U.S. Customs and Border Protection

Slip Op. 10–62

EAST SEA SEAFOODS LLC, Plaintiff, v. UNITED STATES, Defendant and CATFISH FARMERS OF AMERICA, Defendant-Intervenor.

Before: Gregory W. Carman, Judge
Court No. 10–00102

[Remand Results are set aside in part and sustained in part, and judgment is entered for Defendant.]

Dated: May 27, 2010

Arent Fox LLP (*John M. Gurley*, *Nancy Aileen Noonan*, *Diana Dimitriuc Quaia*, *Matthew L. Kanna*), for Plaintiff.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Claudia Burke*, *Courtney S. McNamara*); *David W. Richardson*, of counsel, Office of the Chief Counsel for Import Administration, Department of Commerce, for Defendant.

Akin Gump Strauss Hauer & Feld LLP (*Valerie A. Slater*, *Jarrod Mark Goldfeder*, *Nicole Marie D'Avanzo*, *Natalya Daria Dobrowolsky*, *Jaehong David Park*), for Defendant-Intervenor.

OPINION & ORDER

CARMAN, JUDGE:

Introduction

In this case, Plaintiff East Sea Seafoods LLC ("ESS LLC" or "Plaintiff") challenged the final results of the fifth administrative review of an antidumping duty order on certain frozen fish fillets from Vietnam. *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 75 Fed. Reg. 12,728 (Mar. 17, 2010) (the "Final Results"). In an opinion dated April 19, 2010, this Court affirmed the U.S. Department of Commerce's ("Commerce" or "Defendant") determination that ESS LLC was not the successor-in-interest to East Sea Seafoods JVC ("ESS JVC").[1] *East Sea Seafoods LLC v. United States*, 34 CIT __, Slip Op. 10-42 at 30-33 (April 19, 2010)

[1] For convenience, ESS LLC and ESS JVC are also occasionally referred to as "East Sea entities."

("*East Sea 1*"). The Court also found that it was unlawful for Commerce to treat ESS LLC as if it was a part of the Vietnam-wide entity without first considering abundant record evidence pertaining to Plaintiff's independence from the Vietnamese government. Before the Court are the Final Results of Redetermination ("*Remand Results* ") filed by Commerce on April 27, 2010. For the reasons set forth below, the *Remand Results* are held unlawful in part and affirmed in part. Because the legal error set aside by the Court does not require correction through remand to the agency, judgment shall be entered for Defendant.

Background

The background of this case, set out fully in *East Sea 1*, is summarized briefly here for convenience. ESS JVC was named in the Notice of Initiation of the 5th Administrative Review ("5th AR") of an antidumping duty order on Certain Fish Fillets from Vietnam because it had exported subject merchandise to the United States during the period of review ("5th POR"). *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 73 Fed. Reg. 56,795, 56,796 (Sep. 30, 2008) ("Notice of Initiation"). Approximately six weeks prior to the end of the 5th POR, on June 17, 2008, ESS JVC changed its name to ESS LLC pursuant to a requirement of Vietnamese law. The administrative review was not initiated as to ESS LLC because Commerce received no request to review that entity, and ESS LLC was not identified as the exporter on any entries of subject merchandise imported during the 5th POR.[2] Nevertheless, ESS LLC was permitted to participate extensively in the administrative proceeding, and ultimately succeeded in obtaining a successor-in-interest analysis from Commerce. Commerce found that ESS LLC was not the successor-in-interest to ESS JVC as it had existed the last time it was reviewed, during the 3rd administrative review. As a result, ESS LLC did not qualify for the antidumping cash deposit rate previously assigned to ESS JVC, and was instead assigned the cash deposit rate of the Vietnam-wide entity, of $2.11/kg. Additionally, in the Final Results, Commerce determined that all entries made after the date of the name change would be treated as entries of ESS LLC, and would be liquidated at $2.11/kg.

In *East Sea 1*, this Court affirmed the results of the successor-in-interest analysis, but held unlawful the assignment of a cash deposit rate to ESS LLC equal to the Vietnam-wide entity rate. The Court found that for Commerce to presume that ESS LLC was an exporter

[2] Approximately 19 entries made during the 5th POR and after June 17, 2008 (the date of the name change) identify ESS JVC as the exporter.

under the control of the Vietnamese government without first considering record evidence to the contrary was not in accordance with law. On remand, the Court required Commerce to consider the evidence submitted by ESS LLC pertaining to its independence from the Vietnamese government, and to determine whether ESS LLC had established *de jure* and *de facto* independence, entitling it to a separate rate. The Court also required Commerce to reconsider its decision to liquidate all entries that had been exported by ESS JVC after the date of the name change at the rate assigned to ESS LLC. The Court has jurisdiction over this case pursuant to 28 U.S.C. 1581(c).

Discussion

I. The Treatment of Entries Made after June 17, 2008 Identifying ESS JVC as the Exporter

A. Remand Results

In *East Sea 1*, this Court found that "the decision of Commerce to order liquidation of entries by ESS JVC at the rate assigned to ESS LLC for all entries after the effective date of the name change" was unsupported by substantial evidence in the record, and not in accordance with law. *East Sea 1* at 45–46. On remand, Commerce changed its position and decided to liquidate all entries made between the June 17, 2008 name change and the end of the POR, that identified ESS JVC as the exporter (the "Post Name Change Entries") at the rate assigned to ESS JVC in this review: $0.02/kg. *Remand Results* at 14. Although Commerce maintains its position that as of June 17, 2008, ESS JVC ceased to exist, it appears to have accepted Plaintiff's contention that "subject merchandise exported by East Sea JVC up to June 17, 2008 would not enter the United States for a number of weeks after exportation." (Pl.'s Rule 56.2 Mot. at 20; *see also Remand Results* at 14.) Commerce determined that the most reliable source for determining which East Sea entity exported the Post Name Change Entries was the import data provided by U.S. Customs and Border Protection ("CBP"), which clearly shows "that all entries [made by an East Sea entity] during these last 45 days of the POR were made by ESS JVC." *Remand Results* at 14.

B. Parties' Contentions

Although it now stands to receive significantly more favorable antidumping duty treatment of the Post Name Change Entries, Plaintiff denies ever claiming that all of these entries were entries of ESS JVC. (Plaintiff's Comments on Defendant's Redetermination on Remand ("Pl.'s Comments") at 9.) Instead, it offers the carefully nuanced claim

that it had only argued that "the product shipped from Vietnam by ESS JVC before the name change might arrive in the U.S. several weeks after the name change." (*Id.*) On May 7, 2010, Plaintiff requested leave to file a reply to Defendant's Response. In its reply, Plaintiff suggests for the first time its "belie[f] that four shipments from Vietnam with invoices dated after June 17, 2008 entered U.S. commerce prior to July 31, 2008," and argues that by Commerce's "own reasoning . . . [these entries] must be attributed to ESS LLC." (Pl.'s Reply to Def.'s Comments ("Pl.'s Reply") at 2.) The four entries Plaintiff refers to apparently identify ESS JVC as the exporter.

Defendant takes the position that ESS LLC has conceded that it made no entries during the period of review. (Def.'s Resp. to Pl.'s Comments ("Def.'s Resp.") at 2, 5, 10.) On May 12, 2010, Defendant requested leave to file a surreply to Plaintiff's reply, in large part to argue that ESS LLC should be "judicially estopped" from now claiming that any Post Name Change Entries actually belong to ESS LLC. (Def.'s Surreply to Pl.'s Reply ("Def.'s Surreply") at 1–4.)

C. Analysis

Commerce's determination that the Post Name Change Entries should be liquidated at the rate assigned to ESS JVC is supported by substantial evidence in the record and otherwise in accordance with law, and is therefore sustained. Specifically, Commerce's reliance on the official CBP import data in determining which East Sea entity exported the Post Name Change Entries is eminently reasonable. *See id.* This decision was supported by ESS LLC's assertion in its USCIT R. 56.2 Motion that exports from ESS JVC immediately prior to the name change would take "a number of weeks" to enter the country. Without any evidence in the record explicitly linking entries with sales, it was reasonable for Commerce to conclude that the Post Name Change Entries correctly identified ESS JVC as the exporter.

The Court finds no evidence in the record to support Plaintiff's eleventh hour claim that as many as four of the Post Name Change Entries identified the wrong exporter, and disregards this argument as not probative here. The Court also notes the abnormality and possible consequences stemming from Plaintiff's claim that its affiliated importer inaccurately identified the exporter on entries of subject merchandise.

II. ESS LLC's Entitlement to a Separate Rate Determination

A. Remand Results

In its *Remand Results*, Commerce determined that because ESS LLC had no entries during the 5th POR, it is "not entitled to a review

on any issues, including separate rates." *Remand Results* at 3–5. Commerce states that it "is not required to conduct administrative reviews and change cash deposit rates of companies which have no entries during the period of review." *Id*. at 3 (citing *Allegheny Ludlum Corp., et. al. v. United States*, 346 F. 3d 1368 (Fed. Cir. 2003)). Commerce also disagrees with this Court's reliance on *Transcom, Inc. v. United States*, 182 F.3d 876 (Fed. Cir. 1999), claiming that *Transcom* does not require Commerce to provide "any interested party with the opportunity to rebut the presumption that they are not [sic] part of the nonmarket economy ('NME') government." *Id*. at 4. Additionally, in Commerce's view, being required "to resolve issues in a review for companies with no entries" would produce "an entirely new type of proceeding, a review without entries, and grant a new type of respondent status in a review, a company with no entries which is entitled to have a review." *Id*. at 4.

B. Parties' Contentions

Plaintiff asserts that Commerce's concern that granting a separate rate test in this case sets an "undesirable precedent" for the agency is "wholly without merit." (Pl.'s Comments at 23–25.) Plaintiff is confident that a separate rates analysis depends on "export activities, and not entries," so it finds Commerce's claim that it cannot perform the separate rates analysis "disingenuous." (*Id.* at 2.) Plaintiff also claims that given the unusual circumstances under which it managed to obtain the successor-in-interest analysis in this administrative review, "[i]t appears highly unlikely that a similar case will present itself" to Commerce in the future. (*Id.* at 25.)

In response, Defendant asserts that "Commerce has never awarded a separate rate to a company without any entries, let alone to a company that was found not to be a successor in interest . . . and a company that did not ask to be reviewed." (Def.'s Resp. at 9.) Defendant claims that when a company "never requested a review" and "made no entries," Commerce is not "free to review" it. (Def.'s Resp. at 3.)

C. Analysis

In *East Sea 1*, the Court did not ask Commerce to decide whether ESS LLC was entitled to a separate rate determination; the Court held that ESS LLC was so entitled. The Court therefore ordered Commerce to perform that separate rate determination, and to decide on the merits whether ESS LLC had rebutted the presumption of government control. Consequently, Commerce's conclusion that ESS LLC is not **entitled** to a separate rate determination is not in accordance with law, and is set aside.

In the *Remand Results*, Commerce also evinces concern that the Court has required it to treat ESS LLC as if ESS LLC was subject to the 5th AR, despite the fact that ESS LLC had no entries during the 5th POR and was not named in the Notice of Initiation. Commerce should be reassured that this is not so. Consequently, *Allegheny* is not implicated in this case, as nothing in *East Sea 1* required Commerce to conduct an administrative review of a company without POR entries.[3]

What the remand order did require was for Commerce to finish the unusual job it began when it chose to conduct a successor-in-interest analysis, during an administrative review, of a company that was not subject to the administrative review. As set out in *East Sea 1*, when conducting a successor-in-interest analysis, Commerce determines whether or not to permit an alleged successor to qualify for the cash deposit rate calculated for an alleged predecessor. If Commerce reaches a negative successorship determination, the non-succeeding entity receives some sort of default rate—either an all-others rate, or in the case of a nonmarket economy, the antidumping rate of the government controlled country-wide entity (here, the Vietnam-wide entity rate). In the nonmarket economy context, that single default rate has been calculated for a theoretical country-wide entity, which is presumed to include all exporters, unless an exporter can prove that it is not under the control of the nonmarket economy government. The Court of Appeals for the Federal Circuit ("Federal Circuit") has both validated the use of this presumption (in *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997)), and emphasized that a party subject to the presumption has a right to attempt to rebut it (in *Transcom*, 182 F.3d at 883). Commerce erred by prohibiting ESS LLC from rebutting the presumption, thereby making the presumption "irrefutable rather than rebuttable." *East Sea 1* at 41.

While Commerce's understanding of the holding of *Transcom* is generally consistent with the Court's (*compare Remand Results* at 4, *with East Sea 1* at 39), Commerce does not appear to appreciate the CAFC's expressed reasoning underlying that holding. In *Transcom*, the CAFC forbade Commerce from subjecting certain parties to the NME entity rate because those parties had not been properly notified that this might happen through the notice of initiation. *Transcom*, 182 F.3d at 884. The reason for the notice requirement, however, was not to idly ensure the inclusion of a footnote in all future notices of

[3] The Court notes that nothing in *Allegheny* forbids Commerce from reviewing a company with sales and exports but not entries during the POR; *Allegheny* validated Commerce's policy of limiting review to companies with entries in the POR. *See Allegheny*, 346 F.3d at 1374.

initiation, but rather to ensure that the underlying right of respondents in a nonmarket economy antidumping proceeding to rebut the presumption of government control before being subjected to it would be vindicated—by notice, in the particular facts of *Transcom*. *See Transcom*, 182 F.3d at 883 ("[A] party that is subject to the presumption has a right to attempt to rebut it."). To permit Commerce to apply the presumption of government control to ESS LLC without considering rebuttal evidence in the administrative record would permit Commerce to abrogate the right identified in *Transcom* and *Sigma*. Commerce's redetermination on remand that ESS LLC is not entitled to a separate rate determination is therefore set aside as contrary to law.

III. ESS LLC's De Jure and De Facto Independence From the Vietnamese Government

A. Remand Results

Appropriately, notwithstanding its opinion that a separate rate determination was not necessary, Commerce complied with this Court's specific remand instructions to consider the record evidence pertaining to ESS LLC's *de jure* and *de facto* independence from the Vietnamese government. After considering the submissions from ESS LLC, Commerce determined that there was "sufficient evidence . . . to support a finding of *de jure* absence of government control over [ESS LLC's] export activities." *Remand Results* at 9. In regards to *de facto* control, however, Commerce found that ESS LLC had not rebutted the presumption of government control because there was no evidence in the record of any of ESS LLC's "sales" or "trading activity." *Id*. at 12–13.

Essentially, Commerce found a massive deficiency in the evidence submitted by ESS LLC in an attempt to demonstrate *de facto* independence: namely, that "there is no evidence that ESS LLC exported merchandise to the United States during the POR." *Remand Results* at 10. Commerce reviewed Exhibit A16 to ESS LLC's Section A Questionnaire Response, and found it to "demonstrate that ESS LLC did not have any sales into the United States during the POR." *Id*. at 10. Commerce found that ESS LLC had failed to provide "proper sales information (e.g., sales negotiation documents, contracts, invoices, payment documentation, entry documents, etc.) . . . [needed] in order to determine the absence of *de facto* Vietnamese government control." *Id*. at 10–11. For these reasons, Commerce determined that ESS LLC had not rebutted the presumption of government control, and therefore did not revise ESS LLC's cash deposit rate of $2.11/kg. *Id*. at 15.

B. Parties' Contentions

Plaintiff insists that it had both export and sales activity during the POR. (Pl.'s Comments at 12–16.) Plaintiff cites to statements it made in its Section A Questionnaire Response, filed by ESS LLC, that "ESS head office was involved in the exportation of fish fillets," and "[d]uring the POR, ESS purchased processed fillets from its affiliate Atlantic Co., Ltd. for export to the U.S." (*Id*. at 12–13.) Plaintiff cites sales data indicating that both before and after its name change on June 17, 2008, "East Sea" was engaged in the purchase of subject merchandise from Atlantic Co., Ltd. (*Id*. at 13.) Plaintiff asserts it is only logical to infer that ESS LLC continued to export this subject merchandise to PSW. (*Id*.) Plaintiff claims that all activity occurring after June 17, 2008 is activity of ESS LLC, specifically pointing to Exhibit A16 of the Section A Questionnaire response, which includes an entry summary dated June 18, 2008,[4] and an invoice between PSW and an unaffiliated customer dated June 24, 2008. (*Id.* at 13, 11.)

Defendant reiterates Commerce's finding in the *Remand Results* that the record contains no "evidence of East Sea LLC's trading activity." (Def.'s Resp. at 7.) Pointing to what it sees as a gaping hole in ESS LLC's evidence, Defendant insists "that it has become clear that East Sea LLC made no shipments, had no entries, and made no sales during the period of review." (*Id*. at 8.) Defendant-Intervenor reiterates many of the points made by Defendant, but also claims that the invoices provided by Plaintiff in exhibit A16 to its Section A Response are "irrelevant" to the question of ESS LLC's *de facto* independence of the Vietnamese government, because the invoices are for sales between PSW and unaffiliated customers. (Resp. of Def.-Interv., Catfish Farmers of America, to Pl.'s Comments ("Def.-Int.'s Resp") at 12–13.)

C. Analysis

The Court finds that Commerce's determination that ESS LLC is not under *de jure* control of the Vietnamese government is supported by substantial evidence on the record, and is therefore sustained.

In regards to *de facto* control, the Court finds that while Commerce has overstated the deficiency in ESS LLC's evidence capable of rebutting the presumption of *de facto* control, it has nevertheless identified a genuine absence of information that is essential to the agency's analysis. For this reason, the agency's determination that ESS

[4] This entry summary identifies ESS JVC as the exporter of the subject merchandise through both the manufacturer ID number in box 13, and the 10 digit AD/CVD Case No.

LLC failed to rebut the presumption of *de facto* government control is supported by substantial evidence in the record, and is therefore sustained.

Upon considering the *Remand Results* and the arguments of the parties, and upon closely inspecting the administrative record, the Court finds there is evidence in the record of at least one sale during the POR that is rightly attributed to ESS LLC. This sale is evidenced in Exhibit A16 to Plaintiff's Section A Response by an invoice between PSW and an unaffiliated customer dated June 24, 2008, and an undated sales contract between PSW and this same customer pertaining to the same purchase order identified in the invoice. Contrary to the assertions of Defendant–Intervenor that information about "the U.S. selling activities of a U.S. corporation is irrelevant" to the issue of ESS LLC's *de facto* independence from the Vietnamese government, it is highly relevant. In fact, this is precisely the information sought by Commerce's separate rate application, which requires the applicant to provide legible photocopies of documents "for the first sale by invoice date of subject merchandise to an *unaffiliated* customer in the United States during the POR/POI." *Separate Rate Application*, Office of AD/CVD Operations, at 8 (emphasis in original). This invoice fulfills this requirement, and belies Commerce's repeated assertion in the *Remand Results* that ESS LLC had no sales during the POR. *See Remand Results* at 10, 12.

The problem for ESS LLC is the dearth of evidence of a complete export transaction. As explained in the Separate Rate Application, a party seeking a separate rate must provide photocopies of "*all* of the following original documents" for a given sale: (1) the CBP Form 7501 Entry Summary, (2) the bill of lading, (3) the commercial invoice, (4) the packing list, and (5) documentation demonstrating receipt of payment. *Separate Rate Application* at 8–9. In addition to providing this evidence, the party seeking a separate rate

> must provide a narrative explanation of how the documents relate to one another and what the specific links are among the documents. If volumes or values do not exactly match from one document to the next, the applicant must provide in this narrative a clear explanation of any apparent discrepancies among the documents. The applicant must also provide and explain additional documentation necessary to corroborate its explanation in this regard. For example, if the invoice and payment amount do not match, the applicant must explain the difference and provide documentary support for this explanation.

Id. at 9. By requiring this information from separate rate applicants, Commerce ensures that it has sufficient evidence to evaluate the "*de facto* standards," *i.e.*, to determine whether the exporter "(1) sets its own export prices independent of the government and other exporters; (2) retains the proceeds from its export sales and makes independent decisions regarding the disposition of profits or financing of losses; [and] (3), has the authority to negotiate and sign contracts and other agreements." *Remand Results* at 10. Plaintiff's deficiency was not in failing to submit a Separate Rate Application *per se*, but in failing to provide the agency with this information, which is necessary to establish *de facto* independence from the government of Vietnam.

Plaintiff has pointed to evidence in the record that *suggests* ESS LLC continued to export subject merchandise to the United States. For instance, Commerce found that ESS JVC and ESS LLC shared the same base of unaffiliated customers, through their affiliated importer PSW. Issues & Decision Memorandum, A-522-801, 5th Administrative Review at 39 (Mar. 10, 2010), Admin. R. Pub. Doc. 185, *available at* http://ia.ita.doc.gov/frn/summary/VIETNAM/2010-5853-1.pdf (last visited May 21, 2010). ESS LLC continued to purchase subject merchandise from Atlantic Co., Ltd. after June 17, 2008. (Supplemental Separate Rate Certification at Exhibit SA–1.) After June 17, 2008, PSW continued to sell subject merchandise. (Section A Questionnaire Response at Exhibit A16.) ESS LLC now even asserts that as many as four entries at the end of the 5th POR may have incorrectly identified ESS JVC as the exporter, when they were actually exported by ESS LLC. (Pl.'s Reply at 2.) Even if ESS LLC exported subject merchandise during the POR, though, it still must provide Commerce with sufficient information from a single sale for export to the United States to permit Commerce to determine whether the presumption of government control has been rebutted. Clearly, Plaintiff has not done this. Accordingly, Commerce's determination that ESS LLC is not entitled to a separate rate is supported by substantial evidence in the record and is in accordance with law.

Conclusion

For the reasons given above, upon consideration of the *Remand Results*, Defendant's Motion for Clarification, Plaintiff's Comments, Defendant's Response, Defendant-Intervenor's Response, Plaintiff's Reply, Defendant's Surreply and all other papers and proceedings in this case, the Court sets aside in part and affirms in part the *Remand Results*. Furthermore, it is hereby

ORDERED that Plaintiff's motion to file a reply is GRANTED, and it is further

ORDERED that Defendant's motion to file a surreply is GRANTED, and it is further

ORDERED that Defendant's Motion for Clarification is GRANTED and the injunction issued in this case on March 25, 2010 shall remain in effect according to its own terms, pending a final and conclusive court decision in this litigation, notwithstanding language in *East Sea 1* to the contrary.

Judgment will be entered accordingly.

Dated: May 27, 2010
New York, NY

/s/ Gregory W. Carman
GREGORY W. CARMAN, JUDGE

Slip Op. 10–63

SPARKS BELTING COMPANY, Plaintiff, v. UNITED STATES, Defendant.

BEFORE: HONORABLE NICHOLAS TSOUCALAS, SENIOR JUDGE
Court No. 02–00245

[Defendant's motion for summary judgment is granted; Plaintiff's cross-motion is denied]

Dated: June 1, 2010

Edmund Maciorowski, P.C. (*Edmund Maciorowski*) for Plaintiff.

Tony West, Assistant Attorney General; Barbara S. Williams, Attorney-in- Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Aimee Lee); Chi S. Choy, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, Of Counsel, for Defendant.

OPINION

TSOUCALAS, Senior Judge:

Introduction

At issue is the proper classification under the Harmonized Tariff Schedule of the United States ("HTSUS") for certain merchandise imported by Plaintiff Sparks Belting Company ("Sparks"). This action, which has been designated a test case pursuant to USCIT Rule 84, is before the Court on cross-motions for summary judgment. For the reasons set forth below, the Court finds that no genuine issues of material fact remain and this dispute may be resolved pursuant to USCIT Rule 56.

I. Background

The present action involves several entries made between March and September of 2000 through the port of Detroit, Michigan. The subject imports are described in the commercial invoices and other entry documents as "conveyor belts". *See* Pl.'s Statement of Material Facts as to Which There is No Genuine Issue to be Tried ("Pl.'s Facts") ¶ 12; Def.'s Resp. to Pl.'s Statement of Material Facts as to Which There is No Genuine Issue to be Tried ("Def.'s Resp. to Pl.'s Facts") ¶ 12. The merchandise is designed and used in industrial applications for the conveyance of food products and other goods. *See* Pl.'s Facts at ¶ 25.

Upon liquidation of the entries, the merchandise was classified and assessed with duties by U.S. Customs and Border Protection ("Customs" or the "Government") under either Subheading 5910.00.10, HTSUS,[1]with an assessed duty rate of 5.6% ad valorem, or Subheading 5910.00.90, HTSUS, with a duty rate of 3.6% ad valorem. *See* Entries, Protests. The relevant portions of Heading 5910 are as follows:

5910.00	Transmission or conveyor belts or belting, of textile material, whether or not impregnated, coated, covered or laminated with plastics, or reinforced with metal or other material:	
5910.00.10	Of man-made fibers	5.6%
	* * *	
5910.00.90	Other	3.6%

Sparks protested Customs' classification of the subject merchandise, asserting that classification was proper under either 5903.10.15, HTSUS, or 5903.20.15, HTSUS, both with dutiable rates of 1.4% *advalorem*. *See* Protests. After Customs denied Plaintiff's protest at the port level, Sparks filed a timely summons with the Court disputing the classification of the subject imports. All liquidated duties, charges and exactions for the subject entries have been paid prior to the commencement of this action. *See* Compl. at ¶ 3.

During discovery, Defendant served interrogatories on Sparks in order to obtain samples of specific measurements. *See* Def.'s Br. at Ex. 2. Sparks submitted ten sample pieces of the subject merchandise and a proposed stipulation in early autumn of 2008. With one exception in August of 2009, Plaintiff did not produce any further samples

[1] Unless otherwise indicated, all statutory citations, including those to the HTSUS, are to the 2000 edition.

to Defendant. *See* Def.'s Br. at 2; *id*. at Ex. 3. The Government proceeded to file a motion to compel more samples. *See* Pl.'s Mot. to Compel (Doc. 25). The Court denied Defendant's motion on the basis that the Government had ample time to attain the samples but failed to, given that the case had been ongoing since 2002 and that discovery had concluded. *See* Mem. Order Den. Def.'s Mot. to Compel dated Aug. 31, 2009 (Doc. 29).

Both Plaintiff and Defendant concurrently moved for summary judgment.[2] As evidentiary support, the parties have submitted numerous documents including the briefs for summary judgment and responsive documents thereto. *See* Pl.'s Mot. for Summ. J. ("Pl.'s Br."); Def.'s Resp. to Pl.'s Mot. for Summ. J. ("Def.'s Resp."); Pl.'s Reply to Def.'s Resp. to Pl.'s Mot. for Summ. J. ("Pl.'s Reply"); Def.'s Mot. for Summ. J. ("Def.'s Br."); and Pl.'s Resp. to Def.'s Mot. for Summ. J. ("Pl.'s Resp."); Def.'s Reply to Pl.'s Resp. to Def.'s Mot. for Summ. J. ("Def.'s Reply"). Sparks, who had originally named twenty-four entries containing eighteen products, abandoned its claims concerning all but seven entries containing eight different products.[3] *See* Summons; Def.'s Statement of Material Facts as to Which There is No Genuine Issue to be Tried ("Def.'s Facts") ¶¶ 1–2 ; Pl.'s Resp. to Def.'s Statement of Material Facts as to Which There is No Genuine Issue to be Tried ("Pl.'s Resp. to Def.'s Facts") ¶ 1; Pl.'s Br. at 2, n.2. Accordingly, this Court dismisses the claims abandoned by Sparks.[4]

On March 31, 2010, Defendant moved to strike portions of the affidavit of Ivo Spaargaren, attached as an exhibit to Plaintiff's brief. *See* Def.'s Mot. to Strike (Doc. 41). This Court granted Defendant's motion, ruling that parts of Spaargaren's affidavit lacked a basis of

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[2] Plaintiff also filed a motion for leave in order to file a motion for oral argument out of time on May 7, 2010 (Doc. 48), which was denied on May 13, 2010 (Doc 52).

[3] The remaining merchandise at issue before the Court includes: BF BP 111 A/S [Entry 0056488–8]; 2M8 10/0 G and 2M8 20/0 SG3 [Entry 0054589–2]; EM 8/2 0+04 PU Trans AS [Entry 0018964–5]; EM 6/1+1 PVC AGREEN [Entry 0018909–0]; MF BP 111 A/S [Entry 0056352–6]; MF GP 270 [Entry 0055038–2]; Type 2E7–0N White [Entry 0055741–1]. *See* Pl.'s Resp. to Def.'s Facts at ¶¶ 1–2.

[4] The dismissed claims include: Sparks Part 02–800, WF NSF 24 Paraskin N550 BEEG Blue [*See* Pl.'s Resp. to Def.'s Facts ¶ 6]; Sparks Part 03–111, MF WU 110 A/S [*See* Pl.'s Resp. to Def.'s Facts ¶ 7]; Sparks Part 03–134, Ultra Kool II [*See* Pl.'s Resp. to Def.'s Facts ¶ 8]; Sparks Part 03–135, Ultra Kool II Light [*See* Pl.'s Resp. to Def.'s Facts ¶ 9]; Sparks Part 03–150, MF GU 210 [*See* Pl.'s Resp. to Def.'s Facts ¶ 10]; Sparks Part 03–326, MF AU 200 A/S, 12/2 00+00 PU Black AS [*See* Pl.'s Resp. to Def.'s Facts ¶ 12]; Sparks Part 03332, MF LBP 210, UN 100 P/M [*See* Pl.'s Resp. to Def.'s Facts ¶ 13]; Sparks Part 02–802, Silon 40 HC, WF NSF 15, 12/2 00+00 PU Black AS, Paraskin N500 BEEG [*See* Pl.'s Resp. to Def.'s Facts ¶ 17]; Sparks Part 03–162, MF BU 300, 3 LRA RX [*See* Pl.'s Resp. to Def.'s Facts ¶ 17]; Sparks Part 03–175, Ultra Kool II Tan, 2 M8 3/0 0U Tan [*See* Pl.'s Resp. to Def.'s Facts ¶ 17]; Sparks Part 03–242, MF WP 220, 2 M8 5/00 2T [*See* Pl.'s Resp. to Def.'s Facts 27]; and Sparks Part 03–377, MF GP 230 [*See* Pl.'s Reply at 2, n.1].

personal knowledge in contravention of USCIT Rule 56(e). *See* Mem. Order Granting Def.'s Mot. to Strike, dated Apr. 20, 2010 (Doc. 47).

II. Contentions of the Parties

Sparks contends that its summary judgment motion should be granted because Customs improperly classified the subject imports under Heading 5910, HTSUS, despite Chapter Note 6 which excludes "[t]ransmission or conveyor belting, of textile material, of a thickness of less than 3 mm" from that heading. Sparks alleges that the subject articles are properly classified under HTSUS subheadings 5903.10.15 or 5903.20.15, depending on whether they are coated with polyvinyl chloride or polyurethane, respectively.

The Government asserts that summary judgment is appropriate in its favor for several reasons. Regarding the products not represented by a sample, Defendant posits that Sparks failed to establish elements essential to its case and upon which it bears the burden of proof. Further, according to Defendant, the subject imports cannot be classified under Sparks' claimed classification provisions because those subheadings contemplate the products being a fabric in accordance with Note 9 to Section XI of the HTSUS, which the subject merchandise are not. Finally, with regard to Entry 0054859–2, Defendant submits that the Court lacks jurisdiction because Sparks's protest of that entry has already been granted.

III. Summary Judgment and Standard of Review

Summary judgment is appropriate when there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. USCIT R. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). At the summary judgment stage, the question to be answered is "whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Processed Plastic Co. v. United States*, 29 CIT 1129, 1132, 395 F.Supp.2d

1296, 1299 (2005) (internal citation omitted). The purpose of summary judgment is to avoid a clearly unnecessary trial. *See Seal-Flex, Inc. v. Athletic Track and Court Constr.*, 98 F.3d 1318, 1321 (Fed. Cir. 1996) (*citing Matsushita Electric Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

The fact that both parties have moved for summary judgment "does not mean that the court must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is

not proper if disputes remain as to material facts." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987) (internal citation omitted). In classification cases, summary judgment is appropriate when "there is no genuine dispute as to . . . what the merchandise is." *Ero Indus., Inc. v. United States*, 24 CIT 1175, 1179, 118 F.Supp.2d. 1356, 1359 (2000). In other words, if no dispute over a material fact would impact the outcome of the suit and the action focuses solely on the proper classification of the merchandise, a court may grant summary judgment. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998).

Ultimately, it is the Court's duty to determine the correct classification. *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 876 (Fed. Cir. 1984). Classification cases are reviewed de novo by this Court, pursuant to 28 U.S.C. § 2640(a). *See Cargill, Inc. v. United States*, 28 CIT 401, 408, 318 F.Supp.2d 1279, 1287 (2004). The Court must determine whether "the government's classification is correct, both independently and in comparison with the importer's alternative." *Sumitomo Corp. of America v. United States*, 18 CIT 501, 505, 855 F.Supp. 1283, 1287 (1994).

In order to establish the proper classification of imported merchandise, the Court applies a two-step analysis whereby it "(1) ascertain[s] the proper meaning of the specific terms in the tariff provision; and [then] (2) determin[es] whether the merchandise at issue comes within the description of such terms as [] properly construed." *Global Sourcing Group v. United States*, 33 CIT __, __, 611 F.Supp.2d 1367, 1371 (2009) (citing *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999)). The first step of the analysis is a question of law and the second is a question of fact. *See* Pillowtex, 171 F.3d at 1373.

The General Rules of Interpretation ("GRIs") direct classification of merchandise under the HTSUS. *See Boen Hardwood Flooring, Inc. v. United States*, 357 F.3d 1262, 1264 (Fed. Cir. 2004). The GRIs are applied in numerical order; once a particular rule provides proper classification, a court may not consider any subsequent GRI. *See Mita Copystar Am. v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998). The first GRI holds that "classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1; *see also Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998). Section and Chapter Notes are "not optional interpretive rules, but are statutory law, codified at 19 U.S.C. § 1202." *Michael Simon Design, Inc. v. United States*, 30 CIT 1160, 1164, 452

F.Supp.2d 1316, 1321 (2006) (*internal quotation omitted*). The Explanatory Notes ("ENs"), which accompany each chapter of the HTSUS, provide persuasive assistance to the court, though they do not constitute legally binding authority. *See Lonza, Inc. v. United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995).

IV. Discussion

A. Jurisdiction over Entry 0054859–2

Prior to addressing the propriety of Customs' classification, the Court must dispense with a jurisdictional issue. Upon liquidation, Customs classified Entry 0054859–2 under 5910.00.10, HTSUS, with an assigned duty of 5.6% ad valorem. *See* Def.'s Resp. at 7. Sparks protested that rate of liquidation and claimed that the goods should be reliquidated under Subheading 5903.10.15, HTSUS, dutiable at 1.4% ad valorem. *See* Pl.'s Br. at 20; Protest No. 3801–01–100321. Customs denied Sparks's protest on February 7, 2002. *See* Summons. However, less than three months later, Customs reliquidated Protest No. 3801–01–100321 at the rate sought by Sparks in its protest and Plaintiff received duty refund checks for all articles under this protest, including Entry 0054859–2. *See* Pl.'s Reply at 3; Pl.'s Br. at Ex. 14. Accordingly, Defendant asserts, since Sparks received the relief it sought, there is no case or controversy with regard to these products and the Court lacks jurisdiction with respect to Entry 0054859–2. *See* Def.'s Resp. at 7. The Court agrees.

A condition precedent to the Court's power to adjudicate the appeal of a denied entry is that an importer first file a protest with Customs by ninety days after notice of liquidation. *See* 28 U.S.C. § 1581(a); 19 § U.S.C. 1514. Such protest must be denied by Customs, in whole or in part, for the Court to hear the civil action. *See* § 1581(a). Similarly, an entry that has been reliquidated must also be protested and denied by Customs for the Court to have jurisdiction. "[W]hen Customs changes its decision 'to conform to a decision sought by a protest, that protest has been completely granted.'" *Novell, Inc. v. United States*, 21 CIT 1141, 1142, 985 F.Supp. 121, 123 (1997) (*quoting Transflock, Inc. v. United States*, 15 CIT 248, 249, 765 F.Supp. 750, 751 (1991)). This is because "reliquidation vacates and is substituted for the collector's original liquidation. The reliquidation, not the original liquidation, is the final decision of the collector as to the rate and amount of duty to be paid by the importer, and the time to protest begins to run from the date of the latest liquidation." *Mitsubishi Electronics America, Inc. v. United States*, 18 CIT 929, 931, 865 F.Supp. 877, 879 (1994) (*internal citation omitted*). A reliquidation becomes final if the importer fails to file a protest with Customs

within ninety days. *See* §§ 1514(a), (c). Thus, protest of a reliquidation with Customs is a prerequisite to seeking judicial review. *See Transflock*, 15 CIT at 249.

Sparks asserts that the products at issue remain relevant since the action before the Court has been designated a test case, involving the same fact or questions of law for six pending cases, some of which include the same products imported under the pertinent entry at issue here, Entry 0054859–2. *See* Pl.'s Reply at 3–4. Plaintiff further contends that the issues in this case are all the more salient considering that other ports continue to enter these same products at the current high rate of duty, resulting further litigation. *See* Pl.'s Reply at 4. However, it is a well-established principle that the outcome of a classification case is not considered *res judicata* for merchandise that are not stemming from the actual transactions at issue before the court. *See United States v. Stone & Downer Co.*, 274 U.S. 225, 235–237, 47 S.Ct. 616, 71 L.Ed. 1013 (1927). The typical res judicata rules do not apply in protest cases and collateral estoppel doesn't prevent an importer from successive litigation over the classification of merchandise, even when subsequent importations involve the same issues of fact and the same questions of law. *See, Daimler-Chrysler Corp. v. United States*, 442 F.3d 1313, 1321 (Fed. Cir. 2006). The Court has no power to entertain issues that are not in controversy under the instant case. Sparks will be able to fully address the products therein and related Customs decisions in other ports when they are ripe for adjudication. Accordingly, Entry 0054859–2 must be dismissed from the case at bar. The remainder of this dispute falls within the Court's jurisdiction under 28 U.S.C. § 1581(a).

B. Motion for Summary Judgment

On a motion for summary judgment, the movant has the burden of coming forth with evidence to support the factual allegations of its claims. *See Rockwell Automation Inc. v. United States*, 31 CIT 692, 696 (2007) (citing Celotex, 477 U.S. at 323 ("[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.")). Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an essential element to its case. *See* Celotex, 477 U.S. at 323. Consequently, Sparks bears the burden of offering evidence to support its claims that the correct classification of the subject merchandise is under

HTSUS subheadings 5903.10.15 or 5903.20.15 and not 5910.00.90 or 5910.00.10. In order to determine whether Sparks has met its burden, the Court must ascertain the proper meaning of headings 5910 and 5903, and their relevant section or chapter notes under the GRIs.

To begin, Heading 5910 applies to "[t]ransmission or conveyor belts or belting, of textile material, whether or not impregnated, coated, covered or laminated with plastics, or reinforced with metal or other material". Chapter Note 6 to Heading 5910 provides that it does not apply to "[t]ransmission or conveyor belting, of textile material, of a thickness of less than 3mm." To that end, the Court must preliminarily determine whether the imports are more or less than 3mm thick: if the merchandise at issue is more than 3mm thick, it remains classified in Heading 5910, but if it is less than 3mm thick, the belting is excluded from this heading.

Next, Heading 5903 encompasses "[t]extile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902." For the subject merchandise to be classified under this heading, two notes to Chapter 59 must be considered. The first note defines textile fabric: "[e]xcept where the context otherwise requires, for the purposes of this chapter the expression "*textile fabrics*" applies only to the woven fabrics of chapters 50 to 55 and headings 5803 and 5806, the braids and ornamental trimmings in the piece of heading 5808 and the knitted or crocheted fabrics of heading 6002." Note 1 to Chapter 59 (*emphasis in original*). Thus, to be classified in Heading 5903, the subject imports must consist of one of these textile fabrics.

The second note pertinent to Heading 5903 is Chapter Note 2(a). Note 2(a)(1) provides that Heading 5903 does not apply to "[f]abrics in which the impregnation, coating or covering cannot be seen with the naked eye," with no account being taken of any color changes. Thus, if the merchandise at issue is comprised of a textile fabric that has been impregnated, coated, covered or laminated with a plastic material that cannot be seen with the naked eye, it is excluded from the parameters of Heading 5903. Note 2(a)(2) states that Heading 5903 does not apply to "[p]roducts which cannot, without fracturing, be bent manually around a cylinder of a diameter of 7 mm, at a temperature between 15°C and 30°C." Accordingly, if the subject merchandise cannot be bent manually without fracturing, it is precluded from classification in Heading 5903. Lastly, Note 2(a)(3) conditions that Heading 5903 excludes "[p]roducts in which the textile fabric is either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change in color." Thus, if the products at issue are

completely embedded or entirely coated or covered on both sides with plastic that can be seen with the naked eye, it is ruled out from classification under Heading 5903.

Now that the language of the tariff provisions has been ascertained, the Court turns to the facts of the case at bar in order to determine whether the subject merchandise fits within the parameters of the relevant subheadings. In determining this question of fact, the Court also proceeds in ascertaining whether Plaintiff has carried its burden of establishing the elements of its case and prevail on its motion.

1. Entries Without Representative Samples

The Government advances that the headings and applicable chapter notes at issue require specific information that can only be ascertained by examining a physical sample. *See* Def.'s Br. at 7. Since only three of the imports at issue were represented by a sample, and the absence of any necessary information to determine the classification of each product is tantamount to a failure of proof by Plaintiff, Defendant concludes that Sparks has failed to prove its case as a matter of law regarding the three remaining sample-less products, BF BP 111 A/S (Entry 0056488–8), EM 6/1+1 PVC AGREEN (Entry 0018909–0), and MF BP 111 A/S (Entry 056352–6).

In response, Sparks posits that samples themselves are not a required element of proof for classifying an article. To support this proposition, Plaintiff relies on two Customs Court cases, *W.T. Grant Co. v. United States* ("*Grant*"), 74 Cust.Ct. 3, 11, C.D. 4579 (1975), and *L.B. Watson Co., A/C Murphy Reir, Inc. v. United States* ("*Watson*"), 79 Cust.Ct. 85, 87, C.D. 4717 (1977), both holding that any deficiency caused by a lack of samples had been overcome by a reliable and complete record, thereby allowing the Court to determine the proper classification of the merchandise. *See Grant*, 74 Cust.Ct. at 9; *Watson*, 79 Cust.Ct. at 90.

It is accurate to state that samples of the merchandise as imported would have conclusively determined classification due to the nature of the tariff provisions advanced here by Sparks. However, it is also true that the unavailability of physical samples is not a bar to recovery. These two seemingly incompatible statements can be reconciled. The *Watson* Court elucidates: although "it is not necessary for plaintiff to offer a sample of the imported merchandise, it must, however, present adequate evidence to establish the nature and essential characteristics of the importation." *Watson*, 79 Cust.Ct. at 87. Thus, the crux of the issue is whether Plaintiff's evidence as a whole succeeds in establishing the essential characteristics required by the relevant tariff provisions.

Sparks claims that, even without samples, it has "provided definitive evidence regarding the physical characteristics of the articles." Pl.'s Resp. at 2. To that end, Plaintiff submitted to the Court documentary exhibits including technical data sheets and sworn affidavits[5], which it contends "present incontrovertible evidence establishing that the physical characteristics of the subject articles are representative of the condition of these articles, as imported." Id. Both the affidavits of Grasmeyer and Spaargaren address the sample-less products, and include information on their manufacture, thickness, and amount of plastic by weight. This information is cross-referenced by the technical data sheets of both Sparks and the manufacturer of the product.

However, the relevant tariff provisions and chapter notes in this case require very specific information that goes beyond basic data that can typically be found in technical datasheets, books and records. The supporting documentation contains manufacturing data which, in many instances, establishes only some of the general characteristics of the products, but not the very specific physical properties of the imports necessary here. Furthermore, neither affidavit satisfies the criteria required by the chapter notes. Spaargaren attempts to testify on these characteristics, however the Court has previously ruled that Spaargaren may not testify based on his personal knowledge and can only testify based on books and records. *See* Mem. Order dated Apr. 20, 2010 (Doc 47). Grasmeyer does not testify at all to the physical test requirements. The result is that both Spaargaren and Grasmeyer's testimony fails to establish the essential characteristics required for classification. Thus, although Sparks presented some data concerning the products during discovery, such information is incomplete and falls short in satisfying the visibility and physical test requirements necessary for classification here.

Consequently, the Court finds that Plaintiff has submitted sufficient proof with respect to the issue of some, but not all, of the products at issue. Where samples have been provided, Sparks has met its burden; for those products not represented by a sample, Plaintiff is unable to provide adequate evidence establishing the essential characteristics of each product in order to allow for an accurate classification. In particular, the evidence presented by Plaintiff fails to establish with certainty the essential characteristics, nature, and identity of the merchandise without samples: BF BP 111 A/S

[5] The affidavits that Plaintiff submitted are from John Grasmeyer, Vice President of Operations at Sparks ("Grasmeyer Aff."); Ivo Spaargaren, responsible for manufacturing within the Management Team of manufacturer Ammeraal Beltech Holding, B.V. ("Spaargaren Aff."); and Peter de Vries, Inside Sales Representative of manufacturer Derco, B.V. ("De Vries Aff."). *See* Pl.'s Br. and accompanying documents.

(Entry 0056488–8); EM 6/1+1 PVC AGREEN (Entry 0018909–0); and MF BP 111 A/S (Entry 0056352–6). Without such information, the Court cannot determine accurate classification of these products. The Government is entitled to summary judgment as a matter of law concerning these entries because Plaintiff has failed to establish the existence of elements essential to its case, and on which it bears the burden of proof at trial. There exists "'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. 317 at 322–23 (*citing Anderson*, 477 U.S. at 250).

2. Classification for Products with Samples Provided

Samples exist for three of the remaining products at issue: MF GP 270 (Entry 0055038–2); Type 2E7–0N White (Entry 0055741–1); and EM 8/2 0+04 PU Trans AS (Entry 0018964–5). The parties are in agreement as to the nature of these three products but disagree as to the meaning and scope of the tariff provisions at issue. The sole issue is a matter of properly interpreting the classification term at issue to determine whether the scope of that term is broad enough to encompass the items with particular characteristics. Accordingly, this matter is ripe for summary judgment of these three products.

The Court begins its analysis with the competing tariff headings. Determining the most appropriate classification for the merchandise involves a "close textual analysis for the language of the headings and the accompanying explanatory notes." *Conair Corp. v. United States*, 29 CIT 888, 891–892 (2005) (internal citation omitted). In determining which heading is more specific, and hence more appropriate for classification, a court should compare only the language of the headings and not the language of the subheadings. *See* GRI 1, 3.

MF GP 270 and Type 2E7–0N White

Chapter Note 6 permits classification under Heading 5910 for products that are 3mm thick or more. Both MF GP 270 and Type 2E7–0N White are less than 3mm thick. *See* Def.'s Facts ¶ 15(a), ¶ 16(a); Pl.'s Resp. to Def.'s Facts ¶ 15, ¶ 16. Although the parties differ on the exact measurements of thickness, this is not a material fact since both parties concur that the products are within the parameters of the relevant chapter note. Thus, these products are excluded from classification under Heading 5910.

Turning to Heading 5903, Chapter Note 1 provides that the subject merchandise must be a "textile fabric." The products at issue are woven fabrics. *See* Def.'s Facts at ¶ 15(b), ¶ 16(b); Pl.'s Resp. to Def.'s Facts at ¶ 15, 16. Since woven fabrics are a textile fabric, these

products fulfill the requirements of Chapter Note 1(a), and the evaluation of Heading 5903 can proceed.

Chapter Note 2(a)(1) and (3) require the merchandise to be comprised of a textile fabric that has been impregnated, coated, covered or laminated with a plastic material able to be seen with the naked eye but not completely embedded, coated, or covered on both sides with plastics. Type 2E7–0N White meets the terms of this requirement. *See* De Vries Aff. ¶ 4–5; Def.'s Facts ¶ 16. For MF GP 270, Sparks's evidence does not speak to the issue of whether the requirements of Chapter Note 2(a)(1) and (3) have been met and thus the Court relies on Defendant's lab analysis to conclude that the coating is visible to the naked eye. *See* Declaration of Deborah Walsh, Customs National Import Specialist, Def.'s Br. at Ex. 8 ("Walsh Decl.") ¶ 11.

Chapter Note 2(a)(2) conditions that the subject merchandise must be able to be bend manually without fracturing around a cylinder with a diameter of 7 mm, at a temperature between 15°C and 30°C. Again, Type 2E7–0N White clearly meets this requirement. *See* Walsh Decl. ¶ 11; De Vries Aff. ¶ 6. With respect to MF GP 270, however, Plaintiff's evidence fails to establish the relevant characteristics and the Court again uses Defendant's lab report to determine that the product is able to bend manually around a 7 mm cylinder. Thus, MF GP 270 complies with Chapter Note 2(a)(2) and can be classified under Heading 5903. Accordingly, both Type 2E7 0N White and MF GP 270 are classifiable under Heading 5903.

Having determined that Heading 5903 controls the analysis, the Court may now look to the subheadings to find the correct classification for the merchandise. *See* GRI 6; Orlando Food, 140 F.3d at 1440. Sparks advances Subheading 5903.10.15, whereas the Government asserts that 5903.10.20 is more appropriate. The pertinent provisions of Heading 5903 are as follows:

5903	Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902:	
5903.10	With polyvinyl chloride:	
	* * *	
5903.10.15	Of man-made fibers: Fabrics specified in note 9 to section XI: Over 60 percent by weight of plastics	1.4%
	* * *	

5903.10.20	Of man-made fibers: Other: Over 70 percent by weight of rubber or plastics	1.7%

The merchandise is made with polyvinyl chloride (*see* Def.'s Facts ¶ 15(d), 16(d); Pl.'s Facts ¶ 56) and so the critical issue is whether the products qualify as "fabrics specified in note 9 to section XI," which provides that:

> [t]he woven fabrics of chapters 50 to 55 include fabrics consisting of layers of parallel textile yarns superimposed on each other at acute or right angles. These layers are bonded at the intersections of the yarns by an adhesive or by thermal bonding.

Section XI, Note 9, HTSUS. Sparks contends that the subject merchandise are Note 9 fabrics; the Government maintains that they are not.

Plaintiff interprets the language of Note 9 expansively to include both the fabrics specified in the note as well as the regular "woven fabrics of Chapters 50 to 55," which is defined in the ENs as:

> products obtained by interlacing textile yarns (whether of the kinds classified in Chapters 50 to 55 or those regarded as twine, cordage, etc., of heading 56.07), rovings, monofilament or strip and the like of Chapter 54, loop wale-yarn, narrow ribbons, braids or narrow fabrics (consisting of warp without weft assembled by means of an adhesive, etc.), on warp and weft looms.

Harmonized Commodity Description and Coding System Explanatory Notes, World Customs Organization, Vol. 2, Section XI, I(C). Sparks claims that any other reading of the term "woven" in Note 9 would negate its plain meaning, and accordingly, Plaintiff asserts that Note 9 fabrics can be joined together by mechanical bonding or by traditional interlacing.

On the contrary, Defendant argues, a Note 9 fabric cannot be a woven fabric because by definition it does not have an interlaced fiber construction. The Government urges the Court consider the EN in its entirety, since it also provides that "[t]he essential characteristics of [a Note 9 fabric] is that the yarns are not interlaced as in conventional woven fabrics, but are bonded at the intersections with an adhesive or by thermal bonding." Id. According to Defendant, it is plain that Note 9 fabrics are specialized and do not include traditional woven fabrics that weave over and under each other. *See* Def.'s Br. at 15.

The Court finds that Plaintiff's interpretation of Note 9 conflicts with the true meaning of the tariff provision. It is a "general rule of statutory construction that where Congress has clearly stated its intent in the language of a statute, a court should not inquire further into the meaning of the statute." Pillotex, 171 F.3d at 1373. Section XI, Note 9 itself explicitly defines what a Note 9 fabric construction is: a specific construction bonded with an adhesive or by thermal bonding, not a traditional weave. If Note 9 fabrics were read in the way that Sparks submits, there would be no need to distinguish Note 9 fabrics from regular woven fabrics. The fact that Congress included this provision indicates that it intended to delineate regular woven fabrics from Note 9 fabrics and restrict the scope of the subheading.

The Customs laboratory concluded that both MF GP 270 and Type 2E7–0N White are textile fibers that are interlaced and woven in the traditional sense, and therefore cannot be Note 9 fabrics classifiable under Subheading 5903.10.15. *See* Walsh Decl.; Ex. 5, Laboratory Reports. Accordingly, entries 0055038–2 and 0055741–1, containing products MF GP 270 and Type 2E7–0N White, are classified under Subheading 5903.10.20 with a duty rate of 1.7% *ad valorem*.

EM 8/2 PU Trans AS

The final product, EM 8/2 PU Trans AS, measures less than 3mm wide and cannot be classified within the parameters of Chapter 5910. *See* Def.'s Facts ¶ 11(a); Pl.'s Resp. to Def.'s Facts ¶ 11. Turning to Heading 5903, EM 8/2 PU Trans AS has been established as a woven fabric in conformity with the requirements of Chapter Note 1. *See* Def.'s Facts at ¶ 11(b); Pl.'s Resp. to Def.'s Facts at ¶ 11. The Court relies on Defendant's lab analysis of the representative sample for EM 8/2 PU Trans AS, to conclude that the coating is visible to the naked eye, since Plaintiff fails to establish the criteria of Chapter Note 2(a)(1) and (3) based on the record.

The parties differ as to whether EM 8/2 PU Trans AS can bend manually around a cylinder of a diameter of 7 mm, at a temperature between 15°C and 30°C without fracturing. Sparks asserts that this product can meet the test of Note 2(a)(2) but offers no admissible evidence to that end. Instead, it urges the Court to conduct its own test of Note 2(a)(2). *See* Pl's Resp. at 12–13. The Court resists the temptation to perform fact-finding functions on a motion for summary judgment. However, this issue remains a question of law since Sparks has offered no contradictory evidence on the record before the Court and so no compelling reason exists to discredit Defendant's laboratory testing. The Government's lab report concludes that EM 8/2 PU Trans cannot bend manually around a cylinder of a diameter

of 7mm, at a temperature between 15°C and 30°C without fracturing. Therefore, EM 8/2 PU Trans AS is excluded from classification under Heading 5903.

Since EM 8/2 PU Trans AS is excluded from HTSUS headings 5910 and 5903, the Court must look to another heading for classification. Heading 3921, HTSUS, provides for "[o]ther plates, sheets, film, foil and strip, of plastics." Note 2(m) to Chapter 39 excludes "[g]oods of section XI (textiles and textile articles)." As discussed above, Sparks has failed to demonstrate that the subject merchandise is classifiable under Section XI, and consequently is not foreclosed from classification under Heading 3921 by Chapter Note 2(m). The Court concludes that Entry 0018964–5, containing article EM 8/2 PU Trans AS, is most appropriately classified under Subheading 3921.90.25, HTSUS, as:

3921	Other plates, sheets, film, foil and strip, of plastics:	
	* * *	
3921.90	Other:	
	* * *	
3921.90.25		Combined with textile materials and weighing more than 1.492 kg/m2: [p]roducts with textile components in which man-made fibers predominate by weight over any other single textile fiber 10.3%

V. Conclusion

For the aforementioned reasons, Defendant must prevail "as a matter of law," based on the evidence before the Court. Anderson, 477 U.S. at 251–52. There remains no factual disputes that must be resolved at trial. As a result, Spark's motion is denied and the Government's motion for summary judgment is granted.

The following entries were abandoned by Plaintiff and are hereby dismissed: 1758482–7, 1758593–1, 0018821–7, 0018917–3, 0018992–6, 0055232–1, 0055126–5, 0055310–5, 005673–7, 0056589–3, 0056740–2, 00570661, 0056634–7, 0018743–3, 0018769–8, 0054935–0, 0054712–3. The Court dismisses Entry 0054859–2 for lack of jurisdiction. Plaintiff has failed to establish the elements necessary to its case and upon which it would bear the burden of proof at trial, with respect to entries 0056488–8, 0018909–0, and 0056352–6. Finally, the Court finds that entries

00550382 and 0055741–1 are properly classified under Subheading 5903.10.20, HTSUS, and Entry 0018964–5 is classified under HTSUS Subheading 3921.90.25.

Dated: June 1, 2010
New York, New York

/*s*/ *TSOUCALAS*
NICHOLAS TSOUCALAS
SENIOR JUDGE

Slip. Op. 10–64

BP PRODUCTS NORTH AMERICA INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 06–00184

[In Customs classification matter the court denies Plaintiff's motion for summary judgment and grants Defendant's cross-motion for summary judgment.]

Dated: June 1, 2010

Phelan & Mitri (*Michael Francis Mitri* and *Christopher Eduard Pey*) for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Justin Reinhart Miller* and *Mikki Cottet*); *Paula S. Smith*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of counsel, for the defendant.

OPINION

Restani, Chief Judge:

Introduction

This matter is before the court on cross-motions for summary judgment by Plaintiff BP Products North America ("BP"), an importer of merchandise for use in the production of commercial-grade unleaded gasoline, and Defendant United States ("the Government") pursuant to USCIT Rule 56. The Government asserts that the United States Bureau of Customs and Border Protection ("Customs") properly classified the subject merchandise as preparations under subheading 2710.11.15 of the Harmonized Tariff Schedule of the United States

("HTSUS"), that is, as gasoline (motor fuel).[1] BP, however, asserts that the subject merchandise is properly classified under subheading 2707.50.00, HTSUS, because it was an oil product and its aromatic constituents exceeded nonaromatic constituents.[2] For the reasons stated below, the court denies BP's motion for summary judgment and grants the Government's cross-motion for summary judgment.

BACKGROUND

The parties agree on the underlying facts of this case. (Def.'s Mem. In Supp. Of Its Cross-Mot. For Summ. J. And In Opp'n To Pl.'s Mot. For Summ. J. ("Def.'s Mem.") 2.) In December 2004 and February 2005, BP imported a liquid mixture known as 93 octane (premium grade) conventional gasoline ("Conv. 93") into the United States from Germany. (App. To Pl.'s Mem. In Supp. Of Its Mot. For Summ. J. ("Pl.'s App.") Tab B; Def.'s Statement Of Additional Material Facts As To Which There Are No Genuine Issues To Be Tried ("Def.'s Statement of Facts") ¶ 1; Pl.'s Resp. To Def.'s First Interrogs. And First Req. For Produc. Of Doc. And Things ("Pl.'s First Interrogs.") 14, *available at* Def.'s Mem. Ex. A.)[3] "Conv. 93 consist[ed] of a blended mixture of components and was likely prepared to satisfy particular specifications and to possess particular measured properties." (Def.'s State-

[1] The relevant portion of Chapter 27, Subheading 2710.11.15 of the HTSUS reads:

2710	Petroleum oils and oils obtained from bituminous minerals, other than crude; preparations not elsewhere specified or included, containing by weight 70 percent or more of petroleum oils or of oils obtained from bituminous minerals, these oils being for basic constituents of the preparations; waste oils:
	* * *
2710.11	Light oils and preparations:
	* * *
2710.11.15	Motor fuel

[2] The relevant portion of Chapter 27, Subheading 2707.50.00 of the HTSUS reads:

2707	Oils and other products of the distillation of high temperate coal tar; similar products in which the weight of the aromatic constituents exceeds that of the nonaromatic constituents . . . .
	* * *
2707.50.00	Other aromatic hydrocarbon mixtures of which 65 percent or more by volume (including losses) distills at 250°C by the ASTM D 86 method

[3] After admitting eleven of the twelve facts initially submitted by BP, (*see* Def.'s Resp. To Pl.'s Statement Of Material Facts As To Which There Are No Genuine Issue To Be Tried), the Government submitted eight additional facts, including the statement that "[t]he imported product . . . is conventional gasoline," (Def.'s Statement of Facts ¶ 1). Although BP did not formally admit these additional facts, it did not controvert them either. Therefore, the court concludes they are admitted facts.

ment of Facts ¶ 4.) "Petroleum constitute[d] the basic constituent of the imported Conv. 93," which "contain[ed], by weight, 70 percent or more of petroleum oils." (Def.'s Statement of Facts ¶¶ 2, 3; *see also* Dep. Of Tim McMahon ("McMahon Dep.") 45–46, *available at* Def.'s Mem. Ex. C.)[4] Each cargo of Conv. 93 had an "aromatic hydrocarbon compound content . . . greater than 50% by weight, as measured and reported by BP's independent commercial gauger utilizing the American Society of Testing and Materials ("ASTM") D 5769 test method."[5] (Pl.'s Statement Of Material Facts Not In Dispute ("Pl.'s Statement of Facts") ¶ 3.) Conv. 93 "satisfie[d] the typical U.S. requirements for automotive motor fuel as set forth in ASTM D 4814, Standard Specification for Automotive Spark-Ignition Engine Fuel." (*Id.* at ¶ 9.) In addition, Conv. 93 was "capable of being used in automobile engines in its condition as imported." (Def.'s Statement of Facts ¶ 7.) Thus, it was gasoline motor fuel.

Upon entry, BP classified Conv. 93 under subheading 2707.50.00, HTSUS, subject to no duty. (Pl.'s App. Tab A.) Customs, however, classified Conv. 93 under subheading 2710.11.15, HTSUS, at a duty rate of 52.5 cents per barrel, (*id.* at Tab B), and liquidated the entries accordingly, (*see id.* at Tab C). After liquidation, BP challenged this classification, but Customs denied its protests. (*Id.*) BP then commenced the present action. Both parties now move for summary judgment pursuant to USCIT Rule 56.

STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a). Summary judgment is appropriate if "there is no genuine issue as to any material fact," and "the movant is entitled to judgment as a matter of law." USCIT R. 56(c). The proper construction of a tariff provision is a question of law, and whether the subject merchandise falls within a particular tariff provision is a question of fact. *Franklin v. United States*, 289 F.3d 753, 757 (Fed. Cir. 2002). Where, as here, "the nature of the merchandise is undisputed, . . . the classification issue collapses entirely into a question of law," and the court reviews Customs' classification decision *de novo*. *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006).

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[4] At the time of his deposition, Tim McMahon was employed by BP as an international products trader. (*Id.* at 11.)

[5] Aromatic is defined as "of, relating to, or characterized by the presence of at least one benzene ring — used of a large class of monocyclic, bicyclic, and polycyclic hydrocarbons and their derivatives (as benzene, toluene, naphthalene, phenol, aniline, salicylic acid) . . . ." *Webster's Third New International Dictionary* 120 (Philip Babcock Gove et al. eds., 1981).

DISCUSSION

I. Heading 2710, HTSUS

A. Conv. 93 is a preparation under heading 2710, HTSUS.

Conv. 93 is a blended mixture of components, including at least seventy percent petroleum oils, that, once combined with certain additives,[6] may be sold as automobile gasoline in the United States. In its memorandum of law, BP admits that Conv. 93 is described by the terms of heading 2710, HTSUS, but contends that Conv. 93 is a petroleum oil, not a preparation. (Pl.'s Mem. Of Law In Supp. Of Its M. For Summ. J. ("Pl.'s Mem.") 5; Pl.'s Resp. To Def.'s Cross-Mot. For Summ. J. And Reply To Def.'s Resp. To Pl.'s Mot. For Summ. J. ("Pl.'s Resp.") 4 n.2.) BP argues that "[b]y failing to recognize that a basic blended nature is common to gasoline and substantially all petroleum fuels, defendant overreaches." (Pl.'s Resp. 2.) It argues "[p]etroleum products are not 'preparations' as opposed to 'oils' for tariff purposes simply because they consist of hydrocarbon streams that are blended to meet specifications."[7] (*Id.*) Rather, BP contends that the distinction between petroleum oils and preparations under heading 2710, HTSUS, is the inclusion of additives in the latter.[8] BP's claim lacks merit.

The General Rules of Interpretation ("GRIs") of the HTSUS govern the classification of merchandise entered into the United States. *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). Under GRI 1, HTSUS, "classification shall be determined

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[6] Although these additives are not technically necessary to manufacture finished gasoline motor fuel, the ASTM D requires certain additives, such as ethanol, for the purpose of cleaning engines as they run. (McMahon Dep. 31–32.) Neal Byington, a national petroleum chemist within Customs, stated that the specifications of ASTM D 4814 must be met before gasoline motor fuel can be sold to the general public. (*See* Declar. of Neal D. Byington ("Byington Decl.") ¶¶ 1, 21.c, 24, *available at* Def.'s Mem. Ex. D.) Environmental regulations, however, do not control Customs classification. *See North Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001) (providing that "USDA regulations are not dispositive" in Custom classification cases).

[7] BP argues that if the Government's understanding of preparations is correct, "the 'oils' portion of Heading 2710 would apply to virtually no products." (*Id.*) As made clear by the Explanatory Notes, however, this is not the case. *See* World Customs Organization, *Harmonized Commodity & Coding System Explanatory Notes*, Explanatory Note 27.10, 249 (3d. 2002) ("Explanatory Notes") (listing "gas-oils," "kerosene," and "fuel oils" under this first category of heading 2710, HTSUS).

[8] By additives, BP seems to mean components that are "almost universally *not* made directly from petroleum." (Pl.'s Resp. 5.) But preparations are not limited in the way BP asserts. *See, infra*, note 14.

according to the terms of the headings and any relative section or chapter notes . . . .” Courts may use plain meanings and dictionary definitions to interpret these terms. *See E.T. Horn Co. v. United States*, 367 F.3d 1326, 1331 (Fed. Cir. 2004).

Heading 2710, HTSUS, includes “[p]etroleum oils and oils obtained from bituminous minerals, other than crude; preparations not elsewhere specified or included, containing by weight 70 percent or more of petroleum oils or of oils obtained from bituminous minerals, these oils being the basic constituents of the preparations; waste oils . . . .”[9] This heading, therefore, contains three distinct categories of merchandise as indicated by the placement of semicolons: 1) “petroleum oils and oils obtained from bituminous minerals, other than crude;” 2) “preparations not elsewhere specified or included, containing by weight 70 percent or more of petroleum oils or of oils obtained from bituminous minerals, these oils being the basic constituents of the preparations;” and 3) “waste oils.” *See Commercial Aluminum Cookware Co. v. United States*, 938 F. Supp. 875, 883 (CIT 1996) (providing that semicolons create “separate *independent* clauses of a sentence”).

“Inherent in the term preparation is the notion that the object involved is destined for a specific use. The relevant definition from The Oxford English Dictionary defines preparation as a substance specially prepared, or made up for its appropriate use or application, e.g. as food or medicine, or in the arts or sciences.” *Orlando Food*, 140 F.3d at 1441 (internal quotation marks and citation omitted). This understanding of the word “preparation” is further supported by the corresponding Explanatory Notes, which provide that heading 2710, HTSUS, includes “[t]he oils described . . . above to which various substances have been added to *render them suitable for particular uses* . . . .” Explanatory Notes at 249 (emphasis added). To determine whether Conv. 93 is a preparation or a petroleum oil under heading 2710, HTSUS, therefore, the court will consider the gasoline refinement process in order to determine if Conv. 93 was specially prepared for a specific use.[10] The description below has not been disputed.

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[9] Bitumen is defined as “any of various mixtures of hydrocarbons (as asphalt, crude petroleum, or tar) often together with their nonmetallic derivatives that are usu. dark brown or black and occur naturally or are obtained as residues from naturally occurring substances by heat refining.” *Webster’s Third New International Dictionary* 223 (Philip Babcock Gove et al. eds., 1981).

[10] The court notes BP’s frequent reference to the website http://wikipedia.org in its description of this process. (*See* Pl.’s Resp. 4–6.) Wikipedia is a “user-contributed online encyclopedia” compiled of articles placed on “[w]eb sites that allow users to directly edit any [w]eb page on their own from their home computer.” Thomas L. Friedman, The World is Flat: A Brief History of the Twenty-First Century 94 (Farrar, Straus and Giroux 2005). Wikipedia’s construction is based on the theory that “allowing anyone who surfs along to add or delete content on that page” will result in “a credible, balanced encyclopedia by way of an ad hoc

"Gasoline is a complex mixture of hundreds of different hydrocarbons" that is "derived from petroleum and used as fuel for internal combustion engines." 5 The New Encyclopædia Britannica 138 (15th ed. 1986).[11] "In most cases, crude oil is unsuitable for direct use. It is converted into such useful products as gasoline, motor oil, and petrochemicals through the refining process." 21 The New Encyclopædia Britannica 439 (15th ed. 1986). "The primary refinery process is fractional distillation," *id.*, which "consists of heating crude oil in a container . . . until it begins to boil and then continuing to heat the crude oil while collecting the condensation from the vapors," (Byington Decl. ¶ 21.a). This methodology works because "[e]ach of the compounds in crude oil has its own unique boiling point . . . ." (*Id.*) The base material for the preparation of gasoline, called a "straight run distillation cut," consists of the compounds in crude oil that boil between approximately thirty-five and two hundred degrees Celsius. (*Id.* at ¶ 22.) Generally, this "straight run distillate" "has an aromatic content of less than 20 percent by weight." (*Id.* at ¶ 25.)

"After physical separation into such constituents as gasoline, kerosene, and lubricating oils, selected petroleum fractions may be subjected to chemical conversion processes, such as cracking and reforming." 9 The New Encyclopædia Britannica 344 (15th ed. 1986). "Both cracking and reforming can be brought about by simply heating the petroleum fraction to high temperatures (thermal processes) or by bringing them into contact with certain reagents (catalytic process)."[12] *Id.* Refiners may "blend into this base 'straight run distillate'

open-source, open-editing movement." *Id.* Although the court is aware that some studies have led prominent scholars to promote Wikipedia's veracity, *see* Yochai Benkler, The Wealth of Networks: How Social Production Transforms Markets and Freedom 71–72 (Yale University Press 2006), and acknowledges that several circuit courts have relied on it in opinions, *see, e.g.*, *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 96 n.1 (2nd Cir. 2010); *United States v. Lane*, 591 F.3d 921, 924 n.1 (7th Cir. 2010); *Brown v. Nucor Corp.*, 576 F.3d 149, 156 n.9 (4th Cir. 2009), countless district courts have held that "Wikipedia is not a reliable source at this level of discourse," *Kole v. Astrue*, No. CV 08–0411–LMB, 2010 U.S. Dist. LEXIS 31245, at *18 n.3 (D. Idaho Mar. 31, 2010); *see also Nuton v. Astrue*, No. SKG–08–1292, 2010 U.S. Dist. LEXIS 30755, at *4 n.1 (D. Md. Mar. 30, 2010); *Techradium, Inc. v. Blackboard Connect Inc.*, No. 208–CV–00214–TJW, 2009 U.S. Dist. LEXIS 36083, at *13 n.5 (E.D. Tex. Apr. 29, 2009); *Capcom Co. v. MKR Group, Inc.*, No. C 08–0904 RS, 2008 U.S. Dist. LEXIS 83836, at *11 (N.D. Cal. Oct. 10, 2008). Based on the ability of any user to alter Wikipedia, the court is skeptical of it as a consistently reliable source of information. At this time, therefore, the court does not accept Wikipedia for the purposes of judicial notice.

[11] Both parties cite to online versions of this source, which do not differ in a material way. (*See* Pl.'s Statement of Facts 2; Def.'s Mem. 21–23; Pl.'s Resp. 15.)

[12] "In the most general terms, cracking breaks the large molecules of hard-to-use heavy oils into the smaller molecules that form their lighter, more valuable fractions. Reforming changes the structure of a molecule without breaking it to pieces; the process is widely used to raise the octane number of gasolines . . . ." *Id.*

a variety of smaller volume 'blendstocks,'" which are "obtained by the refiner from other process units in the refinery or purchased on the open market." (Byington Decl. ¶ 23) "One of the ways refiners commonly increase the octane rating (anti-knock index) is to blend the 'straight run distillate' with aromatic compounds (compounds which contain benzene-like ring structures)."[13] (*Id.* at ¶ 26.) "One common method to prepare high octane finished premium gasoline with over 50 weight percent aromatic contents is to blend 100 percent aromatic blendstock, or other high aromatic content blendstock, into a 'straight run distillate' that has an aromatic percent content on a weight basis of 10–20 percent."[14] (*Id.* at ¶ 27.) Afterwards, a small amount of additives may be introduced. 5 Encyclopædia Britannica 138; 21 Encyclopædia Britannica 444. As a result of these processes, finished gasoline motor fuel generally consists of fifty to seventy-five percent "straight run distillation cut," by volume.[15] (Byington Decl. ¶ 23.)

Conv. 93 possesses an aromatic compound content of over fifty-percent by weight, although a typical straight run distillate possesses merely ten to twenty-percent. (Pl.'s Statement of Facts ¶ 3; Byington Decl. ¶ 27.) BP does not contend that Conv. 93 is derived from anything other than crude petroleum oil, (McMahon Dep. 43), but "is unable to specify the exact blend components of [Conv. 93] due to the passage of time, lack of access to the independent foreign producer's records, and the inherently changing nature of petroleum blending," (Pl.'s First Interrogs. 8). The only inference the court can draw logically from the undisputed facts is that a high aromatic content blendstock was added to a "straight run distillate" to create Conv. 93, high octane gasoline.[16] Thus, Conv. 93 is a preparation, rather than a petroleum oil, under heading 2710, HTSUS, because the liquid has been specially prepared for a specific use. *See* HQ 951428 (Apr. 14,

[13] "The anti-knock characteristics of a gasoline—its ability to resist knocking, which indicates that the combustion of fuel vapour in the cylinder is taking place too rapidly for efficiency—is expressed in octane number." 5 Encyclopædia Britannica 138. Generally speaking, the higher the octane number assigned to a gasoline, the better the quality. (*See* McMahon Dep. 18–19).

[14] BP's witness acknowledged Byington's description as one possible gasoline manufacturing process and agreed that he did not have "any reason to believe that the merchandise in this instance wasn't produced pursuant to that process." (McMahon Dep. 46–47.) BP, however, criticizes Byington's declaration as "fail[ing] to provide any information about the crucial distinction between blending components and gasoline additives." (Pl.'s Resp. 4.) But preparations in 2710, HTSUS, are not limited to those which include a specific category of "additives." Thus, this is not a crucial distinction.

[15] The percentage level varies depending on the desired octane of the gasoline being produced. (Byington Decl. ¶ 23.)

[16] BP states that the fact "[t]hat the imported merchandise contained more aromatic than nonaromatic hydrocarbons [merely] indicates its utility as a higher end gasoline base stock or blending component." (*Id.*) BP presents no evidence or alternative theory as to how Conv. 93 comes to possess such a high aromatic content. BP's position stems from its incorrect

1994), *available at* 1994 WL 495852 (holding that a high-aromatic-content reformate is a preparation under heading 2710 despite containing no additives); HQ 088342 (Dec. 23, 1991), *available at* 1991 WL 425316 (holding that an imported motor fuel, in which the weight of the aromatic constituents exceed the weight of the nonaromatic constituents, is "a preparation to which a mixed blend of aromatics have been added, regardless of amount, (as well as other additives) to make the finished gasoline").

B. The aromatic constituency limitation in Note 2 of Chapter 27, HTSUS, pertains only to "similar oils."

BP also claims that Conv. 93 cannot be classified under heading 2710, HTSUS, because Statutory Note 2 of Chapter 27 excludes petroleum oil in which "the weight of the nonaromatic constituents exceeds that of the aromatic constituents" from the heading. (Pl.'s Mem. 5–6, quoting Note 2 of Chapter 27, HTSUS.) Even if Conv. 93 is characterized as a preparation, rather than a petroleum oil, BP contends that "[Explanatory Note 27.10] (C) [which appears to apply to preparations] by its terms incorporates by reference the aromatics exclusion applicable to [Explanatory Note 27.10 oil] categories (A) and (B)."[17] (Pl.'s Resp. 2.) This claim lacks merit.

Statutory Chapter Note 2 provides that:

> References in heading 2710 to '*petroleum oils and oils obtained from bituminous minerals*' include not only petroleum oils and oils obtained from bituminous minerals, but also similar oils, as well as those consisting mainly of mixed unsaturated hydrocarbons, obtained by any process, provided that the weight of the nonaromatic constituents exceeds that of the aromatic constituents.

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legal conclusion that, for the purposes of heading 2710, HTSUS, a blended gasoline is a petroleum oil. Accordingly, any disagreement that may exist on this point raises no genuine issue of material fact.

[17] The relevant portion of the Explanatory Notes reads:

The heading includes:

(A)"Topped crudes" (where certain lighter fractions have been removed by distillation), as well as light, medium and heavy oils obtained in more or less broad fractions by the distillation or refining of crude petroleum oils or of crude oils obtained from bituminous minerals. These oils, which are more or less liquid or semi-solid, consist predominantly of *non-aromatic* hydrocarbons such as paraffinic, cyclanic (naphthenic)

. . . . .

(C) The oils described in (A) . . . above to which various substances have been added to render them suitable for particular uses, *provided* the products contain by weight 70 % or more of petroleum oils or of oils obtained from bituminous minerals as a basis and that they are not covered by a more specific heading in the Nomenclature.

Explanatory Notes at 249–50.

Note 2 of Chapter 27, HTSUS. This aromatic constituency limitation, therefore, has no application to petroleum oils because the exclusion applies only to the last antecedent, "similar oils." *See Finisar Corp. v. DirecTV Group, Inc.*, 523 F.3d 1323, 1336 (Fed Cir. 2008) (stating that the doctrine of the last antecedent provides that "[r]eferential and qualifying words and phrases, *where no contrary intention appears*, refer solely to the last antecedent, which consists of the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence" (internal quotation marks and citation omitted)).[18]

If aromatic constituency exclusion of Statutory Chapter Note 2 does not apply to petroleum oils under heading 2710, HTSUS, logically there is also no such limitation on preparations. Even if such a limitation were applicable to petroleum oils, there is nothing in the language of the Explanatory Notes to indicate that an exclusion contained in (A), covering oils, should be incorporated into (C), covering preparations. *See* Explanatory Notes at 249–50. It is clear that a product qualifies under (C) only if alterations to an oil of category (A) or (B) are made. *Id.* These qualifying changes may permit an increase in the aromatic constituency of a substance. Here the nonbinding Explanatory Notes are fully consistent with the statute. Regardless of whether Conv. 93 is a petroleum oil or a preparation under heading 2710, HTSUS, it is not subject to an aromatic constituent limitation. Accordingly, Conv. 93 is not excluded from heading 2710, HTSUS, by operation of Statutory Chapter Note 2. Furthermore, Additional U.S. Note 3 of Chapter 27, HTSUS, indicates Congress intended that, in general, motor fuels would be classified under heading 2710, HTSUS. U.S. Note 3 provides that "[f]or the purposes of subheading 2710.11.15, '*motor fuel*' is any product derived primarily from petroleum, shale or natural gas, whether or not containing additives, which is principally used as a fuel in internal-combustion or other engines." U.S. Chapter Note 3 to Chapter 27, HTSUS. Plaintiff has not demonstrated that this motor fuel must be classified elsewhere, specifically under heading 2707, HTSUS.

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[18] This interpretation is further supported by the Explanatory Notes, which characterize petroleum oils as "consist[ing] predominantly of *non-aromatic* hydrocarbons," but similar oils as "oils in which the weight of the non-aromatic constituents exceeds that of the aromatic constituents." Explanatory Notes at 249; *see also* HQ 088342 (stating that "it cannot be ignored that regardless of what might have been the drafters' intention in the chapter note, the language fails as a matter of grammatical construction to establish that the limitation does, in fact, apply to petroleum oils; rather it is concluded that the limitation modifies only the nearest antecedent: 'similar oils'").

II. Heading 2707, HTSUS

A preparation may be classified under heading 2710, HTSUS, however, only if it is "not elsewhere specified or included." BP claims that Conv. 93 is included under heading 2707, HTSUS, as a product "similar" to "[o]ils and other products of the distillation of high temperate coal tar . . . in which the weight of the aromatic constituents exceeds that of the nonaromatic constituents." (Pl.'s Mem. 11, quoting heading 2707, HTSUS.) Specifically, BP argues that "the 'similar products' clause . . . can be read simply as shorthand for 'predominantly aromatic products'" because "while every imported petroleum and petrochemical product must be classified [somewhere] in the [HTSUS], not every such product is contemplated by the express terms of the [various headings], and the classification provisions often must be construed broadly enough to encompass actual products falling outside the [headings'] ostensible range." (*Id.* at 13, 14.) BP encourages the court "to conclude that Congress did not intend that Customs or this Court should engage in a detailed inquiry regarding the extent to which a particular imported oil was 'similar' to oils and other products of the distillation of high temperature coal tar."[19] (*Id.* at 14.) Based on this view, BP did not attempt to demon-

[19] The entirety of BP's legal position is based on its belief that "Congress made the conscious decision to differentiate between those products that are predominantly aromatic (in Heading 2707) and those that are not (in Heading 2710)." (*Id.* at 14) BP, therefore, interprets the structure of HTSUS Chapter 27 as only differentiating between predominantly aromatic products and predominantly nonaromatic products. (*See id.* at 7.) In support of its understanding, BP heavily relies on a sentence in the Explanatory Notes to heading 2710, HTSUS, which provides that "the heading *does not include* oils with a predominance by weight of aromatic constituents, obtained by the processing of petroleum or by any other process (*heading 27.07*)." Explanatory Notes at 249. Although this provision includes the general phrase "the heading," suggesting that the exclusion applies to heading 2710, HTSUS, in its entirety, the court notes this sentence's location within the Explanatory Notes. This sentence is presented as a paragraph under section (B) and comes before section (C). *See id.* This is relevant because section (B) applies to "[s]imilar oils *in which the weight of the non-aromatic constituents exceeds that of the aromatic constituents*." *Id.* (emphasis added). Furthermore, the final paragraph of Explanatory Note 27.10 contains several generally applicable exclusions, yet lacks any similar provision. *See id.* at 250–51. Based on these observations, the court concludes that this sentence is limited to section (B) of Explanatory Note 27.10. To the extent it reads otherwise, the Explanatory Notes are not binding. *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) ("[A] court may refer to the Explanatory Notes of a tariff subheading, which do not constitute controlling legislative history but nonetheless are intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting subheadings.").

strate a factual similarity, relying instead on aromatic content.[20] (*See id.*) BP's claim fails.

By its plain language heading 2707, HTSUS, applies to "[o]ils and other products of the distillation of high temperature coal tar; similar products in which the weight of the aromatic constituents exceeds that of the nonaromatic constituents." If Congress intended heading 2707 to be a catch all for any predominantly aromatic substance produced by the distillation and blending of any organic hydrocarbon source, the limiting adjective "similar" would not be present. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (holding that "a statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant"). The Heading and its Explanatory Notes indicate that "similar" under heading 2707, HTSUS, requires more than a mere predominance of aromatic constituents.[21] *See* HQ951428 (Apr. 14, 1994) (holding that a high-aromatic-content motor fuel blending stock is a preparation under heading 2710, HTSUS, rather than a product under heading 2707, HTSUS, because "it is not a coal tar crude, but, rather, something more, one reformed for a special use" that is included under heading 2710, HTSUS). The statutory language requires a similarity to products derived from coal tar distillation. Accordingly, Conv. 93 is not classified as a "similar product[]" under heading 2707, HTSUS.

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[20] BP claims that "[t]he requisite similarity of such products fairly [is] presumed from their common organic hydrocarbon source, be it crude petroleum or coal tar, and from their manner of production, primarily consisting of distillation and blending." (*Id.*) During oral argument, BP clarified that a finding of similarity may be based on content, production method, and source material. Specifically, BP now contends that Conv. 93 is a "similar product[]" under heading 2707, HTSUS, because it is a highly aromatic mixture of materials that is produced by the distillation and blending of a common organic hydrocarbon source material. (*See id.*) If this understanding of "similar" were adopted, however, the only real criteria for similarity would be aromatic constituency. The source material and production method characteristics, which apply to a vast array of products, add little to the definition that BP advances.

[21] The relevant portion of Explanatory Note 27.07 reads:

> This heading covers:
>
> (1) The oils and other products obtained by the distillation of high temperature coal tar in more or less broad fractions, which produces mixtures consisting predominantly of aromatic hydrocarbons and other aromatic compounds.
>
> These oils and other products include:
>
> - Benzol (benzene), toluol (toluene), xylol (xylenes) and solvent naphtha.
> - Naphthalene oils and crude naphthalene.
> - Anthracene oils and crude anthracene.
> - Phenolic oils (phenols, cresols, xylenols, etc.).
> - Pyridine, quinoline and acridine bases.
> - Creosote oils.
>
> (2) Similar oils and products with a predominance of aromatic constituents obtained by the distillation of low temperature coal tar or other mineral tar, by the "stripping" of coal gas, by the processing of petroleum or by any other process.

Explanatory Notes at 247.

CONCLUSION

For the aforementioned reasons, the court holds that Conv. 93 is properly classified as a preparation under heading 2710, HTSUS. Furthermore, the record supports that it is an unleaded gasoline, properly classified under 2710.11.15. Accordingly, BP's motion for summary judgment is denied and the Government's cross-motion for summary judgment is granted.

Dated: This 1st day of June, 2010.
New York, New York.

/s/ Jane A. Restani
JANE A. RESTANI
Chief Judge