

The Court found insufficient Commerce's explanations that (i) the pricing behaviors of the test and comparison groups represented "separate and equally rational" and "equally genuine" behavior, and (ii) using the simple average provides greater "predictability" in antidumping determinations.[8] *Id.* at 1379–80 (discussing Second Remand Results at 8–9). The Court emphasized Commerce's failure to explain the connection between the rationality and genuineness of a seller's choices and "the undisputed purpose of the denominator figure." *Id.* Relatedly, the Court questioned Commerce's assertion that the means and variances of both test and comparison groups "constitute an abstract effect" which "exclusively define[s] the independent pricing behavior of each group." *Id.* at 1380; Second Remand Results

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[7] Reviewing the literature, the Court of Appeals referenced affirmative language in Cohen, Coe, and Ellis which supports the use of a weighted average. *See Mid Continent V*, 31 F.4th at 1378; *see also* Cohen at 67; Ellis, Paul, *The Essential Guide to Effect Sizes: Statistical Power, Meta-Analysis, and the Interpretation of Research Results*, 26–27, (2010), A-580–876, PRRD 8, bar code 4181776–01 (Nov. 12, 2021)("Ellis"); Coe, Robert, *It's the Effect Size: Stupid: What Effect Size Is and Why It Is Important*, 6, (September 2002), A-580–876, PRRD 8, bar code 4181776–01 (Nov. 12, 2021) ("Coe"). The Court of Appeals concluded that Commerce had departed from "all the cited statistical literature governing Cohen's *d*," and that "[t]he cited literature nowhere suggests simple averaging for unequal-size groups." *Id.* at 1377, 1380.

[8] In context, Commerce explained that:

> For the purpose of this particular analysis, Commerce finds that these two distinct pricing behaviors [of the test and comparison groups] are separate and equally rational, and each is manifested in the individual prices within each group. Therefore, each warrants an equal weighting when determining the "standard deviation" used to gauge the significance of the difference in the means of the prices of comparable merchandise between these two groups. Because Commerce finds that each of these pricing behaviors are equally genuine when considering the distinct pricing behaviors between a given purchaser, region, or time period and all other sales, an equal weighting is justified when calculating the "standard deviation" of the Cohen's d coefficient.

Second Remand Results at 8–9.

at 45.[9] The Court held Commerce failed to explain why focusing on the difference between the groups calls for a simple averaging yardstick. *Mid Continent V*, 31 F.4th at 1380.

Further, the Court of Appeals concluded Commerce's assertion that using the simple average provides greater "predictability" was both unclear and inadequate to support its determination. The Court of Appeals stated it was unclear if Commerce was referring to "predictability" as the ability to predict consequences, and if so, it did not see how Commerce had provided a basis for its assertion of greater predictability, given that weighting is calculated on the basis of product weight, value or units, and not number of transactions.[10] *Id.*

On remand, Commerce abandons its arguments justifying the use of a simple average apart from the literature, and instead argues, again, that the literature supports its methodology. *See, e.g.*, Remand Results at 57 (arguing the choice of a simple average is reasonable because it is supported by the academic literature); *id.* at 42 (responding to the Court of Appeals' discussion regarding the qualitative factors and stating "the academic literature does contain support for the use of a simple average"); *id.* at 42–43 (responding to the Court of Appeals' direction to explain its choice as reasonable or to reconsider, and explaining that the academic literature supports its choice). Commerce does not further explain how the pricing behaviors of the test and comparison groups represent "separate and equally rational" and "equally genuine" behavior. Commerce likewise does not provide additional support for its assertion of "predictability."

On remand, Commerce fails to offer any further explanation for its assertions of predictability, abstract effect, and rationality, observing that "[t]he CAFC has already opined in *Mid Continent V* that these prior arguments are unpersuasive to support that the simple average is reasonable, and now Commerce has taken a new approach which focusses on the academic literature . . . ." Remand Results at 36. Commerce misconstrues the Court of Appeals' mandate. The Court held that Commerce's non-academic arguments were unsupported—not unsupportable. *See, e.g.*, *Mid Continent V*, 31 F.4th at 1379 ("Commerce has not offered an adequate explanation of why [equal rationality and genuineness] support[] the particular step Commerce must justify"); *id.* ("And in any event, Commerce has not provided a reasonable explanation for this predictability assertion").

[9] The Court concluded that the section of Cohen cited by Commerce for the "abstract effect" proposition did not call for simple averaging, and in any case, related to calculating a different measure of effect size, *f*, instead of Cohen's *d*. *Mid Continent V*, 31 F.4th at 1380.

[10] Additionally, the Court of Appeals had already reached the same conclusion regarding predictability in *Mid Continent III*, when Commerce claimed that simple averaging was more predicable than weighted averaging. *See Mid Continent III*, 940 F.3d at 674.

Mid Continent attempts to fill the void left by Commerce and argues that there are practical justifications for using the simple average. For example, Mid Continent argues that the "prevalence and sophistication of many respondents' 'dump-proofing' activities" means that using a weighted average could potentially open the door to manipulation of dumping calculations. Mid Continent's Cmts. at 11. Yet, even if such explanations could support the reasonableness of Commerce's choice, they are not Commerce's explanation, and thus they cannot support its determinations. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (agency action reviewed on grounds invoked by agency).

Instead of attempting to comply with the Court of Appeals' direction "to provide a reasonable justification for departing from what the acknowledge literature teaches," Commerce interprets the Court of Appeals' direction as allowing it to offer an explanation, again, of its view of the literature. Even assuming the Court of Appeals left this option open, Commerce's arguments fail to support its position. First, Commerce argues that the simple average is supported because it uses the full population of sales, and does not estimate means or standard deviations for the test and comparison groups. Remand Results at 14. Therefore, because the literature only contemplates using the weighted average approach when the standard deviations are estimates, Commerce argues that the simple average is supported, and the weighted average is not. *Id.*

This argument fails for two reasons. First, it is unclear what supports Commerce's premise that Cohen contemplated using equation (2.3.2), the simple average, with full populations.[11] Cohen's power tables appear to use sample size as an input, *see* Cohen at 28, and specify that they are to be used "for power analysis in the case where two samples, each of n cases, have been randomly and independently drawn from normal populations." *Id.* at 19. Commerce's reference to equations (2.2.1) and (2.2.2) as "explicitly" calculating effect size based on actual populations seems inconsistent, given that Cohen used these equations to generate d values to create his power tables, not as stand-alone tests. *See id.* at 20; Remand Results at 35. A test for full populations in the context of power analysis would be redundant on its face, as there would be no question of statistical significance to analyze. Thus, Commerce does not explain, and it is not

[11] PT argues that section 2.3 of Cohen's book exclusively concerns sampling from a population. PT's Cmts. at 9. However, as Defendant argues, PT failed to raise this argument in its comments on the preliminary results, so it has not been exhausted. *See* 28 U.S.C. § 2637; 19 C.F.R. § 351.309(c)(2). Because the court is remanding the matter for further consideration or explanation, Commerce should address this argument in the first instance on remand.

discernable why Commerce believes that equations (2.2.1) and (2.2.2)—still less equation (2.3.2), which expressly implicates sample size—are intended for testing full populations.[12] Moreover, the Court of Appeals has already held that the literature does not suggest simple averaging for unequal-sized groups. *Mid Continent V*, 31 F.4th at 1380.

Additionally, even if equation (2.3.2) could be used with full populations, Commerce offers no support for its argument that use of the simple average is reasonable in this context. Rather, Commerce argues that the weighted average would be unreasonable, asserting that the literature discussing weighted averaging is exclusively concerned with sampling. Remand Results at 14; *see* Cohen at 67. Commerce also asserts that the differential pricing analysis does not involve sampling, but uses full populations, and thus concludes that weighted averaging is inappropriate in light of this distinction. Remand Results at 14. However, Commerce's premise does not lead to its conclusion. That weighted averaging is supported when sampling is present does not mean that it is unsupported when sampling is absent.

Commerce further claims that it may use equation (2.3.2) regardless of sample size, because sample size is only an important factor in the determination of statistical significance. *Id.* at 15. In support of this proposition, Commerce references Coe, Cohen, and Ellis, who agree that sample size is a necessary input when calculating pooled standard deviation from sampled data. Remand Results at 15; *see also* Cohen at 40; Coe at 10; Ellis at 10. Commerce's argument again fails for two reasons.

First, although it is true that sample size is necessary to determine statistical significance, it does not follow that sample size is irrelevant where statistical significance is absent. Commerce explains that Cohen's d is one of the three variables (d, a, and n) used to determine statistical significance with a t-test. Remand Results at 16. Thus, Commerce argues, Cohen's warning that power values "may be greatly in error" if both sample sizes and standard deviations are unequal does not apply to the differential pricing analysis, which does not calculate power values. *Id.* As with its "full population" argument, the fact that Commerce is not conducting a power analysis does not

[12] Defendant argues that PT failed to exhaust its argument that Cohen does not state equation (2.3.2) applies only to full populations. *See* Def.'s Reply at 15; PT's Cmts. at 9. In *Mid Continent V*, the Court of Appeals discusses the use of equation (2.3.2) with sample groups, rather than full populations, implicitly recognizing that the equation does not apply only to full populations. *See Mid Continent V*, 31 F.4th at 1378. Therefore, because the Court of Appeals has already addressed this issue, the court need not consider whether PT's argument has been exhausted.

necessarily mean that it may disregard Cohen's limitations on equation (2.3.2) for calculating *d*.

Commerce's assertion that equation (2.5.2) requires estimation from a sample while equation (2.3.2) does not require estimation from a sample, appears inconsistent with the literature. *See id.* at 15 (citing Cohen at 66–67). Although Commerce identifies σ_A and σ_B in equation (2.3.2) as representing standard deviations of full populations, it fails to consider that the σ values themselves seem to be used by Cohen as pre-test estimates of the full population value, which will later be calculated with sampling. *See* Cohen at 44 (stating that equation (2.3.2) is accurate "provided that sample sizes are about equal"); *see also* Ellis at 10, 10 n.8 (stating of Cohen's *d* test "[i]f [the standard deviations] of both groups are roughly the same then it is reasonable to assume that they are estimating a common population standard deviation"). Thus, Commerce's assertion that sampling is not implicated in equation (2.3.2) is unsupported, as Cohen seems to use this equation in calculating statistical power.

Additionally, Commerce's assertion that the literature provides no support for the weighted average appears to contradict Cohen, Ellis, and Coe at a number of points, as the Court of Appeals has already observed. *See Mid Continent V*, 31 F.4th at 1378 ("the cited literature uniformly teaches use of a pooled standard deviation that involves weighted averaging"). For example, Cohen's power tables use a single n value, representing the size of both samples. *See* Cohen at 40 ("*Sample size, n*. This is the size of *each* of the two samples being compared") (emphasis in original). The tables appear to be designed for what Cohen calls "Case 0," which is when $\sigma_A = \sigma_B$ and $n_A = n_B$ (i.e., when standard deviations are equal and sample sizes are also equal) *See id.* at 27. Cohen's "Case 1" (equation (2.3.1)) and "Case 2" (equation (2.3.2)) represent adaptations to Cohen's power tables, which allow them to function even when an assumption is not met. *See id.* at 42–44. As Cohen's examples following each equation demonstrate, however, all three equations are evidently intended for experimental planning.[13] *See id.* None of Cohen's many illustrative examples show using simple averaging with unequal samples. Equation (2.5.2), on the other hand, is used for calculating *d* from experimental data. *See* Cohen at 67 ("Here, our focus shifts from research planning to the

[13] Example 2.3 following equation (2.3.1) shows the power that a psychological experimenter could find in a test, given posited values for *a*, *d*, n_A, and n_B. Cohen at 43. Example 2.4 is similar, and shows the power an economist could expect from running an experiment with posited *d*, *a*, and *n* values. *Id.* at 45. These examples show that the power tables in section 2.3 of Cohen's book allow an experimenter to find any one value of *t, d, a,* and *n*, provided that the other three variables are fixed. *See id.* at 14. Thus, it appears that equation (2.3.2) is used as a tool to estimate *d* in order to find one of the other three variables in a proposed experiment.

appraisal of research results, and . . . the palpable characteristics of the sample"). Ellis and Coe both expressly prescribe equation (2.5.2) for situations where effect size is being calculated from experimental data.[14] *See* Ellis at 10 n.8; Coe at 10. Neither author discusses using a simple, unweighted average. Therefore, as the Court of Appeals found in *Mid Continent V*, Commerce's claim that academia supports the simple average appears to be contradicted by the literature itself. If Commerce continues to rely on the academic literature to support its methodology, it must further explain why its choice of the simple average is reasonable in light of this inconsistency. The matter is remanded to Commerce for further explanation or reconsideration.

CONCLUSION

In accordance with the foregoing, it is

ORDERED that Commerce's determination is remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 90 days of this date; and it is further

ORDERED that the parties shall have 30 days to file comments on the remand redetermination; and it is further

ORDERED that the parties shall have 30 days to file their replies to the comments on the remand redetermination; and it is further

ORDERED that the parties shall file the joint appendix within 14 days after the filing of replies to the comments on the remand redetermination; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing of its remand redetermination; and it is further

ORDERED that PT's motion for oral argument, *see* ECF No. 198, is denied as moot.

Dated: April 3, 2023
New York, New York

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

[14] Coe and Ellis express pooled standard deviation using different notation than Cohen, but their formulae are algebraically equivalent. *Compare* Ellis at 10 n.8 and Coe at 10 with Cohen at 67.

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