Slip Op. 03–136

UNITED STATES, PLAINTIFF, *v.* NEW-FORM MANUFACTURING COMPANY, LTD., DEFENDANT.

Court No. 01–00034

JUDGMENT

RIDGWAY, JUDGE: This action having been duly submitted for decision; and the Court, after due deliberation, having rendered a decision herein, imposing a civil penalty of $73,867.36 and awarding Plaintiff interest and costs (*see* Slip Op. 03–77, 27 CIT ___ (June 30, 2003)); and

Upon consideration of Plaintiff's Notice of Filing and Proposed Final Judgment Order, as well as Plaintiff's Bill of Costs Against New-Form Manufacturing Company, Ltd., and Position on the Award of Pre-Judgment Interest; and

In light of Plaintiff's responses to the questions posed in the Court's letter of October 15, 2003, as well as Plaintiff's other representations in the course of the October 20, 2003 teleconference with the Court in this matter; and

Noting the absence of any opposition or other comment by Defendant;

Now, therefore, in conformity with Slip Op. 03–77, it is hereby

ORDERED, ADJUDGED and DECREED that Plaintiff recover from Defendant $73,867.36 in penalties; and it is further

ORDERED, ADJUDGED and DECREED that Plaintiff recover from Defendant $1,612.26 for costs incurred in this matter; and it is further

ORDERED, ADJUDGED and DECREED that Defendant pay to Plaintiff post-judgment interest on the sums awarded as penalties and costs, in accordance with 28 U.S.C. § 1961, from the date of this Judgment to the date of payment; and it is further

ORDERED, ADJUDGED and DECREED that this action be, and it hereby is, dismissed.

Slip Op. 03–137

DOLLY, INC., PLAINTIFF, *v.* UNITED STATES OF AMERICA, DEFENDANT.

Court No. 98–04–00677

[Judgment is entered for Plaintiff after trial as to Customs' classification of certain bags based upon all of the evidence, papers, and arguments submitted by the parties. Defendant is directed to reliquidate the subject entries at the appropriate duty rate and refund any amounts owing, including interest, as provided for under the law.]

Neville Peterson LLP (*John M. Peterson*, *Curtis W. Knauss*), Washington, D.C., for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice; *James A. Curley*, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, for Defendant.

Dated: October 22, 2003

OPINION

CARMAN, CHIEF JUDGE: Pursuant to 28 U.S.C. § 2640(a)(1) (2000), this Court tried a classification dispute involving certain mini bags.[1] Plaintiff, Dolly, Inc., challenges the United States Department of Customs', now the Bureau of Customs and Border Protection, ("Customs") classification of the mini bags under heading 4202 of the Harmonized Tariff Schedule of the United States ("HTSUS") (1997), 19 U.S.C. § 1202 (1994). The Court has exclusive jurisdiction pursuant to 28 U.S.C. § 1581(a). Based upon the findings of fact and conclusions of law set forth below, the Court enters final judgment in favor of Plaintiff.

BACKGROUND

The seven entries at issue in this case were imported in 1997 through the Port of Dayton, Ohio. (Pretrial Order, Schedule C, *Uncontested Facts* ¶1.) The mini bags were entered and liquidated under subheading 4202.92.45 HTSUS. (*Id.* ¶2.) Heading 4202 provides:

[1] As discussed, this case turns on the proper description of the subject merchandise. For the purposes of this opinion, the Court will use the general term "mini bags" to refer to the merchandise at issue.

4202	Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly or mainly covered with such materials or with paper:

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4202.92	With outer surface of sheeting of plastic or of textile materials:
	Travel, sports and similar bags:
	With outer surface of textile materials:
	Of vegetable fibers and not of pile or tufted construction:

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4202.92.45	Other 20%

HTSUS (1997). Accordingly, Customs assessed a tariff of 20% *ad valorem*. Plaintiff protested Customs' classification of the subject merchandise, asserting that Customs should have classified the merchandise under subheading 3924.10.50, HTSUS, which provides:

3924	Tableware, kitchenware, other household articles and toilet articles, of plastics:
3924.10	Tableware and kitchenware:
3924.10.10	Salt, pepper, mustard and ketchup dispensers and similar dispensers
3924.10.20	Plates, cups, saucers, soup bowls, cereal bowls, sugar bowls, creamers, gravy boats, serving dishes and platters
3924.10.30	Trays
3924.10.50	Other 3.4%

HTSUS (1997). The corresponding duty rate under HTSUS 3924.10.50 is 3.4% *ad valorem*.

Customs denied Plaintiff's protests. (Pretrial Order, Schedule C, *Uncontested Facts* ¶3.) All liquidated duties, charges, and exactions for the subject entries were paid prior to the commencement of this action. (*Id.*) Plaintiff seeks reliquidation of the subject entries and a

full refund of duties paid together with interest as provided by law. (Complaint at 2–3.) In 2001, the parties filed cross-motions for summary judgment. In denying the parties' cross-motions for summary judgment, this Court held that there was a genuine issue of material fact as to the proper description of the subject merchandise. *Dolly, Inc. v. United States*, No. 98–04–00677, 2002 Ct. Int'l Trade LEXIS 58, at *9–*10 (Ct. Int'l Trade June 20, 2002).

Throughout the administrative process and this litigation, Plaintiff has continued to assert that the mini bags were "designed[,] manufactured, marketed and sold to provide the insulated transport and storage of infant and toddler's food and beverages." (Pretrial Order, Schedule D–1, *Pl.'s Claims and Defenses* ¶1.) As such, Plaintiff contends that the mini bags are correctly classified under 3924.10.50, HTSUS covering other household articles of plastic. (*Id.* ¶2.)

Defendant maintains that the bags at issue were properly classified by Customs as entered under heading 4202, HTSUS, covering travel bags and similar containers because the subject merchandise is "designed to hold during transport a variety of items used in caring for an infant or young child." (Pretrial Order, Schedule D–2, *Def.'s Liability Claims and Defenses* ¶1.) Defendant contends that the mini bags "are not principally used to prepare, serve or store food or beverages," as required under heading 3924; rather, the mini bags "are used to organize, store, protect and carry various items." (*Id.* ¶1–2.)

The Court held a bench trial on September 16, 2003, to resolve factual disputes surrounding the proper description of mini bags at issue and to determine the correct classification of the subject merchandise under the HTSUS.

STANDARD OF REVIEW

The Court makes its determination *de novo* based upon the record before the Court, not upon the record developed by Customs. 28 U.S.C. § 2640. Customs classification rulings are usually accorded deference in proportion to their "power to persuade" following *United States v. Mead Corp.* and *Skidmore v. Swift & Co. See Rubie's Costume Co. v. United States*, 337 F.3d 1350, 1355 (Fed. Cir. 2003) (citing *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001), in turn quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The Federal Circuit has noted that the Supreme Court's decision in *Mead* "indicates that the following factors are to be evaluated when determining the degree of deference to accord a Customs classification ruling: 'its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight.' Those factors echo the factors set forth in *Skidmore* for determining the weight to accord an administrative ruling, interpretation, or opinion . . . 'depend[ent] upon the thoroughness evident in its consideration, the va-

lidity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give power to persuade.' " *Rubie's Costume Co. v. United States*, 337 F.3d 1350, 1355–1356 (Fed. Cir. 2003) (quoting *Mead*, 533 U.S. at 235 and *Skidmore*, 323 U.S. at 140). However, in this case, Customs summarily denied Plaintiff's protests of the classification without issuing an official ruling, therefore the Court will consider the parties arguments without deference. *Hartog Foods v. United States*, 291 F.3d 789, 791 (Fed. Cir. 2002) ("[B]ecause Customs denied this protest without an official ruling, this court extends no *Skidmore* deference. This court therefore considers the parties' arguments in this case without deference."); *see also Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1307–1308 (Fed. Cir. 2003) (considering, without mention of *Skidmore* deference, Customs' summary denial of the plaintiff's protest of the classification of the subject merchandise).

ANALYSIS

"Although Customs's decision 'is presumed to be correct' on review, 28 U.S.C. § 2639(a)(1), the CIT 'may consider any new ground' even if not raised below, § 2638, and 'shall make its determinations upon the basis of the record made before the court,' rather than that developed by Customs, § 2640(a)." *Mead*, 533 U.S. at 233 n.16; *see also G&R Produce Co. v. United States*, No. 96–11–02569, 2003 Ct. Int'l Trade LEXIS 118, at *7 (Ct. Int'l Trade Sept. 15, 2003); *Int'l Home Textiles, Inc. v. United States*, No. 99–10–00627, 2001 Ct. Int'l Trade LEXIS 110, at *6 n.5 (Ct. Int'l Trade Aug. 10, 2001). Under § 2639(a)(1), the presumption of correctness allocates the burden of proof to Plaintiff in presenting evidence that Customs' classification of the subject merchandise was incorrect. *See Universal Electronics, Inc. v. United States*, 112 F.3d 488, 493 (Fed. Cir. 1997).

The General Rules of Interpretation (GRI) of the HTSUS and the Additional United States Rules of Interpretation direct the classification of merchandise entering the United States. *See Len-Ron*, 334 F.3d at 1308; *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). The HTSUS is organized by headings, followed by one or more subheadings which provide a more detailed segregation of the heading. *Orlando Food*, 140 F.3d at 1439. Under GRI 1, the Court must first construe the language of the heading and any section or chapter notes in question to determine whether the product at issue is classifiable under that heading. GRI 1, 6. After determining whether the merchandise is classifiable under the heading, the Court may look to the subheadings to find the correct classification for the merchandise at issue. *Orlando Food*, 140 F.3d at 1440; GRI 1, 6.

Determining the proper classification of the mini bags involves a two-step analysis: "(1) ascertaining the proper meaning of specific terms in the tariff provision; and (2) determining whether the mer-

chandise at issues comes within the description of such terms as properly construed." *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391; *see also Universal Elecs.*, 112 F.3d. at 491. The first step is a question of law; the second is a question of fact. *Id.*

Turning first to the central question of law, the competing tariff provisions are heading 4202 and heading 3924, HTSUS. Heading 4202 provides for "[t]runks, suitcases, vanity cases, attache cases, . . . and similar containers,"[2] and heading 3924 covers "[t]ableware, kitchenware, other household articles and toilet articles, of plastics." HTSUS (1997).

Chapter 39, Note 2(ij) states that Chapter 39 does not cover "[s]addlery or harness (heading 4201) or trunks, suitcases, handbags or other containers of heading 4202." Accordingly, if the mini bags are prima facie classifiable under heading 4202, then applying Note 2(ij), the mini bags are specifically excluded from classification under heading 3924. *See Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423, 1429 (Fed. Cir. 1997). Therefore, it is necessary to determine whether or not the mini bags are classifiable within heading 4202 before heading 3924 can be considered. *Id.*

Heading 4202 and heading 3924 are organized as lists of items or exemplars followed by general phrases: "similar containers" in heading 4202; "other household articles" in heading 3924. As the Federal Circuit has directed, "when a list of items is followed by a general word or phrase, the rule of *ejusdem generis*[3] is used to determine the scope of the general word or phrase." *Avenues in Leather, Inc. v. United States*, 178 F.3d 1241, 1244 (Fed. Cir. 1999) (citing *Totes, Inc. v. United States*, 69 F.3d 495, 498 (Fed. Cir. 1995)). "In classification cases, *ejusdem generis* requires that . . . the [subject] merchandise must possess the same essential characteristics or purposes that

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[2] In 2001, pursuant to Presidential Proclamation 7515, the term "insulated food or beverage bags" was added in the text of Heading 4202, HTSUS. Proclamation No. 7515, 66 Fed. Reg. 66,549, 66,619 (Dec. 18, 2001), *as corrected by* Technical Corrections to the Harmonized Tariff Schedule of the United States, 67 Fed. Reg. 2008 (Jan. 15, 2002). The provision now reads:

> Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, *insulated food or beverage bags*, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly or mainly covered with such materials or with paper.

HTSUS 4202 (2003) (emphasis added). This change requires that all insulated food or beverage bags and similar containers, entered on or after January 10, 2002, be classified under Heading 4202. The Court notes that these mini bags were entered in 1997; therefore, the duty rate as it was determined then under the HTSUS will apply in this case. *See* 19 C.F.R. § 141.69.

[3] "Of the same kind, class, or nature." BLACK'S LAW DICTIONARY 517 (6th ed. 1990).

unite the listed examples preceding the general term." *Id.* (citations omitted). Under an *ejusdem generis* analysis, this Court "must consider the common characteristics or unifying purpose of the listed exemplars in a heading as well as consider the specific primary purpose of the imported merchandise." *Id.* The Federal Circuit has noted that "[c]lassification . . . under *ejusdem generis* is appropriate only if the imported merchandise shares the characteristics or purpose and does not have a more specific primary purpose that is inconsistent with the listed exemplars." *Id.* (citations omitted).

First, the Court must consider the common characteristics or unifying purpose of the exemplars listed in the tariff provisions relevant in this case: heading 4202 and heading 3924, HTSUS. This particular question has been addressed in prior cases before this Court and the Federal Circuit. *See, e.g., Len-Ron Mfg. Co. v. United States*, 118 F. Supp. 2d 1266 (Ct. Int'l Trade 2000), *aff'd*, 334 F.3d 1304 (Fed. Cir. 2003) (determining the proper classification of small plastic cosmetic bags used in cosmetic sales promotions under heading 4202); *Avenues in Leather, Inc. v. United States*, 11 F. Supp. 2d 719 (Ct. Int'l Trade 1998), *aff'd*, 178 F.3d 1241, 1242 (Fed. Cir. 1999) (affirming Customs' classification of leather folios used to store, organize, and carry papers, books, pens, pencils, etc. under heading 4202); *SGI, Inc. v. United States*, 917 F. Supp. 822 (Ct. Int'l Trade 1996); *rev'd*, 122 F.3d 1468, 1469 (Fed. Cir. 1997) (examining the applicability of headings 4202 and 3924 in classifying "portable soft-sided vinyl insulated coolers with handles or straps used for storage of food or beverages"); *Totes, Inc. v. United States*, 865 F. Supp. 867 (Ct. Int'l Trade 1994), *aff'd*, 69 F.3d 495 (Fed. Cir. 1995) (considering the classification of "Totes Trunk Organizers" under heading 4202); *Sports Graphics, Inc. v. United States*, 806 F. Supp. 268 (Ct. Int'l Trade 1992), *aff'd*, 24 F.3d 1390 (Fed. Cir. 1994) (reviewing the classification of soft-sided plastic containers with foam insulation, a zippered top, and carrying straps under competing provisions of the Tariff Schedules of the United States ("TSUS") that are similar to headings 4202 and 3924, HTSUS.)

"It is well-established that the essential characteristic and purposes of the heading 4202, HTSUS, exemplars is 'to organize, store, protect and carry various items.' " *Len-Ron*, 118 F. Supp. 2d at 1279–1280 (quoting *SGI*, 122 F.3d at 1471; *Totes*, 865 F. Supp. 867, 872), *see also Len-Ron*, 334 F.3d at 1309 n.4. ("This court has noted that the essential characteristics of the exemplars listed in Heading 4202 are to organize, store, protect and carry various items.").

The essential characteristic and purpose of the exemplars listed in heading 3924, HTSUS is to store or contain food and beverages. *SGI*, 122 F.3d at 1473 ("The exemplars listed in Heading 3924 encompass various household containers for foodstuffs."). Although acknowledging that the Explanatory Notes are not controlling legislative history, the Federal Circuit looked to the Explanatory Notes accompa-

nying heading 3924 for additional guidance. *Id.* "The explanatory notes specifically mention 'luncheon boxes,' an article similar to the coolers at issue, as 'other household articles.' " *Id.* The Federal Circuit agreed with this Court's analysis that "the coolers [could] be considered 'household articles [because they] may be used in a number of locations where food or beverages might be consumed, such as in and around the home and during trips away from home on picnics, sporting, and at spectator and participation sporting events.' " *Id.* (quoting *SGI*, 917 F. Supp. at 825).

Under the second step in the *ejusdem generis* analysis, the Court must "consider the specific primary purpose of the imported merchandise." *Avenues in Leather*, 178 F.3d at 1244. The specific primary purpose "must be [the subject merchandise's] predominant use, rather than simply one possible use." *Len-Ron*, 334 F.3d at 1311. To determine the specific primary purpose, the Court "must look to all the pertinent circumstances . . . includ[ing] the general physical characteristics of the merchandise, the expectation of the ultimate purchasers, the channels, class or kind of trade in which the merchandise moves, the environment of the sale (i.e., accompanying accessories and the manner in which the merchandise is advertised and displayed), [and] the use." *United States v. Carborundum Co.*, 536 F.2d 373, 377 (C.C.P.A. 1976). Once the specific primary purpose of the subject merchandise has been established, the Court must determine if the subject merchandise shares the same essential characteristic or purpose as the exemplars in the competing headings.

When comparing between classification under heading 4202 and heading 3924, HTSUS, the Federal Circuit noted with approval this Court's analysis that "the focus should be on whether food or beverage is involved." *SGI*, 122 F.3d at 1469, 1471–72; *see also Sports Graphics*, 24 F.3d at 1393 ("The trial court concluded that when determining the classification of the merchandise at issue here, under a proper analysis, the focus should be on whether food or beverage is involved. We agree."). The appellate court held that "[i]n focusing on whether food or beverage is involved, it is clear that the [subject] merchandise has a different purpose, *the storage of food and beverage*, which precludes the merchandise from being *ejusdem generis* with the exemplars listed in [4202]." *SGI*, 122 F.3d at 1469–1470 (emphasis added).

Here, the trial on September 16, 2003, was held to establish the specific primary purpose of the mini bags at issue. As Defendant asserts, if the Court finds that the specific primary purpose of the mini bags is to "organize, store, protect, and carry various items," then the mini bags were correctly classified by Customs under 4202 and are specifically excluded from classification under heading 3924 by operation of Chapter 39, Note 2(ij). However, consistent with Plaintiff's contentions, if the Court finds that the specific primary purpose of the mini bags is to "store food and beverages," then, following the

Federal Circuit's analysis in *SGI*, the mini bags are precluded from being *ejusdem generis* with the exemplars listed in 4202 and should be classified under heading 3924, HTSUS.

A. Findings of Fact

Pursuant to Rule 52(a), "in all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." USCIT R. 52(a) (2002). As stated above, determining whether the mini bags come within heading 4202 or heading 3924 as properly construed, is a question of fact. *See Universal Elecs.*, 112 F.3d at 491. Under the *ejusdem generis* analysis, having already established the essential characteristics or purposes of the exemplars in heading 4202 and heading 3924, the Court must now find the specific primary purpose of the mini bags. *See Avenues in Leather*, 178 F.3d at 1244. As detailed below, the evidence presented at trial supports the finding that the mini bags at issue are of a distinct class or kind of merchandise within the juvenile products industry that have the specific primary purpose of transporting and storing infant and toddler food and beverages at a desired temperature over a period of time.

The following uncontested facts were agreed to by the parties in the pretrial order submitted to the Court on September 3, 2003.

1. The bags at issue were imported under the following seven entries listed on the summons: Entry Nos. F81–0068724–0, F81–0068823–0, F81–0068830–5, F81–0068750–5, F81–0068831–3, F81–0068914–7, F81–0068946–9. (Pretrial Order, Schedule C, *Uncontested Facts* ¶1.)
2. The bags at issue are nine different styles, designated by Dolly, Inc. as style numbers 1270, 8458, 8467, 8477, 8483, 8496, 8498, 8499, and 8525. (*Id.* ¶1.)
3. The bags at issue share several common design features: each bag has either a zipper or a hook and loop closure on top; the interior of each bag contains elastic bottle loops; the bags have attached carrying straps; and five of the bags have small exterior pockets. (*Id.* ¶¶5–9.)

The Court finds the following facts based upon the parties' submissions at trial and the Court's examination of the evidence:

4. The nine mini bag styles at issue are described in Dolly's advertising literature as follows: Style No. 1270 "Pooh 'Profile' Mini Bottle Tote" (Def.'s Ex. I at 40); Style No. 8458 "Noah's Parade Mini" (*Id.* at 44, 50); Style No. 8467 "Pastel Icons Mini" (*Id.* at 57); Style No. 8477 "Checkerboard Mini" (*Id.* at 71); Style No. 8483 "Bedtime Babies Mini" (*Id.* at 34); Style No. 8496 "Alphabet Mini" (*Id.* at 70); Style No. 8498 "Checks Mini" (*Id.* at 72); Style No. 8499 "Honeypots Mini" (*Id.* at 63); Style No. 8525 "Noah's 2 by 2 Mini." (*Id.* at 44, 49).

5. The mini bags are made of three layers of plastic: a decorative outer layer; an insulative middle layer approximately one-fourth of an inch thick; and an interior layer of white plastic. (*See* Pl.'s Exs. 1–9.)
6. The main distinguishing feature among the bags is the decorative graphics featured on the outer layer of plastic, for example, Disney characters, Winnie the Pooh, Noah's Ark, etc., which do not affect the classification of the merchandise. (*Id.*)
7. Although each bag has slightly different dimensions, overall, the bags are approximately nine inches long, four and one-half inches wide, and ten and one-half inches high. (*See* Pl.'s Exs. 1–9; Def.'s Ex. J, Diaper Bag Specifications Style No. 8496; Def.'s Ex. K, Diaper Bag Specifications Style No. 8498; Def.'s Ex. L, Diaper Bag Specifications Style No. 8467; Def.'s Ex. M, Diaper Bag Specifications Style No. 8525; Def.'s Ex. N, Diaper Bag Specifications Style No. 8458; Def.'s Ex. O, Diaper Bag Specifications Style No. 8499.)
8. Most of the styles of mini bags at issue have a stiff white plastic-coated cardboard floor insert so that the items placed inside the mini bags will not fall over. (Pl.'s Exs. 2–9.)
9. The mini bags possess some insulative properties.[4]
10. Plaintiff presented the testimony of Mr. Dennis J. Sullivan, President and C.E.O. of Dolly, Inc. since 1985. (Trial Tr. at 18, 20.)
11. Mr. Sullivan has over 30 years of experience in the juvenile industry, including participation and leadership in various juvenile trade associations. (*Id.* at 19–24.)
12. Mr. Sullivan's testimony was based on his professional experience and various market research that had been conducted by Dolly, Inc. regarding their full line of juvenile products. (*Id.* at 36.) The Court finds his testimony credible and highly probative.
13. Plaintiff also presented the testimony of Ms. Tracy Bowden, a former buyer of juvenile products for the Kmart Corporation. (*Id.* at 88, 91.)
14. Ms. Bowden has over fifteen years of experience in the juvenile products line. (*Id.* at 88, 109.)
15. Ms. Bowden's testimony was based on her professional experience and Kmart's sales records. (*Id.* at 96, 109.) The Court finds

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[4] During the course of his testimony, Mr. Sullivan, president and C.E.O. of Dolly, Inc., was presented with two bottles of cold milk. Plaintiff's counsel asked Mr. Sullivan to place one bottle of cold milk inside one mini bag, Style No. 1270, and allowed the other bottle of cold milk to remain exposed to the open air of the courtroom. (Trial Tr. at 27–28.) Each bottle had a thermometer attached which read 33.8 degrees. (*Id.* at 27.) After approximately fifty minutes, Mr. Sullivan read the temperatures on the bottles. (*Id.* at 69–70.) The bottle inside the mini bag maintained a colder temperature, 44.4 degrees, versus the bottle that was exposed to the open air of the courtroom, 52.8 degrees. (*Id.* at 69)

the testimony given by Ms. Bowden credible and highly probative.

16. In the juvenile products industry, there is a general umbrella category of products referred to as "diaper bags." (*Id.* at 24, 93.)
17. Within that umbrella category, the industry recognizes two distinct kinds of merchandise: diaper bags or standard tote bags and mini bags. (*Id.* at 24, 85, 93.)
18. Diaper bags or standard tote bags are marketed, designed, and primarily used to carry various baby necessities. (*Id.* at 56–58, 102.) These standard tote bags are large, at least twice the size of mini bags, have greater storage capacity, usually have multiple interior and exterior pockets or compartments for organizing various baby necessities, and often come with a separate "dirty duds" bags to hold soiled clothing. (*Id.* at 59–61, 103–104.)
19. Mini bags are marketed, designed, and primarily used to carry baby bottles, jars of baby food, "sipee" cups for toddlers, and other feeding items for toddlers and infants. (*Id.* at 26–28, 53–54, 58, 94–95, 102, 104.) Mini bags are small, insulated bags, usually with only one storage compartment, and contain elastic bottle loops in the interior of the bag. (*Id.* at 25, 30–51, 94–97; Pl.'s Exs. 1–9;)
20. Consumers generally purchase both kinds of bags, standard totes and mini bags, because they are used for two different functions. (*Id.* at 31–33, 95–96.)
21. Mini bags are used on trips when storing baby bottles and food is the primary concern. (*Id.* at 52, 102.)
22. The main reason why purchasers buy mini bags is to transport baby food, bottles, milk, formula, etc. (*Id.* at 32–33, 102, 107.)
23. Mini bags allow consumers to keep feeding items separate from diaper changing items. (*Id.* at 32–33, 61.)
24. Mini bags are not primarily used to carry other baby necessities (i.e., toys, clothing, diaper changing accessories) because consumers want to keep baby food, bottles, and feeding accessories away from other baby items that might be soiled. (*Id.* at 32.)
25. Mini bags are generally sold in the infant department of retail stores with the other juvenile products. (*Id.* at 36–37, 96–97, 158.)
26. Mini bags are usually sold adjacent to feeding accessories and sometimes near diapering supplies. (*Id.* at 96, 102, 158.)
27. Five styles of the mini bags submitted into evidence have "hang tags" attached which are intended to advertise the mini bags to the consumer. (*See* Pl.'s Exs. 1, 2, 4, 6, 8.) Four of the hang tags describe the merchandise as "mini totes," and list the features as "insulated fabric keeps contents warm or cool—elastic bottle loops inside—waterproof lining/vinyl lining—vinyl wipes clean

with damp cloth—fabric styles hand washable." (Pl.'s Exs. 1, 8, 6, 4.) One hang tag describes the merchandise as a "diaper bag" and lists the features as "fashion friendly diaper bags for all those away-from-home baby necessities. Inside bottle holders—comfortable shoulder-length handles—water resistant lining—easy care, wipe-clean fabrics." (Pl.'s Ex. 2.)

28. The subject merchandise is referred to by many names throughout Dolly, Inc.'s various advertisements, price lists, invoices, and product specifications: "mini" (Def.'s Ex. I at 23–24, 33–34, 38–39, 44–45, 57, 63, 70–72, 84, 94–95, 99–102, 104–111, 113–120, 122–123, 126–127, 130–132, 134–136); "bottle tote" (*Id.* at 74–76, 81–82, 85); "mini bag" (*Id.* at 86–92); "mini diaper bag" (*Id.* at 85, 93, 96); "mini-tote" (*Id.* at 85, 128); and "mini bottle tote" (*Id.* at 25, 40).
29. One style of the subject merchandise is described on Dolly's price list as "Disney Babies Bottle Tote," under the general category of "Diaper Bags." (*Id.* at 74.)
30. In one Dolly, Inc. advertisement, standard tote bags and mini bags are marketed as "New Disney Diaper Bags and Bottle Totes." (*Id.* at 75.) The advertisement states that "Dolly and Disney team up to bring fashion and function together in this new line of diaper bags and bottle totes." (*Id.*) Further, the advertisement states that "[a] bottle tote, a standard and a deluxe diaper bag are available in pink or blue." (*Id.*)
31. Another Dolly, Inc. advertisement presents standard tote bags and mini bags as "New Dolly Diaper Bags and Bottle Totes." (*Id.* at 81.)
32. Dolly, Inc. urges retailers in one advertisement to "[s]tock Disney Babies Diaper Bags and Bottle Totes." (*Id.* at 82.)
33. Another Dolly, Inc. advertisement attempts to sell to retailers an in-store merchandising aid which describes the subject merchandise as a "Lunch Bag, Bottle Tote, Mini Diaper Bag, School Tote, Carry-all for Travel." (*Id.* at 85.)
34. The subject merchandise is described as "bottle bags" in Plaintiff's protests. (*Id.* at 35–36, 20–21, 26–27, 41–42, 51–52, 58, 64.)
35. In the invoices, packing lists, and weight lists provided to Plaintiff by its Hong Kong exporters, the subject merchandise is listed as "PVC diaper bags." (*Id.* at 29–32, 47, 54–56, 60–62, 66–69.)
36. The subject merchandise is listed as "diaper bags" on the entry papers. (Def.'s Exs. A–G.)
37. Defendant presented the testimony of Mr. Kevin P. Gorman. (Trial Tr. at 114.) The Court finds the testimony given by Mr. Gorman to be credible and probative.

38. Since 1975, Mr. Gorman has been a national import specialist in charge of the product line covered by heading 4202, HTSUS. (*Id*. at 117–118, 120.)
39. Mr. Gorman based his knowledge regarding the subject merchandise on his examination of the mini bags, visits to various retail stores over the course of his employment with Customs, his personal observations, and general knowledge. (*Id*. at 156, 159.)
40. Mr. Gorman conceded that the mini bags were insulated. (*Id*. at 147–148.)
41. Mr. Gorman testified that he had attended "all types of trade shows that might be relevant to the assigned line of merchandise." (*Id*. at 120.) Yet, Mr. Gorman acknowledged that he had never attended a trade show for juvenile products. (*Id*. at 181.)

1. Factual Conclusions

At trial, Defendant claimed that the bags at issue are merely smaller versions of standard tote bags and are manufactured, designed, and primarily used to carry various baby necessities. (*Id*. at 193.) The Court is not persuaded by Defendant's claims. At trial, Defendant relied heavily on the Hong Kong exporters' invoices and packing lists, and a few references in Dolly Inc.'s literature, that identify the subject merchandise as "diaper bags." (Trial Tr. at 197–198.) However, a thorough review of the exhibits submitted by Defendant reveals that Dolly, Inc. refers to the subject merchandise by a variety of names, most commonly "mini" or "mini bottle totes." (*See generally* Def.'s Ex. I.) Further, the former buyer for Kmart testified that the subject merchandise is recognized throughout the juvenile products industry as "minis." (Trial Tr. at 93.) The overwhelming evidence presented at trial indicates that the mini bags are a distinct product, identifiable within the juvenile products industry, and recognized by retailers and consumers. The Court finds the testimony of Mr. Sullivan and Ms. Bowden very persuasive. As this Court's predecessor stated: "It has long been held that importers and merchants have every incentive for knowing the uses to which their goods are or may be put. . . . [E]xecutives concerned with designing, framing specifications, ordering, importing, selling, distributing, and promoting an article have to know its chief uses and are competent to testify about them. *Novelty Import Co. v. United States*, 285 F. Supp. 160, 165–166 (Cust. Ct. 1968) (citation omitted), *see also Mast Indus., Inc. v. United States*, 9 C.I.T. 549, 551–552 (Ct. Int'l Trade 1985). Defendant did not present any contrary evidence of use, other than Mr. Gorman's anecdotal evidence regarding his personal observations of the general public. Although Plaintiff conceded that the mini bags could be used to carry anything that would fit inside (Trial Tr. at 79–80), that possibility does not change the fact that the use of

the mini bags "which exceeds all others" is the storage of food and beverages. *Sports Graphics*, 24 F.3d at 1392–1394.

The former Court of Customs and Patent Appeals stressed that in classification disputes, "the [subject] merchandise itself may be strong evidence of use." *Mast Indus.*, 9 C.I.T. at 552 (citing *United States v. Bruce Duncan Co.*, 50 C.C.P.A. 43, 46 (1963)); *see also Int'l Home Textiles*, 2001 Ct. Int'l Trade LEXIS at *10. Here, the Court has examined the mini bags at issue and concludes that the mini bags are small, insulated, posses a single compartment, lack other organizing features, and have at least two elastic bottle loops that, when filled with bottles of milk or jars of baby food, would leave little room for much else. Although some styles of the mini bags at issue have a small, flat pocket on the front panel of the bag, this design feature does not add significant storage space or other organizational properties that might change the primary use of the subject merchandise. Weighing all of the evidence submitted, the Court finds that the mini bags have the specific primary purpose of transporting and storing infant food and beverage over a period of time in an insulated environment.

B. Conclusions of Law

In light of the factual findings set forth above, the Court concludes that the mini bags at issue do not share the essential characteristics of the exemplars listed in heading 4202, that is, containers whose principal use is to protect, carry, and store various items. Similar to the cooler bags examined in *SGI*, the mini bags at issue have the specific primary purpose of transporting and storing food and beverages in an insulated environment. As the appellate court reasoned in *SGI*, merchandise that has the specific primary purpose of storing food and beverages, is "preclude[d] . . . from being *ejusdem generis* with the exemplars listed in [4202]." *SGI*, 122 F.3d at 1469–1470.

Because the mini bags' primary purpose of storing and transporting food and beverages precludes classification under heading 4202, the Court next examines whether classification under Plaintiff's proposed heading 3924, HTSUS, would be appropriate. In considering classification under 3924, the focus should be on whether food and beverage in involved. *SGI*, 122 F.3d at 1469; *see also Sports Graphics*, 24 F.3d at 1393. As the Federal Circuit stated in SGI, "none of the exemplars under [4202] involves containment of any food or beverage . . . however, [heading 3924] does encompass exemplars that are *ejusdem generis* with the [subject merchandise] because their purpose is to contain food and beverages." *SGI*, 122 F.3d at 1472. The Court concludes that the mini bags at issue are *ejusdem generis* with the exemplars listed in 3924 because the mini bags' specific primary purpose is to contain food and beverages.

Under the GRI 6, the next step in the analysis is examining the classification of the mini bags under the appropriate subheading. *See* GRI 6. Heading 3924, HTSUS is organized as follows:

3924	Tableware, kitchenware, other household articles and toilet articles, of plastics:		
	3924.10	Tableware and kitchenware:	
	3924.10.10	Salt, pepper, mustard and ketchup dispensers and similar dispensers	
	3924.10.20	Plates, cups, saucers, soup bowls, cereal bowls, sugar bowls, creamers, gravy boats, serving dishes and platters	
	3924.10.30	Trays	
	3924.10.50	Other	3.4%

HTSUS (1997). The catch-all subheading, 3924.10.50, "Other," is appropriate because the other subheadings under 3924 are inapposite. *See Orlando Food*, 140 F.3d at 1442. "Absent a more apt subheading," the catch-all subheading 3924.10.50, HTSUS is the appropriate classification for the mini bags at issue. *See id*. Accordingly, the Court concludes that the mini bags are correctly classified under subheading 3924.10.50, HTSUS. The corresponding duty rate under 3924.10.50, HTSUS, is 3.4% *ad valorem*. HTSUS (1997).

CONCLUSION

In accordance with the foregoing findings of fact and conclusions of law, the Court concludes that the bags at issue are properly classified under HTSUS subheading 3924.10.50. Defendant is directed to reliquidate the subject entries at the appropriate duty rate and refund any amounts owing, including interest, as provided for under the law.

Slip Op. 03–138

FORMER EMPLOYEES OF AMERIPHONE, INC., PLAINTIFFS, *v.* UNITED STATES, DEFENDANT.

Court No. 03–00243

[Final Corrected Remand Determination, certifying Plaintiffs as eligible to apply for NAFTA-TAA benefits, is sustained.]

Decided: October 24, 2003

Michael H. Greenberg, for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, and *Patricia McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stefan Shaibani*); *Charles D. Raymond*, Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, United States Department of Labor (*Gary E. Bernstecker*), Of Counsel; for Defendant.

OPINION

RIDGWAY, Judge: Plaintiffs ("the Workers")—former employees of Ameriphone, Inc., a wholly owned subsidiary of Plantronics, Inc., Garden Grove, California ("Ameriphone")—brought brought this action to contest the determination of the U.S. Department of Labor ("Labor Department") denying their petition for certification of eligibility for transitional adjustment assistance benefits under the North American Free Trade Agreement ("NAFTA") Implementation Act ("NAFTA-TAA benefits"). *See* Letter to Court from D. Arnston, dated May 5, 2003 ("Complaint"); 67 Fed. Reg. 61,160, 61,162 (Sept. 27, 2002); 68 Fed. Reg. 12,938 (March 18, 2003); A.R. 22, 26; A.R. 37–38.[1] Jurisdiction lies under 28 U.S.C. § 1581(d)(1) (2000).

Pending before the Court is the Labor Department's Notice of Revised Determination on Remand (Corrected: October 1, 2003) ("Final Corrected Remand Determination"), which certifies that:

> All workers of Ameriphone, Inc., . . . who became totally or partially separated from employment on or after June 24, 2001 through two years of this certification [dated October 1, 2003], are eligible to apply for NAFTA-TAA [benefits] under Section 250 of the Trade Act of 1974.

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[1] Because the administrative record in this action includes confidential information, two versions of that record were prepared. Citations to the public administrative record are noted as "A.R.," while citations to the confidential version are noted as "C.A.R.". The supplemental administrative record, developed on remand, is paginated to follow the record of the initial investigation, and begins with page 44.

68 Fed. Reg. 60,120 (Oct. 21, 2003). The Workers have advised that they are satisfied with that certification. Accordingly, with the observations and clarifications set forth below, the Labor Department's Final Corrected Remand Determination is sustained.

I. Background

A. *The Trade Adjustment Assistance Laws*

Modeled generally on the trade adjustment assistance program under the Trade Act of 1974, 19 U.S.C. § 2271 *et seq.* (2000), the NAFTA-TAA program entitles certain workers whose job losses are attributable to increased import competition from—or shifts in production to—Canada or Mexico to receive benefits including employment services, appropriate training, job search and relocation allowances, and income support payments.[2] 19 U.S.C. § 2331 (2000). *See generally Former Employees of Chevron Prods. Co. v. U.S. Sec'y of Labor*, 26 CIT ___, ___, 245 F. Supp. 2d 1312, 1317–18 (2002) ("*Chevron I*").

The trade adjustment assistance laws are remedial legislation and, as such, are to be construed broadly to effectuate their intended purpose. *See generally Woodrum v. Donovan*, 5 CIT 191, 198, 564 F. Supp. 826, 832 (1983) (*citing United Shoe Workers of Am. v. Bedell*, 506 F.2d 174, 187 (D.C. Cir. 1974)), *aff'd*, 737 F.2d 1575 (Fed. Cir. 1984). *See also Former Employees of Champion Aviation Prods. v. Herman*, 23 CIT 349, 352 (1999) (citations omitted) (NAFTA-TAA statute is remedial legislation, to be construed broadly); *Chevron I*, 26 CIT at ___, 245 F. Supp. 2d at 1318 (citations omitted) (same). Moreover, both "because of the *ex parte* nature of the certification process, and the remedial purpose of [the statutes], the [Labor Department] is obliged to conduct [its] investigation with the utmost regard for the interests of the petitioning workers." *Stidham v. U.S. Dep't of Labor*, 11 CIT 548, 551, 669 F. Supp. 432, 435 (*citing Abbott v. Donovan*, 7 CIT 323, 327–28, 588 F. Supp. 1438, 1442 (1984) (quotations omitted)).

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[2] Worker benefits available under the program established by the Trade Act of 1974 are denominated "*trade* adjustment assistance," while those available under the NAFTA Implementation Act are referred to as "*transitional* adjustment assistance." However, the two programs are very similar, and, for the sake of convenience, both are generally referred to herein as "trade adjustment assistance," except as otherwise specifically noted.

Congress recently consolidated both the TAA and NAFTA-TAA programs into a new, expanded benefits program under the Trade Act of 2002. *See* Pub. L. No. 107–210, § 123, 116 Stat. 933, 944 (2002). However, because the Workers' petition for benefits predates November 4, 2002 (the effective date of the new statute), this action is governed by the NAFTA-TAA statute. *See Former Employees of Rohm and Haas Co. v. Chao*, 27 CIT ____, ____ n.1, ____ n.3, ____, 246 F. Supp. 2d 1339, 1342 n.1, 1343 n.3, 1348 (2003).

Thus, while the Labor Department is vested with considerable discretion in the conduct of its investigation of trade adjustment assistance claims, "there exists a threshold requirement of reasonable inquiry." *Former Employees of Hawkins Oil and Gas, Inc. v. U.S. Sec'y of Labor*, 17 CIT 126, 130, 814 F. Supp. 1111, 1115 (1993). Courts have not hesitated to set aside agency determinations which are the product of perfunctory investigations.[3]

B. *The Facts of This Case*

The Workers' former employer, Ameriphone, specialized in communications and related technologies to meet the requirements of the hearing-impaired, deaf and other special needs communities. Product lines included telephones with specialized volume control, text (TTY) telephones for the deaf, bed-shaking alarm clocks for the deaf,

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[3] *See, e.g., Hawkins Oil and Gas*, 17 CIT at 130, 814 F. Supp. at 1115 (castigating agency for "a sloppy and inadequate investigation" which was "the product of laziness," and holding that a fourth remand would be "futile"); *Local 116, Int'l Union of Electronic, Electrical, Salaried, Mach. and Furniture Workers v. U.S. Sec'y of Labor*, 16 CIT 490, 493–94, 793 F. Supp. 1094, 1096–97 (1992) (criticizing agency efforts as "cursory at best," and finding that "there was actually no investigation done whatsoever"); *Former Employees of Alcatel Telecomms. Cable v. Herman*, 24 CIT 655, 664 (2000) (concluding that "the administrative record reveal[ed] no more than an inadequate investigation lacking detail" where, *inter alia*, agency based its negative determination on responses to wrong type of questionnaire and failed to verify accuracy of company's questionnaire responses); *Former Employees of Swiss Indus. Abrasives v. United States*, 17 CIT 945, 949–50, 830 F. Supp. 637, 641–42 (1993) (characterizing agency's actions as "unreasonable" and its investigation as "misguided and inadequate at best" where agency, *inter alia*, failed to clarify important aspects of information provided by company, relied on company's unsubstantiated statements on critical point, and ignored other relevant information); *Former Employees of Pittsburgh Logistics Sys., Inc. v. U.S. Sec'y of Labor*, Slip Op. 03–111, 2003 Ct. Intl. Trade LEXIS 111, * 32 (Aug. 28, 2003) ("conclud[ing] that Labor . . . conducted an inadequate investigation and analysis of the plaintiffs as 'production' workers" and, similarly, that "Labor's service worker [analysis was] inadequate"); *Former Employees of Tyco Elecs. v. U.S. Dep't of Labor*, 27 CIT ____ , ____ , 264 F. Supp. 2d 1322, 1330 (2003) (holding that "Labor's failure to collect any information from Plaintiffs, as well as Labor's rejection of the . . . information voluntarily submitted by the Plaintiffs was a result of Labor's arbitrary and capricious treatment of [the] remand investigation"), 1331 (finding "Labor's reliance on . . . incomplete customer surveys to be insufficient to support Labor's conclusion" and criticizing Labor's "fail[ure] to conduct any independent import analysis which might have substantiated or contradicted the information reported by the customers"), 1331–32 (castigating Labor for flouting court remand instructions by failing to further investigate alleged shift of production to Mexico and for inappropriately relying on, *inter alia*, "unverified statements from an untitled . . . company official"); *Former Employees of Marathon Ashland Pipeline, LLC v. Chao*, 2003 Ct. Intl. Trade LEXIS 66, *41 (2003)(ordering Labor Department to certify workers where employer failed to adequately respond to agency inquiries and "[n]othing in the record indicate[d] that [the employer] w[ould] be more forthcoming if the court were to remand again" and where "[n]othing in the record indicate[d] that Labor ha[d] the resources or willingness to conduct an investigation beyond making inquiries of [employer]"); *Chevron I*, 26 CIT at ____ n.25, 245 F. Supp. 2d at 1334 n.25 (condemning Labor Department's investigation as sloppy, incomplete and "*pro forma* at best"); *Former Employees of Chevron Prods. Co. v. U.S. Sec'y of Labor*, Slip Op. 03–96, 2003 Ct. Intl. Trade LEXIS 93, *39 (July 28, 2003) (criticizing Labor Department investigation where agency "repeatedly failed and refused to seek relevant data and to make a determination as to whether imports . . . contributed importantly" to workers' separation).

and other similar specialized communication, notification and emergency response systems. A.R. 3, 20, 28–29. Although volume production of most items occurred in China (with initial assembly by a subcontractor there), merchandise was then shipped to Ameriphone (in California), where employees—*inter alia*—inspected and tested the products, performed necessary repairs and refurbishment, and completed upgrades and modifications as appropriate. Ameriphone employees also designed and built prototypes. A.R. 28–29; 68 Fed. Reg. 60,120.

After Plantronics acquired Ameriphone in January 2002, much of the work performed by Ameriphone employees was shifted to a Plantronics facility in Tijuana, Mexico. Complaint; A.R. 3, 28; 68 Fed. Reg. 60,120. Some 20-plus employees were laid off, effective June 30 and July 30, 2002. A.R. 3. In late June 2002, three of those employees filed a petition for NAFTA-TAA benefits. A.R. 3. However, the Labor Department found that the Workers "provided administrative, technical, sales and distribution services" and thus did not produce an article as required for certification as "production workers" under the NAFTA-TAA statute. The agency further found that the Workers failed to satisfy the requirements for certification as service workers. The Labor Department therefore denied the Workers' petition. A.R. 19–21, 22–23; 67 Fed. Reg. 61,160, 61,162.

The Workers timely sought reconsideration of the denial, describing their duties in detail and explaining that those duties constituted "the final phase of production." A.R. 28–29. The Labor Department nevertheless denied reconsideration, concluding that—with few exceptions—the Workers' duties did not constitute "production" within the meaning of the statute, and that those exceptions—product modification, prototype production and product upgrades—accounted for only "a negligible portion" or "a negligible percentage" of the work performed at the plant. The agency further found that the Workers did not produce packaging or updated literature, and that the generation of "fault reports" did not constitute "production." In addition, the agency found that "components were added either as part of repair work, or were intermittent and not significant enough to qualify" as "production." Accordingly, the Labor Department again concluded that the Workers were in fact service workers. The agency reiterated its earlier conclusion that the Workers failed to satisfy the requirements for certification as service workers as well. A.R. 32–35, 37–38; 68 Fed. Reg. 12,938.

This appeal followed. In lieu of filing an Answer with the Court, the Government sought and was granted a voluntary remand "to conduct a further investigation and to make a redetermination" as to the Workers' eligibility for NAFTA-TAA benefits. *Former Employees of Ameriphone, Inc. v. United States*, Slip Op. 03–72, 2003 WL 21508227, *1 (Ct. Int'l Trade June 25, 2003).

On remand, the Labor Department "contacted [Plantronics] and requested detailed information regarding the workers' functions . . . . The newly obtained information revealed that [the] workers . . . were engaged in production. The new information also revealed that a significant proportion of the production performed at the [Ameriphone] facility was shifted to Mexico." 68 Fed. Reg. 60,120. The Labor Department therefore concluded "that a shift of production to Mexico of products like or directly competitive with those produced at [Ameriphone] contributed importantly to the decline in sales or production and to the . . . separation of [Ameriphone] workers," and certified as eligible to apply for benefits all Ameriphone workers "who became totally or partially separated from employment on or after June 24, 2001 through two years of [the] certification." *Id.*[4]

II. *Analysis*

The Labor Department's belated affirmative determination is relatively cold comfort to the Workers here, who lost their jobs more than a year ago and had to haul the agency into court to force the agency to take a hard look at their claim. On the one hand, the Government is to be commended for recognizing the need for a voluntary remand. On the other hand, the agency's about-face as a result of that remand simply highlights the fact that the agency should have certified these Workers in the first place, within 40 days of receipt of their petition.

Here, the entirety of the Labor Department's initial investigation consisted of forwarding the standard NAFTA Transitional Adjustment Assistance Confidential Data Request Form to Plantronic's Vice President for Human Resources. C.A.R. 10–13.[5] The record re-

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[4] The Labor Department's initial Notice of Revised Determination on Remand—issued August 18, 2003—erroneously certified the Workers as eligible for *TAA* (rather than *NAFTA-TAA*) benefits. *See* A.R. 53 (certifying eligibility "to apply for adjustment assistance under Section 223 of the Trade Act of 1974"); 68 Fed. Reg. 53,399 (Sept. 10, 2003). The agency corrected the statutory reference in a subsequent notice, but back-dated that corrected certification to the date of the initial certification. *See* A.R. 58 (notice marked "Corrected: September 9, 2003" but back-dated to August 18, 2003, certifying eligibility "to apply for NAFTA-TAA under Section 250 of the Trade Act of 1974"); 68 Fed. Reg. 54,490 (Sept. 17, 2003). That notice was, in turn, reissued on October 1, 2003, certifying the Workers as of that date. Notice of Revised Determination on Remand (Corrected: October 1, 2003); 68 Fed. Reg. 60,120 (Oct. 21, 2003).

The Labor Department has now expressly confirmed that all Ameriphone employees "totally or partially separated from employment on or after June 24, 2001" *through October 1, 2005* are eligible to apply for NAFTA-TAA benefits. *See* C.A.R. 50 (confirming that, as used in the certification, the phrase "through two years of this certification" means "through two years [from the date] of this certification"); 68 Fed. Reg. 60,120.

[5] The second page of the five-page questionnaire is missing from the administrative record. *Compare* C.A.R. 10 (page 1 of 5) *with* C.A.R. 11 (page 3 of 5).

veals that the agency failed to follow up with company officials (via telephone or otherwise), even though the company's responses to the Labor Department questionnaire were, in a number of instances, ambiguous or inconsistent, and called for clarification.

For example, the company's questionnaire responses in one place flatly asserted that "[n]o products were produced" at Ameriphone's facility. C.A.R. 15. But that seemingly definitive statement was undercut by other, much more qualified responses given elsewhere in the same questionnaire, which hedged that the Ameriphone facility was not responsible for "*volume* production of *standard* products" and that "*standard products* . . . [were] manufactured through a subcontractor arrangement in China." C.A.R. 14, 16 (emphasis added).[6] And other responses acknowledged that some Ameriphone operations personnel were involved in "rework and assembly," "customization of special orders," and "final assembly." C.A.R. 14, 16–17.

Indeed, the company itself chose the term "production" to describe the duties of a significant percentage of the affected workers. *See* C.A.R. 17 (describing workers' duties as "production/repair/rework"). This and other critical information was either overlooked or simply ignored in the Labor Department's preparation of the Findings of the Investigation and in its initial Negative Determination. C.A.R. 18; A.R. 19–21.

Moreover, the agency's investigation conducted in response to the Workers' request for reconsideration was little more than a rubber-stamp of its initial Negative Determination. The Labor Department's "reconsideration" consisted—in toto—of two phone conversations with company officials on a single day, which were in turn documented in two memoranda that, together, constituted a mere three sentences. C.A.R. 30–31.

Only after this action was filed and the voluntary remand granted did the Labor Department seriously probe the nature of the Ameriphone Workers' duties, pressing Plantronics representatives for the "comprehensive and detailed information about work functions at the [Ameriphone] facility" that was at the time still so conspicuously absent from the agency's files. A.R. 47. *See also* A.R. 44 (posing specific, detailed questions to Plantronics). It is particularly telling—and troubling—that the information which ultimately resulted in the certification of the Workers was obtained during the remand from the same company officials who had responded to earlier agency inquiries. *Compare* C.A.R. 10, 30–31 *with* C.A.R. 45, 48. It is

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[6] The record is devoid of any evidence that the Labor Department made any effort to discern the extent to which Ameriphone employees were engaged in "non-volume production" of "standard products"—or, for that matter, were engaged in "volume production" of "special order" or "customized products." Nor does the record reveal any analysis of the nature of the Workers' duties *vis-à-vis* "rework and assembly," "customization of special orders," and "final assembly," or why those duties did not constitute "production."

thus obvious that the Labor Department could—and should—have elicited the necessary information much earlier, by scrutinizing the company's statements, seeking greater specificity and clarification, and reconciling the evident inconsistencies.

By regulation, the Labor Department is required "to marshal all relevant facts to make a determination" on TAA and NAFTA-TAA petitions. 29 C.F.R. § 90.12 (2002).[7] The agency cannot rely on employers' blanket assurances that workers were, or were not, engaged in "production."[8] *Former Employees of Marathon Ashland Pipeline, LLC v. Chao*, 26 CIT ___ , 215 F. Supp. 2d 1345, 1352–53 (2002) (Labor Department's reliance on employer's conclusory assertions concerning "production" constituted impermissible abdication of agency's responsibility to interpret TAA statute and to define terms used in it). Rather, the agency has an *affirmative obligation* to conduct its own independent "factual inquiry into the nature of the work performed by the petitioners" to determine whether or not that work constituted "production." *Chevron I*, 26 CIT at ___ , 245 F. Supp. 2d at 1327–28 (*quoting Former Employees of Shot Point Servs. v. United States*, 17 CIT 502, 507 (1993)). The Labor Department here failed to properly discharge that duty.

While this case is troubling enough when viewed in isolation, it is even more troubling if it is viewed in the context of other TAA and NAFTA-TAA cases appealed to this Court. The relatively high number of requests for voluntary remands in such cases suggests that the Labor Department may be routinely failing to "conduct [its] investigation with the utmost regard for the interests of the petitioning workers" and to "marshal all relevant facts" before making its determinations. *Stidham*, 11 CIT at 551, 669 F. Supp. at 435; 29 C.F.R. § 90.12. There is something fundamentally wrong with the administration of the nation's trade adjustment assistance programs if, as a practical matter, workers often must appeal their cases to the courts to secure the thorough investigation that the Labor Department is obligated to conduct by law.[9]

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[7] The Labor Department never promulgated regulations specifically addressed to the NAFTA-TAA program. In NAFTA-TAA cases, the agency and the courts have looked to the TAA regulations for guidance, where appropriate. *Former Employees of Oxford Auto. U.A.W. Local 2088 v. U.S. Dep't of Labor*, Slip Op. 03–129 at 11 n.15 (*citing Former Employees of Carhartt, Inc. v. Chao*, Slip Op. 01–71 at 9 n.5 (2001)).

[8] Nor can the agency rely on the unverified statements of company officials in the face of factual discrepancies in the record, as it did in this case. *See generally Chevron I*, 26 CIT at ____ n.9, 245 F. Supp. 2d at 1326 n.9 (and cases cited there); *Former Employees of Pittsburgh Logistics Sys., Inc. v. U.S. Sec'y of Labor*, Slip Op. 03–32, 2003 Ct. Intl. Trade LEXIS 18, *24 (February 28, 2003) (*citing Former Employees of Shaw Pipe v. U.S. Sec'y of Labor*, 21 CIT 1282, 1289, 988 F. Supp. 588, 592 (1997)); *Oxford Auto.*, Slip Op. 03–129 at 10 n.14 (and cases cited there).

[9] Of course, for various reasons (including, for example, a blind faith in the Labor Department and its discharge of its duties), the vast majority of workers whose petitions are denied never challenge the agency's determinations in court. Thus, the claims of many

To be sure, the statutory deadlines for the completion of investigations are tight. And—given the current state of the economy—the Labor Department is, no doubt, inundated with claims. *See generally Pittsburgh Logistics*, 2003 Ct. Intl. Trade LEXIS 18, *9–10, *32; *Former Employees of Tyco Elecs. v. U.S. Dep't of Labor*, 27 CIT ___ , ___ , 259 F. Supp. 2d 1246, 1249 (2003).[10] But, if the agency's resources are not adequate to enable it to meet its statutory mandate, the remedy lies with Congress. The volume of claims filed with the agency cannot serve to excuse it from fulfilling its legal obligations *vis-à-vis* the legions of displaced workers. Indeed, if anything, the volume of claims filed serves to underscore the vital nature of the agency's mission.

III. *Conclusion*

It can hardly be said that "all's well that ends well," when the Workers here have been for over a year deprived of the job training and other benefits to which they are entitled. But, as a result of the voluntary remand, the Labor Department has now certified the Workers as eligible to apply for NAFTA transitional adjustment assistance; and the Workers have advised that they are satisfied with that certification. The Final Corrected Remand Determination is therefore sustained. *See* 68 Fed. Reg. 60,120 (Oct. 21, 2003).

Judgment will enter accordingly.

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workers may *never* have been the subject of thorough investigation; and, obviously, some percentage of those claims were meritorious.

It would be wholly inconsistent with Congress' intent if the trade adjustment assistance programs were to become little more than "claims mills," where all but the most well-documented and patently meritorious claims were denied at the agency level, and thorough investigations were largely reserved for those few cases which were appealed to the courts.

[10] The Labor Department's resources have also been strained by implementation of the new, expanded trade adjustment assistance program under the Trade Act of 2002. *Tyco*, 27 CIT at ____ , 259 F. Supp. 2d at 1249.

Slip Op. 03–139

RAININ INSTRUMENT CO., INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Court No. 00–11–00514

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

Decided: October 24, 2003

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Steven P. Florsheim*), for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Assistant Branch Director, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Arthur J. Gribbin*); *Michael W. Heydrich*, Office of the Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, U.S. Department of Homeland Security, Of Counsel; for Defendant.

OPINION

RIDGWAY, Judge: At issue in this case is the proper tariff classification of certain adjustable mechanical pipettes—known as "Pipetman" pipettes—which were imported from France through the port of Boston in 1999 by Plaintiff Rainin Instrument Co., Inc. ("Rainin"). Rainin challenges the decision of the United States Customs Service ("Customs")[1] denying its protest and classifying the pipettes as "[m]achines and mechanical appliances having individual functions," under subheading 8479.89.97 of the Harmonized Tariff Schedule of the United States ("HTSUS") (1999).[2] Duties were assessed at the rate of 2.5% *ad valorem*. Complaint ¶5.[3]

Rainin claims that the pipettes instead are properly classified as "[i]nstruments and apparatus for measuring or checking the flow, level, pressure or other variables of liquids or gases (for example, flow meters, level gauges, manometers, heat meters)," under subheading 9026.80.60, HTSUS, free of duty. Complaint ¶6.[4] In the al-

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[1] Effective March 1, 2003, the United States Customs Service was renamed the Bureau of Customs and Border Protection of the United States Department of Homeland Security. *See Reorganization Plan Modification for the Department of Homeland Security*, H.R. Doc. 108–32, at 4 (2003).

[2] All references are to the 1999 version of the HTSUS.

[3] Subheading 8479.89.97, HTSUS covers "[m]achines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: [o]ther machines and mechanical appliances: [o]ther: [o]ther."

[4] Subheading 9026.80.60, HTSUS covers "[i]nstruments and apparatus for measuring or checking the flow, level, pressure or other variables of liquids or gases (for example, flow

ternative, Rainin contends that the pipettes should be classified as "[p]umps for liquids, whether or not fitted with a measuring device," under subheading 8413.19.00, HTSUS, also duty-free. Complaint ¶11.[5]

Jurisdiction lies under 28 U.S.C. § 1581(a) (1994). Customs' classification decisions are subject to *de novo* review pursuant to 28 U.S.C. § 2640 (1994). For the reasons discussed below, the pipettes at issue are properly classified as "[m]achines and mechanical appliances having individual functions," under subheading 8479.89.97, HTSUS. Accordingly, the Government's motion for summary judgment is granted, and Rainin's cross-motion is denied.

I. *Background*

The merchandise at issue is a mechanical device made up of a number of different mechanical parts, "including plungers, pistons, adjusting dials, and tip ejectors, all of which are utilized to perform a function." Defendant's Statement of Material Facts ("Def.'s Statement of Facts") ¶3 (citations omitted); Plaintiff's Response to Defendant's Statement of Material Facts ("Pl.'s Response to Def.'s Statement of Facts") ¶3.

Each Pipetman pipette is fitted with an adjustable micrometer that allows the user to set the desired volume of liquid to be drawn. Plaintiff's Statement of Material Facts ("Pl.'s Statement of Facts") ¶4; Defendant's Response to Plaintiff's Statement of Material Facts ("Def.'s Response to Pl.'s Statement of Facts") ¶4.[6] Generally, the pipettes

> function through air displacement. . . . [A] vacuum is created by expelling air from the pipette's tip through depression of the push button plunger on the pipette. The tip is then immersed in the liquid of the source container, and the plunger is released, causing the source liquid to be sucked into the pipette tip. The liquid is then expelled into the receiving container by

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meters, level gauges, manometers, heat meters), excluding instruments and apparatus of heading 9014, 9015, 9028 or 9032; parts and accessories thereof: [o]ther instruments and apparatus: [o]ther: [o]ther."

[5] Subheading 8413.19.00, HTSUS covers "[p]umps for liquids, whether or not fitted with a measuring device; liquid elevators; part thereof: [p]umps fitted or designed to be fitted with a measuring device: [o]ther."

[6] The merchandise at issue consists of several models of Pipetman pipettes, in "various sizes, by range of capacity." Memorandum of Law in Support of Plaintiff's Cross Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment ("Pl.'s Brief") at 3; Def.'s Statement of Facts ¶2; Pl.'s Response to Def.'s Statement of Facts & 2. The pipettes "are continuously adjustable. For example, the volumetric capacity of the model P–20 can be adjusted over a range of 2 to 20 [microliters] . . . , in increments of 0.02 [microliters]." Pl.'s Brief at 3 (citations omitted). One microliter (as represented by the symbol µL) is 1/1000 of a milliliter. *Id*. *See generally* Pl.'s Brief, Exhs. 1 (sample of a Pipetman pipette), 2 (published description of Pipetman pipettes).

> again depressing the plunger, which releases the vacuum on the liquid in the pipette tip.

Pl.'s Statement of Facts ¶6. *See also* Def.'s Response to Pl.'s Statement of Facts ¶¶4, 6 (same); Pl.'s Statement of Facts ¶4 (same). The pipettes are therefore capable of "pick[ing] up a pre-selected quantity of liquid and permit[ting] the transfer of that volume of liquid to another vessel." Def.'s Statement of Facts ¶4 (citation omitted). Thus, they may be used both to measure and to transfer fluids.

Finally, each pipette "[w]orks independently [;] it does not have to work in conjunction with another machine, instrument or apparatus to perform its function of picking up . . . liquid and depositing it in another vessel." Def.'s Statement of Facts ¶5 (citations omitted). *See also* Pl.'s Response to Def.'s Statement of Facts ¶5.

II. *Standard of Review*

Under USCIT Rule 56, summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to . . . judgment as a matter of law." USCIT R. 56(c).

Customs classification rulings are reviewed through a two-step process: first, construing the relevant tariff headings, which is a question of law; and second, determining whether the merchandise is properly classified under the headings, which is a question of fact. *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (*citing Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997)).

"[S]ummary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb*, 148 F.3d at 1365 (citations omitted). Although the parties here argue for different classifications, they do not disagree as to the nature of the Pipetman pipettes. *See also* Memorandum in Support of Defendant's Motion for Summary Judgment ("Def.'s Brief") at 7–8; Pl.'s Brief at 14. The case is therefore ripe for summary judgment.

While Customs classification decisions do not merit *Chevron* deference, they are entitled to "a respect proportional to [their] 'power to persuade.' " *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (*citing Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). "That power to persuade depends on the thoroughness evident in the classification ruling, the validity of its reasoning, its consistency with earlier and later pronouncements, the formality attendant the particular ruling, and all those factors that give it power to persuade." *Mead Corp. v. United States*, 283 F.3d 1342, 1346 (Fed. Cir. 2002) (*citing Mead Corp.*, 533 U.S. at 219–20; *Skidmore*, 323 U.S. at 140).

Finally, the court has "[an] independent responsibility to decide the legal issue regarding the proper meaning and scope of the

HTSUS terms." *Mead Corp.*, 283 F.3d at 1346 (*citing Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)). *See also Rollerblade, Inc. v. United States*, 112 F.3d 481, 484 (Fed. Cir. 1997) (noting the court's duty to "reach the correct decision") (*quoting* 28 U.S.C. 2643(b)).

III. *Analysis*

The General Rules of Interpretation ("GRIs"), applied in order, provide a framework for the classification of merchandise under the HTSUS, and are considered statutory provisions of law for all purposes. *See North Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001); *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). "The structure of the GRI[s] controls the point at which each rule comes into play." *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1374 (Fed. Cir. 1999) (*citing Mita Copystar Am. v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998)).

Most goods are classified pursuant to GRI 1, which provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions [Rules 2 through 6]." The intent of GRI 1 is "to make it quite clear that the terms of a heading and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification." Explanatory Notes at GRI 1(V).[7] *See also Orlando Food Corp.*, 140 F.3d at 1440 ("Only after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise.").

A. Heading 8413, HTSUS

Customs classified the pipettes at issue here under heading 8479—the "basket" provision of chapter 84—which covers, in relevant part, "[m]achines and mechanical appliances having individual functions, *not specified or included elsewhere in this chapter*." (Emphasis added.) If—as Rainin postulates—the pipettes can be classified under heading 8413[8] (or, for that matter, under any other

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[7] The World Customs Organization's *Harmonized Commodity Description and Coding System: Explanatory Notes* (2d ed. 1996) ("Explanatory Notes") function as an interpretative supplement to the HTSUS. While the Explanatory Notes "do not constitute controlling legislative history," they "are intended to clarify the scope of HTSUS subheadings and offer guidance in interpreting its subheadings." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (*citing Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992)). *See also Guidance for Interpretation of Harmonized System*, 54 Fed. Reg. 35,127 (Aug. 23, 1989).

[8] Rainin contends that if the pipettes are classifiable under both heading 8413 and heading 8479, heading 8413 prevails, based on GRI 3(a). According to GRI 3(a), "[w]hen . . .

heading within Chapter 84), Customs' classification under heading 8479 would, by definition, be incorrect.[9]

Heading 8413 covers, in relevant part, "[p]umps for liquids, whether or not fitted with a measuring device." The Government maintains that the Pipetman pipettes are not "pumps" within the meaning of heading 8413, HTSUS. *See* Def.'s Brief at 6–7, 12–15; Def.'s Response Brief at 2, 14–18. The Government makes much of the fact that the pipettes here "are not known, referred to or commercially considered to be pumps." Def.'s Brief at 14. *See also* Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Def.'s Response Brief") at 14 n.8 (noting that "[n]either Rainin nor anyone else refers to Pipetman pipettes as pumps").[10] A review of the record confirms that, indeed, the pipettes at issue were not marketed as "pumps." *See, e.g.*, Pl.'s Brief, Exhs. 1 (sample of a Pipetman pipette), 2 (published description of Pipetman pipettes). Even Rainin concedes that the pipettes "are not known as or referred to as 'pumps.' " Pl.'s Brief at 9.

Yet, while the marketing of merchandise is a factor to be considered in determining its classification (*see* Def.'s Brief at 1, and cases cited there), it is not dispositive. *See Russ Berrie & Co. v. United*

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goods are, *prima facie*, classifiable under two or more headings, . . . [t]he heading which provides the most specific description shall be preferred to headings providing a more general description." Rainin reasons that—as between heading 8413 and heading 8479—classification under heading 8413 would be appropriate, because it is "[t]he heading which provides the most specific description." Pl.'s Brief at 13 (*quoting* GRI 3(a)).

But, if the pipettes are *prima facie* classifiable under heading 8413, there is no need to resort to GRI 3. GRI 1 provides that classification is determined "according to the terms of the headings and any relative section or chapter notes." By its terms, heading 8479 classifies goods "not specified or included elsewhere" in chapter 84, which includes goods covered by heading 8413.

Further, "a machine or appliance which answers to a description in one or more of the headings 8401 to 8424 and at the same time to a description in one or more of the headings 8425 to 8480 is to be classified under the appropriate heading of the former group and not the latter." Note 2 to Chapter 84, Section XVI, HTSUS. *See also* Explanatory Note 84.79 (providing that heading 8479, HTSUS "is restricted to machinery having individual functions, which: (a) [i]s not excluded from this Chapter by the operation of any Section or Chapter Note . . . and (b) [i]s not covered more specifically by a heading in any other Chapter of the Nomenclature . . . and (c) [c]annot be classified in any other particular heading of this Chapter . . . .") (emphasis omitted).

[9] Moreover, if the pipettes can be classified as "pumps" under heading 8413, they would not be classifiable under Rainin's primary proposed classification—heading 9026 ("[i]nstruments and apparatus for measuring . . . liquids"), because merchandise classifiable under heading 8413 is expressly excluded from classification under Chapter 90. *See* Note 1(g) to Chapter 90, Section XVIII, HTSUS (stating that Chapter 90 does not cover "[p]umps incorporating measuring devices, of heading 8413"). *See also* Pl.'s Brief at 12. *See generally* Section III.B (discussing Rainin's argument for classification under heading 9026).

[10] The Government further emphasizes that—in addition to the devices at issue here—Rainin also sells devices specifically called "peristaltic pumps," which are "substantially different from the [imported] Pipetman pipettes" and which "use[ ] a series of rollers to continuously pump liquids." Def.'s Response Brief at 14.

States, 76 Cust. Ct. 218, 226 (1976) (*citing S.Y. Rhee Imps. v. United States*, 486 F.2d 1385, 1387 (CCPA 1973); *Novelty Imp. Co. v. United States*, 53 Cust. Ct. 274 (1964); *United States v. Ignaz Strauss & Co.*, 37 CCPA 32 (1949)).

Rainin contends that "the tariff provision for pumps has been given a broad meaning, and includes articles that are not referred to as pumps." Def.'s Brief at 9. As the Government notes, however, the primary characteristic of a pump (at least for tariff classification purposes) is its use for "continuously displacing volumes of liquid." Pl.'s Brief at 13. The Explanatory Notes to heading 8413 expressly state that the heading covers devices "for raising or otherwise *continuously displacing* volumes of liquids . . . whether they are operated by hand or by any kind of power unit, integral or otherwise." Explanatory Note 84.13 (emphasis added). *See also* Def.'s Brief at 13; Def.'s Response Brief at 16–18.[11]

Rainin seeks to minimize the "continuous displacement" criterion by emphasizing that it derives from the Explanatory Notes, and by arguing that the Explanatory Notes are not "conclusive." Pl.'s Brief at 11. However, the Explanatory Notes cannot be so readily dismissed. The trade community, Customs and the courts all have recognized that they are a vital supplement to the HTSUS, serving to clarify the scope of headings and to offer guidance in interpretation. *See, e.g., Mita Copystar Am.*, 21 F.3d at 1082 (*citing Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992)).

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[11] The Explanatory Notes to heading 8413 also explain that "the machines of [that] heading can be subdivided according to their system of operation," and list the different types of pumps classifiable under heading 8413. The Government asserts that, of the pumps listed in Explanatory Note 84.13, the Pipetman pipettes most closely resemble "reciprocating positive displacement pumps." Def.'s Brief at 13–14. Like the pipettes, reciprocating positive displacement pumps "use the linear suction or forcing action of a piston or plunger driven within a cylinder." Explanatory Note 84.13(A). However, reciprocating positive displacement pumps have inlets and outlets, which are regulated by valves, which the pipettes here lack. Def.'s Brief at 14.

Rainin cites *Hancock Gross, Inc. v. United States*, 64 Cust. Ct. 97 (1970) as authority for the proposition that "pistons, valves, [and] other moving parts" are not "an essential attribute of all types of pumps." 64 Cust. Ct. at 101–02. But the Government does not here claim that *all* pumps must have valves. Rather, the Government argues that—consistent with the Explanatory Notes—a pump employing the reciprocating piston principle (which is there basis of the pipettes at issue) must have valves in order to function and be classified as a pump. Def.'s Response Brief at 15. *Hancock* involved a "venturi tube" device, and is therefore not applicable here.

As the Government explains, the requirement for valves in reciprocating positive displacement pumps "is logical because, in order to function as pumps, they must be capable of pumping liquid from a source (input) to a destination (output)." Def.'s Response Brief at 15–16. In the instant case, "[b]ecause the pipettes have no valves, once the piston pulls the liquid into the cylinder . . . the pipette must be removed from the source container and placed into the destination container before liquid can be ejected." Def.'s Response Brief at 16. In short, "[a] pump employing a reciprocating piston principle must have valves in order to be classified as a pump because it is the valves that enable this particular device to continuously displace volumes of liquids." *Id*. As discussed above, the pipettes at issue lack any such valves.

Rainin asserts broadly that the "continuous displacement" criterion is inconsistent with "case law and lexicographic authorities." Pl.'s Brief at 11. But nothing in the dictionary definitions cited in Rainin's briefs can be read to suggest that the continuous displacement of liquid is not a defining characteristic of a pump. *See generally* Pl.'s Brief at 10–11 (quoting various dictionary definitions). Rainin's reliance on *Hancock Gross, Inc. v. United States*, 64 Cust. Ct. 97 (1970) and *Fedtro, Inc. v. United States*, 65 Cust. Ct. 35 (1970) is similarly misplaced. *See* Pl.'s Brief at 9–10; Plaintiff's Reply to Defendant's Response in Opposition to Plaintiff's Cross Motion for Summary Judgment ("Pl.'s Reply Brief") at 8. Nothing in those cases indicates that the "continuous displacement" of liquid is not a defining characteristic of a pump.

Finally, Rainin contends that, even if the "continuous displacement" of liquid is a defining characteristic of a pump, a user of a Pipetman pipet "can repetitively draw measured amounts of fluid from a source container and deliver the same to a receiving container." Thus, Rainin asserts, Pipetman pipettes "are capable of . . . continuous use." Pl.'s Brief at 11. Rainin strains to analogize "the repetitive depression and release of the push button plunger on the pipette" to "the repetitive pumping of the lever on a classic hand operated water pump, or the repetitive squeezing of the cylinder or chamber on the 'portable siphon pumps' involved in *Fedtro*." Pl.'s Brief at 11. But the attempt at analogy fails.

The Government points out that squeezing the cylindrical portable siphon pump at issue in *Fedtro continuously* displaced water from one container to another—specifically, in the courtroom demonstration, from a pitcher to a cup. *See* Def.'s Response Brief at 17 (describing operation of *Fedtro* pump). In contrast, the pipettes at issue here "are only capable of *intermittently* transferring minute amounts of liquid from one container to another, and it is the *physical movement of the pipettes from one container to another that effects the transfer of liquid*, not a pumping mechanism within the pipettes." Def.'s Response Brief at 17 (emphasis added). *See also* Def.'s Brief at 13 (noting that the pipettes "do not displace volumes of liquid continuously, but rather displace a volume of liquid intermittently as part of their normal operation," and that, "unlike a pump, which is capable of continuous displacement of liquids at one location and normally does so as part of its routine operation, these pipettes are designed for discrete displacement of fluids").

The Government correctly observes that "[i]ntermittently carrying minute amounts of liquid from a source container to a destination container" simply is not "the equivalent of continuously displacing volumes of liquids by means of a pump." *Id.* at 18. Further, "[w]ith the Pipetman pipettes, the transfer of the liquid requires the physical moving of the pipette from one container to the other, an operation not necessary with a pump." *Id.*

As the court stated in *Fedtro*, classification in this case is "controlled by what the imported article was constructed and designed to do . . . ." *Fedtro*, 65 Cust. Ct. at 44. Pipetman pipettes were not constructed or designed as "pumps" within the meaning of heading 8413, and cannot be classified thereunder.

B. Heading 9026, HTSUS

Rainin's primary claim is that Pipetman pipettes are properly classifiable under heading 9026, HTSUS, which covers "[i]nstruments and apparatus for *measuring* or checking the *flow, level, pressure or other variable* of liquids or gases (for example, flow meters, level gauges, manometers, heat meters), excluding instruments and apparatus of heading 9014, 9014, 9028 or 9032; parts and accessories thereof." (Emphasis added.)[12] To that end, Rainin argues—in sum and substance—that volume is a variable of liquids, and that the pipettes are instruments whose primary purpose is to measure the volume of liquids. *See* Pl.'s Brief at 4–6; Pl.'s Reply Brief at 2–5.

The Government denies that the pipettes' primary purpose is measurement, and asserts that the pipettes are instead used principally to move and dispense liquids. *See, e.g.*, Def's Brief at 6, 8–9; Def.'s Response Brief at 12–13. Specifically, according to the Government:

> [T]he Pipetman [pipettes] only measure[ ] in the sense that when the pipettes are adjusted for a specific volume, [that] volume is picked up and dispensed. However, the Pipetman pipettes have not been used to "measure" in the sense of determining an unknown volume. . . . In the case of the Pipetman [pipette], it is not used to ascertain the quantity of a liquid, but instead is used to deliver a selected amount of liquid.

Def.'s Brief at 9.

Rainin rejects the Government's argument as a "distinction without a difference." Pl.'s Brief at 5. Rainin contends that measuring devices can be used both "to measure a predetermined quantity" and to "determine unknown quantities." *Id*. As an example, Rainin cites a carpenter's rule which, it asserts, "is primarily used to measure a precise length of lumber, although it could also be used to determine the unknown length of [a] piece of lumber." *Id*. Rainin analogizes the carpenter's rule to the pipettes at issue here, arguing that "[t]o the same extent the pipette is primarily used to measure a precise volume of liquid, although it could also be used to determine the unknown liquid volume of a container." *Id*.

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[12] If the pipettes are classifiable as "[i]nstruments and apparatus for measuring . . . liquids" under heading 9026, HTSUS, then they cannot also be classified as "[m]achines and mechanical appliances having individual functions" under heading 8479, HTSUS. *See* Note 1(m) of Section XVI, HTSUS (noting that Section XVI, which includes heading 8479, HTSUS, "does not cover . . . [a]rticles of chapter 90"). *See also* Pl.'s Brief at 12–13.

Whatever the validity of Rainin's example and analogy, there is—as the Government notes—a larger point: Even if the measurement of a variable (*i.e.*, the volume) of liquids were the purpose of the pipettes, the pipettes still would not be classifiable under heading 9026, because the Explanatory Notes for the heading indicate that the variables measured by the devices classified under this heading are *process* variables. *See* Explanatory Note 90.26 (noting that heading 9026 "covers instruments and apparatus for measuring or checking the flow, level, pressure, kinetic energy or other *process variables* of liquids or gases." (Emphasis added.) See also Def.'s Brief at 9; Def.'s Response Brief at 3–4[13]

The Government's position is buttressed by the exemplars named in heading 9026—flow meters, level gauges, manometers and heat meters. The pipettes at issue are fundamentally different in nature and function from the enumerated devices. Unlike the exemplars, the pipettes are not used to (and cannot be used to) measure the process (dynamic) variables of liquids. Def.'s Brief at 11–12; Def.'s Response Brief at 7–8.

The Pipetman pipettes thus are not instruments of measurement within the meaning of heading 9026, because they do not measure the type of variable to which the provision refers, and because they have a different specific primary function. Accordingly, they cannot be classified thereunder.

C. Heading 8479, HTSUS

Heading 8479, HTSUS classifies, in relevant part, "[m]achines and mechanical appliances having individual functions." According to the Explanatory Notes, "[t]his heading is restricted to machinery having individual functions . . . . For this purpose the following are to be regarded as having 'individual functions': (A) Mechanical devices, with or without motors or other driving force, whose function can be performed distinctly from and independently of any other machine or appliance." Explanatory Note 84.79.

Customs' rulings here are persuasive, and are therefore entitled to deference. As Customs has found, the pipettes are mechanical devices with individual functions (i.e., measuring and transferring liquids) that function "independently of any other machine or appliance." *See* HQ 957301 (Jan. 18, 1995) ("[T]he process of utilizing the plunger to operate the pipette, and the use of the pistons to control accuracy, is one that is mechanical. The user must exert force to push down the plunger to gather the fluid, then release force to hold

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[13] Rainin argues that heading 9026 does not include the term "process," and that the Explanatory Notes "are not controlling legislative history." Pl.'s Brief at 7. However, as discussed in Section III.A above, the Explanatory Notes—while not controlling—are highly authoritative. *See also* Def.'s Brief at 6–7 (discussing history and purpose of, and weight customarily accorded to, Explanatory Notes).

the liquid in the pipette."). *See also* NY F81392 (Jan. 20, 2000) (classifying "mechanical pipettes" imported by Rainin under heading 8479, HTSUS). *See generally* Def.'s Brief at 3, 12, 16–18. Finally, the pipettes are "not excluded from [Chapter 84, HTSUS] by the operation of any Section or Chapter Note," they are "not covered more specifically by a heading in any other Chapter [of the HTSUS]," and they "[c]annot be classified in any other particular heading of [Chapter 84, HTSUS]." Explanatory Note 84.79.

Thus, the classification of the Pipetman pipettes is properly determined by the terms of heading 8479, HTSUS.

IV. *Conclusion*

Customs properly classified the pipettes here at issue as "[m]achines and mechanical appliances having individual functions," under subheading 8479.89.97, HTSUS. The Government's motion for summary judgment is therefore granted, and Rainin's cross-motion is denied.

Judgment will enter accordingly.

ERRATA

RECORDATION OF TRADE NAME: "YOUPAL"

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "YOUPAL". The trade name is owned by Youpal International, Inc., an Arkansas corporation organized and created in the State of Arkansas, 6900 Cantrell Road, E6, Little Rock Arkansas 72207.

The application states that the applicant is the importer, exporter and manufacturer of Titanium Folding Bicycles and Carbon Folding Bicycles. The applicant also states that the trade name "YOUPAL" is solely and exclusively owned and operated by Youpal International, Inc., and supervises the manufacturing process for three model (SFM585F; SFM820F; SEF468BBS), bicycles, including the design, the standards used, and the product's parts. The merchandise is manufactured in China.

Before final action is taken on the application, consideration will be give to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received or on before December 19, 2003.

ADDRESS: Written comments should be addressed to the Department of Homeland Security, Bureau of Customs and Border Protection, Attention: Office of Regulations & Rulings, Intellectual Property Rights Branch, 1300 Pennsylvania Avenue, NW. (Mint Annex), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Gwendolyn D. Savoy, Intellectual Property Rights Branch, at (202) 572–8710).

Dated: October 10, 2003

GEORGE FREDERICK MCCRAY, ESQ.,
Chief,
Intellectual Property Rights Branch.

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