

# Decisions of the United States Court of International Trade

Slip Op. 06–47

TA CHEN STAINLESS STEEL PIPE, LTD., Plaintiff, v. UNITED STATES, Defendant, and ALLOY PIPING PRODUCTS, INC., ET AL., Defendant-Intervenors ALLOY PIPING PRODUCTS, INC., FLOWLINE DIVISION, MARKOVITZ ENTERPRISES, INC., GERLIN, INC. and TAYLOR FORGE STAINLESS, INC., Plaintiffs, v. UNITED STATES, Defendant.

Consolidated Court No. 01–00027

[U.S. Department of Commerce's Final Results Pursuant to Remand are sustained.]

Decided: April 6, 2006

*Miller & Chevalier Chartered (Peter J. Koenig)*, for Plaintiff Ta Chen Stainless Steel Pipe, Ltd.

*Collier Shannon Scott, PLLC (David A. Hartquist and Jeffrey S. Beckington)*, for Plaintiffs/Defendant-Intervenors Alloy Piping Products, Inc., *et al.*

*Peter D. Keisler*, Assistant Attorney General; *David M. Cohen*, Director, and *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*); *Rachael E. Wenthold*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel; for Defendant United States.

## OPINION

RIDGWAY, Judge:

At issue in this action are the final results of the U.S. Department of Commerce's sixth administrative review of the antidumping duty order covering certain stainless steel butt-weld pipe fittings from Taiwan. *See* Final Results of Antidumping Administrative Review: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan, 65 Fed. Reg. 81,827 (Dec. 27, 2000) ("Final Results"). The Final Results were challenged by Ta Chen,<sup>1</sup> as well as the Domestic Producers,<sup>2</sup> in

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<sup>1</sup> Ta Chen is a Taiwanese producer and exporter of stainless steel butt-weld pipe fittings subject to the underlying antidumping duty order. Ta Chen sells its pipe fittings to its U.S.

two separate appeals which were consolidated into this action.

In brief, *Ta Chen I* addressed a total of four issues disputing the Final Results, remanding two of those issues to Commerce. *See generally Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT \_\_\_, 342 F. Supp. 2d 1191 (2004) (“*Ta Chen I*”).<sup>3</sup> Specifically, *Ta Chen I* instructed Commerce to reconsider its determination to double Ta Chen’s dumping margin based on an agreement dating from 1992 to 1994 under which the agency found that Ta Chen had agreed to reimburse antidumping duties paid by TCI. *See Ta Chen I*, 28 CIT at \_\_\_, 342 F. Supp. 2d at 1197–99. In addition, Commerce was directed to justify its practice of using recognized expenses in some parts of its standard equation for calculating Constructed Export Price (“CEP”) Profit, in light of its use of imputed expenses elsewhere in that equation. *See Ta Chen I*, 28 CIT at \_\_\_, 342 F. Supp. 2d at 1199–1203.<sup>4</sup>

Now pending before the Court are Commerce’s Final Results Pursuant to Remand (“Remand Results”), together with the parties’ comments thereon. *See* Plaintiff Ta Chen Stainless Steel Pipe, Ltd.: Opposition to August 16, 2004 Final Results Pursuant to Remand of the U.S. Department of Commerce (“Ta Chen Remand Brief”); Defendant-Intervenors’ Comments Regarding the U.S. Department of Commerce’s Final Results Pursuant to Remand (“Dom. Prods. Remand Brief”); Defendant’s Response to the Parties’ Comments Concerning the Remand Results (“Gov’t Remand Brief”).

As a result of its reconsideration on remand, Commerce has recalculated the antidumping margin for Ta Chen. As revised, Ta Chen’s weighted-average margin for the period of review is 6.42%. *See* Remand Results at 29, 31.

As discussed more fully below, the Remand Results that Commerce has filed with the Court comply with *Ta Chen I*. They are, therefore, sustained.

### **I. The Remand Results on the Alleged Reimbursement Agreement**

As *Ta Chen I* explained, Ta Chen’s threshold attack on the results of the administrative review challenged Commerce’s determination

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subsidiary, Ta Chen International (“TCI”), which – in turn – sells them to unaffiliated U.S. customers. *See generally Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT \_\_\_, , 342 F. Supp. 2d 1191, 1195 (2004) (“*Ta Chen I*”).

<sup>2</sup>The Domestic Producers – Alloy Piping Products, Inc.; Flowline Division, Markovitz Enterprises, Inc.; Gerlin, Inc.; and Taylor Forge Stainless, Inc. – were the domestic petitioners in the underlying administrative review.

<sup>3</sup>Familiarity with *Ta Chen I* is presumed.

<sup>4</sup>In contrast, *Ta Chen I* rejected the Domestic Producers’ attack on Commerce’s calculation of TCI’s indirect selling expenses, as well as Ta Chen’s challenge to the agency’s decision denying the company a CEP Offset Adjustment. *See generally Ta Chen I*, 28 CIT at \_\_\_, 342 F. Supp. 2d at 1203–07.

to double Ta Chen's dumping margin based on the agency's finding that company financial statements evidenced an agreement by Ta Chen to reimburse TCI (its U.S. subsidiary) for antidumping duties imposed on Ta Chen's merchandise. The agency concluded that "evidence pointing to a reimbursement agreement dating from 1992 to 1994 raised 'a rebuttable presumption that the agreement [was] still in effect during [this period of review].'" *Ta Chen I*, 28 CIT at \_\_\_ , 342 F. Supp. 2d at 1196-97 (*quoting* final results of administrative review).

Ta Chen argued that the mere existence of an agreement to reimburse duties incurred from 1992 through 1994 cannot constitute evidence that reimbursement occurred during the period of review here at issue. In addition, Ta Chen asserted that Commerce abused its discretion by refusing to consider evidence proffered by the company to prove that there was no reimbursement agreement and that no reimbursement had occurred during the relevant period. Finally, Ta Chen challenged the validity of Commerce's "reimbursement regulation" – the regulation that the agency invoked in doubling Ta Chen's duty rate. According to Ta Chen, because that regulation authorizes the imposition of antidumping duties in excess of the calculated dumping margin, the regulation contravenes both the U.S. antidumping statute and the United States' international obligations. *See Ta Chen I*, 28 CIT at \_\_\_ , 342 F. Supp. 2d at 1197-98.

The Government vigorously defended the legality of Commerce's regulation. But even the Government had to concede that Commerce's rejection of the information that Ta Chen sought to submit to the agency in the course of the administrative review had "denied [Ta Chen] a meaningful opportunity to rebut [the Commerce Department's] presumption of reimbursement." *Ta Chen I*, 28 CIT at \_\_\_ , 342 F. Supp. 2d at 1198 (*quoting* Government's opening brief).

Accordingly, with the support of the Government as well as the Domestic Producers, *Ta Chen I* remanded the reimbursement issue to Commerce, with instructions to "reconsider the bases for its determination concerning the alleged reimbursement agreement, in light of any relevant factual evidence, as well as the agency's own findings, conclusions, and determinations in other matters . . . , and the applicable law." *Ta Chen I*, 28 CIT at \_\_\_ , \_\_\_ , 342 F. Supp. 2d at 1198-99, 1207.

On remand, Commerce requested and reviewed additional information from Ta Chen. Based on that information, the agency found that the reimbursement agreement "expressly mentions only the 1992-1994 period." Remand Results at 28. Concluding that "an agreement to reimburse antidumping duties . . . was not in effect" for any subsequent period (including the period of review here at issue), Commerce has rescinded its decision to double Ta Chen's antidumping margin (reducing the margin to 6.42%). *Id.* at 28-29, 31.

Because the Remand Results on the issue of the reimbursement agreement comply in full with the Court's instructions in *Ta Chen I*, and absent any objection by the parties,<sup>5</sup> those Remand Results are sustained.

## II. *The Remand Results on Calculation of CEP Profit*

As *Ta Chen I* sets forth in greater detail,<sup>6</sup> dumping occurs when goods are imported into the U.S. and sold at a price lower than their "normal value." 19 U.S.C. §§ 1673, 1677(34).<sup>7</sup> When normal value is compared to the U.S. price and dumping is found, antidumping duties equal to the "dumping margin" – the difference between the normal value and the U.S. price – may be imposed. 19 U.S.C. §§ 1673(2)(B), 1677(35)(A).

Normal value is calculated using the exporting (home) market price (*i.e.*, the price in the market where the goods are produced), an appropriate third country market price, or the cost of production of the goods. 19 U.S.C. § 1677b. Where – as in this case – the U.S. purchaser is affiliated with the producer or exporter, the U.S. price is based on the first sale from the affiliated purchaser (here, *Ta Chen's* subsidiary, TCI) to an unaffiliated purchaser in the U.S. This is the basis for constructed export price ("CEP"). 19 U.S.C. § 1677a(b).

Because the prices used to determine normal value and the U.S. price occur at different points in the stream of commerce, and under different circumstances, certain adjustments are made to attempt to make them comparable, to ensure "apples to apples" price comparisons. Where – as here – the price to be calculated is CEP, additional special adjustments are made. Among these are adjustments to account for selling expenses incurred in the U.S. by the entity affiliated with the foreign producer or exporter (including expenses such as commissions, guarantees and warranties, and credit expenses). 19 U.S.C. § 1677a(d)(1).

In addition to the adjustments for selling expenses, the CEP is reduced to account for the portion of profit attributable to those selling expenses. 19 U.S.C. § 1677a(d)(3). It is the calculation of this CEP Profit adjustment that is the focus of *Ta Chen's* remaining claim. Specifically, *Ta Chen* maintains that the "enormous . . . inventory carrying and credit costs" in this case are not properly accounted for by Commerce's application of its standard methodology for calculat-

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<sup>5</sup> See Gov't Remand Brief at 2 (noting that no party objected to the Remand Results on the issue of the reimbursement agreement, and asserting that "thus, the Remand Determination should be sustained upon that issue"); Dom. Prods. Remand Brief at 1 n.1 (advising that the Domestic Producers' comments on the Remand Results "do not address the . . . question of reimbursement of antidumping duties"). *Ta Chen's* brief is entirely silent on the issue.

<sup>6</sup> See generally *Ta Chen I*, 28 CIT at \_\_\_\_ , 342 F. Supp. 2d at 1193–95.

<sup>7</sup> All statutory citations are to the 1994 version of the U.S. Code. The pertinent text of the cited provisions remained the same at all times relevant herein.

ing CEP Profit, which treats such costs as “embedded” in a respondent’s actual, *recognized expenses* in certain parts of the CEP Profit equation, while accounting for the same costs with *imputed expenses* elsewhere in the equation. *See* Ta Chen Remand Brief at 13; *SNR Roulements v. United States*, 402 F.3d 1358, 1361, 1363 (Fed. Cir. 2005) (explaining assumptions underlying Commerce’s standard methodology).

As outlined in Commerce’s CEP Profit Policy Bulletin,<sup>8</sup> CEP Profit is determined by allocating a portion of the “Total Actual Profit” for *all* production and selling activities of the subject merchandise to U.S. CEP selling and further-manufacturing activities. The calculation of CEP Profit can be expressed in an equation:

$$\text{Total CEP Profit allocated} = \text{Total Actual Profit} \times \frac{\text{Total U.S. Expenses to U.S. expenses}}{\text{Total Expenses}}$$

For purposes of the CEP Profit equation, Commerce calculates the “Total Actual Profit” multiplier by (1) adding the revenue attributable to sales of subject (or like) merchandise in both the U.S. and the home market; (2) deducting from that sum the cost of the merchandise for both markets; and (3) deducting the selling, packing, and distribution expenses for both markets. *See* Remand Results at 4 (*citing* 19 U.S.C. § 1677a(f)(2)(D); CEP Profit Policy Bulletin). The “Total Expenses” denominator is calculated by adding (1) the cost of merchandise for both markets and (2) the selling, packing, and distribution expenses for both markets. *See* Remand Results at 4 (*citing* 19 U.S.C. § 1677a(f)(2)(C); CEP Profit Policy Bulletin). Under Commerce’s standard methodology for calculating CEP Profit, in both the “Total Expenses” denominator and the “Total Actual Profit” multiplier, *recognized financial expenses* are included in the cost of both the U.S. and the home market merchandise. *See* Remand Results at 4 & n.1 (*citing* CEP Profit Policy Bulletin); Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, at 825 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4164 (stating that “[t]he total profit is calculated on the same basis as the total expenses”).

As Commerce explains its standard methodology, “[w]hen calculating both the ‘Total Actual Profit’ multiplier and the ‘Total Expenses’ denominator, net financial expenses are calculated from the [foreign producer/exporter’s] constructed value (‘CV’) database in determining the cost of U.S. merchandise, and from the [foreign producer/exporter’s] cost of production (‘COP’) database in determining the

<sup>8</sup> *See* U.S. Department of Commerce Policy Bulletin 97/1, Calculation of Profit for Constructed Export Price Transactions (Sept. 4, 1997) (“CEP Profit Policy Bulletin”); *see also* *The Timken Co. v. United States*, 26 CIT 1072, 1087, 240 F. Supp. 2d 1228, 1244 (2002), *aff’d on other grounds*, 354 F.3d 1334 (Fed. Cir. 2004) (Commerce’s official CEP Profit Policy Bulletin is “well-established” and “consistently applied” by the agency).

cost of home market merchandise.” Remand Results at 5 (*citing* 19 U.S.C. §§ 1677b(e), 1677b(b)(3)). Commerce notes that “[g]enerally, net financial expenses are calculated by offsetting the total financial expenses incurred with any financial income earned during the period.” Remand Results at 5. Because net financial expenses are included in both the “Total Actual Profit” multiplier and the “Total Expenses” denominator as a cost item, and because Commerce historically has read the statute to require that those two numbers be actual (*i.e.*, *recognized*) amounts,<sup>9</sup> the agency’s standard methodology does not include *imputed* financial expenses as an expense item in the CEP Profit calculation. *See* Remand Results at 5–6 (*citing* CEP Profit Policy Bulletin at n.5).

In contrast to the *recognized* figures used in other parts of the CEP Profit equation, “Total U.S. Expenses” – the numerator of the ratio in that equation – includes *imputed* credit and inventory carrying costs, as an approximation of the borrowing costs associated with U.S. selling activities. *See* Remand Results at 5.<sup>10</sup> As Commerce observes, “[t]he imputed financial expenses related to selling activities [*i.e.*, imputed credit and inventory carrying costs] simply represent the opportunity cost of having . . . merchandise sit in inventory prior to sale, and of extending credit after the sale. To the extent that a company incurs a longer waiting period between production and payment, it will not have recourse to such funds and will generally incur greater financial expenses” than it would if the company received payment immediately upon production. Remand Results at 6–7.

As the Remand Results explain, *imputed* expenses are used in the “Total U.S. Expenses” numerator largely because, as a practical matter, appropriate *recognized* figures do not exist. In other words, because money is fungible, “it is difficult to ascertain exactly which portion of [a producer/exporter’s] financial expenses arises as a result of certain specific operations of the company, such as U.S. selling activities.” The imputed expenses are an *estimate* of that amount. *See* Remand Results at 5–6, 17, 22.

Finally, as the Remand Results note – because a company’s total recognized financial expenses reflect its costs of carrying merchandise in inventory and extending credit, and because those recognized expenses are included in the “Total Expenses” denominator and in the “Total Actual Profit” multiplier – the corresponding imputed expenses must be excluded from those parts of the CEP Profit equation, to avoid double-counting. By the same token, because the “Total U.S. Expenses” numerator includes imputed expenses, the corre-

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<sup>9</sup> *See generally* n.14, *infra*.

<sup>10</sup> Commerce notes that “inclusion of the imputed financial expenses in the ‘Total U.S. Expenses’ numerator is consistent with 19 U.S.C. § 1677a(f)(2)(B), which defines the term ‘Total U.S. Expenses’ as described under 19 U.S.C. § 1677a(d)(1) and (2).” Remand Results at 5; *see also* Gov’t Remand Brief at 4.



sponding recognized expenses must be excluded from that part of the equation. *See* Remand Results at 5–7, 15–16.

A. *The General Sufficiency of the Remand Results*

From the inception of this case, Ta Chen has asserted that the Commerce Department's application here of its standard methodology for calculating CEP Profit essentially "ignore[d] enormous . . . inventory carrying and credit costs," making U.S. sales of Ta Chen's merchandise appear overly profitable in comparison to home market sales. *See Ta Chen I*, 28 CIT at \_\_\_, 342 F. Supp. 2d at 1199–1200 (*quoting* Ta Chen's opening brief); Ta Chen Remand Brief at 3–4, 8, 10, 13–16.

Based on the arguments raised by Ta Chen, as well as the then-existing conflicts in the relevant case law, *Ta Chen I* instructed the Commerce Department to explain in greater detail why the *recognized* expenses included in the "Total Expenses" denominator and in the "Total Actual Profit" multiplier are an adequate proxy for the *imputed* expenses included in the "Total U.S. Expenses" numerator. *See generally Ta Chen I*, 28 CIT at \_\_\_, 342 F. Supp. 2d at 1199–1203.

Ta Chen now claims that Commerce's Remand Results do little more than parrot the agency's previous arguments and analyses, and thus fail to comply with the remand instructions in *Ta Chen I*. *See, e.g.*, Ta Chen Remand Brief at 2–6, 15–16. There is, however, no truth to that charge. The Remand Results amply evidence Commerce's compliance with the Court's mandate. *See* Remand Results at 1–4, 13–14 & *passim*; *see generally* Gov't Remand Brief at 2–3; Dom. Prods. Remand Brief at 1.

Specifically, as summarized above, the Remand Results elaborate on the statutory basis for Commerce's standard methodology, and describe in greater detail the methodology in general. *See generally* Remand Results at 4–8, 14; Gov't Remand Brief at 4. In particular, the Remand Results explain how the imputed financial expenses included in the "Total U.S. Expenses" numerator are a reasonable surrogate for the relevant recognized financial expenses included in both the "Total Expenses" denominator and the "Total Actual Profit" multiplier. *See generally* Remand Results at 1–2, 4–10, 14, 16; Gov't Remand Brief at 4–5.<sup>11</sup> The Remand Results further demonstrate that, in principle, the application of Commerce's standard methodol-

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<sup>11</sup>The reasoning advanced by Commerce here has been sustained in other cases, some of which have expressly recognized that, although the imputed figures and recognized figures may not be exactly the same, they are reasonable surrogates for one another. *See, e.g., SNR Roulements*, 402 F.3d at 1361–63; *SNR Roulements v. United States*, 28 CIT \_\_\_, \_\_\_, 341 F. Supp. 2d 1334, 1340 (2004) (citation omitted), *appeal docketed*, Nos. 05–1297, 05–1322 & 05–1323 (Fed. Cir. April 11, 2005); *The Timken Co.*, 26 CIT at 1090, 240 F. Supp. 2d at 1247; *Thai Pineapple Canning Indus. Corp. v. United States*, 24 CIT 107, 115 (2000), *aff'd in part, and rev'd in part on other grounds*, 273 F.3d 1077 (Fed. Cir. 2001). *See also* Remand Results at 16.

ogy properly accounts for a producer/exporter's financial expenses in all parts of the CEP Profit equation. *See generally* Remand Results at 3–8, 14; Gov't Remand Brief at 3–4.

Moreover, as discussed more fully in section II.D below, the supplemental administrative record filed with the Remand Results includes the test program that Commerce ran in this case. As the Remand Results explain, that test program demonstrates that – even if the imputed expenses had been included in the “Total Actual Profit” multiplier and the “Total Expenses” denominator in this case – such a change would have had only a minimal effect on Ta Chen's dumping margin. *See* Remand Results at 10–11, 21. Indeed, the Remand Results indicate that – contrary to Ta Chen's assertions – the addition of *imputed* expenses to those parts of the CEP Profit equation that already include corresponding *recognized* financial expenses would not render a more accurate dumping margin but, rather, would itself result in distortion (due to double-counting). *See* Remand Results at 11–12; *see also id.* at 5–7, 15–16.

For its part, Ta Chen has failed to adduce any real evidence to substantiate its claims that Commerce's standard methodology for calculating CEP Profit improperly distorted the results in this case.<sup>12</sup> *See SNR Roulements*, 402 F.3d at 1361 (Commerce's standard methodology for calculation of CEP Profit to be sustained absent challenging party's “showing that the amount of imputed expenses is not accurately reflected or embedded in its actual expenses”); *see also SNR Roulements*, 28 CIT at \_\_\_, 341 F. Supp. 2d at 1340 (Commerce's standard methodology to be sustained absent demonstration that (1) including imputed expenses in denominator and multiplier parts of calculation would not result in double-counting, or (2) that standard methodology results in distortion); *Thai Pineapple*, 24 CIT at 114–15 (sustaining Commerce's standard methodology because plaintiff failed to demonstrate any significant discrepancy).

Ta Chen's brief contesting the Remand Results is not a model of clarity, to say the least. However, distilled to its essence, it appears to press two principal challenges to the application of Commerce's standard methodology in this case. As discussed below, neither of those arguments is well-founded; and Ta Chen's other points are equally unavailing.

#### B. *The Magnitude of the Numerator vs. the Denominator*

Ta Chen first seeks to make much of the fact that the imputed credit and inventory carrying expenses reflected in the numerator of Commerce's CEP Profit equation exceed the recognized financial expenses included in the denominator. *See* Ta Chen Remand Brief at 6,

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<sup>12</sup> *See generally* Ta Chen Remand Brief at 2, 4–6, 13–16; *but see* Gov't Remand Brief at 5–6.



8, 11. Indeed, Ta Chen characterizes this point as the “basic distortion at issue” here. *See* Ta Chen Remand Brief at 6.

Ta Chen simply misunderstands the CEP Profit equation. *See generally* Gov’t Remand Brief at 6–7. Contrary to Ta Chen’s implication, “there is no theoretical or logical requirement that the imputed U.S. inventory carrying cost[s] and imputed U.S. credit expense[s] [reflected in the numerator of Commerce’s equation] should somehow be *limited to or less than* the total amount of recognized net financial expenses . . . included in the ‘Total Expenses’ denominator.” Remand Results at 10. The operative word in that sentence is “net.” As the Remand Results explain, “the imputed expenses in the numerator are *gross* expenses, while the recognized financial expenses in the denominator are *net* of interest income, which itself may not be allocable to U.S. selling activities. Thus, the imputed expenses may reasonably exceed the amount of recognized financial expenses in the denominator without the existence of a distortion.” Remand Results at 13.<sup>13</sup>

*C. Commerce’s Use of Data for Subject Merchandise vs. All Products*

Ta Chen’s second principal argument turns on its claim that the recognized expenses used in the equation are “impermissibly

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<sup>13</sup> *See also* Remand Results at 16 (“The imputed expenses are an estimate of the amount of gross financial costs associated with the respondent’s U.S. selling activities. The recognized financial expenses are net amounts of financial expenses associated with all production and selling activities, both in the United States and the home market.”), 22 (“The imputed expenses are an estimate of the amount of financial costs associated with the respondent’s U.S. selling activities. The recognized expenses are net financial costs associated with all production and selling activities, both in the United States and the home market.”), 23 (addressing claim that “Ta Chen had large imputed financial expenses for U.S. selling activities, yet . . . TCI had very little recognized interest expense during the [Period of Review]” at issue).

The gravamen of Ta Chen’s case – and the apparent basis for its preference for the use of imputed figures – seems to be that it has “enormous . . . inventory carrying and credit costs” which, it contends, are not adequately reflected (i.e., are understated) in the recognized figures used in both the “Total Expenses” denominator and the “Total Actual Profit” multiplier of Commerce’s standard CEP Profit equation. *See, e.g.*, Ta Chen Remand Brief at 13. However, contrary to Ta Chen’s claims, Commerce has not ignored any of the company’s costs. *See* Remand Results at 16; Gov’t Remand Brief at 7.

Indeed, in the Remand Results, Commerce expressly acknowledged Ta Chen’s relatively high credit and inventory carrying costs. But, as Commerce observes, there is no apparent reason why all such costs – whatever their magnitude – would not be fully and accurately reflected in Ta Chen’s consolidated financial statements. *See* Remand Results at 9, 12–13, 14. Ta Chen has failed to advance any such reason (much less to proffer any evidence to substantiate such a claim). And it is Ta Chen’s consolidated financial statements that are the source of the “recognized” figures that the company seeks to avoid. *See, e.g.*, Remand Results at 17, 22.

Moreover, although Ta Chen seems to view “imputed” figures as emanating from some mystical source, they are, in fact, derived directly from “recognized” figures. *See* Remand Results at 6–7, 12, 16; Dom. Prods. Remand Brief at 3–4. Ta Chen’s claim that Commerce ignored certain of its expenses thus finds no support in the record here.

*company-wide* versus for the *subject merchandise* in particular.” Ta Chen Remand Brief at 4. *See also* Ta Chen Remand Brief at 6 (asserting that Commerce “erroneously uses [‘company-wide . . . actual expenses on all products’] as a proxy for [the] costs of the subject merchandise in particular”), 9–10 (arguing that Commerce “failed to calculate the profit on the subject merchandise” and “did not consider imputed credit and inventory carrying costs incurred specifically on the subject merchandise”), 11 (alleging that Commerce “impermissibly uses . . . company-wide costs”).<sup>14</sup>

This argument, too, reflects a fundamental misconception as to Commerce’s methodology. As Ta Chen correctly points out, its financial statements report its financial expenses related to *all* of its products – not just those expenses related to subject merchandise. But, contrary to Ta Chen’s implication, Commerce did not use the raw numbers in its CEP Profit equation. Instead, in accordance with its standard methodology, Commerce calculated the portion of the total net financial expenses that are reflected in Ta Chen’s consolidated financial statements which are attributable to the subject merchandise. *See* Remand Results at 23–24. Thus, as the Remand Results explain, “the recognized net financial expenses in the ‘Total Actual Profit’ multiplier and the ‘Total Expenses’ denominator . . . in fact represent a figure *for subject merchandise only*, excluding the appropriate amounts for any non-subject products.” Remand Results at 24 (emphasis added).

#### D. Commerce’s Test Program

The validity of Commerce’s standard methodology as applied to the facts of this case is buttressed by the results of the test program that the agency ran in the course of the administrative review at issue. In accordance with *Ta Chen I*, all documentation related to that

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<sup>14</sup>Ta Chen continues to criticize Commerce’s reliance on generally accepted accounting principles. Ta Chen accuses the agency of improperly invoking accounting principles to justify its use of recognized expenses, which – according to Ta Chen – violates the agency’s statutory obligation to calculate dumping margins as accurately as possible. Ta Chen Remand Brief at 4, 6, 10–12.

The Government emphasizes that Commerce’s standard methodology for calculating CEP Profit is based on the statute, and that the agency’s normal practice is to value costs using recognized financial expenses. *See* Gov’t Remand Brief at 12–13 (*citing* Remand Results at 5, which in turn cite CEP Profit Policy Bulletin; Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, at 825 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4164–65). Indeed, the Remand Results state flatly that “the statute indicates that [‘Total Actual Profit’ and ‘Total Expenses’] are to be actual (*i.e.*, recognized) amounts.” Remand Results at 5. *But see SNR Roulements*, 402 F.3d at 1361–62 (holding that the statute “does not unambiguously address the issue” of the use of recognized expenses vs. imputed expenses in calculating “Total Expenses”).

In any event, Commerce has the discretion to depart from its standard methodology where necessary to achieve a more accurate result. But Ta Chen has failed to establish that any such departure is warranted here. *See* Gov’t Remand Brief at 13.

test program was disclosed to Ta Chen and included in the supplemental administrative record compiled on remand. *See Ta Chen I*, 28 CIT at \_\_\_\_, 342 F. Supp. 2d at 1202; Remand Results at 11, 20, Att. A; Draft Results Pursuant to Remand at Att. I (including both “Log for CEP Test Program” and “Output for CEP Test Program”).

Commerce’s test program included Ta Chen’s imputed expenses in all parts of the CEP Profit equation. *See* Remand Results at 10, 19–20. Still, the results that the test program yielded did not differ significantly from the results reached using Commerce’s standard methodology. *See* Remand Results at 10–11, 21. The Government highlights this fact as further proof that “Commerce’s standard methodology did not result in a distorted calculation.” Gov’t Remand Brief at 8 (*citing* Remand Results at 21).<sup>15</sup>

Ta Chen attacks Commerce’s test program, asserting (a) that there is no evidence that the test program actually ever even “considered, much less adequately [considered], imputed credit and inventory costs,” and (b) that – more generally – there must be an error in the test program because there is no great discrepancy between the results yielded by that program and the results of the agency’s standard methodology. *See* Ta Chen Remand Brief at 2, 7–9.

The Government argues that Ta Chen’s challenges to the test program come too late. In the course of the remand proceedings, Commerce served Ta Chen with copies of both the complete test program and the output log. According to the Government, Ta Chen was obli-

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<sup>15</sup>The Government takes pains to emphasize that the test program “does not represent a change in practice or an approach which Commerce intends to employ in the future.” Gov’t Remand Brief at 8–9; *see also* Remand Results at 10, 12, 21. The Government characterizes the exercise instead as “a unique and extraordinary attempt to probe the potential factual basis underlying Ta Chen’s argument, and an effort to resolve Ta Chen’s assertions that Commerce’s longstanding CEP profit methodology results in inaccuracies.” Gov’t Remand Brief at 8–9.

As the Remand Results explain, “the [alternative] methodology for calculating CEP profit set forth in [the test program] is flawed”:

According to the Department’s [standard] methodology, the imputed interest expenses are already reflected in the recognized financial expenses, which [are] included in the cost of merchandise in the denominator and the multiplier of the CEP profit equation. By adding the imputed interest expenses to the denominator and the multiplier, these amounts are then double-counted in the denominator and in the multiplier, such that the denominator and the multiplier would have both the recognized amount and the imputed measurement of the respondent’s interest expenses. Furthermore, the CEP profit equation applied in [the test program] is not accurate or symmetrical. By adding only the U.S. imputed interest expenses, but ignoring the home market imputed interest expenses and any imputed expenses related to production, purchasing, financing, or administrative activities, [the test program] places undue emphasis on Ta Chen’s imputed U.S. selling expenses.

Remand Results at 11–12; Dom. Prods. Remand Brief at 5. *See also* Remand Results at 25–26 (cataloguing a few of the “additional adjustments” that would be necessary to remedy flaws in the test program methodology, which “leaves much room for improvement”; even so, Commerce’s standard methodology would still “represent[ ] the most accurate methodology”).

gated to raise all objections to the test program with the agency at that time. The Government maintains that any attempt to raise such concerns now – for the first time – is barred by the doctrine of exhaustion of administrative remedies. *See* Gov't Remand Brief at 9; Remand Results at 20. *See generally Ta Chen I*, 28 CIT at \_\_\_\_, 342 F. Supp. 2d at 1205–07 (discussing doctrine of exhaustion); 28 U.S.C. § 2637(d).

The Government is only about half right. It is true that Ta Chen failed to raise the second (more general) point at the administrative level. But, contrary to the Government's claim, it appears that Ta Chen's comments on the Draft Remand Results in fact did flag the first point (concerning the test program's use of imputed expenses). Indeed, Ta Chen's comment on that issue precipitated a response from Commerce in the agency's final Remand Results filed with the Court.<sup>16</sup>

In any event, and more to the point, neither of Ta Chen's arguments is persuasive on the merits. As the Government puts it, "Ta Chen takes fragments of the test program out of context to incorrectly argue that imputed costs are not included in Total United States Selling Expenses ("TOTSELLU")." *See* Gov't Remand Brief at 9–10; Ta Chen Remand Brief at 7–8. Ta Chen apparently examined only a part of the test program. A more comprehensive review of the relevant parts of the program confirms that Commerce did indeed include Ta Chen's imputed expenses in the Total Selling Expenses ("TOTSELLU") line item. *See generally* Remand Results at 19–21.<sup>17</sup>

Equally lacking in substance is Ta Chen's claim that the relatively insignificant change in the results yielded by the test program somehow "defies mathematical logic" and constitutes proof of some funda-

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<sup>16</sup> *See* Letter to U.S. Sec'y of Commerce from Counsel to Ta Chen (Aug. 9, 2004) at 2 (arguing that, in the Draft Remand Results, "the Department purports . . . to recalculate the CEP Profit adjustment per Ta Chen's arguments that imputed costs must be considered") (emphasis added); Remand Results at 21 (stating that "the test program did in fact include the U.S. imputed financial expenses in the 'Total Actual Profit' multiplier and the 'Total Expenses' denominator, despite Ta Chen's claims to the contrary") (emphasis added).

<sup>17</sup> The Remand Results describe the test program in detail:

As evidenced by the equations set forth in the test program, the Department added the imputed expenses to the "Total Expenses" denominator, thus increasing "Total Expenses" by the amount of the imputed expenses. [Commerce] also deducted this recalculated "Total Expenses," which now includes the imputed expenses, from Ta Chen's "Total Revenue" to recalculate the "Total Actual Profit" multiplier. *See* CEP Test Program Log at lines 3293–3391. Thus, [Commerce] did in fact increase the "Total Expenses" denominator by the amount of the imputed expenses, and . . . also did in fact decrease "Total Actual Profit" multiplier by including the same imputed expenses as a deduction from "Total Revenue." . . .

. . . As evidenced from the actual calculations in the CEP test program and the test program computer language, the test program did in fact include the U.S. imputed financial expenses in the "Total Actual Profit" multiplier and the "Total Expenses" denominator, despite Ta Chen's claims to the contrary.

Remand Results at 20–21; *see also* Gov't Remand Brief at 10.

mental error. *See generally* Ta Chen Remand Brief at 2, 8–9. Apart from its general expressions of skepticism and incredulity, Ta Chen largely fails to elucidate this point, or to proffer any real evidence to support it.

As the Government observes, “The test program resulted in a difference of 6.5% in the total United States selling expenses. This, in turn, [would] lower[ ] Ta Chen’s margin slightly.” Gov’t Remand Brief at 10 (*citing* Remand Results at 11). According to the Government, the difference in results between the test program and the application of the agency’s standard methodology – however modest that difference may be in Ta Chen’s eyes – itself constitutes “evidence that Commerce did in fact add imputed expenses to two parts of the calculation.” Gov’t Remand Brief at 10–11.

Notwithstanding its various criticisms of the test program, Ta Chen seeks to avail itself of the program’s results. Specifically, Ta Chen argues that, at a minimum, the results of the test program “confirmed that it *does* make a difference in the dumping margin to consider imputed expenses on U.S. sales” in calculating CEP Profit. Ta Chen Remand Brief at 2–3. Emphasizing that the statute and judicial precedent require that dumping margins be calculated as accurately as possible, Ta Chen apparently contends that its dumping margin must be recalculated to reflect the test program results: “The statute does not say that minor inaccuracies may be ignored.” Ta Chen Remand Brief at 2–3, 15–16 (*citing* *D & L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed. Cir. 1997)).

But Ta Chen’s claim is wide of the mark, and must be rejected. As detailed in note 15 above, the test program has a number of inherent flaws. *See generally* Remand Results at 11–12, 21, 25–26.<sup>18</sup> Thus, there can be no suggestion that the test program is more accurate than Commerce’s standard methodology. *See* Remand Results at 25.

E. *Commerce’s Departure from Its Standard Methodology in Other Cases*

Ta Chen continues to emphasize that there are other cases where Commerce has deviated from its standard methodology for calculating CEP Profit. Ta Chen urges that the same course should be followed here. *See generally* Ta Chen Remand Brief at 14–16.<sup>19</sup>

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<sup>18</sup>In the Remand Results, Commerce noted – as an aside – that, in the event that one were to consider actually relying on the approach employed in the test program, numerous refinements and adjustments would be necessary. *See* Remand Results at 11–12, 25–26. Ta Chen pounces on the agency’s observations, dismissing them as mere “speculation without record support.” Ta Chen Remand Brief at 8. To the contrary, the points that Commerce makes are well-reasoned and clearly articulated, and (among other things) further illuminate the deficiencies in Ta Chen’s proposed alternative approach to the calculation of CEP Profit.

<sup>19</sup>It has become increasingly unclear precisely how Ta Chen would propose to calculate CEP Profit. Although Ta Chen now denies advocating the use of TCI’s financial statements,

But the cases that Ta Chen invokes are anomalies. *See generally* Gov't Remand Brief at 11–12. In each of those cases, Commerce departed from its standard methodology only because it was required to do so by the court – *not* because the agency viewed the alternative methodology as more accurate.<sup>20</sup> In each of those cases, although Commerce complied with the court's directive, the agency respectfully objected to the departure from its standard methodology.<sup>21</sup> And, in each of those cases, the agency prevailed on appeal. *See SNR*

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it appears that, in fact, it has urged exactly that in the past. *Compare* Ta Chen Remand Brief at 9 (asserting that it is not proposing use of TCI's financial statements) *with* Ta Chen Memorandum of Law In Support of Motion For Judgment On the Agency Record (Sept. 4, 2001) at 28 (arguing for use of "TCI's relevant financial statement ending October 31, 1998").

As the Remand Results detail, however, any such use of TCI's financial statements would pose a panoply of problems. *See generally* Remand Results at 16–17, 21–23. As Commerce explains, it would be inappropriate for the agency to "rely on the individual financial statements of a single subsidiary [*i.e.*, TCI] to reflect the full financial results and position of the consolidated correspondent [*i.e.*, Ta Chen]." *Id.* at 17. For example, because TCI "sells a full range of products which are outside the scope of [the] [antidumping] order [at issue], and has significant related-party transactions with other Ta Chen companies," there is no basis for treating TCI's financial statements as though they "effectively isolate the proper portion of Ta Chen's recognized financial expenses that may be attributable to U.S. selling activities of subject merchandise." *Id.* at 17, 23. For this reason, and others, "[n]either [Commerce] nor the Court has contemplated using TCI's recognized financial expenses as a substitute for Ta Chen's recognized financial expenses or as a substitute for Ta Chen's imputed financial expenses." *Id.* at 23; *see also id.* at 17.

Further, as the Remand Results note, Ta Chen has previously argued that "Ta Chen had large imputed financial expenses for U.S. selling activities, yet that TCI had very little recognized interest expense during the [period of review]." Remand Results at 23 (citation omitted). As Commerce observes, "[t]his suggests that any recognized financing expenses related to imputed credit or inventory carrying costs are not being borne by TCI, but rather by the parent company [Ta Chen] or other Ta Chen companies. Such amounts are not reported in TCI's separate financial statements, but would be reflected in Ta Chen's consolidated statements." *Id.*

Most recently, Ta Chen has suggested that – to avoid the "double counting" that results from including both imputed and recognized numbers in the same parts of the equation (a phenomenon that Ta Chen apparently now concedes) – Commerce "need only include imputed and not recognized expenses" in all parts of its CEP Profit equation. Ta Chen Remand Brief at 8. But it is far too late in the day to start vetting new proposed alternative methodologies. In any event, Commerce's preference for the use of actual, recognized, "booked" figures, where available (rather than imputed figures), is entirely reasonable and in accordance with generally accepted accounting principles. *See, e.g., The Timken Co.*, 26 CIT at 1090, 240 F. Supp. 2d at 1246 (*citing* Antidumping Manual). *Cf. The Thai Pineapple Public Co. v. United States*, 187 F.3d 1362, 1366 & n.5 (Fed. Cir. 1999). Absent some showing that Commerce's use of recognized figures in its CEP Profit calculations improperly skews the results, there is no basis for requiring the agency to use some other set of data. Certainly Ta Chen has made no such showing here.

<sup>20</sup> *See NTN Bearing Corp. of America v. United States*, 25 CIT 664, 155 F. Supp. 2d 715 (2001); *FAG Kugelfischer Georg Schafer AG v. United States*, 25 CIT 74, 131 F. Supp. 2d 104 (2001); *FAG Italia, S.p.A. v. United States*, 24 CIT 1311 (2000); *SNR Roulements v. United States*, 24 CIT 1130, 118 F. Supp. 2d 1333 (2000).

<sup>21</sup> The Government summarizes some of Commerce's concerns about its departures from its standard methodology in the three (outdated) cases on which Ta Chen relies:



*Roulements*, 402 F.3d 1358; *FAG Italia S.p.A. v. United States*, 402 F.3d 1356 (Fed. Cir. 2005).<sup>22</sup> See generally Gov't Remand Brief at 11–12.

Indeed, Ta Chen itself has been down this road before. Another court has previously rejected basically the same arguments that Ta Chen presses here, in a case in which Ta Chen challenged a different administrative review of the same underlying antidumping order at issue in this action. See generally *Alloy Piping Prods. Co. v. United States*, 28 CIT \_\_\_, 2004 WL 2418314 (2004); Ta Chen Remand Brief at 4 n.3 (acknowledging that Ta Chen raised same challenges to Commerce's standard CEP Profit calculation methodology both in instant case and in *Alloy Piping*). In *Alloy Piping*, the court sustained Commerce's application of its standard CEP Profit calculation methodology, because Ta Chen was unable to demonstrate that imputed expenses were not adequately reflected. *Alloy Piping*, 28 CIT at \_\_\_, 2004 WL 2418314 at \* 5. So too Ta Chen has failed to demonstrate that imputed expenses were not properly reflected in Commerce's CEP Profit calculations in the case at bar.

In sum, pursuant to *Ta Chen I* and in accordance with the Court of Appeals' holding in *SNR Roulements*, Ta Chen has been accorded more than ample opportunity to demonstrate that – under the facts of this case – the Commerce Department's use of actual, recognized expenses in the calculation of “Total Expenses” and “Total Actual Profit” did not fully account for U.S. credit and inventory carrying costs. See *Ta Chen I*, 28 CIT at \_\_\_, 342 F. Supp. 2d at 1199–1203; *SNR Roulements*, 402 F.3d at 1361, 1363. Yet Ta Chen has pointed to nothing in the record that casts doubt on the agency's determination that its standard methodology for calculating CEP Profit (including the use of recognized figures) remains “the most accurate methodology.” See Remand Results at 25. Under the circumstances, Commerce was well within its rights to decline to depart from that methodology.

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Commerce respectfully objected to the court-ordered methodology because the change distorted the ratio of United States selling expenses to total expenses. A distortion was created because the addition of imputed expenses incurred upon sales of the subject merchandise in the United States does not result in the addition of imputed expenses incurred upon sales of foreign like product sold in the exporting country. This overstatement of costs understates the ratio of United States selling expenses to total expenses and, thus, understates the amount of actual profit allocated to selling, distribution, and further manufacturing activities in the United States.

Gov't Remand Brief at 11–12.

<sup>22</sup> Obviously, these decisions by the Court of Appeals also dispose of Ta Chen's claim that judicial precedent mandates the inclusion of imputed expenses in all parts of the CEP Profit equation. See *Ta Chen Remand Brief* at 13–16.

### III. Conclusion

For all the reasons set forth above, the Final Results Pursuant to Remand filed by the Department of Commerce in this action are sustained. Judgment will enter accordingly.

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#### Slip Op. 06-48

CANADIAN LUMBER TRADE ALLIANCE; NORSK HYDRO CANADA, INC.; CANADIAN WHEAT BOARD; ONTARIO FOREST INDUS. ASS'N; ONTARIO LUMBER MFGS ASS'N; THE FREE TRADE LUMBER COUNCIL; and THE GOVERNMENT OF CANADA, Plaintiffs, v. THE UNITED STATES OF AMERICA; DEBORAH J. SPERO, ACTING COMMISSIONER, UNITED STATES CUSTOMS & BORDER PROTECTION; and UNITED STATES CUSTOMS & BORDER PROTECTION, Defendants, and COALITION FOR FAIR LUMBER IMPS. EXECUTIVE COMM.; U.S. MAGNESIUM, LLC; UNITED STATES STEEL CORP.; U.S. FOUNDRY & MFG. CO.; NEENAH FOUNDRY CO.; ALLEGHENY LUDLUM CORP; AK STEEL CORP.; EAST JORDAN IRONWORKS, INC.; LEBARON FOUNDRY CORP.; MUNICIPAL CASTINGS, INC.; and NORTH DAKOTA WHEAT COMM'N; Defendant-Intervenors.

Before: Pogue, Judge  
Consol. Ct. No. 05-00324

Decided: April 7, 2006

[Plaintiffs' motion granted in part; Defendant's motion granted in part]  
*Steptoe & Johnson, LLP* (Mark A. Moran, Kaija Wadsworth, Matthew S. Yeo, and Michael T. Gershberg) for Plaintiff Canadian Lumber Trade Alliance;  
*Steptoe & Johnson, LLP* (Gregory S. McCue) for Plaintiff Norsk Hydro Canada, LLC;  
*Steptoe & Johnson, LLP* (Edward J. Krauland, Joel D. Kaufman, and Thomas R. Best) for Plaintiff Canadian Wheat Board;  
*Sidley Austin LLP* (Neil R. Ellis, Andrew W. Shoyer, Carter G. Phillips, Lawrence R. Walders, and Richard D. Bernstein) for Plaintiff Government of Canada;  
*Baker & Hostetler, LLP* (Elliot J. Feldman, John Burke, Michael S. Snarr, and Bryan J. Brown) for Plaintiffs Ontario Forest Industries Association, Ontario Lumber Manufacturers Association, and The Free Trade Lumber Council;  
*Stuart E. Schiffer*, Deputy Assistant Attorney General; *David M. Cohen*, Director, *Jean E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Kenneth M. Dintzer*, Senior Trial Counsel, and *David S. Silverbrand*, Trial Attorney) for Defendant United States;  
*Dewey Ballantine LLP* (Bradford L. Ward, Harry L. Clark, Linda A. Andros, Mayur R. Patel, and Rory F. Quirk) for Defendant-Intervenor Coalition for Fair Lumber Imports Executive Committee;  
*King & Spalding, LLP* (Joseph W. Dorn, Stephen A. Jones, and Jeffrey M. Telep) for Defendant-Intervenor US Magnesium LLC;  
*Skadden Arps Slate Meagher & Flom, LLP* (John J. Mangan, Jeffrey D. Gerrish, and Robert E. Lighthizer) for Defendant-Intervenor United States Steel Corporation;

*Collier, Shannon, Scott, PLLC (Michael R. Kershow, Mary T. Staley, Paul C. Rosenthal, and Robin H. Gilbert)* for Defendant-Intervenors Neenah Foundry Company, Municipal Castings, Incorporated, LeBaron Foundry Incorporated, East Jordan Iron Works, Incorporated, Allegheny Ludlum Corporation, and AK Steel Corporation; *Troutman Sanders LLP (Charles Alvin Hunnicutt, and G. Brent Connor)* for Defendant-Intervenor North Dakota Wheat Commission.  
*Pillsbury, Winthrop, Shaw, Pittman, LLP (Stephan E. Becker, Sanjay J. Mullick, and Joshua D. Fitzhugh)* for Amicus Curiae Government of Mexico.

### OPINION

POGUE, Judge: This case presents two key questions: First, whether domestic law authorizes the Government of Canada and/or its exporters to challenge in this court the administration of the United States' trade laws, particularly the Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, § 1003, 114 Stat. 1549, 1623 (2000) codified at 19 U.S.C. § 1675c (the "Byrd Amendment"). The United States Bureau of Customs and Border Protection ("Customs" or "Defendant" or "Commissioner"),<sup>1</sup> relying on the Byrd Amendment, distributes to domestic producers who are competitors of the Plaintiff Canadian exporters the duties collected as a result of antidumping and countervailing orders on Canadian goods. If Plaintiffs are authorized to challenge the Defendant's implementation of the Byrd Amendment by bringing this action, the second issue is whether Customs is authorized to distribute funds collected from duty orders on Canadian (and Mexican) imports of goods where the Byrd Amendment does not specifically so direct.

For the reasons stated below, the court finds that the Plaintiff Canadian exporters, but not the Government of Canada, are authorized to bring this action, and that Customs has violated U.S. law, specifically a provision of the NAFTA Implementation Act in applying the Byrd Amendment to antidumping and countervailing duties on goods from Canada and Mexico, 19 U.S.C. § 3438.

### BACKGROUND

#### A.

In the early 1990's, the United States, Canada and Mexico negotiated, and signed, the North American Free Trade Agreement ("NAFTA"). See North American Free Trade Agreement Implementation Act Statement of Administrative Action ("SAA"), reprinted in H. R. Doc. No. 103-159, p. 1 (1993); *Xerox Corp. v. United States*, 423 F.3d 1356, 1358 (Fed. Cir. 2005); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1302-03 (11th Cir. 2001). NAFTA aims to achieve "the liberalization of trade in goods and services, removal of

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<sup>1</sup>In this opinion, the term Defendants refers to Defendant and Defendant-Intervenors. The court has attempted, when possible, to properly attribute arguments.

barriers to investment, [and] the protection and enforcement of intellectual property rights[.]” SAA, reprinted in H. R. Doc. No. 103–159, p. 3 (1993).

As is relevant here, NAFTA allows the United States (and the other NAFTA parties) to amend their antidumping and countervailing duty laws “provided that . . . [any] amendment shall apply to goods from another Party *only* if the amending statute specifies that it applies to goods from that Party or from the Parties to this Agreement.” North American Free Trade Agreement, art. 1902(2)(a) (1993) (entered into force Jan. 1, 1994) (*reprinted in Jackson, et al, 2002 Documents Supplement to Legal Problems of International Economic Relations* at 512 (4th ed. 2002)) (emphasis added).<sup>2</sup> NAFTA further requires that, if the United States does amend its antidumping or countervailing duty laws as to goods from Canada or Mexico: (1) it will notify “in writing the Parties to which the amendment applies of the amending statute as far in advance as possible of the date of enactment of such statute,” (2) it will consult with the affected party before adopting the amending statute, and (3) any such amendment

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<sup>2</sup> Article 1902 provides:

Retention of Domestic Antidumping Law and Countervailing Duty Law

1. Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of any other Party. Antidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice and judicial precedents.
2. Each Party reserves the right to change or modify its antidumping law or countervailing duty law, provided that in the case of an amendment to a Party’s antidumping or countervailing duty statute:
  - (a) such amendment shall apply to goods from another Party only if the amending statute specifies that it applies to goods from that Party or from the Parties to this Agreement;
  - (b) the amending Party notifies in writing the Parties to which the amendment applies of the amending statute as far in advance as possible of the date of enactment of such statute;
  - (c) following notification, the amending Party, on request of any Party to which the amendment applies, consults with that Party prior to the enactment of the amending statute; and
  - (d) such amendment, as applicable to that other Party, is not inconsistent with
    - (i) the General Agreement on Tariffs and Trade (GATT), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Antidumping Code) or the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Subsidies Code), or any successor agreement to which all the original signatories to this Agreement are party, or
    - (ii) the object and purpose of this Agreement and this Chapter, which is to establish fair and predictable conditions for the progressive liberalization of trade between the Parties to this Agreement while maintaining effective and fair disciplines on unfair trade practices, such object and purpose to be ascertained from the provisions of this Agreement, its preamble and objectives, and the practices of the Parties.

may not run counter to the General Agreement on Tariffs and Trade (“GATT”) or the principles of NAFTA. *Id.* at art. 1902(2)(b)–(d).

Congress approved NAFTA in the North American Free Trade Agreement Implementation Act (“NAFTA Implementation Act”) which also amended U.S. law to reflect the NAFTA framework. NAFTA Implementation Act, Pub. L. No. 103–182, 107 Stat. 2060–2164 (1993), codified at 19 U.S.C. §§ 3301–3473 (2000). Specifically, in implementing NAFTA art. 1902, Section 408 of the NAFTA Implementation Act, codified at 19 U.S.C. § 3438 (“Section 408”), provides that “[a]ny amendment . . . [to] title VII of the Tariff Act of 1930 [19 U.S.C. §§ 1671 *et seq.*], or any successor statute . . . shall apply to goods from a NAFTA country only to the extent specified in the amendment.” The NAFTA Implementation Act, including 19 U.S.C. § 3438, became effective January 1, 1994.

## B.

Subsequent to the passage of the NAFTA Implementation Act, in 2000, Congress amended Title VII of the Tariff Act of 1930 with the passage of the Byrd Amendment, 19 U.S.C. § 1675c. The passage of the Byrd Amendment was intended to strengthen the remedial purposes of the antidumping and countervailing duty laws.<sup>3</sup> Specifically, prior to the Byrd Amendment, under Title VII of the Tariff Act of 1930, Customs collected antidumping and countervailing duties on dumped and subsidized imports, implementing such orders to attempt to neutralize the distortive and adverse effects of dumping and subsidization; Customs then deposited all revenues collected from these duties into the U.S. Treasury, from which the duties were available to pay for general government expenses. *See generally* 21A

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<sup>3</sup>In adopting the Byrd Amendment, Congress made the following specific findings:

- (1) Consistent with the rights of the United States under the World Trade Organization, injurious dumping is to be condemned and actionable subsidies which cause injury to domestic industries must be effectively neutralized.
- (2) United States unfair trade laws have as their purpose the restoration of conditions of fair trade so that jobs and investment that should be in the United States are not lost through the false market signals.
- (3) The continued dumping or subsidization of imported products after the issuance of antidumping orders or findings or countervailing duty orders can frustrate the remedial purpose of the laws by preventing market prices from returning to fair levels.
- (4) Where dumping or subsidization continues, domestic producers will be reluctant to reinvest or rehire and may be unable to maintain pension and health care benefits that conditions of fair trade would permit. Similarly, small businesses and American farmers and ranchers may be unable to pay down accumulated debt, to obtain working capital, or to otherwise remain viable.
- (5) United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved.

Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106–387, § 1(a), § 1002, 114 Stat. 1549, 1549A–72 (2000).

Am Jur 2d, Customs Duties and Import Regulations § 221 (2004) (“In general, all receipts from customs must be promptly paid into the Treasury.”).

After the Byrd Amendment’s passage, Customs still collects anti-dumping and countervailing duties that attempt to neutralize the distortive and adverse effects of dumping and subsidization, but now, following the Byrd Amendment, Customs deposits all duties collected into “special accounts” established within the U.S. Treasury for each antidumping and countervailing duty order. 19 U.S.C. § 1675c(e); 19 C.F.R. § 159.64.<sup>4</sup> In addition, each year, Customs distributes all monies contained in those special accounts, plus interest, on a *pro rata* basis, to “affected domestic producers,” *i.e.*, companies (who continue to produce the subject merchandise under the anti-dumping or countervailing duty order) and worker groups that supported the petition for the antidumping or countervailing duty order. The funds distributed, known as the “continued dumping and subsidy offset,” 19 U.S.C. § 1675c(a); 19 C.F.R. § 159.61(a) (“Byrd Distributions”), are intended to strengthen trade law remedies, through an allocation based on “qualifying expenditures,” *i.e.*, certain enumerated business expenses such as manufacturing facilities, equipment, input materials, health benefits for employees, and “[w]orking capital or other funds needed to maintain production,” paid by affected domestic producers, 19 U.S.C. §§ 1675c(b)(4); 1675c(d)(2)–(3); 19 C.F.R. § 159.61(c).

On February 8, 2006, President Bush signed the Deficit Reduction Act of 2005 repealing the Byrd Amendment. *See*, Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(b), 120 Stat. 4, 154 (2006). As provided by this repeal: “All duties on entries of goods made and filed before October 1, 2007, that would, but for [the repeal]” be distributed will continue to be distributed under the Byrd Amendment, 19 U.S.C. § 1675c.” *Id.*

### C.

The Byrd Amendment does not specify that it applies to goods from Canada or Mexico, *see* 19 U.S.C. § 1675c, nor did the United States provide advance notice of the Byrd Amendment to Canada or Mexico or engage in consultations with regard thereto.

Seeking to challenge the Byrd Amendment, and alleging that the Byrd Amendment violated the Uruguay Round Agreements,<sup>5</sup>

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<sup>4</sup> Customs deposits monies into special accounts only after the entries of the goods have been liquidated, *i.e.*, final duties have been collected and deposited. Prior to liquidation, Customs deposits all monies collected, *i.e.*, cash deposits, in clearing accounts. *See* 19 C.F.R. § 159.64(a). When goods are liquidated, the money in the clearing accounts are transferred to special accounts. *See* 19 C.F.R. § 159.64(b).

<sup>5</sup> The Uruguay Round Agreements are the most recent completed trade agreements conducted under the GATT (now the WTO).



Canada and Mexico joined with nine other foreign governments in bringing a claim against the United States before the Dispute Resolution Body of the World Trade Organization (“WTO”).<sup>6</sup> In the proceedings, both a panel of the Dispute Resolution Body, Panel Reports, *United States-Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WTDS234/R (Sept. 16, 2002), and the Appellate Body, Appellate Body Reports, *United States-Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WTDS234/AB/R (Jan. 16, 2003), ruled against the United States, determining that the Byrd Distributions were inconsistent with the Uruguay Round Agreements.<sup>7</sup>

Pursuant to the WTO adjudication, and after consultation and arbitration, the WTO authorized the complaining nations to suspend tariff concessions and other obligations in an amount equal to a portion of the prior Byrd Distributions which the WTO had determined to be improper. Decision by the Arbitrator, *United States — Continued Dumping and Subsidy Offset Act of 2000*, ¶ 5.2, WT/DS234/ARB/CAN (Aug. 31, 2004). Specifically, the WTO authorized Canada to suspend tariff concessions in an amount equal to 72% of the value of the United States’ annual Byrd Distributions during fiscal 2004, *id.*, that percentage having been determined to be “the extent to which disbursement under the [Byrd Amendment] affect[ed] exports” from Canada, *id.* at ¶ 3.76. Additionally, Canada is authorized to suspend tariff concessions, and other obligations, totaling 72% of the value of distributions made by the United States for all years subsequent to 2004 (as annually calculated by the arbitrator). *Id.* at ¶ 5.1. Pursuant to this authorization, Canada imposes a 15% surtax on imports of live swine, cigarettes, oysters, and certain speciality fish, from the United States. See International Trade Canada, *Trade Negotiations and Agreements: Dispute Settlement* (2005), <http://www.dfait-maeci.gc.ca/tna-nac/disp/factsheet-en.asp>. The WTO has also approved Mexico’s suspension of trade concessions authorizing Mexico to impose tariffs ranging from 9% to 30% on imports of chewing gum and

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<sup>6</sup>The other complaining nations were Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea, and Thailand. See Decision by the Arbitrator, *United States - Continued Dumping and Subsidy Offset Act of 2000*, ¶ 1.2 n.3, WT/DS234/ARB/CAN (Aug. 31, 2004).

<sup>7</sup>Specifically, the Panel found that the Byrd Amendment was not a specific, and therefore actionable, subsidy. *United States-Continued Dumping and Subsidy Offset Act of 2000*, ¶¶ 7.115–16, WT/DS217/R, WTDS234/R. This conclusion was not appealed. However, the WTO Appellate Body found that the Byrd Amendment was a “specific action against dumping” and a “specific action against a subsidy” not taken in accordance with GATT 1994. *United States-Continued Dumping and Subsidy Offset Act of 2000*, ¶ 318, WT/DS217/AB/R, WTDS234/AB/R. Thus, while finding that the Byrd Distributions were not specific subsidies, the WTO found that Byrd Distributions were injurious to importers. See, e.g., *United States-Continued Dumping and Subsidy Offset Act of 2000*, ¶ 256, WT/DS217/AB/R, WTDS234/AB/R. The court provides this only as background information; the remainder of the court’s opinion relies exclusively on U.S. law and principles pertaining thereto.

candy, dairy, blends used for products such as baby formula, and various wines from the United States. *See* Decreto por el que se modifica temporalmente el artículo 1 el Decreto por el que se establece la Tasa Aplicable durante 2003 del Impuesto General de Importación para las mercancías originarias de América del Norte publicado el 31 diciembre de 2002 por lo que respecta para las mercancías originarias de EE.UU [Decree temporarily modifying various tariff rates applied to North American goods], Diario Oficial de la Federación [D.O.], 17 de Agosto de 2005 (Mex.) (2005) at 68–69, available at [http://gobnacion.gob.mx/dof/2005/agosto/dof\\_17-08-2005.pdf](http://gobnacion.gob.mx/dof/2005/agosto/dof_17-08-2005.pdf).

#### D.

Plaintiffs in this case are producers and exporters of goods from Canada (collectively “Canadian Producers”) and the Government of Canada (“Canada”); the Canadian Producers were all subject to countervailing and antidumping duty orders at one point of time since the passage of the Byrd Amendment and are direct competitors with recipients of Byrd Distributions, *see, e.g.*, Allan Decl., Pl.’s Ex. 1 at 4; Vincent Decl., Pl.’s Ex. 2 at 4; Milton Decl., Pl.’s Ex. 3 at 3; LaFlamme Decl., Pl.’s Ex. 4 at 5; Beudry Decl., Pl.’s Ex. at 10; Thompson Decl., Pl.’s Ex. at 3. The Government of Mexico has also participated in these proceedings as an *amicus curiae*.

Plaintiffs the Canadian Lumber Trade Alliance, the Ontario Forest Industry Association, the Ontario Lumber Manufacturers Association, and the Free Trade Lumber Council (“Lumber Plaintiffs”)<sup>8</sup> all represent Canadian Producers and exporters of softwood lumber whose imports into the United States are currently subject to anti-dumping and countervailing duty orders. *See Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 36,068 (Dep’t Commerce May 22, 2002) (notice of amended final determination of sales at less than fair value and antidumping duty order), *Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 36,070 (Dep’t Commerce May 22, 2002) (notice of amended final affirmative countervailing duty determination and notice of countervailing duty order). Based on these orders and pursuant to the Byrd Amendment, the Commissioner distributed \$3,278,700.42 to 106 affected domestic producers in 2005, \$5,378,612.97 to 126 affected domestic producers in 2004, and \$73,422.34 to at least 102 affected domestic producers in 2003. Revised Jt. Stip. Undisp. Facts at 6, Ex. 1 to Pl.’s Status Report Regarding a Revised Stmt. Undisp. Mat. Facts (Jan. 20, 2006) (“Pl.’s Stip. Facts”); Jt. Stip. Undisp. Mat. Facts at para. 8–9 (Nov.

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<sup>8</sup>The parties do not dispute, and the court does not challenge, that these associations have standing on behalf of their members. *See generally Automobile Workers v. Brock*, 477 U.S. 274 282 (1986); *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 346 (1977).

17, 2005) (“Def.-Int.’s Stip. Facts”). In addition, in accordance with these orders, Customs is currently holding cash deposits of \$4,189,827,439.59 (as of October 1, 2005) from entries of imports awaiting liquidation. Pl.’s Stip. Facts at 10.

Plaintiff Norsk Hydro Canada Inc. (“Norsk”) is a producer and exporter of pure and alloy magnesium ingots. Norsk’s imports into the United States are currently subject to countervailing duties pursuant to *Pure Magnesium and Alloy Magnesium From Canada*, 57 Fed. Reg. 39,392 (Dept. Commerce August 31, 1992) (countervailing duty order). The Commissioner has distributed \$25,486.40 in 2005, \$63,405.69 in 2004, and \$7,787.58 in 2003 to U.S. Magnesium (or its predecessor), Norsk’s domestic competitor. Pl.’s Stip. Facts at 6–7; Def.-Int.’s Stip Facts at para. 10.<sup>9</sup> Under this order, Customs holds cash deposits (as of October 1, 2005) of \$6,328,090.94. Pl.’s Stip. Facts at 10.

Plaintiff the Canadian Wheat Board purchases hard red spring wheat from Canadian farmers and sells that wheat in Canada and export markets including the United States. The Canadian Wheat Board was subject to antidumping and countervailing duty orders, *Certain Durum and Hard Red Spring Wheat From Canada*, 68 Fed. Reg. 52,747 (Dept. Commerce Sept. 5, 2003) (notice of final affirmative countervailing duty determinations); *Certain Durum and Hard Red Spring Wheat From Canada*, 68 Fed. Reg. 52,741 (Dept. Commerce Sept. 5, 2003) (notice of final determinations of antidumping duty investigations), until Commerce rescinded those orders effective as of January 2, 2006, *Antidumping Duty Investigation and Countervailing Duty Investigation of Hard Red Spring Wheat from Canada: Notice of Panel Decision, Revocation of Countervailing and Antidumping Duty Orders and Termination of Suspension of Liquidation*, 71 Fed. Reg. 8,275 (Dep’t Commerce Feb. 16, 2005). On June 1, 2005, Customs published a notice of intent to make distributions of monies collected from the Canadian Wheat Board identifying a single eligible affected domestic producer: Defendant-Intervenor the North Dakota Wheat Commission. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 70 Fed. Reg. 31,566, 32,132 (Dep’t Customs June 1, 2005) (notice of intent to distribute offset for Fiscal Year 2005). Pursuant to the two orders on hard red spring wheat from Canada, the Commissioner distributed \$127,643.68 to the North Dakota Wheat Commission (“NDWC”) in November 2005, Def.’s Resp. Def. Int.’s Proposed Stmt. Facts at para. 59 (Jan. 30, 2006), and currently holds cash deposits of \$290,021.87 from unliquidated entries (as of October 1, 2005), Pl.’s Stip. Facts at 10.

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<sup>9</sup>There are numerous other orders on related products from Canada that are not detailed here.

### E.

Plaintiffs filed their summonses and complaints in this action on April 29, 2005, claiming jurisdiction under 28 U.S.C. §1581(i).<sup>10</sup> On July 12, 2005, the Defendant moved to dismiss each action pursuant to USCIT Rules 12(b)(1) and 12(b)(5), asserting that the court lacked subject matter jurisdiction and that the Plaintiffs had failed to state a claim for which relief could be granted because Plaintiffs' complaints were not authorized by domestic law. In a telephone conference held on August 2, 2005, Plaintiffs informed the court that they would oppose the Defendant's motion to dismiss for lack of subject matter jurisdiction with affidavits and would be filing motions for summary judgment pursuant to USCIT Rule 56 (more appropriately, motions for judgment on the agency record under Rule 56.1). Following the Supreme Court's suggestion in *Pennell v. San Jose*, 485 U.S. 1, 7 (1988) ("We strongly suggest that in future cases parties litigating in this Court under circumstances similar to those here take pains to supplement the record in any manner necessary to enable us to address with as much precision as possible any question of standing that may be raised."); *Bennett v. Spear*, 520 U.S. 154, 167-68 (1997) (outlining the evidentiary requirements of standing), the court, in light of the Plaintiffs' proposed filings, converted all pending motions into cross motions for summary judgment/motions for judgment on the agency record,<sup>11</sup> and pursuant to Rule 56 (d), on March 27 and March 28, 2006, held a hearing to resolve any dis-

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<sup>10</sup>28 U.S.C. § 1581(i) provides:

In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

- (1) revenue from imports or tonnage;
- (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
- (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
- (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 [19 U.S.C. § 1516a(a)] or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930 [19 U.S.C. § 1516a(g)].

<sup>11</sup>The Defendant correctly notes that the merits of this case are solely determined on the basis of the administrative record. As such, the court has no fact-finding role with respect to the merits of the case at bar. Therefore, in this instance, a motion to dismiss brought under USCIT R. 12(b)(5) is effectively the same as a motion for judgment on the agency record

puted facts related to jurisdiction. The court also granted a motion by Plaintiffs to consolidate all of Plaintiffs' cases under Docket Number 05-324.

### I. Overview

Defendant and Defendant-Intervenors allege numerous jurisdictional defects in the Plaintiffs' Complaints. Because jurisdictional bars to entertaining Plaintiffs' suits are a threshold inquiry, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577-78 (1999); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89-102 (1998), the court must find that jurisdiction exists before it may reach the merits. Nevertheless, because many of the jurisdictional arguments depend on at least a superficial understanding of the statutory scheme at issue, the court will here briefly discuss the text, purpose, and effect of Section 408 while leaving discussion of the *bona fide* disagreements over its interpretation to Section V below.

Plaintiffs, including Canada, raise their claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, to enforce Section 408 of the NAFTA Implementation Act as applied to Customs' administration of the Byrd Amendment. Plaintiffs ask the court to: (1) find unlawful Defendant's disbursements of monies collected on goods from Canada; (2) permanently enjoin future distributions; and (3) instruct Defendants to reclaim distributions made on March 15, 2004 and December 17, 2004. *See, e.g.*, Gov't Canada Compl. 9, Can. Lum. Compl. 11-12.

It follows that, while Plaintiffs' causes of action are stated under the APA, the thrust of Plaintiffs' claims rest on Section 408. Section 408 provides that:

Any amendment enacted after the Agreement enters into force with respect to the United States that is made to—

(1) section 303 or title VII of the Tariff Act of 1930 [19 U.S.C. §§ 1671 *et seq.*], or any successor statute, or

(2) any other statute which—

(A) provides for judicial review of final determinations under such section, title, or successor statute, or

(B) indicates the standard of review to be applied,

shall apply to goods from a NAFTA country only to the extent specified in the amendment.

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brought under USCIT Rule 56.1. Accordingly, in the interests of a "just, speedy, and inexpensive," resolution of such cases, USCIT R. 1, the court prefers that parties move under USCIT Rule 56.1 for judgment on the agency record.

By requiring that amendments apply to goods from Canada and Mexico “only to the extent specified in the amendment,” Congress, through Section 408, imposed a “magic words”<sup>12</sup> rule of interpretation on amendments to U.S. trade laws, *i.e.*, that any amendment to title VII of the Tariff Act of 1930 must contain certain “magic words” for Congress to indicate that it intends to alter antidumping and countervailing duty laws with respect to NAFTA parties. SAA, *reprinted in* H.R. Doc. No. 103–159, p. 203 (1993) (“Section 408 of the bill implements the requirement of Article 1902 that amendments to the AD and CVD laws shall apply to a NAFTA country only if the amendment so states explicitly.”).

In so doing, Section 408 insulates NAFTA parties, including their exporters, from some changes to the antidumping and countervailing duty laws unless Congress has explicitly stated otherwise. Such an exercise of self-restraint was intended to ensure that future Congresses, agencies, and courts did not inadvertently abrogate the rights NAFTA parties negotiated, or, alternatively, to require future Congresses to give due consideration to the United States’ NAFTA obligations before they amend the antidumping and countervailing duty laws. *See id.*; *cf. Spector v. Norwegian Cruise Line Ltd.*, 125B S. Ct. 2169, 2182 (2005) (“These clear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation.”); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (applying a clear statement rule “to protect against unintended clashes between [U.S.] laws and those of other nations which could result in international discord” which Congress presumably seeks to avoid); *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953) (applying the *Charming Betsy* canon, a clear statement canon, because, “in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided[.]”). Consequently, Plaintiffs claim, when the Byrd Amendment is read in conjunction with Section 408, the Byrd Amendment states that Customs shall distribute monies collected on duty orders except for duty orders on goods from Canada or Mexico.

With this overview in mind, the court will first consider the Defendant and Defendant-Intervenors’ jurisdictional objections. Taken to-

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<sup>12</sup>A “magic words” rule, also referred to as a “magical password,” “express-reference” or “express-statement” rule, is a strict clear statement rule which requires the use of certain words to signal a particular Congressional intent. *See, e.g., Lockhart v. United States*, 126 S. Ct. 699, 703 (2005); *cf. Demore v. Kim*, 538 U.S. 510, 517 (2003) (discussing *INS v. St. Cyr*, 533 U.S. 289, 327 (2001) (Scalia, J. concurring). Here, the required “magic words” are “shall apply to goods from Canada and Mexico.” *Cf.* Section 234, Uruguay Round Agreements Act, 108 Stat. 4809, 4901 (1994) (“Pursuant to article 1902 of the North American Free Trade Agreement and section 408 of the North American Free Trade Agreement Implementation Act, the amendments made by this title shall apply with respect to goods from Canada and Mexico.”). The court reserves discussion of the propriety of a “magic words” rule for Section V.b below.



gether, the Defendant and Defendant-Intervenors' assert that (1) the Plaintiffs lack the legal capacity to bring their complaints, *i.e.*, they lack standing (both under Article III and because of prudential limitations on standing); and (2) Plaintiffs' claims are barred by the political question doctrine.<sup>13</sup> Relatedly,<sup>14</sup> Defendant and Defendant-Intervenors contend that Plaintiffs cause of action is barred by Section 102(c) of the NAFTA Implementation Act, codified at 19 U.S.C. § 3312(c). Because the court finds that it does have jurisdiction with respect to the Canadian Producers, and that they have a cause of action under U.S. law, it will then consider the merits.

## II. STANDING

Article III of the United States Constitution provides that "[t]he judicial Power shall extend to [certain] Cases . . . [and] Controversies. . . ." U.S. Const. art. III, § 2, cl. 1; *cf.* 28 U.S.C. § 251 (establishing the Court of International Trade as an Article III court). In accordance with this language, courts have required that every pending matter before an Article III Court be a "case" or "controversy." *See Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). One of the cornerstones of this inquiry is whether the complaining parties have standing to raise their claims.

"In . . . pedestrian terms, [standing] is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?' " Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 882 (1983). Specifically as this question relates to challenges to administrative decision making, Plaintiffs must demonstrate that they have been, or likely will be, injured by Defendant's conduct, in a manner redressable by the court, and that the prudential considerations have been met. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) ("*NCUA*"); *Dir. v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126–27 (1995); *Ass'n of Data Processing Service Org., Inc.*

<sup>13</sup>All parties agree, as they must, that Congress' repeal of the Byrd Amendment does not moot this case. Not only are Plaintiffs seeking disgorgement of prior distributions which the repeal does not address, but also, because the repeal is not effective until October 1, 2007, *see* Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(b), 120 Stat. 4, 154 (2006), injunctive relief may still be appropriate for monies collected until October 1, 2007.

<sup>14</sup>"The question whether a federal statute creates a claim for relief is not jurisdictional." *Nw. Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365 (1994); *Air Courier Conf. v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991) (absence of a cause of action defense is waiveable because "[w]hether a cause of action exists is not a question of jurisdiction."). *Cf. Steel Co.*, 523 U.S. at 89 ("the absence of a valid (as opposed to arguable) cause of action does not implicate [a court's] subject matter jurisdiction"); *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976) (finding that the "final agency action" requirement of the APA is waiveable). The court discusses whether Plaintiffs have a cause of action in Section IV below.

*v. Camp*, 397 U.S. 150, 152–53 (1970) (“*Data Processing*”). Each prong will be addressed in turn.

#### **A. Article III Standing:**

Article III standing requires plaintiffs to demonstrate: (1) that they have suffered some injury-in-fact; (2) a causal connection between the defendant’s conduct and this injury-in-fact; and (3) that this injury is redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“*Defenders of Wildlife*”) (citations omitted). Although the prongs of the test are not always factually separable, each prong must be satisfied. See, e.g., *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984); *Wyo. Sawmills Inc. v. U.S. Forest Serv.*, 383 F.3d 1241, 1247–48 (10th Cir. 2004), *cert. denied* 126 S. Ct. 330 (2005); *The Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 320 (4th Cir. 2002). Because the Canadian Producers’ standing claim turns on a different analysis than that of the Government of Canada, the court will consider each claim separately.

##### *i. Canadian Producers’ Standing*

##### **a. The Injury-in-fact Requirement**

Article III first requires Plaintiffs to demonstrate that they have suffered an injury-in-fact “which is (a) concrete and particularized, [and] (b) ‘actual or imminent, not conjectural or hypothetical.’” *Defenders of Wildlife*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). The injury-in-fact requirement aims not to shield defendants from litigation, but to ensure that the plaintiffs have a stake in the fight and will therefore diligently prosecute the case, *United Food & Commer. Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 556 (1996) (the standing requirement assures “adversarial vigor”); *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972), while, at the same time, ensuring that the claim is not abstract or conjectural so that resolution by the judiciary is both manageable and proper, *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 20 (1998); *Allen*, 468 U.S. at 752; *Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Accordingly, while injury-in-fact must be found in every case regardless of the statutory provision at issue, *Defenders of Wildlife*, 504 U.S. at 577–78; *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976), it is nonetheless a “very generous” test, requiring only that claimants “allege[] some specific identifiable trifle of injury. . . .” *Bowman v. Wilson*, 672 F.2d 1145, 1151 (3rd Cir. 1982) (citing *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973) (rejecting the argument that plaintiffs’ interests must be “significantly” affected, noting that only an “identifiable trifle” is sufficient)).

Applying these principles, courts “routinely recognize probable economic injury resulting from [governmental actions] that alter competitive conditions [are] sufficient to satisfy the [Article III ‘injury-in-fact’ requirement].” *Clinton v. City of New York*, 524 U.S.

417, 433 (1998) (quoting III Kenneth Kulp Davis & Richard J. Pierce, *Administrative Law Treatise* 13–14 (3d ed. 1994)). Accordingly, courts have held that parties may “‘suffer constitutional injury in fact when agencies . . . allow increased competition’ against them.” *U.S. Telecom Ass’n v. FCC*, 295 F.3d 1326, 1331 (D.C. Cir. 2002) (quoting *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998)).

In this case, there can be no doubt that the Plaintiffs are direct competitors with the recipients of Byrd Amendment distributions. *Cf. Sualt Ste. Marie Tribe of Chippewa Indians v. United States*, 288 F.3d 910, 916 (6th Cir. 2002) (denying standing because plaintiff failed to offer any evidence that a casino forty miles away would detract from its business); *Dek Energy Co. v. FERC*, 248 F.3d 1192, 1196 (D.C. Cir. 2001) (denying standing because of only a “vague probability” that competitor’s product would “actually reach that market and a still lower probability that its arrival will cause [plaintiff] to lose business or drop its prices.”); *Area Transp., Inc. v. Ettinger*, 219 F.3d 671, 673 (7th Cir. 2000) (where competitor was barred from the market, plaintiff lacked standing to seek disgorgement of subsidy). If it were not the case that the Canadian Producers and the domestic industries are direct competitors, it would be unlikely that the domestic producers would be entitled to obtain the protection of the underlying antidumping and countervailing duty orders that are the source of the Byrd Distributions. *See, e.g.*, 19 U.S.C. §§ 1671d(b)(1) & 1673d(b)(1) (requiring International Trade Commission to find material injury); 19 U.S.C. § 1675a(a) (same); 19 U.S.C. § 1677(9)(A) (defining interested parties to proceedings to include producers of the subject merchandise). Nor can it be seriously questioned that a direct payment to, *i.e.*, conferring of a subsidy on, a direct competitor may be sufficient to cause increased competition and therefore “a concrete and particularized injury” that is “actual or imminent.” *See, e.g., W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 195 n.10 & 196 n.12 (1994);<sup>15</sup> *Bacchus Imps., Ltd. v. Dias*, 468 U.S.

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<sup>15</sup>The Supreme Court did not discuss standing in *W. Lynn Creamery*. Nevertheless, the Court did discuss at length the injurious effect of subsidies, *see W. Lynn Creamery*, 512 U.S. at 195 n.10, and the Court has incorporated *W. Lynn Creamery*, and its analysis, into its standing jurisprudence. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997).

Both Defendant and Defendant-Intervenors rely on the *W. Lynn Creamery* Court’s statement that “[a] pure subsidy funded out of general revenue imposes no burden on interstate commerce, but merely assists local business,” to argue that the Byrd Distributions do not cause competitive injuries. *See, e.g.*, Def.’s Supp. Br. at 25 (quoting *W. Lynn Creamery*, 512 U.S. at 199). This reliance, however, is misplaced for two reasons. First, the scheme at issue here is not funded out of “general revenue sources” but from special accounts funded by duty orders on foreign competitors. Therefore, the Court’s statement, under its own terms, cannot aid the Defendant and Defendant-Intervenors. *See id.* (“The pricing order in this case, however, is funded principally from taxes on the sale of milk produced in other states.”). Secondly, this court agrees with Justice Scalia’s assessment of this language when he stated in his concurrence:

263, 267 (1984);<sup>16</sup> *United States Telecom Ass'n*, 295 F.3d at 1326; *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 43 (D.C. Cir. 1999); *Adams v. Watson*, 10 F.3d 915, 920–21 (1st Cir. 1993); *Westport Taxi Serv., Inc. v. Adams*, 571 F.2d 697, 700–01 (2d Cir. 1978); *Rental Hous. Ass'n of Greater Lynn, Inc. v. Hills*, 548 F.2d 388, 389–90 (1st Cir. 1977); *Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696, 701 (5th Cir. 1973). *Cf. Area Transp., Inc. v. Ettinger*, 219 F.3d at 673. Indeed, it must be the case that subsidies to competitors confer standing under our trade laws — if parties did not suffer an injury-in-fact from an agency's failure to countermand such a subsidy, then no member of the domestic industry would have standing to challenge a *negative* determination by the Department of Commerce or International Trade Commission in an antidumping and countervailing duty case, see *Shieldalloy Metallurgical Corp. v. United States*, 20 CIT 1362, 1374, 947 F. Supp. 525, 536 (1996) (“As a direct competitor of Shieldalloy, Galt would suffer injury in fact if Commerce were to calculate Shieldalloy's dumping margin based on distorted or impermissible data.”), or (perhaps), even intervene in such cases before this Court, *Diamond v. Charles*, 476 U.S. 54, 68–69 (1986) (leaving open whether intervenors must have standing).<sup>17</sup>

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The Court guardedly asserts that a “pure subsidy funded out of general revenue *ordinarily* imposes no burden on interstate commerce, but merely assists local business,” but under its analysis that must be taken to be true only because most local businesses (*e.g.*, the local hardware store) are not competing with businesses out of State.

*W. Lynn Creamery*, 512 U.S. at 208 (Scalia, J. concurring) (citation omitted) (emphasis in original). Here, this assumption does not hold as the recipients of Byrd Distributions are most assuredly “competing with businesses out of State.” Consequently, the majority's discussion of how it is axiomatic that subsidies harm competitors, *e.g.*, *W. Lynn Creamery*, 512 U.S. at 195 n.10, is in no way negated by this statement.

<sup>16</sup> *Bacchus* involved a challenge to a tax exemption which is similar to, and results in similar ends, as a subsidy. See *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983); *cf. Camps v. Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 588–594 (1997) (although factually similar, tax exemptions are permitted under the Establishment Clause whereas subsidies are not); *W. Lynn Creamery*, 512 U.S. at 207–12 (Scalia, J. concurring) (noting that although they achieve the same result, it appears that subsidies are permissible under the Dormant Commerce Clause whereas tax exemptions are not).

<sup>17</sup> The Defendant also tries to distinguish *Shieldalloy Metallurgical Corp.*, 20 CIT 1362, 947 F. Supp. 525 (1996), asserting that, in that case, the statute provided standing. This argument fails to recognize that injury-in-fact is an indispensable constitutional minimum. No act of Congress may displace this requirement. *Defenders of Wildlife*, 504 U.S. at 560; *Muskrat v. United States*, 219 U.S. 346, 362 (1911). Therefore, the Article III injury does not turn on whether Congress has granted parties a cause of action. See *Defenders of Wildlife*, 504 U.S. at 576 (“[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right.”); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 497 (7th Cir. 2005); compare *Clinton*, 524 U.S. at 433–34 n.22 with *id.* at 456 (Scalia J. dissenting); *cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n.5 (1998) (“Also contrary to JUSTICE STEVENS' unprecedented suggestion . . . redressability — like the other prongs of the standing inquiry — does not depend on the defendant's status as a governmental entity.” (citation omitted)). The court further notes that whatever minimum evidentiary requirement applies here must apply to all cases; this requirement is blind to whether the plaintiff is a member of the domestic industry appeal-

Nevertheless, both Defendant and Defendant-Intervenors argue that the Canadian Producers do not have standing to maintain their challenge because: (a) the Complaints did not sufficiently plead standing; (b) economic injury is an insufficient basis to confer standing; and (c) Plaintiffs have suffered no injury-in-fact as a matter of fact. Each objection will be addressed in turn.

### 1) *Sufficiency of the Complaints*

In their Complaints, the Canadian Producers allege that they are exporters in “direct competition” with recipients of Byrd Distributions, and that they “have suffered, and will continue to suffer harm to their economic and competitive interests as a result of the distribution of funds pursuant to [the Byrd Amendment].” Can. Lum. Compl. 4. *See also* Norsk Compl. 4 (same); Ontario Forest Indus. Compl. 3; CWB Compl. 3 (alleging that it “will suffer harm to its economic interests”). The Defendant, citing the Federal Circuit’s decision in *McKinney v. U.S. Dep’t of Treasury*, 799 F.2d 1544, 1555 (Fed. Cir. 1986), avers that the Canadian Producers alleged no “specific injury whatsoever” in their complaints. Def.’s Mem. Supp. Def.’s Mot. Dismiss at 16 (“Def.’s Mem.”). *See also* Def.’s Combined Reply Supp. Mot. Dismiss & Opp. Pl.’s Mot. Summ. J. at 25–26 (“Def.’s Reply”).<sup>18</sup>

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ing a negative determination or an importer appealing an affirmative determination. Furthermore, standing is a matter this court must determine *de novo*, *Fieldturf Inc. v. Sw. Recreational Indus., Inc.*, 357 F.3d 1266, 1268 (Fed. Cir. 2004); therefore, whatever standard the court applies here, it must apply in every case notwithstanding a finding of material injury by the International Trade Commission. *See generally Steel Co.*, 523 U.S. at 94 (the question of standing is one the court is “bound to ask and answer for itself” (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)); *cf. United Transp. Union v. ICC*, 891 F.2d 908, 916 (D.C. Cir. 1989) (while the court may consider Congressional findings, it must ultimately conclude for itself that standing exists). Certainly, many injury determinations by the International Trade Commission are not based on the type of specific injuries that the Defendants would have us require.

Even after oral argument, the Defendant continues to press its attempt to distinguish *Shieldalloy*. Citing *Warth v. Seldin*, 422 U.S. 490, 514 (1975) (“Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where plaintiff would have suffered no judicially cognizable injury in the absence of statute.”), the Defendant argues that because “an aggrieved petitioner for an antidumping or countervailing duty order may challenge a final negative injury determination by the International Trade Commission (“ITC”) contending that it is ‘unsupported by substantial evidence on the record, or otherwise not in accordance with law,’ 19 U.S.C. § 1516a,” Congress has created a statutory right of the type contemplated by *Warth*, “(i.e., by enacting the antidumping and countervailing duty statutes, Congress has made ‘legally cognizable,’ a petitioner’s claim).” Def.’s Post-Hearing Supp. Br. at 3.

This argument, however, ignores the requirements of *Defenders of Wildlife* that constitutional standing be met in every case; in addition, it inappropriately conflates the analysis of a plaintiff’s cause of action with the analysis of standing. *See infra* at pp. 43–44.

<sup>18</sup>Defendant’s argument also overlooks the fact that a court, in considering a motion to dismiss under 12(b)(1), may look at materials outside the complaint. Def.’s Reply at 9 (quoting *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993)). In other words, the court need not limit itself to the four corners of the complaint, but may consider affidavits, reports by the International Trade Commission, Congressional Research Service, fac-



Although Defendant's argument may be supported by language in *McKinney*, in the years since that decision, the Supreme Court has clarified pleading requirements for standing. See, e.g., *Bennett v. Spear*, 520 U.S. 154, 167–68 (1997); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) ("*Nat'l Wildlife Fed'n*"). According to the Supreme Court's current articulation of the pleading requirements, "each element of Article III standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.'" *Bennett*, 520 U.S. at 167–68 (quoting *Defenders of Wildlife*, 504 U.S. at 561). Because Plaintiffs' Complaint need only "set forth . . . a short and plain statement of the grounds upon which the court's jurisdiction depends," USCIT R. 8, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Defenders of Wildlife*, 504 U.S. at 561 (quoting *Nat'l Wildlife Fed'n*, 497 U.S. at 889). Consequently, a district court may only dismiss a complaint if it can presume no "specific facts under which the petitioners will be injured." *Bennett*, 520 U.S. at 168; see also *Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir. 2003); *Alliant Energy Corp. v. Bie*, 277 F.3d 916, 920 (7th Cir. 2002) (Easterbrook, J.) ("supplying details is not the function of a complaint. It is easy to imagine facts *consistent with* this complaint and affidavits that will show plaintiffs' standing, and no more is required." (emphasis in original)); *S. Austin Coal. Cmty. Council v. SBC Commc'ns., Inc.*, 274 F.3d 1168, 1171 (7th Cir. 2001) ("Complaints need not be elaborate, and in this respect injury (and thus standing) is no different from any other matter that may be alleged generally."); *S. Christian Leadership Conf. v. Supreme Court of La.*, 252 F.3d 781, 788 (5th Cir. 2001) (noting the "expansive and deferential way in which [courts] construe pleadings" with respect to injury).<sup>19</sup>

Applying the rule stated in *Defenders of Wildlife*, in this case, the court cannot fail to presume the specific facts necessary to satisfy standing here because such consequences are implicit in the statutory scheme itself. Here, it is apparent that the Plaintiffs' sales may

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tual assessments by the WTO, or the statute itself, see Section II(1)(C) below. Moreover, (and as Defendant-Intervenors appear to concede with regard to cases in which standing is uncontested) the Supreme Court has required very little evidence in finding economic injuries cognizable. See, e.g., *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 395 (1987); *Bacchus Imp., Ltd.*, 468 U.S. at 267 (the regulation "increase[d] the price of [plaintiffs'] products as compared to the exempted beverages, and the wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business."); *Bryant v. Yellen*, 447 U.S. 352, 367 (1980).

<sup>19</sup>Neither Defendant nor Defendant-Intervenors offered an explanation as to why the Complaints did not meet this standard.



be diverted to a competitor that is better able to compete as a result of the Byrd Amendment distributions. *See, e.g., W. Lynn Creamery, Inc.*, 512 U.S. at 195 n.10 & 196 n.12; *Data Processing*, 397 U.S. at 152 (proving injury by reference to customers who had switched to competitors); *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 620 (1971); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476–77 (1940) (granting license to competitor sufficient to satisfy injury-in-fact); *Leaf Tobacco Exp. Ass'n v. Block*, 749 F.2d 1106, 1112 (4th Cir. 1984); *Ray Baillie*, 477 F.2d at 701 (Government contract scheme “enabled [plaintiff’s competitor] to receive a premium price above that which would have prevailed under competitive bidding and that [its competitor has] since used this premium to submit low bids for private commercial contracts, thus causing the plaintiffs to lose some of their customers to [its competitor].”). *See also C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 430 (1994) (Souter, J. dissenting) (“a subsidized competitor can effectively squelch competition by underbidding it.”); *United States v. Butler*, 297 U.S. 1, 71 (1936) (“If the cotton grower elects not to accept the [subsidy], he will receive less for his crops; those who receive payments will be able to undersell him.”). Relatedly, Plaintiffs’ comparative advantage may be undermined thereby reducing the price they may charge (and therefore reducing their profit margins). *See, e.g., Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 94 (D.C. Cir. 2002); *Minn. Milk Producers Ass’n v. Madigan*, 956 F.2d 816, 817–19 (8th Cir. 1992) (agency action which causes supply to increase created injury); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 506 (9th Cir. 1988) (injury caused by a tax which upset comparative advantage); *Panhandle Producers & Royalty Owners Ass’n v. Econ. Regulatory Admin.*, 822 F.2d 1105, 1108–09 (D.C. Cir. 1987) (“Under undisputed economic principles, such an increase in supply is likely to depress the prices that petitioners’ members can secure.”); *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 137–38 (D.C. Cir. 1977) (same); *cf. Bryant*, 447 U.S. at 367 (government program that made possible the sale of excess lands at below market price sufficient to confer standing on potential purchasers interested in maintaining program). The increase (or sustaining) of competition may cause Plaintiffs’ costs to grow to counter this competition, again reducing their profit margin. *See, e.g., Nat’l Park Hospitality Ass’n v. DOI*, 538 U.S. 803, 819 (2003) (Breyer, J. dissenting); *DIRECTV, Inc. v. FCC*, 110 F.3d 817, 830 (D.C. Cir. 1997) (injury caused by divestiture requirement in bidding process); *cf. Clinton*, 524 U.S. at 432 (denial of benefit during bargaining process sufficient to confer standing). The competitiveness of the market may make Plaintiffs’ business ventures less attractive to potential investors, reducing the Plaintiffs’ ability to raise capital or sell their business interests. *See, e.g., Alliant Energy Corp.*, 277 F.3d at 920 (“Higher costs of capital injure the firm, making [plaintiffs] the right plaintiffs.”); *Mount Wilson FM Broadcasters*,

*Inc. v. FCC*, 884 F.2d 1462, 1465 (D.C. Cir. 1987) (approving this theory); *Tax Analysts*, 566 F.2d at 136–37; cf. *McKinney*, 799 F.2d at 1555.

Because economic logic suggests that Plaintiffs have been injured, and because Defendant-Intervenors are the only parties who would have any evidence as to how the distributions have been, and will be, used and, therefore, whether they have enhanced affected domestic producers' abilities to compete, requiring anything further in the way of allegations at the pleading stage would convert pleading requirements into a formidable barrier – a result at odds with the liberal notice pleading requirements underlying USCIT R. 8. See, e.g., *United Transp. Union*, 891 F.2d at 912 n.7 (“Allegations founded on economic principles such as . . . in competitor standing cases, while perhaps not as reliable as allegations based on the laws of physics, are at least more akin to demonstrable facts than are predictions based only on speculation.”); *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 593–94 (7th Cir. 1995); cf. *Sugar Cane Growers*, 289 F.3d at 94 (it was the Government's burden if it wanted to contest Plaintiff's economic theory of injury to request a hearing); *Alliant Energy Corp.*, 277 F.3d at 916 (plaintiff does not have to negate defenses in its complaint); *Adams*, 10 F.3d at 925 (defendants can refute economic theory at summary judgment or an evidentiary hearing). This principle is especially true here given that subsidies are known for their lack of transparency. See Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. Chi. L. Rev. 1, 30–31 (1999); cf. Testimony of Dr. David John Teece, Trial Transcript of March 28, 2006 Hearing at 282.

Accordingly, following clear Supreme Court precedent, Defendant's argument to dismiss on this basis must be rejected.

## 2) *Whether competitive injuries are cognizable*

Defendant and Defendant-Intervenors contend that economic injuries are not cognizable within the meaning of the injury-in-fact test. See, e.g., Def.'s Reply at 22–24; Def.'s Mem. at 14, 17; Def.-Int.'s Reply Mot. Supp. Def.-Int.'s Mot. Summ. J. & Resp. Opp. Pl.'s Cross-Mot. Summ. J. at 30–32 (“Def.-Int.'s Reply”). Specifically, relying on the Supreme Court's statement in *Hardin v. Ky. Utils. Co.*, 390 U.S. 1, 5–6 (1968) that “[t]his Court has, it is true, repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations,” and the proposition that there is no constitutional right to import, see, e.g., *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 318 (1933); *Bd. of Trustees of the Univ. of Ill. v. United States*, 289 U.S. 48, 58 (1933), Defendant and Defendant-Intervenors argue that Plaintiffs have suffered no injury. The court disagrees.

First, Defendant and Defendant-Intervenors' reliance on this authority is unfounded. Although they correctly quote one line of *Hardin*, the very next lines of that decision read:

*But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule, at least since the Chicago Junction Case, 264 U.S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision.*

*Hardin*, 390 U.S. at 6 (emphasis added).<sup>20</sup> The *Hardin* Court then went on to find standing because of competitive injuries. *Id.* Neither Defendant, nor Defendant-Intervenors, mention this second and third sentence, or the Court's holding.

Defendant-Intervenors attempt to buttress their argument by quoting *Arnold Tours, Inc. v. Camp*, 408 F.2d 1147, 1149 (1st Cir. 1969) ("because of the policy encouraging free and open competition – a policy that favors competition in the market place, not in the courts."), claiming that this decision was "reversed on other grounds" by *Arnold Tours, Inc. v. Camp*, 397 U.S. 315 (1969).<sup>21</sup> Def.-Int.'s Reply at 30. The First Circuit's decision in *Arnold Tours*, however, was not "reversed on other grounds," it was *vacated*, *Arnold Tours*, 397

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<sup>20</sup>The Defendant claims that *Hardin* has been cited approvingly by the Supreme Court. It matters, however, *how Hardin* was being cited. Most recently, Justice O'Connor cited *Hardin* in her *dissent* in *NCUA* to contrast a case where the statute concerned competition, *i.e.*, *Hardin*, from plaintiffs' case in *NCUA*. *NCUA*, 522 U.S. at 518 (O'Connor, J. dissenting). Justice O'Connor also made this argument in relation to the *zone of interest* test, discussed *infra* at 63–69, not the injury-in-fact test. In *Defenders of Wildlife*, 504 U.S. at 578, the Court noted that cases decided around the time of, and including, *Hardin* "involved Congress' elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law (namely, injury to an individual's personal interest in living in a racially integrated community, see *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208–212 (1972), and injury to a company's interest in marketing its product free from competition, see *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968))." In other words, *Defenders of Wildlife* recognized that *Hardin* stood for the proposition that economic injuries were cognizable and that the line of analysis upon which Defendant relies is out of vogue. These later cases, just like the court here, do not read *Hardin* to preclude Plaintiffs' standing but to support it. See also *Bradford Sch. Bus Transit, Inc. v. Chi. Transit Auth.*, 537 F.2d 943, 946 (7th Cir. 1976); *Scanwell Labs, Inc. v. Shaffer*, 424 F.2d 859, 865 (D.C. Cir. 1970).

<sup>21</sup>Similarly, Defendant repeatedly relies on *Kan. City Power & Light Co. v. McKay*, 225 F.2d 924, 928 (D.C. Cir. 1955) for the proposition that where plaintiffs "have not been subjected to any obligation or duty . . . decisions of the Supreme Court . . . establish that an interest of this kind is not sufficient to enable them to sue to enjoin execution of . . . [a] program of the Government." See, *e.g.*, Def.'s Supp. Br. at 15; Def.'s Reply at 21. This, however, is a statement of the legal rights test, and has been rejected by the Supreme Court. See *Sierra Club v. Morton*, 405 U.S. 727, 733 & n.4 (1972); see also *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39 & n.18 (1976).

U.S. at 315, and therefore *may not be cited*. Moreover, as the Supreme Court recounted the following year when it again took up the case: “Following our decisions last Term . . . we vacated and remanded the case for reconsideration . . . and the Court of Appeals reaffirmed its previous decision.” *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46 (1970). In this latter decision, the Court *reversed* the First Circuit and found standing. *Id.* In other words, the case upon which the Defendant-Intervenors rely was not “reversed on other grounds” it was vacated and then, when the Supreme Court granted certiorari again, reversed on those grounds. *See, e.g.*, Def.-Int.’s Reply at 32 n.25 (properly noting this subsequent history in light of the District Court’s decision in *Arnold Tours*). From this authority, and others, the First Circuit agreed eight years later that there exists “no authority for the proposition that competitive harm is an insufficient allegation of injury in fact. Quite the contrary, the cases finding allegations of competitive injury sufficient are legion.” *Rental Housing Ass’n v. Hills*, 548 F.2d 388, 389 (1st Cir. 1977).

Furthermore, Plaintiffs’ claims do not rest on a constitutional right to import but on a statutory right not to have the antidumping and countervailing duties laws amended to disadvantage their access to U.S. markets (without Congress explicitly including them within the amendment); *cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (canvassing extensive authority on this distinction in finding that statutes providing substantial evidence review create due process interests); *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (“The actual or threatened injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing . . . .’” (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, n.3 (1973))), rendering any argument that Plaintiffs’ have no constitutional right of no relevance. This does not mean that when Congress does create a legal right, plaintiffs do not have to demonstrate standing. To the contrary, the “[statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.” *Defenders of Wildlife*, 504 U.S. at 578 (quoting *Sierra Club*, 405 U.S. at 738). As such, although injuries to interests that are not constitutionally protected are sufficient, “injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable.” *Id.* at 575.

Perhaps even more importantly, Defendant’s argument rests on a standing analysis that has long been rejected by the Supreme Court. In *Data Processing*, the Supreme Court rejected the “legal interest” analysis which required claimants to demonstrate an injury to their legally protected rights. *See, e.g., Akins*, 524 U.S. at 19; *Barlow v. Collins*, 397 U.S. 159, 164 (1970); *Panhandle Producers*, 822 F.2d at 1108–09 (noting that although counterintuitive, “[c]ompetitors have

a seemingly unbroken record of success in securing standing to challenge decisions involving agency licensing.”). In repudiating that earlier test, the Court noted that the “‘legal interest’ test [went] to the merits [whereas the] question of standing is different,” *Data Processing*, 397 U.S. at 153, and that the legal interest test conflicted with the “broadly remedial purpose” of the APA, *id.* at 156. The Supreme Court’s rejection of the “legal interest” analysis was absolute and unqualified. See Jonathan R. Siegel, *Zone of Interests*, 92 Geo. L. J. 317, 320 (2004) (“*Data Processing* rejected the ‘legal right’ test and created the now-familiar rule that Article III of the Constitution permits a plaintiff to bring suit in federal court provided the plaintiff is ‘injured in fact,’ without regard to whether the plaintiff has a legal right to be free from injury.”); Sanford A. Church, *A Defense of the “Zone of Interests” Standing Test*, 1983 Duke L.J. 447, 449–52 (1983) (“Before 1968, courts used a ‘legal interest’ test to decide the standing of a party challenging agency action . . . The [*Data Processing* Court] replaced the legal interest test with the zone of interests test.”); David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 42 (“The *Data Processing* case in 1969, rejected the ‘legal right’ test, [and] declared in apparently general” terms that the zone of interest analysis would apply to future cases); Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 453 (1970) (“A huge portion of the former foundation of the law of standing was thus knocked out. The old test of ‘a recognized legal interest’ was specifically rejected.”). Any remnants of this analysis are now relevant only to prudential considerations in the context of the zone of interest test discussed below. *Air Courier Conference*, 498 U.S. at 524.

Defendant-Intervenors address the fact that *Data Processing* and its progeny rejected the legal interest analysis asserting that these cases are not controlling because they dealt only with *new competitors*, whereas plaintiffs’ claim alleges unlawful competition from *existing competitors*. Def.-Int.’s Reply at 31. This distinction, however, is unpersuasive. *Data Processing* rejected the legal interest analysis in definitive terms, not only relating to *new competitors*. Moreover, the distinction Defendant-Intervenors attempt to draw fails to recognize that the Plaintiffs are alleging *new competitive* threats as a result of Byrd Amendment distributions. Cf. *Alliance for Clean Coal*, 44 F.3d at 593–94; *Adams*, 10 F.3d at 919; *Nat’l Coal Ass’n v. Hodel*, 825 F.2d 523, 526 (D.C. Cir. 1987). This attempted distinction is also belied by the fact that parties regularly bring suit against existing competitors in antitrust, copyright, and *trade* cases. Accordingly, this distinction is of no moment.

### 3) *Lack of injury-in-fact*

Last, Defendant and Defendant-Intervenors assert that the Byrd Amendment has not so altered the competitive conditions for the Ca-



nadian Producers as to cause an injury-in-fact. As noted above, the court held a two day hearing to resolve this factual dispute. At that hearing, the court took testimony from Mr. Neal Fisher, Administrator for the North Dakota Wheat Commission, Mr. Mike Legge, President of U.S. Magnesium, Professor Janusz Alexander Ordover, Professor of Economics at New York University and Professor David John Teece, Professor of Business Administration at the Walter A. Haas School of Business at the University of California Berkeley.

At the outset on this issue, the Canadian Producers contend that the Byrd Distributions enhance the ability of affected domestic producers to compete; this alteration of the competitive environment, the Canadian Producers claim, will invariably lead to competitive injuries. More specifically, the Canadian Producers maintain, supported by the expert testimony of Dr. Ordover, that the Byrd Amendment leads to two types of harm:

(1) "*Ex Ante*" Harms. The Canadian Producers claim that the Byrd Amendment encourages affected domestic producers to invest in qualifying expenditures that they would not have made but for the Byrd Amendment. Under this theory, because each prospective recipient's share of the money available for distribution is determined by its claimed qualifying expenditures, affected domestic producers have an incentive to expend resources on qualifying expenditures to increase their share of the funds available. To use a simplified example, consider the investment choice of a firm purchasing new equipment. If a firm considers purchasing equipment that will, absent the Byrd Amendment, return ninety-nine cents for every dollar invested, the firm will not invest in the new equipment as its projected investment yields a negative return. However, with the Byrd Amendment, if the expected Byrd Distribution for this qualifying expenditure is more than one cent per dollar invested, the expected value of purchasing that equipment becomes positive, leading the firm to buy the new equipment. The purchase of new equipment may lead to higher production, or lower marginal costs, which will adversely affect the firm's market competitors. Accordingly, under this claim, even without Customs actually distributing money, the mere prospect of Byrd Distributions will lead to competitive investments.<sup>22</sup>

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<sup>22</sup> Plaintiffs concede that, because the North Dakota Wheat Commission and U.S. Magnesium are the only eligible affected domestic producers, this incentive structure will not apply to them. This concession may have been made in haste. If a company is choosing between closing down operations or staying in business, the prospect of future distributions may tilt the balance in favor of staying in the market. For example, if a company is projected to lose \$10 dollars in the next fiscal year, it may decide to close its operations. However, if the expected value of the Byrd Distributions is \$10.01 dollars, it may stay in business an additional year to receive that pay off.



(2) “*Ex Post*” Harms: This claim is that once the Byrd Distributions are made, domestic industries can use those funds to enhance their productivity or weather turbulent economic markets. Because the Byrd Distributions come with no strings attached, firms will make efficient business choices. Nevertheless, the Byrd Distributions allow firms access to “free money.” This not only may lower their costs of capital, but also, lead them to make more investments than those that their creditors otherwise would have sponsored. For example, if there is a downturn in the market for a given product (say because of an over supply of a commodity within a market), affected domestic producers may turn to cash reserves cumulated through Byrd Distributions to out-wait their competitors – a choice their creditors may not have approved.

Both theories are supported by either government studies or economic principles adopted by courts. See *infra* at note 44.

Defendant introduced expert testimony attempting to rebut these hypotheses. In response to the “*ex ante*” analysis, Defendant’s expert, Dr. Teece, argued that there is a large measure of uncertainty with regard to future Byrd Distributions. Specifically, because the money Customs holds on unliquidated entries may never be transferred from the “clearing accounts,” *i.e.*, the escrow-like accounts Customs creates for cash deposits, to “special accounts,” *i.e.*, the accounts from which distributions are then made (from the duties collected on liquidated entries), Dr. Teece opined that firms are not presently considering future allocations in their investment calculus; moreover, Dr. Teece argued, in terms of the Lumber Plaintiffs in particular because there are so many affected domestic producers vying for Byrd Distributions, each company’s share will be very small thereby dissipating any incentive to invest in qualifying expenditures.

Dr. Teece also argued that the Canadian Producers’ “*ex post*” analysis fails. Contrasting production subsidies, *i.e.*, subsidies for which the terms or conditions of receipt are directly or indirectly tied to productive enterprises, with pure subsidies, *i.e.*, lump sum cash grants that may be dedicated to any purpose (“manna from heaven”), Dr. Teece opined that the Byrd Distributions are pure subsidies and can be used for any purpose. As such, firms may use this money to diversify their investments into other markets, increase dividends, shut down their operations, or maintain larger cash reserves for use at some distant date in the future. In essence, Dr. Teece maintained, there are too many alternative ways affected domestic producers may spend their distributions to warrant any conclusion that those expenditures will have any adverse affect on the Canadian Producers.<sup>23</sup>

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<sup>23</sup>The Defendant and Defendant-Intervenors have also marshalled evidence showing

As stated above, in weighing these competing claims, the court must consider whether plaintiffs have demonstrated that their claimed injuries are probable and imminent as opposed to speculative or conjectural.<sup>24</sup> See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 430 (1998); *Defenders of Wildlife*, 504 U.S. at 561; cf. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184 (2000) (noting that there was nothing “improbable” about plaintiffs’ alleged harm). Moreover, the injury need not be great, an identifiable trifle is sufficient, i.e., there is no defense that a harm is *de minimus*. See *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973); see also *Akins*, 524 U.S. at 21 (finding that deprivation of information constitutes an injury because “[t]here is no reason to doubt their claim that the information would help them”); accord *Laidlaw Envtl. Servs.*, 528 U.S. at 186. Moreover, although a party invoking the court’s jurisdiction has the burden of proving that jurisdiction is proper, see, e.g., *Defenders of Wildlife*, 504 U.S. at 561, that party does not have to “negate . . . speculative and hypothetical possibilities . . . in order to demonstrate the likely effectiveness of judicial relief,” *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 78 (1978). The court further notes its agreement with Dr. Teece’s assessment that because money is “completely fungible,” tracing where Byrd distributions are used is a difficult, if not impossible, assignment. Testimony of Dr. Teece, Trial Transcript of March 28, 2006 Hearing at 282. Therefore, the court must consider whether, on the record here, it is likely that any of the past distributions have been, and/or likely will be, used to Plaintiff Producers’ detriment.

Bearing these observations in mind, the court is persuaded by the Canadian Producers’ arguments that there will likely be some injury as a result of the distributions. As this inquiry relates to Lumber Plaintiffs, Dr. Teece did not dispute that affected domestic producers may use a portion of their distributions to enhance their competitive

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that the Canadian Producers’ market shares have not declined since Byrd Distributions started. This fact, however, is not relevant to the injury-in-fact inquiry. *Pennell v. San Jose*, 485 U.S. 1, 8 (1988) (“The likelihood of enforcement, with the concomitant probability that a landlord’s rent will be reduced below what he or she would otherwise be able to obtain in the absence of the Ordinance, is a sufficient threat of actual injury to satisfy Art. III’s requirement . . .”); *Hunt v. Wash. State Apple Advertising Comm’n*, 432 U.S. 333, 345 (1977) (“In the event the North Carolina statute results in a contraction of the market for Washington apples or prevents any market expansion that might otherwise occur, it could reduce the amount of the assessments due the Commission and used to support its activities.”); *Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 422 F.3d 490, 498 (7th Cir. 2005); *Alliance for Clean Coal*, 44 F.3d at 595 (“The alleged injury stems from the fact that sales have not increased as much or as rapidly as they would have on a level playing field without the Coal Act.”).

<sup>24</sup> Imminency is satisfied here because the Byrd Distributions are ongoing, i.e., the putatively illegal governmental action being protested is occurring now. If the court required the parties to wait until their competitors actually used the money, given the two year statute of limitations for bringing claims under 28 U.S.C. § 1581(i), requiring plaintiffs to wait until they were actually injured would deprive them of any relief.

positions. His testimony was simply that the uncertainty was too great to warrant any definitive conclusion that affected domestic producers would use any of their distributions to enhance their competitive positions. However, the fact remains that the very United States Government Accountability Office study that figured into his analysis noted that at least one firm (if not more) has used its distributions on expenditures that would likely enhance its competitive position. United States Government Accountability Office, *Report to Congressional Requesters: International Trade: Issues and Effects of Implementing the Continued Dumping and Subsidy Offset Act*, 104 (2005) (“GAO Report”) (noting from survey results that lumber firms used distributions to “pay debt, past qualifying expenditures, general operating expenditures, general corporate expenses, and *capital investment*.” (emphasis added)). Similarly, although twelve out of the thirteen recipient firms had noticed “little or no effects”<sup>25</sup> of the Byrd Distributions, one firm did note “positive effects.” *Id.* at 102. Nor is the court convinced that future distributions will not be used in a similar fashion. Indeed, according to one group representing the domestic lumber industry, the Byrd Amendment “provides a direct cash influx for those who have been and continue to be most harmed by unfair trade, allowing such entities crucial time and capital to adapt to the unfair trade practices and maintain employment levels.” Coalition for Fair Lumber Imports, *The American Lumber Industry: Enforcement of the Trade Laws Essential to the Industry*, Pl.’s Ex. 32 at 37 (2005). Such investments may occur even in periods of time where there is an “oversupply” of the commodity. Testimony of Dr. David John Teece, Trial Transcript of March 28, 2006 Hearing at 292. As such, it is implausible for the government to maintain that *none* of the money has been, or will be, used to alter the competitive landscape. This is certainly more than the identifiable trifle necessary to sustain standing for the Lumber Plaintiffs.

More problematic are the claims of the Canadian Wheat Board and Norsk. Neither industry is directly discussed in the GAO Report. In the case of the Canadian Wheat Board, the North Dakota Wheat Commission (“NDCW”) is the single recipient of monies. The NDCW does not produce any hard red spring wheat (“HRS wheat”) itself; rather the NDWC (among its other duties) promotes the sale of HRS wheat on behalf of farmers in North Dakota and sponsors research on HRS wheat. Testimony of Mr. Neal Fisher, Trial Transcript of March 27, 2006 Hearing at 14–17. Also problematic for the analysis is that the NDWC received Byrd Distributions, for the first time, in December 2005; moreover, because of this litigation, the NDWC has not earmarked the money from the distribution for any specific future use. Therefore, the NDWC does not have a track record on

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<sup>25</sup> Unfortunately, the GAO Study does not differentiate between little and no effect. Little effect would justify standing whereas no effect might not.

how it spends Byrd money nor does it have a plan on how it will spend that money, Testimony of Mr. Neal Fisher, Trial Transcript of March 27, 2006 Hearing at 28, 33. As a result, predicting the affect of this money becomes highly problematic given that some of the ways the NDWC may spend its distributions, *e.g.*, on research, may actually aid the Canadian Producers (so long as this expenditure has not freed up other money it would have spent on research but for the Byrd Distributions).

Similarly, U.S. Magnesium, the single beneficiary of Byrd Distributions collected from duties on Norsk's goods, has placed its previous distributions in a revolving account with its creditor. Also weighing into the consideration is that U.S. Magnesium has not, over the past two years, received substantial Byrd Distributions as a result of pending litigation over the underlying determination.

Nevertheless, the court is convinced that the Canadian Wheat Board and Norsk have standing. Although Byrd Distributions may only have trickled in over the past few years, cumulatively (and with future distributions) these monies are not necessarily insignificant. Second, the U.S. General Accountability Office's survey demonstrates that Byrd recipients have used their distributions to enhance their competitive positions. GAO Report, *supra*, at 66, 70, 72, 77, 84, 102–04. Although the NDWC and U.S. Magnesium may not follow suit, all that plaintiffs must show is that it is probable. Third, in the case of U.S. Magnesium, it is conceded that the Byrd Distributions do lower its "weighted average cost of capital." Testimony of Dr. Teece, Trial Transcript of March 28, 2006 Hearing at 310–14. Such reduction of its costs of capital alters competitive conditions. *See id.* Likewise, although the NDWC only promotes HRS wheat, the NDWC promotion activities (with the assistance of U.S. Wheat Associates) have "help[ed] to take back market share from Canadian Wheat in specific export markets[.]" Testimony of Mr. Neal Fisher, Trial Transcript of March 27, 2006 Hearing at 38. Therefore, it is unlikely that the money will not, in any way, alter the conditions of competition.<sup>26</sup>

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<sup>26</sup>Defendant also insists that Plaintiffs are required to demonstrate specific losses. Requiring the demonstration of actual losses would be contrary to the principle that plaintiffs need not wait until they are actually injured to have standing. *See, e.g., Bryant v. Yellen*, 447 U.S. 352, 367–68 (1980); *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)); *Alabama-Tombigbee Rivers Coal.*, 338 F.3d at 1254. Furthermore, the effect of subsidies may not be immediately clear; rather, the full effect of a subsidy may not be felt for years. *Cf. Ocean Advocates v. United States Army Corps of Engrs.*, 361 F.3d 1108, 1120 (9th Cir. 2004) *amended by, rehearing denied, rehearing en banc denied*, 402 F.3d 846 (2005); *Alliance for Clean Coal*, 44 F.3d at 594 ("But the showing of specific 'lost opportunities' is neither required to establish standing nor reasonably expected under the circumstances of this case."); *Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 422 F.3d at 498 ("the present impact of a future though uncertain harm may estab-

Therefore, the court finds that the Canadian Producers meet the injury-in-fact test.<sup>27</sup>

### **b) Causality and Redressability**

Having found that the Byrd Amendment is likely to injure foreign competitors, the court next considers whether these injuries are traceable to the Byrd Amendment and whether judicial review may provide relief. In this case, these tests are easily met. Given that the Commissioner distributes such subsidies, the injury caused by these subsidies is directly traceable to the Commissioner's actions. Moreover, the injuries are redressable because an order enjoining such distributions will cause them to cease.

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In sum, the court finds that the Canadian Producers have Article III standing.

#### *ii. Canada's Standing*

Canada argues that it has standing by virtue of the fact that it has suffered a breach of NAFTA by the United States. Canada asserts that Plaintiffs have standing to challenge breaches of contracts.<sup>28</sup> Canada further asserts that international agreements are (essentially) contracts between nations. *See, e.g., B. Altman & Co. v. United States*, 224 U.S. 583, 600 (1912). Canada avers that because the

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lish injury in fact for standing purposes."); *Rental Hous. Ass'n of Greater Lynn, Inc. v. Hills*, 548 F.2d 388, 389 (1st Cir. 1977) ("specific proof of competitive injury is not possible, it could hardly be thought that administrative action likely to cause harm cannot be challenged until it is too late."); *Westport Taxi Serv., Inc. v. Adams*, 571 F.2d 697, 700-701 (2d Cir. 1978). For example, if a competitor uses the subsidy to build a new manufacturing facility, construction may take several years to be completed, and even more time to fully effect the market.

<sup>27</sup>The court further notes that the Defendant has acknowledged the likely effects of Byrd Distributions. In its reply brief, the Defendant argued that the Byrd Amendment "assists those United States domestic producers which have been harmed by unfair import competition," Def.'s Reply at 22, and "accomplishes the 'Findings of Congress' that the injurious effects of persistent unfair trade practices must be neutralized 'so that jobs and investment that should be in the United States are not lost through false market signals,'" *id.* at 26 (emphasis added). Note, the Defendant did not argue that is *feasible* that the Byrd Amendment works as designed, but rather that the Byrd Amendment *does* in fact work as designed. Therefore, it is disingenuous for the Defendant to now argue that plaintiffs' injuries are entirely speculative and hypothetical.

<sup>28</sup>The Defendant claims that a party's injury cannot be based on a violation of NAFTA under 19 U.S.C. § 3312(c) (discussed below). That provision, however, merely states that no person, other than the United States, shall have a cause of action based on NAFTA or Congressional approval thereof. Whether a party is injured for purposes of Article III is an entirely different inquiry than whether a party has a cause of action to bring a claim. Therefore, Section 3312(c) does not bar this injury. *Cf. Air Courier Conf.*, 498 U.S. at 523 n.3; *Republic of Para. v. Allen*, 949 F. Supp. 1269, 1273 (E.D. Va. 1996) (finding standing to challenge the United States' application of a treaty but concluding that plaintiffs did not have cause of action).

United States has violated NAFTA by (a) applying amendments to Canadian goods without the statute so specifically stating, (b) failing to consult with Canada prior to the Amendment's passage (if it does apply to Canada), and (perhaps) (c) applying an amendment to Canada that violated GATT, the United States has injured Canada within the meaning of the injury-in-fact requirement of Article III. Pl.'s Mem. at 16 (citing *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234 (D.C. Cir. 2003), *Republic of Para. v. Allen*, 949 F. Supp. 1269, 1273 (E.D. Va. 1996), *Gov't of Jam. v. United States*, 770 F. Supp. 627, 630 n.6 (M.D. Fla. 1991)).

Even assuming *arguendo* that breaches of a contract *per se* confer standing on parties to the contract, and that international agreements are "contracts," Canada's analysis has failed to account for the fact that it has already elected a remedy for this breach of its contractual obligations by pursuing, and winning, its claim before the WTO, and by receiving compensation in accordance with the WTO decision. Although WTO adjudications may not be binding on the United States in requiring the United States to conform its regulatory law to adverse WTO decisions, see *Corus Staal BV v. DOC*, 395 F.3d 1343, 1347–49 (Fed. Cir. 2005), *cert. denied* 126 S. Ct. 1023 (2006); *but see Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 n.24 (2000); *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1348 (Fed. Cir. 2004), it is nonetheless clear that legal consequences flow as a result of those decisions, *i.e.*, adverse decisions require offending states to conform or compensate, see Andreas F. Lowenfeld, *International Economic Law* 158–61 (2002). See *generally Medellin v. Dretke*, 125B S. Ct. 2088, 2094 (2005) (Ginsburg J., concurring); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899). In this case, the WTO's decision has led to compensation in the form of the suspension of Canada's trade concessions guaranteed to the United States (in contract parlance, garnishment of the United States' benefits under the agreement) – a fact that this court cannot refuse to recognize.

Alternatively, Canada claims that, despite its victory before the WTO, NAFTA aims at achieving free trade and that the United States' breach of NAFTA deprives Canada of this benefit. Retaliation, Canada claims, simply does not adequately compensate it for its contractual losses under NAFTA.<sup>29</sup> But Canada's contract analogy proves too much. Simply because a party might prefer an alternative remedy for a breach of contract to that which it received does not entitle a complaining party to additional remedies. See, *e.g.*, *Hickson Corp. v. Norfolk S. Ry. Co.*, 260 F.3d 559, 567 (6th Cir. 2001); *Artis v. Norfolk & W. Ry Co.*, 204 F.3d 141 (4th Cir. 2000); *Sparaco v. Lawler*,

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<sup>29</sup>NAFTA and the Uruguay Round Agreements are largely coextensive on this matter. See, *e.g.*, NAFTA art. 1902.2(d). Where, as here, they are coextensive, a violation of one injures a party to the same extent as a violation of the other.



*Matusky, Skelly Eng'rs, LLP*, 313 F. Supp. 2d 247 (S.D.N.Y. 2004) (“A plaintiff is not entitled to recover twice for the same injury.”). See also Dan B. Dobbs, *Law of Remedies* § 9.4 (2nd ed. 1993). The WTO has provided a remedy intended to make Canada whole for its losses. See *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS234/ARB/CAN ¶ 5.2 (Aug. 31, 2004). Although an election of a remedy does not prevent a party from seeking redress for legally distinct statutory rights, see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50 (1974), a party may not pursue duplicative or inconsistent remedies, see generally *Artis*, 204 F.3d at 146; *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1371 (7th Cir. 1990) (the election of remedies seeks to prevent double recovery); *Wynfield Inns v. Edward Leroux Group, Inc.*, 896 F.2d 483, 488–89 (11th Cir. 1990) (finding inconsistent a *quantum meruit* remedy and a contract remedy because the prior assumed the nonexistence of a contract where the latter presumed the existence of one). Here, if Canada prevails, the breach of the Uruguay Round Agreements will be effectively cured thereby undermining the contractual basis of the WTO’s award and the compensation that Canada has thus far received. Cf. *id.* Therefore, by pursuing its action before the WTO, Canada has elected this remedy at the expense of others.

Furthermore, specific performance (which Canada seeks here) is generally disfavored as a remedy for a breach of contract. See, e.g., *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211 (2002) (canvassing authority). Equity disfavors specific performance partially because it is difficult for courts to compel recalcitrant parties to perform on contracts. Trade disputes between nations are no different. The drafters of the WTO understood this concept by pragmatically placing any remedy in the hands of the non-breaching party by permitting them to garnish the offending nation’s trade concessions. These were the rules of the road when Canada petitioned the WTO for redress; and this was the remedy that it could expect. Although the court can appreciate that Canada may believe that it has been denied the benefit of its original bargain, the court cannot ignore that in fact it has already been compensated for *this* claimed injury in accordance with the contract upon which it relies to assert standing.<sup>30</sup> Cf. *Defenders of Wildlife*, 504 U.S. at 560

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<sup>30</sup>Canada makes four additional arguments which warrant brief attention. First, Canada claims that it is seeking to enjoin future breaches of the Agreement. However, consistent with the WTO’s decision, Canada may retaliate so long as the United States is in material breach of the Agreement and, therefore, Canada has an adequate remedy at law. Cf. *Lyons*, 461 U.S. at 112. Second, Canada claims it has standing because its statutory rights were violated. As discussed above, see *supra* at 43–44, the court does not adopt this view of standing. Third, Canada claims that Defendant has waived this argument. However, because this analysis flows from Canada’s standing argument, and because standing cannot be waived, this argument must fail. Fourth, Canada claims that the WTO did not compensate it for distributions made prior to 2004. However, in its Complaint, Canada

(injury-in-fact is an indispensable requirement for standing which neither Congress, nor the executive, can displace).

Accordingly, the court finds that Canada lacks standing and, therefore grants Defendant's motion to dismiss in this respect.

### **B. Prudential requirements**

As noted above, in addition to Article III's constitutional requirements for standing, courts have imposed a further limitation for cases brought under the APA. Recognizing the APA, this court's founding statute provides that: "[a]ny civil action of which the Court of International Trade has jurisdiction, . . . may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of section 702 of [T]itle 5." 28 U.S.C. § 2631(i). In turn, Title 5 section 702 (Section 10(a) of the APA), provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review." These provisions require that a party need only be "affected or aggrieved by agency action" in order to bring a claim. Accordingly, the statutes manifest "congressional intent to cast the standing net broadly — beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested." *Akins*, 524 U.S. at 19. However, despite the low bar set by Article III's standing requirement, and the APA's " 'generous review provisions,' " *Data Processing*, 397 U.S. at 156 (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)), "it was [never] thought . . . that Congress, in enacting § 702, had . . . intended to allow suit by every person suffering injury in fact." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 395 (1986). Therefore, courts have "supplied [a] gloss [to the APA's language] by adding to the requirement that the complainant be 'adversely affected or aggrieved,' *i.e.*, injured in fact, the additional requirement that 'the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Id.* at 395–96 (quoting *Data Processing*, 397 U.S. at 153); *Dir., Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126–27 (1995). This is the relevant prudential requirement for standing here.

In this case, Plaintiffs claim that the Commissioner's interpretation of the Byrd Amendment contravenes Section 408. Section 408, therefore, is the relevant statute under which to conduct the zone of

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seeks disgorgement of distributions made only during and after 2004. Gov't Canada Compl. 9. Therefore, Canada has not asked the court to remedy this injury. Accordingly, this cannot provide a basis for the injuries for which Canada seeks redress, *i.e.*, distributions made during and after 2004. *Cf. Lyons*, 461 U.S. at 102–03. *See also Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("standing is not dispensed in gross").

interest analysis. *Nat'l Wildlife Fed'n*, 497 U.S. at 883 (“the plaintiff must establish that the injury he [orshe] complains of . . . falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.” (emphasis added)). See also *Bennett*, 520 U.S. at 175–76; *Air Courier Conf.*, 498 U.S. at 523–524.<sup>31</sup> According to the Supreme Court’s most recent articulation of the zone of interest test in *NCUA*, 522 U.S. at 492, the court must “first discern the interests ‘arguably . . . to be protected’ ” by Section 408, then “inquire whether the plaintiff’s interests affected by the agency action in question are among them.” (internal citation omitted).

In conducting this two-part analysis, the Supreme Court has further maintained that the “zone of interest” test operates under the presumption that agency actions are subject to judicial review, and therefore, “is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff[s].” *Clarke*, 479 U.S. at 399–400 (footnote omitted); see also *NCUA*, 522 U.S. at 488–89 (“Although our prior cases have not stated a clear rule for determining when a plaintiff’s interest is ‘arguably within the zone of interests’ to be protected by a statute, they nonetheless establish that we should not inquire whether there has been a congressional intent to benefit the would-be plaintiff.”). Rather, the zone of interest test only “denies a right of review if the plaintiff’s interests are . . . marginally related to or inconsistent with the purposes implicit in the statute. . . .” *Clarke*, 479 U.S. at 399. For the reasons explained below, it is clear that the Canadian Producers’ interests are so sufficiently related to, and not inconsistent with, the purposes of Section 408 that those interests provide a basis for standing.

As noted above, Section 408 provides that “[a]ny amendment enacted after the Agreement enters into force with respect to the United States that is made to [the antidumping and countervailing duty laws] . . . shall apply to goods from a NAFTA country only to the extent specified in the amendment.” As Plaintiffs correctly note, this provision operates under the auspices of a trade regime which otherwise fosters “conditions of fair competition.” NAFTA, art. 102. See generally SAA, reprinted in H. R. Doc. No. 103–159, p. 3 (1993); Sykes, *supra*, at 14–15. Indeed, the main purpose behind the U.S. trade laws is to regulate the level of competition between foreign and

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<sup>31</sup> Defendant argues that the Byrd Amendment is the relevant statute and that, because the Byrd Amendment seeks to assist domestic industries, Plaintiffs’ interests are inconsistent with the Byrd Amendment. However, as explained above, Section 408 is an interpretative rule that applies to all amendments to the antidumping and countervailing duty laws. Consequently, the Byrd Amendment, when read in conjunction with Section 408, authorizes Customs to distribute money except from duty orders on Canadian or Mexican goods, if those duty orders apply to goods. It is this explicit exception that Section 408 places on the Byrd Amendment and upon which Plaintiffs rely.

domestic producers. *Cf. Zenith Radio Corp. v. United States*, 437 U.S. 443, 456 (1978) (countervailing duty laws are “intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments.”); *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 411 (1928) (noting a predecessor to the modern antidumping regime aimed at “protection that will avoid damaging competition to the country’s industries by the importation of goods from other countries at too low a rate to equalize foreign and domestic competition in the markets of the United States.”); *Globe Metallurgical, Inc. v. United States*, 28 CIT \_\_\_, \_\_\_, 350 F. Supp. 2d 1148, 1157 (2004) *dismissed by* 403 F. Supp. 2d 1305 (2005) (“The goal of the [antidumping] statute is not punitive; the goal is to level the playing field for United States producers of similar goods with producers in an [other] country.”). *Cf. Wheatland Tube Co. v. United States*, 30 CIT \_\_\_, \_\_\_, Slip Op. 06–08 at 22 (Jan. 17, 2006) (Antidumping “duties are intended to offset price discrimination from overseas competitive industries.”). Therefore, by imposing a “magic words” rule on future amendments, the apparent purpose of Section 408 is to protect Canadian and Mexican importers from some statutory alterations of the competitive environment contemplated by the antidumping and countervailing duty laws in effect as of January 1, 1994.

Certainly, the Canadian Producers (as importers into the United States subject to antidumping and countervailing duty orders) have an interest in seeing that the antidumping and countervailing duty laws are not statutorily adjusted to alter the level of competition contemplated by these laws without Congress making its intent to amend these laws explicit. Because Plaintiffs’ interests need only be “marginally related to . . . [the] purposes implicit in the statute,” *Clarke*, 479 U.S. at 399, the Canadian Producers’ interest in maintaining the antidumping and countervailing duty laws as they existed in 1994 falls “arguably within the zone of interests to be protected or regulated by the statute,” *Data Processing*, 397 U.S. at 153; *see also Hardin*, 390 U.S. at 6 (“when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision.”). *Cf. Zenith Radio Corp.*, 437 U.S. at 457–58 (noting the reliance interests of foreign producers on both the continuity of U.S. laws, and the adherence to international legal principles); *Made in the USA Found.*, 242 F.3d at 1318.

Because prudential standing is satisfied when the injury asserted by a plaintiff “arguably [falls] within the zone of interests to be protected or regulated by the statute . . . in question,” *Akins*, 524 U.S. at 20 (quoting *NCUA*, 522 U.S. at 488), there are no prudential standing restraints to bar Plaintiffs’ claims here, *accord United Food & Commer. Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S.

544, 555–58 (1996) (holding that Congress may dispense with prudential standing requirements).

### III. POLITICAL QUESTION DOCTRINE

Defendant also raises concern that the subject matter of the Plaintiffs' Complaints is not proper for judicial resolution. Specifically, Defendant asserts that "plaintiffs' complaints about the [Byrd Amendment] directly implicate foreign affairs and diplomacy, not matters properly addressed pursuant to the APA . . . [and therefore] present non-justiciable political questions and must be dismissed."<sup>32</sup> Def.'s Reply at 36.<sup>33</sup>

The political question doctrine is founded on the recognition that the federal government is composed of three branches of government, each with its own responsibilities. Under this separation of powers principle, courts have recognized that where a subject matter is exclusively assigned to a coordinate branch, or involves questions the political branches are better-suited to answer than the judicial branch, such a subject matter is not appropriate for judicial resolution. *See, e.g., Baker v. Carr*, 369 U.S. 186, 211 (1962).

As properly noted by Plaintiffs, Defendant's objection raised here is similar to the one directly rejected by the Supreme Court in *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221 (1986). In *Japan Whaling*, plaintiffs sought a writ of mandamus to compel the Secretary of Commerce ("Secretary") to certify that the Japanese whaling industry was diminishing the effectiveness of the International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849 (entered into force Nov. 10, 1948), and, as a conse-

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<sup>32</sup>The court notes, by way of comparison, that Congress explicitly provided for judicial review in actions commenced by foreign governments. For example, 28 U.S.C. § 2631(c) provides that "[a] civil action contesting a determination listed in section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a] may be commenced in the Court of International Trade by any interested party who was a party to the proceeding in connection with which the matter arose" where "[t]he term 'interested party' [includes] . . . the government of a country in which such merchandise is produced or manufactured or from which such merchandise is exported," 19 U.S.C. § 1677(9)(B). Moreover, the legislative history of the court, as raised by Plaintiffs, evidence that "a major goal" in the creation of this Court, was the "enlargement of the class of persons eligible to sue in civil actions in the Court of International Trade to include . . . foreign government and those who would otherwise be adversely affected or aggrieved by administrative decisions or litigation arising out of our international trade and tariff laws. . . ." *Customs Court Act of 1979: Hearing on S. 1654 Before the S. Subcomm. on Improvements in Judicial Machinery*, 96th Cong. 28 (1979). Reflective of this principle, this court has entertained cases brought by foreign governments. *See, e.g., Royal Thai Gov't v. United States*, 28 CIT \_\_\_\_ , 341 F. Supp. 2d 1315 (2004) *aff'd in part, rev'd in part Royal Thai Gov't v. United States*, 2006 U.S. App. LEXIS 2415 (Fed. Cir. Feb. 1, 2006), *Gov't of Uzbekistan v. United States*, 25 CIT 1084 (2001), *see also Floral Trade Council v. United States*, 21 CIT 1401, 991 F. Supp. 655 (1997) (wherein the Government of Colombia was a defendant-intervenor).

<sup>33</sup>At oral argument, Defendant told the court that it intended this argument only to apply to Canada. However, because the Defendant referenced all plaintiffs in its briefs, the court will address the matter.

quence of certification, to prohibit the importation of fish products from Japan under the Pelly Amendment to the Fishermen's Protective Act of 1967, 22 U.S.C. § 1978. *Japan Whaling*, 478 U.S. at 220–28. The Secretary defended the decision not to certify Japan, *inter alia*, on the basis of an executive agreement reached between the United States and Japan in which Japan agreed to certain harvest limits with the cessation of whaling by 1988. *Id.*

Before the Supreme Court, the defendant-intervenors in *Japan Whaling* argued that the Supreme Court was precluded by the political question doctrine from entertaining plaintiffs' suits. Clearly rejecting this argument, the Supreme Court held that:

[N]ot every matter touching on politics is a political question . . . and more specifically, that it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." [*Baker v. Carr*, 369 U.S. 186, 211 (1969)]. The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as "courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature." *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (1981) (footnote omitted), cert. denied, 455 U.S. 999 (1982).

As *Baker* plainly held, however, the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. It is also evident that the challenge to the Secretary's decision not to certify Japan for harvesting whales in excess of IWC quotas presents a purely legal question of statutory interpretation. The Court must first determine the nature and scope of the duty imposed upon the Secretary by the Amendments, a decision which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below. We are cognizant of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. *But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.* We conclude, therefore, that the present cases present a justiciable controversy, and turn to the merits of petitioners' arguments.



*Japan Whaling*, 478 U.S. at 229–30 (emphasis added).

The issues presented in Plaintiffs' case here are even more appropriate for judicial resolution than those in *Japan Whaling*. First, like plaintiffs' suit in *Japan Whaling*, Plaintiffs here are seeking enforcement of Customs' non-discretionary statutory obligation under Section 408. Cf. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (finding that the political question doctrine applies where there are no "standards" or "rules" to apply, and where no decision that is "principled, rational, and based upon reasoned distinctions," can be rendered."); *Nixon v. United States*, 506 U.S. 224, 228–29 (1993).

Second, in *Japan Whaling* the Secretary was responsible for determining whether the Japanese whaling industries were "diminish[ing] the effectiveness of an international fishery conservation program," *Japan Whaling*, 478 U.S. at 225; not a very precise standard. In contrast, here, neither the Byrd Amendment nor Section 408 require any level of judgment call – the terms of the Byrd Amendment and Section 408 are clear and unqualified.

Third, because *Japan Whaling* involved matters of foreign relations where the President has inherent authorities, U.S. Const. art. II, §§ 2–3; *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936), the principles announced therein must be applicable in the arena of foreign commerce where the Constitution grants Congress plenary authority, see, e.g., U.S. Const. art. I, § 8; *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 324 (1994); *Itel Containers Int'l Corp. v. Huddelston*, 507 U.S. 60, 85 (1993) (Blackmun, J. dissenting) ("The constitutional power over foreign affairs is shared by Congress and the President . . . but the power to regulate commerce with foreign nations is textually delegated to Congress alone." (citations omitted)). Cf. *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340 (1974) ("Taxation is a legislative function, and Congress . . . is the sole organ for levying taxes"); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) ("Our cases underscore the straightforward and explicit command of the Appropriations Clause. 'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937))). Cf. *Baker*, 369 U.S. at 217 (the political question doctrine applies when there exists a "textually demonstrable constitutional commitment of the issue to a coordinate political department"). Indeed, when the President exercises authority in regulating foreign commerce, he or she does so as Congress' "agent." *Field v. Clark*, 143 U.S. 649, 692–94 (1892); see also *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 558–60 (1976); *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 406–410 (1928); *B. Altman*, 224 U.S. at 602. Consequently, Customs is in no way authorized to avoid compliance with statutory law under the guise of international diplomacy. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.

579, 587–89 (1952) (President not authorized to seize steel factory to secure production of war materials); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659–60 (4th Cir. 1953) (“whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress.”); accord *United States v. Yoshida Int’l, Inc.*, 526 F.2d 560, 572 (C.C.P.A. 1975) (noting that the President has no independent authority over foreign commerce).

Therefore, the decision in *Japan Whaling* precludes applying the political question doctrine to bar Plaintiffs’ suits here. Accordingly, this matter is not barred by the political question doctrine.<sup>34</sup>

#### IV. CAUSE OF ACTION

Defendant and Defendant-Intervenors also assert that U.S. law does not confer on Plaintiffs a cause of action for the complaints in this action. Def.’s Reply at 3, Def.-Int.’s Reply at 7. As noted above, Plaintiffs claim a right of action under the APA, 5 U.S.C. § 702, which presumptively provides judicial review of final agency actions. See 5 U.S.C. § 701(a); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (noting a “strong presumption that Congress intends judicial review of administrative action”); accord *Block v. Cmty. Nutrition Inst.*, 467 U.S. 348, 349 (1984); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967). Nonetheless, this strong presumption in favor of reviewability, may be “overcom[e] whenever the congressional intent to preclude review is ‘fairly discernible in the statutory scheme,’ ” *Block*, 467 U.S. at 351 (quoting *Data Processing*, 397 U.S. at 157); accord *Abbott Labs.*, 387 U.S. at 141 (the presumption may be overcome by “clear and convincing evidence.”).

In *Block*, the Supreme Court identified five types of evidence courts consider in determining whether judicial review is precluded:

- (1) specific statutory language,
- (2) specific legislative history,
- (3) contemporaneous judicial construction followed by Congressional acquiescence,
- (4) the collective import of the legislative and judicial history of the statute, and
- (5) inferences drawn from the statutory scheme as a whole.

III Richard J. Pierce, Jr., *Administrative Law Treatise* § 17.8 (4th ed. 2002) (citing *Block*, 467 U.S. at 349 (1983)); accord *United States v. Fausto*, 484 U.S. 439, 444 (1987) (courts examine “the purpose [of the law], the entirety of its text, and the structure of review that it establishes.”). Of particular importance to this inquiry is whether ju-

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<sup>34</sup>Of, and to the extent, Defendant also raises this challenge pursuant to the APA, that argument was also rejected by the Supreme Court on the same basis in *Japan Whaling*.

dicial review would frustrate the statutory objectives of the NAFTA Implementation Act. *See, e.g., Califano v. Sanders*, 430 U.S. 99, 108 (1977); *accord Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 304 (1943); *Morris v. Gressette*, 432 U.S. 491, 499–507 (1977).

In this case, Defendant-Intervenors point to Section 102(c) of the NAFTA Implementation Act, codified at 19 U.S.C. § 3312(c), which provides that “[n]o person other than the United States . . . shall have any *cause of action* or *defense* under . . . the *Agreement* or by virtue of Congressional *approval thereof*.” 19 U.S.C. § 3312(c) (emphasis added). Defendant-Intervenors claim that this provides “specific statutory language” barring Plaintiffs’ suits. *See also* 5 U.S.C. § 701(a) (the APA provides judicial review except where “statutes preclude judicial review”). Alternatively, the Defendant proposes that the NAFTA Implementation Act (more generally) evidences Congressional intent to foreclose judicial review. Each argument will be addressed in turn.

1. “Approval Thereof” Does Not Extend to Implementing Legislation

Defendant-Intervenors assert that the words “Congressional approval thereof” includes the passage of the implementing legislation, and that therefore neither the Agreement nor any of the provisions incorporated into U.S. law with the passage of the *implementing* legislation provide a cause of action. Def. Int.’s Resp. at 8. Under Defendant-Intervenors’ theory, the NAFTA Implementation Act approved NAFTA, and by consequence of this approval, implemented the Agreement. The “fast track” process meant that Congress approved and enacted such agreements through a *single* vote. *Id.* Accordingly, Defendant-Intervenors claim, Congress could not have intended there to be rights of action stemming from the implementing legislation. *Id.* Therefore, so the argument goes, the bar on rights of action extends to actions such as this one which is based on the implementing legislation. Specifically, even though Plaintiffs’ actions are brought pursuant to Section 408 of the NAFTA Implementation Act, 19 U.S.C. § 3438, Defendant-Intervenors argue that Plaintiffs’ actions are foreclosed.

There are three reasons this argument fails: (1) the text and history of the NAFTA Implementation Act refute this theory; (2) general principles of foreign relations law distinguish between approving an international agreement and the passage of legislation implementing that agreement; and (3) such a reading would produce absurd results.

**(A) The text and history of the NAFTA Implementation Act refute this theory**

First, the text and history of the NAFTA Implementation Act es-

establish that Congress' reference to the "approval of the Agreement" does not include *enactment of the Implementation Act*. Accordingly, the text and history of the NAFTA Implementation Act clearly refute Defendant-Intervenors' theory.

As noted above, the NAFTA Implementation Act was enacted under the legislative procedure referred to as "fast track." See 19 U.S.C. § 2191 *et seq.*; see also 19 U.S.C. § 2901 *et seq.*<sup>35</sup> The "fast track" legislation recognized the complementary constitutional division of power between the executive and Congress in the area of foreign commercial agreements. Because constitutional authority over foreign commerce is exclusively granted to Congress, U.S. Const. art. I, § 8, but the authority to negotiate commercial agreements with foreign nations is vested in the President, U.S. Const. art. II, § 2, the President and Congress agreed to a procedure that would coordinate their respective responsibilities to a common, rather than a conflicting, end. The result was the passage of legislation, establishing the "fast track," wherein Congress authorized the President to negotiate trade agreements within certain parameters, while agreeing to expeditious consideration of, and an up-or-down vote on, any agreements and on the legislation proposed to implement those agreements. See 19 U.S.C. § 2191 *et seq.*; 19 U.S.C. § 2901 *et seq.*

As is relevant here, "fast track" required that before any trade agreement "entered into force," the President would submit to Congress three separate documents: (i) the text of the agreement, (ii) the implementing legislation, and (iii) a statement of administrative action. 19 U.S.C. § 2903(a)(1)(B), (i)-(iii),<sup>36</sup> see also 19 U.S.C.

<sup>35</sup>The version of "fast track" authority employed for the passage of NAFTA expired in 1994. The current version of "fast track," called "Bipartisan Trade Promotion Authority Act," was adopted by Congress in 2002. See 19 U.S.C. § 3801 *et seq.* (West Supp. 2005).

<sup>36</sup>Title 19 Section 2903(a) provides in relevant part:

Implementation of trade agreements

(a) In general.

(1) Any agreement entered into under [19 U.S.C. § 2902(b) or (c)] shall enter into force with respect to the United States if (and only if)—

(A) the President, at least 90 calendar days before the day on which he enters into the trade agreement, notifies the House of Representatives and the Senate of his intention to enter into the agreement, and promptly thereafter publishes notice of such intention in the Federal Register;

(B) after entering into the agreement, the President submits a document to the House of Representatives and to the Senate containing a copy of the final legal text of the agreement, together with—

(i) a draft of an implementing bill,

(ii) a statement of any administrative action proposed to implement the trade agreement, and

(iii) the supporting information described in paragraph (2); and

(C) the implementing bill is enacted into law.

§ 2191(b)(1)(A).<sup>37</sup> Significantly, any agreement could only enter into force after the implementing bill was “enacted” into law. 19 U.S.C. § 2903(a)(1)(C). This provision recognized and protected Congress’ authority over legislation implementing any agreement. The clear requirement under “fast track” that three separate documents be submitted to Congress shows the intention that approval of the agreement is distinct from the instrument of legislation implementing that agreement.

Following this “fast track” framework, in passing the NAFTA Implementation Act, *see* 19 U.S.C. § 3311(a), Congress: (1) approved NAFTA (thereby approving the United States’ international legal obligations specified by the Agreement); (2) approved the statement of administrative action;<sup>38</sup> and (3) amended the statutory law of the United States to conform to NAFTA. That Congress considered these three distinct actions is best evidenced by Section 101(a) of the NAFTA Implementation Act, codified at 19 U.S.C. § 3311(a), in which Congress “approve[d]” separately – “(1) the North American Free Trade Agreement entered into on December 17, 1992, with the Governments of Canada and Mexico and submitted to the Congress on November 4, 1993; and (2) the statement of administrative action proposed to implement the Agreement that was submitted to the Congress on November 4, 1993.” Noticeably absent from this “approval” was mention of the implementing *legislation* itself. Equally significant, regarding the third requirement, the Statement of Administrative Action, Congress separately noted its approval of the Statement of Administrative Action and (therefore) did not consider approval of the Agreement to include, in and of itself, approving anything more than the Agreement. *See* SAA, reprinted in H. R. Doc.

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<sup>37</sup>Title 19 Section 2191(b) provides, in relevant part:

Definitions. For purposes of this section—

(1) The term “implementing bill” means only a bill of either House of Congress which is introduced as provided in subsection (c) . . . submitted to the House of Representatives and the Senate under [19 U.S.C. § 2112, 19 U.S.C. § 3572 or 19 U.S.C. § 3805(a)(1)] and which contains—

- (A) a provision approving such trade agreement or agreements or such extension,
- (B) a provision approving the statement of administrative action (if any) proposed to implement such trade agreement or agreements, and
- (C) if changes in existing laws or new statutory authority is required to implement such trade agreement or agreements or such extension, provisions, necessary or appropriate to implement such trade agreement or agreements or such extension, either repealing or amending existing laws or providing new statutory authority.

<sup>38</sup>The Statement of Administrative Action was the Executive Branch’s proposal on how it would implement the Agreement, *see* 19 U.S.C. § 2903(a)(1)(B)(ii), 19 U.S.C. § 3311(a)(2), which was specifically and separately approved by Congress, 19 U.S.C. § 3311(a)(2); *cf.* 19 U.S.C. § 3512(d) (noting that the SAA for the Uruguay Round Agreements Act is the “authoritative expression” of the United States concerning the interpretation of the Uruguay Round Agreements Implementation Act).

No. 103–159, p. 5 (1993) (“Section 101(a) of the bill provides Congressional approval for the NAFTA and this Statement.”).

As is apparent from both the “fast track” process and Section 101(a) of the NAFTA Implementation Act, Congress considered the implementation of the Agreement to be separate from, and not a part of, the “approval” of the Agreement itself. Therefore, when Congress employed the term “approval thereof” in Section 102(c), it meant to encompass only its approval of the Agreement, *see* SAA, reprinted in H. R. Doc. No. 103–159, p. 13–14 (1993) (“The prohibition of a private right of action based on the NAFTA, or on Congressional approval of the agreement *in section 101(a)*. . . .” (emphasis added)), and did not bar actions brought under the *implementing* legislation, *see* SAA, reprinted in H. R. Doc. No. 103–159, p. 13 (1993) (“Section 102(c) of the implementing bill precludes private right of action or remedy against a federal, state or local government, or against a private party, *based on the provisions of the NAFTA* or of the labor or environmental supplemental agreements.” (emphasis added)).

This reading is supported by the fact that Congress knew how to refer to the implementation of the Agreement when it so intended. *See, e.g.*, North American Free Trade Agreement Implementation Act, Pub. L. 103–82, 107 Stat 2057, Preamble (“A Bill To Implement the North American Free Trade Agreement”); Section 1 (noting that the Act may be cited as the North American Free Trade Agreement Implementation Act); Section 101(b)(1)(A) (if the President determines that “such country has implemented the statutory changes” he may exchange notes with Canada and Mexico providing for entry into force of NAFTA); Section 101(b)(1)(B)(ii) (the President must provide to Congress a report on how Canada and Mexico have ensured the “effective implementation of the binational panel review process”); Section 202(a)(1) (“For purposes of implementing the tariff treatment”). This is especially compelling here where Congress was required to “enact,” not “approve,” the implementing legislation. Compare 19 U.S.C. § 2903(a)(1)(C) (an agreement will enter into force only after “the implementing bill is enacted into law”) *with* Pub. L. 103–82, 107 Stat 2057 (“A Bill To Implement the North American Free Trade Agreement. *Be it enacted*. . . .”); *cf.* 1 U.S.C. § 101 (“The enacting clause of all Acts of Congress shall be in the following form: ‘Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.’”); H.R. Rep. No. 103–826 at 25 (1994) (“This treatment is also consistent with the Congressional view that necessary changes in Federal statutes should be specifically enacted, not preempted by international agreements.”). Given that Congress has demonstrated that it knows how to refer to implementing legislation, the court cannot conclude that “approval of the Agreement” means, or extends to, barring actions under the implementing legislation itself. *Cf. EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991) (evidence that Con-



gress used express language in other statutory provisions sufficient to satisfy that the presumption against extraterritoriality had not been overcome); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) (evidence that Congress used different language in other statutory provisions did not upset reliance on using corporate law principles in construing the Foreign Sovereign Immunities Act). Therefore, both the text and history of the NAFTA Implementation Act indicate that Congress did not intend the “approval thereof” language of Section 102(c) to bar Plaintiffs’ action. Accordingly, because Plaintiffs’ cause of action is based on the Implementation Act, and not on the Agreement, the cause of action is not barred by 19 U.S.C. § 3312 (c).

**B. “Approval” is also separate from implementation legislation when viewed in context of foreign relations law**

The court’s reading of § 102(c) of the NAFTA Implementation Act is confirmed when the term “approval” is viewed in the context of U.S. foreign relations law. The word “approval,” used for Congressional-executive agreements, is the equivalent to the word “ratification” used for treaties, and does not extend to separate legislative enactment. *See, e.g., Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415 (2003) (“the President has authority to make ‘executive agreements’ with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic.”); Lord McNair, *The Law of Treaties* 130 (1961) (Ratification means “loosely and popularly, the approval of the legislature or other State organ whose approval may be necessary.”).

Primarily, an international agreement, be it a treaty or a congressional-executive agreement, creates legal obligations on the international level. *Cf.* Vienna Convention on the Law of Treaties, 8 I.L.M. 679 (1969) at Article 2(b) (“[R]atification”, “acceptance”, “approval” and “accession” mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by [an international agreement].”). Secondarily, a treaty may be self-executing upon ratification. *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (“Our Constitution declares a treaty to be the law of the land . . . [it is regarded as] equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.”). When this is the case, the treaty acts in the same manner as an Act of Congress. *See, e.g., Medellin v. Dretke*, 125B S. Ct. 2088, 2103 (2005) (O’Connor, J. dissenting) (noting that Article 36 of the Vienna Convention on Consular Relations was self-executing); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988) (holding that the Hague Service Convention is self-executing); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (finding the Warsaw Convention self-

executing). Thirdly, just like domestic statutes, agreements may also create private rights of action whereby private parties may enforce the agreement in courts. *See Jogi v. Voges*, 425 F.3d 367, 376–85 (7th Cir. 2005); Louis Henkin, *Foreign Affairs and the United States Constitution* 176–230 (2nd ed. 2002).

As noted, only some treaties embrace the second and third attributes, *i.e.*, only some treaties, after ratification, may be self-executing and may create private rights of action; when they do not, Congress must separately enact legislation to implement any agreement if it wants to give the agreement effect under U.S. law. This analysis is equally applicable to congressional-executive agreements, *see, e.g., B. Altman & Co. v. United States*, 224 U.S. 583, 601 (1912), and executive agreements, *see, e.g., Garamendi*, 539 U.S. at 415–17; *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981), which, with certain limitations, are treated the same as treaties under the law, *see, e.g., Weinberger v. Rossi*, 456 U.S. 25 (1982); *B. Altman & Co.*, 224 U.S. at 602; *cf.* Restatement (Third) The Foreign Relations Law of the United States ¶ 301 (1990), Vienna Convention on the Law of Treaties, *supra*, at Article 2(a), *Made in the USA Found. v. United States*, 242 F.3d 1300, 1314 (11th Cir. 2001).

Accordingly, when using the term “approval” in Section 101(a), Congress was only speaking to its consent to the “ratification” of the Agreement under international law. Therefore, when Congress again used the term “approval” in Section 102(c), it did so to make abundantly clear that no act taken by the United States, *i.e.*, neither the Agreement or Congress’ consent thereto, would create a right of action under NAFTA itself. *Cf.* Hal Shapiro & Lael Brainard, *Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More Than a Name Change*, 35 *Geo. Wash. Int’l L. Rev.* 1, 13 (2004) (“Congressional approval of an agreement, rather, has the effect of giving the United States new obligations under international law, but the implementing bill defines the domestic application of the agreement.”).

Apart from merely approving the Agreement however, Congress has separately implemented portions of that Agreement by enacting specific provisions into domestic law. SAA, reprinted in H. R. Doc. No. 103–159, p. 1 (1993) (“The bill approves *and* makes statutory changes required or appropriate to implement the Agreement.” (emphasis added)); *Corrpro Cos. v. United States*, 433 F.3d 1360, 1361 (Fed. Cir. 2006) (noting that Section 102(c) approved *and* implemented NAFTA). Accordingly, Section 102(c) does not foreclose rights of action under this latter enactment by Congress, *i.e.*, the NAFTA Implementation Act and specifically Section 408, 19 U.S.C. § 3438.

### (C) Absurd Results

Defendant-Intervenors’ argument would also have perverse consequences. For example, 19 U.S.C. §§ 3331 & 2 provide duty free

treatment when an import originates in the territory of a NAFTA nation. Section 3332 was part of the NAFTA Implementation Act. Suppose Customs blatantly ignored Section 3332 despite the importer's protests, and commenced a collection action under 19 U.S.C. § 1592(d) to collect duties at the pre-NAFTA level; were Section 102(c) to be read to bar the recognition of a cause of action or *defense* under the Implementation Act, the importer would have no defense under 19 U.S.C. §§ 3331 & 2. Alternatively, if Defendant-Intervenors were correct, a person could not bring a protest under 19 U.S.C. § 1514(a), to contest a Customs' determination which improperly interpreted any amendment to the Harmonized Tariff Schedule of the United States ("HTSUS") based on NAFTA.<sup>39</sup>

Similarly, if Defendant-Intervenors' theory were correct, Defendant-Intervenors themselves would not be able to assert a Section 102(c) defense here because Section 102(c) is part of the enabling legislation, and Defendant-Intervenors are private parties. Therefore, their own defense, based on Section 102, would preclude private parties from raising defenses under the implementing legislation (which includes Section 102(c)). This would frustrate the very objectives of that provision.

Likewise, the United States agreed in NAFTA to amend its statutory law to conform with the Agreement. That domestic law was to be modified demonstrates the importance that the new statutory provisions and amendments would have in protecting the rights of the NAFTA parties and their exporters. *See, e.g.*, 19 U.S.C. § 3311(b)(1)(A) (requiring the President to assure that NAFTA parties "implemented the statutory changes necessary to bring that country into compliance with its obligations" before exchanging

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<sup>39</sup>Section 102(c) does not discriminate between rights of action under the APA or any other statutory provision; therefore, the same result must obtain regardless of which statutory provision plaintiffs invoke as the basis of their cause of action. *See Fausto*, 484 U.S. at 443 (finding actions foreclosed under numerous statutory provisions, including, but not limited to, the APA); *Lopez v. United States*, 309 F. Supp. 2d 22, 27 (D.D.C. 2004) (finding that claims under NAFTA were barred under "any provision of law"). Customs appears to suggest that actions may be brought to enforce the HTSUS, which it argues, is analytically different than the implementing legislation. Customs' argument fails to take into account that the HTSUS consists of: (a) Congressionally enacted provisions as of 1989; (b) statutory amendments since 1989; and (c) "[e]ach modification or change made to the Harmonized Tariff Schedule by the President under authority of law." 19 U.S.C. § 3004(c)(1); *see also United States v. Haggard Apparel Co.*, 526 U.S. 380, 388-89 (1999). Significantly, at the core of the HTSUS, exists the recognition that the President may be authorized to "proclaim" changes to the HTSUS "to effect the import treatment necessary or appropriate to carry out, modify, withdraw, suspend, or terminate, in whole or in part, *trade agreements*." 19 U.S.C. § 3004(c)(2)(A) (emphasis added). In regard to NAFTA, Congress explicitly provided the President authority to proclaim changes to the HTSUS necessary or appropriate in effecting deals reached as a result of the NAFTA negotiations. *See, e.g.*, 19 U.S.C. §§ 2902, 3332(q). In sum, not only are the changes to the HTSUS made pursuant to the NAFTA Implementation Act, but also, the fact that Customs' recognizes that such proclamations may give rise to causes of actions underscores that Congress did not intend to foreclose private actions brought under provisions implementing the NAFTA Agreement.

notes of approval). Hence, the Defendant-Intervenors' argument cannot be sustained.

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The court appreciates that the conclusion reached here is contrary to that reached by Judge Coyle in *Bronco Wine Co. v. U.S. Dep't of Treasury*, 997 F. Supp. 1318, 1322 (E.D. Cal. 1997)<sup>40</sup> which held that the enabling legislation of the Uruguay Rounds Agreement Acts, 19 U.S.C. § 3512(c), did not create a right of action under the APA. Nevertheless, the United States' judiciary is specifically divided into circuits to foster thoughtful discussion of law, while providing uniformity through appellate review by the Supreme Court.

## 2. Implication

Alternatively, the Defendant claims that this case is "in reality" a claim under NAFTA. Def.'s Reply at 5,6. Given that it is "fairly discernible" that Congress meant to foreclose any NAFTA claim, Defendant claims, judicial review is foreclosed here. *Id.* The Defendant also argues that some provisions of the NAFTA Implementation Act are meant only to ensure promises to the NAFTA party governments, and therefore, implicitly exclude private parties from raising claims thereunder.

"In reality," however, the Plaintiffs' claims are advanced under an Act of Congress, 19 U.S.C. § 3438, *See* 19 U.S.C. 3312(a)(2) ("Nothing in this Act shall be construed . . . to amend or modify any law of the United States . . . unless specifically provided for in this Act."), not the Agreement itself, *cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 n.24 (2000) (rejecting a similar argument in relation to the Uruguay Round Agreements Act in using WTO proceedings as evidence in construing an Act of Congress); *NSK Ltd. v. United States*, 29 CIT \_\_\_, \_\_\_ n.6, 346 F. Supp. 2d 1312, 1322 n.6 (2004). Therefore, the proper focus of the inquiry is not whether claims under NAFTA are permissible, but rather, whether Congress foreclosed judicial review under Section 408.

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<sup>40</sup>Defendant-Intervenors note that this decision was affirmed by *Bronco Wine Co. v. BATF*, 1999 U.S. App. Lexis 2130 (9th Cir. 1999). The Ninth Circuit's decision was unpublished. Pursuant to the Ninth Circuit's rules, "[u]npublished dispositions and orders of this Court are not binding precedent . . . [and generally] may not be cited to or by the courts of this circuit . . ." *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001) (quoting Ninth Cir. R. 36-3). Accordingly, this court will not attribute weight to the Ninth Circuit's affirmation of the district court.

Moreover, other courts have relied upon the NAFTA Implementation Act in reviewing agency actions. *Xerox Corp. v. United States*, 423 F.3d 1356, 1364 (Fed. Cir. 2005); *see also Miss. Poultry Ass'n v. Madigan*, 31 F.3d 293, 303 (5th Cir. 1994); *but cf. Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004) (noting in dicta that Section 3512(c) bars actions "against the government on the ground that Commerce acted inconsistently with the Uruguay Round Agreements Act" but then deciding that Commerce (properly) applied Section 229(b) of the Uruguay Rounds Agreement Act, codified at 19 U.S.C. § 1677(35)(A)).

Here, Congress' intent to foreclose claims brought under NAFTA does not implicate claims brought under Section 408. Indeed, because Congress made explicit its foreclosure of rights of action under the Agreement, its failure to explicitly foreclose rights under the implementing legislation itself indicates that Congress intended to permit rights of action under that implementing legislation. *Cf. Amgen, Inc. v. Smith*, 357 F.3d 103, 112–113 (D.C. Cir. 2004). The Supreme Court has repeatedly held that the reverse is true, *i.e.*, that when Congress explicitly authorizes rights of actions for some claims but not others, no right of action exists for those claims not so enumerated. *See, e.g., Fausto*, 484 U.S. at 448–49; *United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982); *Switchmen's Union of N. Am.*, 320 U.S. at 305–306. It seems apparent to the court that this principle must also mean that Congressional foreclosure of some causes of action implies that others are appropriate for judicial review. This conclusion also follows from the APA's strong presumption in favor of judicial review, *cf. Abbott Labs.*, 387 U.S. at 140 (“The question is phrased in terms of ‘prohibition’ rather than ‘authorization.’”), and from the generous statutory provision of standing for complaining parties, *see* 28 U.S.C. § 2631(i) (permitting causes of action to enforce the administration of trade laws). In sum, there can be no indirect prohibition precluding review here.

Defendant's argument that Congress excluded the right of private parties to enforce obligations owing to their governments is also unpersuasive for the same reasons.<sup>41</sup> Section 408 provides meaningful procedural protections to both the Government of Canada and to its private exporters. Both benefit from the forbearance promised by Section 408.

In addition, Defendant has failed to explain how Plaintiffs' actions would frustrate the legislation's statutory objectives. Neither the Byrd Amendment, nor Section 408, are discretionary in nature, *cf. Webster v. Doe*, 486 U.S. 592 (1988) (the CIA Director's authority to discharge employees, when it was necessary or advisable “exude[d] deference”); *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940) (delegating the President authority to make “necessary or appropriate” modifications to the tariff schedule precluded judicial review); nor would allowing rights of action frustrate Customs' deliberative process because there is none in this matter; Customs' duty is non-discretionary, *cf. Switchmen's Union of N. Am.*, 320 U.S. at

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<sup>41</sup> Interestingly, the United States' obligation to consult with Canada and Mexico prior to any amendment was not part of the NAFTA Implementation Act. In other words, those obligations that were truly sovereign in nature were simply not included as part of the implementing legislation. Moreover, U.S. trade laws have long recognized private rights of action based on U.S. obligations owed to foreign sovereigns. *See, e.g., B. Altman & Co. v. United States*, 224 U.S. 583, 601 (1912); *Field v. Clark*, 143 U.S. 649, 690–94 (1898); *accord Oldfield v. Marriott*, 51 (10 How.) U.S. 146, 161 (1851). Of course, trade agreements exist for the benefit of importers and exporters.

305–306 (finding that the National Mediation Board was intended to be a referee of explosive and pressing matters, rendering judicial review of its decision inappropriate). Indeed, Section 408’s emphatic terms specifically provide for, rather than against, enforcement.

## V. MERITS

Having satisfied itself that jurisdiction exists, and that the Canadian Producers have a cause of action, the court turns to the merits. As discussed above, Section 408 provides that:

Any amendment enacted after the Agreement enters into force with respect to the United States that is made to—

- (1) section 303 or title VII of the Tariff Act of 1930 [19 U.S.C. §§ 1671 *et seq.*], or any successor statute, or
- (2) any other statute which—
  - (A) provides for judicial review of final determinations under such section, title, or successor statute, or
  - (B) indicates the standard of review to be applied,

shall apply to goods from a NAFTA country only to the extent specified in the amendment.

Section 408, however, is not of universal applicability with respect to any amendment passed by Congress that could alter U.S. laws with respect to NAFTA parties. Rather, it applies only where: (1) Congress has enacted an amendment to specific and particular laws; (2) that amendment was enacted after NAFTA entered into force; (3) only in instances where any administering authority is applying that amendment to goods from a NAFTA country; and (4) the amendment is silent on its applicability to goods from Canada and/or Mexico.

In this case, the Byrd Amendment amended title VII of the Tariff Act of 1930, *see* 114 Stat. 1549, 1549A–72; Congress enacted the Byrd Amendment after NAFTA entered into force with respect to the United States, *id.*; and the Byrd Amendment fails to specify its applicability to Canada or Mexico, *id.* Moreover, the Byrd Amendment, unless read in conjunction with Section 408, amended the antidumping and countervailing duty laws with respect to trade remedies imposed upon goods that have entered into the United States from Canada and Mexico.

Despite the fact that the plain language of Section 408 appears to mandate that Customs should not apply the Byrd Amendment to goods from Canada or Mexico, Defendant and Defendant-Intervenors insist (1) that because the Byrd Amendment relates to proceeds of antidumping and countervailing duty orders, it does not “apply to goods” from Canada or Mexico; (2) the Byrd Amendment



supersedes Section 408; and (3) any other interpretation would interfere with Congress' broad spending power. Each objection will be addressed in turn.

**A) The Byrd Amendment is covered by Section 408**

Defendant and Defendant-Intervenors insist that the Byrd Amendment relates only to proceeds collected from antidumping and countervailing duty orders. *See, e.g.*, Def.'s Reply at 45, Def.-Int.'s Reply at 63 ("Section 3438 does not cover all amendments to Title VII. Section 3438, however, by its own terms, applies only to Title VII amendments that apply to goods. The [Byrd Amendment] applies to money, not goods."). Therefore, Defendants assert, Byrd Distributions do not "apply to goods" and consequently, fall outside the scope of Section 408.

Specifically, Defendant, citing to numerous definitions of goods, argues that money collected by Customs is not goods. However, Defendant's attempt to read the "apply to goods" clause, in this manner, violates the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993)). This failure to consider the context in which the "apply to goods" clause is used leads Defendant to erroneously interpret this clause.

When Section 408 is triggered, it does not render an amendment to the trade laws null and entirely void; rather, Section 408 demands that preferential treatment be given to goods from Canada and Mexico by exempting such goods from the auspices of any qualifying amendment. The "apply to goods" clause simply imposes a rule of origin requirement thereby articulating which type of imports are exempted from any amendment. Absent the "apply to goods clause," Section 408 would state that no amendment "shall apply to a NAFTA party" leaving an ambiguous rule of origin, *i.e.*, whether Section 408 covers just goods imported from Canada or Mexico by an importer who is a national of a NAFTA party, any importer importing from a NAFTA party, or any national from a NAFTA party importing from anywhere in the world. By including the "apply to goods" clause, this potential ambiguity disappears, especially in light of the NAFTA Implementation Act's rules of origin provisions, *see, e.g.*, NAFTA Implementation Act, Section 202(a) ("Originating goods").

This reading is supported by the fact that goods are not used in administering and effectuating the purposes of the antidumping and countervailing duty laws; rather, they are the subject matter, and the only subject matter, regulated by those laws, *see Eurodif S.A. v. United States*, 411 F.3d 1355, 1361 (Fed. Cir. 2005) (noting that the antidumping statute only applies to goods); 19 U.S.C. § 1671(a) (imposing the same requirement for the countervailing duty statute).

Therefore, the “apply to goods” clause must speak to how the anti-dumping and countervailing duty laws are administered in relation to goods.

For example, Defendant and Defendant-Intervenors assert that if Congress should find that Commerce is systematically understating dumping margins and therefore amends the antidumping and countervailing duty laws to require Customs to augment all duty margins by five percent, Section 408 would be triggered precluding this amendment from applying to imports from Canada or Mexico. *Cf.* Def.-Int.’s Reply at 66 (arguing that amendments to the rate of duty would trigger Section 408). However, under Defendant’s reading of Section 408, this hypothetical amendment does not apply to “goods,” it applies to a rate of duty. Alternatively, Defendant-Intervenors suggest that if Congress changes the rules on proprietary information used in antidumping and countervailing duty proceedings, then Section 408 would be triggered. Def.-Int.’s Reply at 73 n.50. But again, proprietary information is not “goods” either. In other words, Defendant and Defendant-Intervenors’ argument would foreclose Section 408 in scenarios where Section 408 must obviously apply.

Relatedly, Defendant-Intervenors argue that the “apply to goods” clause limits Section 408 to amendments that *directly* apply to goods; because the Byrd Amendment *indirectly applies* to goods, Defendant-Intervenors claim, Section 408 is not triggered. *See, e.g.*, Def.-Int.’s Reply at 75. But this reading stretches the language of Section 408 beyond recognition; there is simply no means or basis for distinguishing between *direct* and *indirect* applications of any amendment. *Cf.* SAA, reprinted in H. R. Doc. No. 103–159, p. 203 (1993) (“Section 408 of the bill implements the requirement of Article 1902 that amendments to the AD and CVD laws shall apply to a NAFTA country only if the amendment so states explicitly.”). Indeed, such a distinction is belied by Section 408’s use of the term “any,” *i.e.*, that “[a]ny amendment” to the enumerated laws shall not apply. Consequently, that Congress sought to change the competitive conditions through disbursements to affected domestic producers, rather than to increase the rate of duty directly, is of no moment.<sup>42</sup>

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<sup>42</sup> For the most part, tariffs are but a means to an end, not an end in-and-of themselves. The end, of course, is regulating the level of competition domestic producers should face from foreign competitors; by adjusting the tariff rate, Commerce increases the cost to importers of selling in the domestic market, which, in turn, ameliorates the competitive conditions for domestic producers. Indeed, for the most part, the tariff is passed onto the consumer, with the harm to the importer being the increase in the price of its goods vis-a-vis domestic producers. *Cf. Bacchus Imp., Ltd. v. Dias*, 468 U.S. 263, 267 (1984); *accord United States v. Butler*, 297 U.S. 1, 63 n.10 (1936) (“The enactment of protective tariff laws has its basis in the power to regulate foreign commerce.” (citing *Bd. of Trustees of the Univ. of Ill. v. United States*, 289 U.S. 48, 58 (1932))). In other words, the Byrd Amendment magnifies the effect of the antidumping or countervailing duty. When properly framed, it is apparent that a subsidy to domestic producers is no more indirect than a tariff itself.

Nor are Defendant-Intervenors' arguments sound as a practical matter because both the intent<sup>43</sup> and effect<sup>44</sup> of the Byrd Amendment is to change the competitive environment for importers of goods who are subject to antidumping and countervailing duty orders and to use those laws to accomplish this end. *See, e.g., Huaiyin Foreign Trade Council v. United States*, 322 F.3d 1369, 1380 (Fed. Cir. 2003) (the Byrd Amendment's purpose is to "level[ ] the competitive conditions through negation of the unfair advantage gained by the price difference of imported products."). This is especially evidenced by the fact that Byrd Distributions are allocated from special accounts within the U.S. Treasury to parties who supported the anti-dumping or countervailing duty order. 19 U.S.C. § 1675c(e), 19 C.F.R. § 159.64.<sup>45</sup> Under this arrangement, it is apparent that Customs merely holds such duties for affected domestic producers. *Cf. Core Concepts of Fla., Inc. v. United States*, 327 F.3d 1331, 1338 (Fed. Cir. 2003) (money spent from special accounts does not constitute an appropriation); *United States v. Aiello*, 912 F.2d 4, 7 (2d Cir. 1990) ("We do not believe that funds collected by the United States

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<sup>43</sup> *See, e.g.*, Pub. L. No. 106-387, § 1(a), § 1002, 114 Stat. 1549, 1549A-72 ("Consistent with the rights of the United States under the World Trade Organization, injurious dumping is to be condemned and actionable subsidies which cause injury to domestic industries must be effectively neutralized."); *id.* ("United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved."); *id.* ("Where dumping or subsidization continues, domestic producers will be reluctant to reinvest or rehire and may be unable to maintain pension and health care benefits that conditions of fair trade would permit. Similarly, small businesses and American farmers and ranchers may be unable to pay down accumulated debt, to obtain working capital, or to otherwise remain viable."); 106 Cong. Rec. S.497-01 (daily ed. Jan. 19, 1999) (Statement of Senator DeWine) ("As my colleagues know, the Tariff Act of 1930 gives the President the authority to impose duties and fines on imports that are being dumped in U.S. markets, or subsidized by foreign governments. Our bill would take the 1930 Act one step further. Currently, revenues raised through import duties and fines go to the U.S. Treasury. Under our bill, duties and fines would be transferred to injured U.S. companies as compensation for damages caused by dumping or subsidization. We believe this extra step is necessary. Current law simply has not been strong enough to deter unfair trading practices.").

<sup>44</sup> *See* United States Government Accountability Office, Report to Congressional Requesters: International Trade: Issues and Effects of Implementing the Continued Dumping and Subsidy Offset Act, 40-41, 70, 102-04 (2005); Jeanne J. Grimmet, *Congressional Research Service Report for Congress: The Continued Dumping and Subsidy Offset Act 21-22* (2005); Congressional Budget Office, *Economic Analysis of The Continued Dumping and Subsidy Offset Act of 2000* 5-8 (2004). *See generally* W. Lynn Creamery, 512 U.S. at 210-11 (Scalia, J. concurring) (noting that giving a subsidy would have the same effect as raising the tariff rate); Sykes, *supra*, at 7-10; Christopher R. Drahozal, *On Tariffs v. Subsidies in Interstate Trade: A Legal and Economic Analysis*, 74 Wash. U. L. Q. 1127, 1144-50 (1996); William M. Corden, *Trade Policy and Economic Welfare* 12 (1974) ("The production or protection effect [of a tariff] would be exactly the same as in the case of a subsidy . . ."); *but cf.* Bo Södersten and Geoffrey Reed, *International Economics* 212 (3rd ed. 1994) (effect of a tariff of a foreign producers will be greater than a subsidy). In essence, subsidies have the effect of raising the rate of duty on importers.

<sup>45</sup> The fact that unclaimed funds are remitted to the general U.S. Treasury is of no moment. The Byrd Amendment is outcome determinative for any such revenues generated for the U.S. government, and any funds are deposited into the U.S. Treasury only after Customs applies the Byrd Amendment to duty orders.

pursuant to a judgment of the District Court are insulated by the Appropriations Clause from return to the rightful owner in the event of a reversal of that judgment simply because the funds are held in the Treasury during the course of the litigation.”); *Varney v. Warehime*, 147 F.2d 238, 245 (6th Cir. 1945) (where the government merely holds such monies for others, the expenditure of those funds is not an appropriation); compare *J.W. Hampton & Co.*, 276 U.S. at 412 (“So long as the motive of Congress and the effect of its [protective tariff scheme] are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes can not invalidate Congressional action.”) with *Butler*, 297 U.S. at 61 (“[a] tax . . . as [the term is] used in the Constitution, signifies an exaction for the support of the Government” and, therefore, “has not been thought to [authorize] the expropriation of money from one group for the benefit of another.”). As such, it is clear that the Byrd Amendment is part-and-parcel of legislation intended to effectively neutralize the adverse effects of dumped and subsidized goods. See *Huaiyin Foreign Trade Council*, 322 F.3d at 1380 (“The duties now bear less resemblance to a fine payable to the government, and look more like compensation to victims of anticompetitive behavior.”); See 106 Cong. Rec. S. 497–01 (daily ed. Jan. 19, 1999) (Statement of Senator DeWine) (“It’s time we impose a heavier price on dumping and subsidization. . . . Under our bill, foreign steel producers would get a double hit from dumping: they would have to pay a duty, and in turn, see that duty go directly to aid U.S. steel producers.”).

In sum, essentially, the Byrd Amendment converts what was just a tariff into a broader compensatory regime. Certainly, this change in the nature of the remedies available under the trade laws is something Section 408 is meant to foreclose as to Canadian and Mexican goods where Congress has not explicitly stated an intent to change the statutory remedies as to Canada and Mexico.

### **B) The Byrd Amendment Does Not Supersede Section 408**

Defendant and Defendant-Intervenor next argue that, even if Section 408 is applicable, the Byrd Amendment supersedes Section 408. As Defendant-Intervenor points to Section 102(a) of the NAFTA Implementation Act, codified at 19 U.S.C. § 3312(a), which requires that “[n]o provision of the *Agreement*, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.” (Emphasis added). As discussed above, however, Section 408 is a provision of statutory law, not a provision of NAFTA. Therefore, 19 U.S.C. § 3312(a) is not implicated here. Moreover, even if Section 102(a) were implicated, there is no inconsistency between the Byrd Amendment and Section 408. On the contrary, the two are easily reconciled by limiting the reach of the Byrd Amendment to non-NAFTA goods. *Cf. Spector v.*

*Norwegian Cruise Line Ltd.*, 125B S. Ct. 2169, 2182 (2005). Therefore, Defendant-Intervenors' argument must fail.

Alternatively, during oral argument, Defendant argued for the first time that the Byrd Amendment by itself satisfied the "magic words" requirement of Section 408. Relying on Justice Scalia's concurrence in *Lockhart v. United States*, 126 S. Ct. 699, 702 (2005), and the Supreme Court's opinions in *Marcello v. Bonds*, 349 U.S. 302, 210 (1955), and *Great N. R. Co. v. United States*, 208 U.S. 452, 465 (1908), Defendant argues that no "magical password" is required for Congress to supersede the requirements of Section 408. Therefore, Defendant claims, the Byrd Amendment satisfies the requirements of Section 408.

Although the Defendant may be correct that "no magical password" is necessarily required, this precedent does not mean that Section 408 is a dead-letter. Rather, the Court has held that provisions, such as Section 408, may be superseded "expressly or by necessary implication in a subsequent enactment." *Great Northern R. Co. v. United States*, 208 U.S. 452, 465 (1908). *Accord Warden v. Marrero*, 417 U.S. 653, 659–660 n.10 (1974) (express statement provisions may be superseded by "fair implication"). Here, there exists no "express" statement nor is there any "necessary implication," or even "fair" implication, that Congress intended to trump Section 408 when enacting the Byrd Amendment. Therefore, to read the general language of the Byrd Amendment as satisfying the requirements of Section 408 would essentially render Section 408 a dead-letter. The cases upon which Defendant relies do not support this conclusion.

Nor does the court find Justice Scalia's constitutional arguments availing (as applied here). According to Justice Scalia, provisions such as Section 408 tend to "entrench" legislation, *i.e.*, make it more difficult for subsequent legislatures to repeal a law. *Lockhart*, 126 S.Ct. at 703; *cf.* Eric A. Posner and Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1697–99 (2002). Because "'one legislature cannot abridge the powers of a succeeding legislature.'" *Lockhart*, 126 S. Ct. at 703 (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810)), such legislation should be read narrowly – if considered at all.<sup>46</sup> Although these premises or principles are unquestionably true, *see, e.g., United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996), such principles are not implicated

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<sup>46</sup>Justice Scalia concluded his dissent with the observation that, "[i]n any event, I think it does no favor to the Members of Congress, and to those who assist in drafting their legislation, to keep secret the fact that such express-reference provisions are ineffective." *Lockhart*, 126 S. Ct. at 704. The court notes that Justice Scalia's theory, depending on how construed, could have staggering effects. Numerous pieces of legislation purport to define rules of interpretation such as the: Dictionary Act, 1 U.S.C. § 1; Defense of Marriage Act, 1 U.S.C. § 7; General Rules of Interpretation of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202; Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-3(b); National Emergencies Act, 50 U.S.C. § 1621.



here. To the contrary, Section 408 may be repealed, or satisfied, by a simple majority in both houses (assuming no presidential veto). Therefore, Section 408 is not unduly restrictive of Congressional prerogatives.

All Section 408 purports to do is “function as background canon[ ] of interpretation of which Congress is presumptively aware.” *Lockhart*, 126 S. Ct. at 703. Indeed, provisions such as Section 408 are no more entrenching than canons of statutory interpretation under which courts require Congress to conform. *See, e.g., Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 814–15 (1994) (Scalia, J. dissenting) (noting that *Charming Betsy* canon compelled a certain interpretation of a federal statute); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J. concurring) (clear statement rules, such as the presumption against extraterritoriality, overcome *Chevron* deference).

Furthermore, as noted by Justice Scalia, provisions such as Section 408 may “add little or nothing to . . . already-powerful” canons of interpretation. *Lockhart*, 126 S. Ct. at 703–04. In this case, for example, Section 408 exists to protect the United States’ obligations under NAFTA. Indeed, powerful canons do exist to protect such interests. *See, e.g., Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21–22 (1963) (overturning the NLRB’s construction of a statute because Congress did not clearly state that it intended to violate the law of nations); *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J. dissenting) (“Great nations, like great men, should keep their word.”); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 237–38 (D.C. Cir. 2003) (holding that Congress must speak with a clear statement if it intends to abrogate an international agreement). Consequently, because Section 408 is supported by, and plays a complementary role with, canons of interpretation, the logic Justice Scalia advances does not preclude application of Section 408 here.

Accordingly, Defendant’s argument must be rejected.

### **C) Nature of Congressional Power employed is not relevant**

As a last resort, Defendant and Defendant-Intervenors argue that Congress has broad authority under the Spending Clause, U.S. Const. art. I, § 8, which this court would trample were the court to adopt Plaintiffs’ construction of Section 408. *See, e.g., Def.’s Reply* at 42; *Def.-Int.’s Reply* at 72 (arguing that the Byrd Amendment “addresses the disbursement of U.S. Treasury funds that have become property of the United States Government *subsequent* to the imposition of AD/CVD duties. . . . Once the funds become property of the U.S. Government, the Congress has the constitutional power to dispose of the monies under the Spending Clause.” (emphasis in origi-



nal)). This case, however, has *nothing* to do with Congress' spending power. What is at issue is whether the Commissioner is properly distributing monies derived from duty orders on goods from Canada or Mexico, *i.e.*, whether the Commissioner is properly exercising her statutory authority where the Byrd Amendment does not specify that it applies to goods from a NAFTA country.

The Byrd Amendment, when read correctly, in light of Section 408, states that distributions should be made from duties collected pursuant to antidumping and countervailing duty orders except for duty orders on goods from Canada and Mexico. Accordingly, Congress has not authorized the Commissioner to distribute duties collected on goods from Canada and Mexico; in fact, by failing to specify that the Byrd Amendment applies to Canada and Mexico, Congress has exercised its authority to preclude such distributions.

Assuming *arguendo* that the Byrd Amendment is even an appropriations measure, because the Constitution grants Congress the plenary and exclusive authority to expend monies from the federal treasury, *see* U.S. Const. art. I, § 7, *a fortiori*, the U.S. Constitution does not grant the *executive branch* authority to expend monies not appropriated by Congress, *see, e.g., Office of Pers. Mgmt v. Richmond*, 496 U.S. 414, 424 (1990) ("Our cases underscore the straightforward and explicit command of the Appropriations Clause. 'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'") (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)). Therefore, because the Commissioner has no authority either under an Act of Congress or under the Constitution to make the distributions at issue here, her actions in distributing such funds are *ultra vires* and therefore unlawful. Furthermore, the language of Section 408 does not speak to the type of Congressional authority invoked, but to the laws to which amendments are to be made.

The parties also dispute the level of deference owed to Customs' interpretation of Section 408. Because there is no hint of ambiguity in Section 408, the plain language of Section 408 must govern, any deference owed Customs notwithstanding. *See Chevron U. S. A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *see also Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) ("Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("In the context of an unambiguous statute, we need not contemplate deferring to the agency's interpretation."); *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United*

*States*, 13 F.3d 398, 403 (Fed. Cir. 1994) (“Because we believe the antidumping statute is not silent on the question . . . the reasonableness or fairness of Commerce’s interpretation of the Antidumping Act is irrelevant.”).

Therefore, based on Congress’ plain language in Section 408, Customs is not authorized to apply the Byrd Amendment to goods from Canada or Mexico.

## VI. REMEDY

The parties also disagree on the appropriate remedy. Plaintiffs seek both prospective injunctive relief, and disgorgement of all past distributions as permitted by Customs’ regulations, 19 C.F.R. § 159.64(b)(3). Defendant argues that 19 C.F.R. § 159.64(b)(3) only permits Customs to disgorge any “overpayments,” and that, because Plaintiffs seek disgorgement of the entirety of past distributions, Plaintiffs do not seek disgorgement of an “overpayment.” Def.’s Reply at 50. Defendant further asserts that Plaintiffs have slept on their rights for six years, *i.e.*, from the time the Byrd Amendment was passed until the filing of the Complaints rendering (at least retrospective) relief inappropriate. Defendant also avers, without elaboration, that “the Court should exercise its discretion to limit any remedy to prospective relief.” Def.’s Reply at 50 (citing *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 506–07 (9th Cir. 1997); *Or: Nat’l Res. Council v. Harrell*, 52 F.3d 1499, 1508 (9th Cir. 1995)).

Because the parties have devoted little energy to briefing the question of remedy, and because the dismissal of Canada’s claims may impact the parties’ briefing on this question, the court hereby orders further briefing with respect to remedy.<sup>47</sup>

## CONCLUSION AND ORDER

For the foregoing reasons, Defendant’s motion to dismiss the Government of Canada is granted; the Defendant’s motion to dismiss with respect to the Canadian Producers is denied.

The court hereby ORDERS that the parties shall meet and confer concerning an appropriate remedy; the parties shall submit any jointly proposed remedy to the court no later than May 8, 2006; if the parties do not agree on a proposed remedy, the parties shall by said

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<sup>47</sup> In considering the appropriate remedy, the court asks the parties to bear in mind the following considerations: (1) The court has found unlawful Byrd Amendment distributions of antidumping and countervailing duties on goods from a NAFTA country; (2) disgorgement of monies for which Canada has already retaliated may unjustly enrich Canada at the expense of the United States; (3) the public interest in seeing money properly deposited in the United States’ Treasury, and (4) the lack of authority the Commissioner has here exercised in distributing such funds.

date submit recommendations and arguments to the court concerning the proper remedy and the scope of such remedy.  
IT SO ORDERED.



**Slip Op. 06-49**

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

**Before: Carman, Judge**  
**Consol. Court No. 00-00061**

[Judgment for Plaintiff in part and Defendant in part.]

Dated: April 7, 2006

*Bryan Cave LLP (Adam J. Thurston, David R. Stepp, Michael B. Zara), Los Angeles, CA, for Plaintiff.*

*Peter D. Keisler, Assistant Attorney General; Barbara S. Williams, Attorney in Charge, International Trade Field Office, U.S. Department of Justice; Jack S. Rockefeller, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; Beth Brotman, Of Counsel, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection, for Defendant.*

**OPINION**

**CARMAN, Judge:** The matter before this Court follows a bench trial in October 2005. Plaintiff Home Depot, U.S.A., Inc., (“Home Depot” or “Plaintiff”) challenges the United States Customs Service’s<sup>1</sup> (“Customs” or “Defendant”) classification of lighting fixtures. The subject goods are identified by Stock Keeping Unit (“SKU”) numbers assigned by Home Depot. This case involves a total of 124 SKUs, twenty of which are agreed upon represented SKUs. This consolidated case includes nine court numbers: 00-00061; 00-00062; 00-00063; 00-00064; 00-00363; 00-00364; 00-00365; 00-00440; and 01-00107. This Court finds for Plaintiff in part and for Defendant in part as discussed herein.

**BACKGROUND**

Home Depot is the importer of record for the entries which are the subject merchandise at issue. Customs classified the subject merchandise – various lighting fixtures – under the Harmonized Tariff Schedule of the United States (“HTSUS”) subheading 9405.10.60

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<sup>1</sup>Now known as the United States Bureau of Customs and Border Protection.

with a 7.6 percent duty. Home Depot claims the subject merchandise is properly classified under HTSUS subheading 9405.10.80 with a 3.9 percent duty. Home Depot timely filed protests and summons, and all liquidated duties were paid.<sup>2</sup> Nine cases were properly filed with this court between December 2001 and January 2002. In July 2003, parties met in Atlanta, Georgia, to review physical samples of the merchandise and attempted to designate representative SKUs with settlement as an ultimate goal. These negotiations, however, were unsuccessful. In September 2004, parties began a parallel track of discovery in preparation of litigation. In March 2005, this Court granted parties joint motion to consolidate cases. This Court held a bench trial during the week of October 17th-21st, on October 24th, during October 26th-28th, and adjourned on November 2, 2005.

**STANDARD OF REVIEW**

Jurisdiction of this Court is found under 28 U.S.C. § 1581(a) (2000). Although Custom’s decisions are entitled to a presumption of correctness pursuant to 28 U.S.C. § 2639(a)(1) (2000), this Court makes its determinations upon the basis of the record before it, not upon the record developed by Customs. *See United States v. Mead Corp.*, 533 U.S. 218, 233 n.16 (2001). Accordingly, this Court makes the following findings of fact and conclusions of law *de novo*. *See* 28 U.S.C. § 2640(a) (2000).

**DISCUSSION**

The common issue throughout this consolidated case is the correct classification of the subject goods, more specifically whether metal or non-metal imparts the essential character of the lighting fixtures. Parties stipulated that the proper heading is 9405 and six-digit subheading is 9405.10. The parties assert that the ultimate determination is between two potentially applicable eight-digit subheadings: 9405.10.60 and 9405.10.80.<sup>3</sup> *See* Final Amended Pretrial Order (“Final Pretrial Order”), Schedule C, ¶ 6. Customs originally classified

<sup>2</sup>This Court notes that the subject merchandise was entered into the customs territory of the United States during the years of 2001 and 2002. During this period of import, the classifications and duty rates remained unchanged.

<sup>3</sup>The relevant heading and subheadings cover:

- 9405 Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included:
- 9405.10 Chandeliers and other electric ceiling or wall lighting fittings, excluding those of a kind used for lighting public open spaces or thoroughfares:  
Of base metal:
- 9405.10.40 Of brass . . . . . 3.9% ad valorem

the subject fixtures under HTSUS subheading 9405.10.60, claiming that these goods were “of base metal other than of brass.”<sup>4</sup> Home Depot, however, claims the subject merchandise is properly classified under HTSUS subheading 9405.10.80, challenging that these fixtures are “other than of base metal,” and the non-metal consists of glass, plastic or wood. Regardless of competing tariff classifications purposed by parties, this Court is charged with reaching the correct classification. *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 880 (Fed. Cir. 1984).

Parties urge this Court to adopt a single factor objective test for the essential character analysis. This the Court cannot do because both statute and case law instructs otherwise. Plaintiff claims the subject goods are decorative light fixtures, evidenced by Home Depot’s selling these fixtures in a separate department from its utility fixtures, such as mere lamp holders.<sup>5</sup> (Pl. The Home Depot, U.S.A., Inc.’s Post-Trial Br. (“Pl. Post-Trial Br.”) 7.) Plaintiff advances that “Defendant seeks to remove the ‘decorative’ from ‘decorative light fixtures.’” (Pl. Post-Tr. Br. 1.) Plaintiff advocates that “this Court can primarily look to the visible surface area of that fixture” to determine the essential character of the subject fixtures.<sup>6</sup> (Pl. Post-Tr. Br. 19.) Defendant offers a different test that focuses on the “structural framework” as the essential character for all 124 SKUs. (Def.’s Proposed Findings of Fact & Post-Trial Brief (“Def. Post-Tr. Br.”) 11.)

Both parties’ recommendations have appeal. Industries and parties should be able to rely on prior case law and decisions because “international trade prospers best when the participants can rely on established rules and regulations.” *Hemscheidt Corp. v. United States*, 72 F.3d 868, 872 (Fed. Cir. 1995). However, reliance on uniformity cannot be obtained by forsaking a court’s duty of a proper legal analysis. Despite the appeal that a single factor, bright line test has for predictability and uniformity, this Court must reject both

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9405.10.60	Other .....	7.6% ad valorem
9405.10.80	Other .....	3.9% ad valorem

<sup>4</sup> Although in some instances the finish on the metal was brass, polished brass or antique brass, Plaintiff’s witness Mr. St. John explained that the metal component is “plated steel with an electroplate polished brass finish.” (Trial Tr. 66, Oct. 17.) This Court finds that parties sufficiently demonstrated that the metal base is not “of brass” so that the proper metal subheading for consideration is 9405.10.80, of base metal other than of brass.

<sup>5</sup> A lamp holder “is simply the utility holder that the bulb screws in.” (Trial Tr. 77, Oct. 17.) Lamp holders are just one component of these lighting fixtures. Neither a lamp holder nor a lighting fixture, however, emit light. The lamp, which is known in the vernacular as a light bulb, produces light. This Court notes that the subject fixtures are imported without lamps, and there is a separate heading for lamps – 8539 – in the HTSUS. (Trial Tr. 1737, Nov. 2.)

<sup>6</sup> Plaintiff notes that “[o]ther facts may override this presumption in a special case, but this general, objective standard [the visible surface area test] serves the task at hand.” (Pl. Post-Tr. Br. 19.)

parties' suggestions. An essential character inquiry requires a fact intensive analysis. See *Toy Biz, Inc. v. United States*, 26 CIT 816, 828, 219 F. Supp. 2d 1289 (2002).

While Defendant asserts "metal . . . is always the **only indispensable material** . . . which function as a structure" (Def. Post-Tr. Br. 2 (footnote omitted)), this Court notes that structure is only one factor that must be considered. The same applies to Plaintiff's submission of a visible surface area bright line rule. In the case at bar, this Court is to consider all facts in evidence to determine essential character. In reviewing an essential character determination in *Better Home Plastics Corp. v. United States*, the Court of Appeals for the Federal Circuit ("CAFC") saw "no error in the [Court of International Trade's] ultimate conclusion of essential character" because the trial court "carefully consider[ed] all of the facts" and conducted a "reasoned balancing of all the facts." 119 F.3d 969, 971 (Fed. Cir. 1997) ("Better Home II"). Although the task is laborious, this Court will accomplish its duty by considering all of the evidence presented, assigning weight to each piece of evidence, and deciding whether the metal or non-metal components impart the essential character of the subject fixture.

## I. FACTS

### A. Uncontested Facts to Which the Parties Stipulate

The parties agreed upon certain facts, and this Court adopts them. The Uncontested Facts to Which the Parties Stipulate ("Uncontested Facts") are as follows:

1. The merchandise at issue in the nine consolidated cases consists of the lighting fixtures, identified by Stock Keeping Unit ("SKU") number, listed in the joint report by the parties filed September 20, 2005, entitled *Joint Report Regarding Lighting Fixtures In The Nine Consolidated Cases And Stipulations Regarding Representative Fixtures* (the "Joint Report").<sup>7</sup>
2. Plaintiff is importer of the merchandise at issue set forth in the Joint Report.
3. The Court has [j]urisdiction over all of the [ ] protests and entries listed on the Joint Report.
4. The protests and summonses at issue in the above-captioned nine consolidated cases were timely filed.

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<sup>7</sup>This Court notes that the "Amended (10/4/05) Joint Report Regarding Lighting Fixtures in the Nine Consolidated Cases and Stipulations Regarding Representative Fixtures" ("Joint Report"), Schedule K of Final Pretrial Order, supercedes the previous one and reference in this decision is to the Amended (10/4/05) Joint Report.



5. All liquidated duties have been paid.
6. The subject merchandise listed on the Joint Report consists of “chandeliers and other electric ceiling or wall lighting fittings, excluding those of a kind used for lighting public open spaces or thoroughfares,” within the meaning of subheading 9405.10 of the [HTSUS].
7. The subject merchandise listed on the Joint Report was classified by Customs as chandeliers and other electric ceiling or wall lighting fittings, excluding those of a kind used for lighting public open spaces or thoroughfares, of base metal [other than of brass], under HTSUS subheading 9405.10.60, and were assessed with duty at the rate of 7.6 percent *ad valorem*.

Final Pretrial Order, Schedule C.

#### **B. Findings of Fact Established at Trial**

In addition to the Uncontested Facts, this Court finds the following facts were established by a preponderance of the evidence during the bench trial. The following findings are not exhaustive as specific findings will be discussed in the individual fixture analyses below.

1. Home Depot imported the subject merchandise into the United States from various countries, under numerous entries, and through different ports.
2. There are 124 SKUs at issue in this consolidated case for which parties presented evidence during trial. (Trial Tr. 1785, Nov. 2.)
3. Of the 124 SKUS at issue, eleven were deemed “representative SKUs” covering twenty “represented SKUs” by stipulation. (Joint Report.)
4. The subject goods consist of indoor and outdoor ceiling and wall light fixtures.
5. The subject goods are sold in Home Depot’s decorative light department.
6. The subject merchandise is for personal homes and their surrounding exterior spaces.
7. Plaintiff’s proposed classification is HTSUS subheading 9405.10.80 with a duty rate of 3.9 percent *ad valorem*.
8. Plaintiff’s fact witness Greg St. John, Interior Lighting Merchant for Home Depot, is credible.
9. Plaintiff’s expert witness David Mintz, Lighting Designer of Mintz Lighting Group, is credible.

10. Plaintiff's expert witness Alan Goedde, Economist at Freeman & Mills, Inc., in Los Angeles, is credible.<sup>8</sup>
11. Plaintiff's witness Patricia Golembieski, Senior Analyst of Customs Compliance at Home Depot, is credible.
12. Plaintiff's witness Edward Kozloski, Corporate Director of Quality at Specialized Technology Resources, Inc. ("STR"),<sup>9</sup> is credible.
13. The STR process used to take estimated visible surface area and weight measurements is sufficiently reliable.
14. Defendant's expert witness, Mark S. Rea, who holds a P.h.D. in biophysics, is credible.<sup>10</sup>
15. Subject fixtures are composite goods, but the main two components vying for essential character are: (1) base metal, which is not of brass; and (2) nonmetal, which is usually glass except for a few instances in which plastic or wood replaces glass.<sup>11</sup>
16. Subject merchandise is imported without lamps.<sup>12</sup>

## II. EVIDENCE

### A. Admissibility

Prior to trial, parties submitted respective lists of proposed exhibits for trial. (Final Pretrial Order, Schedule H-1, H-2.) Plaintiff

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<sup>8</sup>Although admitted as an expert witness, this Court finds Mr. Goedde's testimony largely irrelevant to the issues in this case.

<sup>9</sup>STR is the consulting firm retained by Home Depot in March 2003 to measure the component visible surface area and weight of the physical samples of the fixtures at issue. "STR provides consumer products testing, auditing and consulting services to major manufacturers, importers and retailers around the world." (Trial Tr. 1539, Oct. 28.)

<sup>10</sup>Although admitted as an expert witness, Dr. Rea's lighting expertise "focused on various technical aspects of lighting and the human response to lighting." (Trial Tr. 724, Oct. 21.) Not only are neither of these aspects of lighting at issue but this Court also notes that the subject fixtures are not imported in an illuminated state. Therefore, the Court accords minimal weight to Dr. Rea's testimony.

<sup>11</sup>In all but four of the fixtures, glass comprises the main non-metal component. There are a few instances where plastic – SKUs 342-071, 342-103, and 342-104 – or wood – SKU 630-304 – is considered the main component in lieu of glass.

<sup>12</sup>Parties presented testimony regarding these fixtures in their illuminated state notwithstanding the fact that fixtures are imported without lamps. (Trial Tr. 684, Oct. 20.) This Court, however, is confined by the well-established principle that "the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." *Worthington v. Robbins*, 139 U.S. 337, 341 (1891); see also *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1577 (Fed. Cir. 1989) ("It is a principle of Customs law that imported merchandise is dutiable in its condition as imported.") Accordingly, testimony regarding the fixtures in their illuminated state will be considered only insofar as it may affect another factor, such as function or marketability.

originally listed 1341 exhibits, and Defendant offered 23 exhibits to be admitted as evidence. (Final Pretrial Order, Schedule H-1, H-2; see also Pl.'s Mot. for Identification of Ex. Subject to Objection, and Admission into Evidence of Ex. Not Subject to Objection ("Pl. Ex. Mot.")).) On the first day of trial, Plaintiff made an application for its uncontroverted exhibits – some photographs, some physical samples, all protests and all entries – to be moved into evidence and the balance of its controverted exhibits to be marked for identification. (Pl. Ex. Mot., Ex. A.) Defendant declined to raise an objection, and this Court granted, from the bench, Plaintiff's motion. (Trial Tr. 9–10, Oct. 17.)

After Plaintiff's application was granted, Defendant moved for its list of exhibits, Schedule H-2 of the Final Pretrial Order, to be marked for identification.<sup>13</sup> This Court granted Defendant's application upon no objection from Plaintiff. (*Id.* at 20.) Throughout the trial, various exhibits were marked for identification, some admitted into evidence and others withdrawn. Upon the close of trial, approximately 1339 exhibits were admitted into evidence.

### **B. Photographs**

One contentious issue regarding admissibility was the photographs of the SKUs for which there are no physical samples.<sup>14</sup> Defendant objected to these exhibits on the basis of authenticity for the images displayed in the photographs and inadmissible hearsay for the written content shown in the photographs. (*See* Def.'s Objections to Pl.'s Tr. Mot. to Admit Photographs of Lighting Fixtures Which Have No Samples Associated with Them ("Def. Photo Opp'n") 4 n.6.) Plaintiff introduced Patricia Golembieski, a customs compliance analyst and licensed customs broker at Home Depot, as a fact witness with knowledge of the photographs. (Trial Tr. 448, Oct. 19.) Ms. Golembieski explained that these photographs are kept in Home Depot's files "as part of the regular course of business activities that it conducts," (*id.* at 450), and that she "maintained the records as part of [her] job" (*id.* at 451). According to Ms. Golembieski, Home Depot relies on the images displayed in the photographs in the customs compliance files "to help [ ] classify [a] product." (*Id.* at 507.)

Ms. Golembieski testified that the SKU numbers on the photographs are "highly reliable," (Trial Tr. 596, Oct. 20), and as a matter of course, when setting up vendor files, the SKU number is checked for, or if necessary assigned to, a photograph of a fixture (*id.* at 581,

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<sup>13</sup>Defendant informed the Court that Defendant's Exhibit O was not available at trial. Thus, Defendant's Exhibit O was omitted from Defendant's list of exhibits to be marked for identification. (Trial Tr. 19–20, Oct. 17.)

<sup>14</sup>Plaintiff did not have physical samples for sixty-five of the fixtures at issue. (The Home Depot, U.S.A., Inc.'s Br. Regarding Admis. of Photographic Ex.; and Offer of Proof ("Pl. Photo Br.") 1.)

583–84). Ms. Golembieski explained the photographs are kept in Home Depot’s vendor files. (*Id.* at 578, 584, 591.) Home Depot makes “all kinds of business decisions” based upon the vendor files, according to Ms. Golembieski. (*Id.* at 585.) She offered that the customs compliance group, of which she was the team leader, within Home Depot verifies information – such as base tables that are created from the vendor files where the photographs are kept – through self-audits. (*Id.* at 587.) Ms. Golembieski testified that she is “familiar with the manner in which the base tables are maintained and the manner in which information is put into the base tables.” (*Id.* at 586.)

Ms. Golembieski proffered that there are three kinds of photographs at issue:

(1) photographs she took; (2) photographs from Home Depot’s Advertising Department (“AD”); and (3) photographs from vendors.<sup>15</sup> During trial, Defendant withdrew its authenticity objection to the two photographs taken by Ms. Golembieski, and thus upon application by Plaintiff, this Court admitted them into evidence.<sup>16</sup> (Trial Tr. 514–15, Oct. 19.) Ms. Golembieski testified that the vendor photographs are commonplace for Home Depot “in anticipation of an importation, to help us classify.” (*Id.* at 513–14.) She testified that vendor photographs are reliable and explained that Home Depot’s contract with the vendors explicitly requires reliability in their transactions. (Trial Tr. 578, 589–90, Oct. 20.) Ms. Golembieski further explained that the AD photographs are also “very reliable,” with not only legal ramifications but also economic repercussions if a photograph is inaccurate. (Trial Tr. 504, Oct. 19.)

Upon conclusion of Ms. Golembieski’s testimony, Plaintiff sought:

[A]dmission of the photographic portion of the exhibits on the grounds that [Plaintiff] laid a sufficient foundation for authen-

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<sup>15</sup>Ms. Golembieski demonstrated the photographs are distinguishable from each other by their labeling. (Trial Tr. 502–03, Oct. 19.) The AD photographs are exhibits: 10, 13, 15, 21, 22, 24, 25, 28, 29, 30, 31, 32, 34, 35, 39, 40, 41, 47, 50, 56, 57, 62, 64, 68, 69, 70, 74, 76, 77, 78, 79, 80, 81, 82, 85, 86, 101, 104, 115, 119, 120, 121, 122. (Trial Tr. 674, Oct. 20.) The vendor photographs are exhibits: 2, 3, 19, 23, 36, 48, 54, 55, 58, 60, 65, 73, 87, 102, 105, 108, 110, 113, 114, 116.

<sup>16</sup>This applied to Plaintiff’s Exhibits 4 and 126. This Court admitted these exhibits into evidence with Defendant reserving “its right to argue about the weight that should be accorded [to these] photograph[s].” (Trial Tr. 514–15, Oct. 19, *see also id.* at 559.)

ticity under [Federal Rule of Evidence] 901,<sup>17</sup> and the written information that correlates the photograph to the SKU number into evidence on the grounds that it qualifies as an exception to the hearsay rule under [Federal Rule of Evidence] 803, subparagraph 6,<sup>18</sup> and the basis for the authenticity and for the hearsay exception is the same from the standpoint of the factual foundation that it has to be laid for either theory.

(Trial Tr. 671, Oct. 20.) It is well-established that the business records exception has been construed generously in favor of admissibility. *Conoco Inc. v. Dep't of Energy*, 99 F.3d 387, 391 (Fed. Cir. 1997). Case law directs, and Defendant concedes, that the witness who authenticates the “business records need not be the person who prepared or maintained the records, or even an employee of the record-keeping entity, as long as the witness understands the system used to prepare the records.” *Id.*; (see also Def. Photo Opp'n 2.) This Court found that Ms. Golembieski not only met this threshold standard of understanding the system used to prepare the records but also was the employee in charge of this system.

Furthermore, the CAFC has adopted the incorporation doctrine into the business record exception. *Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338, 1343 (Fed. Cir. 1999). The incorporation doctrine allows third party documents generated by third parties to be admitted if “the incorporating business rely upon the accu-

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<sup>17</sup> Federal Rule of Evidence 901(b) (2005) provides, in relevant part:

**Rule 901. Requirement of Authentication or Identification**

...

**(b) Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

**(1) Testimony of witness with knowledge.** Testimony that a matter is what it is claimed to be.

...

**(9) Process or system.** Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

<sup>18</sup> Federal Rule of Evidence 803(6) (2005) provides:

**Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial**

**(6) Records of Regularly Conducted Activity.** – A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), and Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

racy of the documented incorporated” and “there are other circumstances indicating the trustworthiness of the document.” *Id.* This Court found that the vendor photographs fell under the rubric of the incorporation doctrine because Plaintiff satisfied both the business reliance and additional assurances factors based upon Ms. Golembieski’s testimony. Upon consideration of evidence and court-directed briefs, this Court, from the bench, granted Plaintiff’s application for the admission of the controverted photographs and ruled that they were properly authenticated. (Trial Tr. 674, Oct. 20.)

### C. Worksheets (Schedule J)

During a pretrial conference, this Court and parties created a worksheet scheme for each fixture to facilitate judicial efficiency. Because there is a large volume of subject merchandise at issue, these worksheets were intended to organize information. The worksheets are deemed “W-” followed by a chronological number which corresponds to the SKU number sequence.<sup>19</sup> These worksheets are part of the Final Pretrial Order as Schedule J. Originally there were a total 106 worksheets, but two worksheets were withdrawn during the course of the trial.<sup>20</sup> Consequently, by trial’s adjournment, there were only 104 worksheets in evidence. (Trial Tr. 1785, Nov. 2.)

On the first day of trial in its application for admission of exhibits, Plaintiff included the worksheets of Schedule J in its application. (*See* Pl. Ex. Mot., Ex. C.) Plaintiff moved for page two of each worksheet in Schedule J to be moved into evidence (Trial Tr. 12, Oct. 17) and Defendant abstained from objection (*id.* at 13). Because Defendant objected to the some of the content on pages one, three and four,<sup>21</sup> Plaintiff moved for these pages to be marked for identification. (*Id.*) This Court granted Plaintiff’s application. (*Id.* at 14.)

Page one of the worksheets contain: a brief narrative description of the fixture; the relevant exhibits to be presented for that fixture; witnesses who will testify regarding that fixture; a table listing the fixture’s component breakdown, each component’s estimated visible surface area and weight in absolute and comparative measurements; each component’s functions; and what, if any, are Defendant’s objections on that page. Page two of the worksheets lists the entries and protest numbers associated with that SKU number. Pages three, and, if any, four, summarize the testimony of Plaintiff’s witnesses.

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<sup>19</sup>Although they were included in the worksheet number sequence, the twenty represented SKUs do not have separate worksheets. (Trial Tr. 1785, Nov. 2.) These represented SKUs without worksheets are: W-6, W-7, W-8, W-18, W-26, W-37, W-42, W-51, W-52, W-53, W-61, W-66, W-67, W-71, W-88, W-89, W-92, W-99, W-100, W-123.

<sup>20</sup>Worksheets W-20 and W-118 were withdrawn during trial. (Trial Tr. 1785, Nov. 2.)

<sup>21</sup>At the start of trial, there were two worksheets that had four pages – W-78 and W-87 – while the balance of the worksheets had three pages. (Trial Tr. 12-13, Oct. 17.)



The measurements supplied on the first page of the worksheets were explained by Plaintiff's witness Mr. Kozloski, who is the Corporate Director of Quality at STR. An STR technician took estimated visible surface area<sup>22</sup> and weight measurements for the components of the physical samples. In preparation for litigation, Mr. Kozloski checked the technician's measurements by comparing the figures with photographs of the fixtures. (Trial Tr. 1552–53, Oct. 28.) Mr. Kozloski concluded that some of the technician's measurements should be revised. Some corrections were already reflected in the worksheets and others were introduced during trial. This Court notes that these measurements are only estimates. Accordingly, the Court considers this fact when assigning weight to each measurement as a factor in determining essential character.

Upon completion of its case-in-chief, Plaintiff applied to have pages one, three and four moved into evidence. (*Id.* at 1613–14.) This Court found that the content on pages one, three and four were either directly testified to or adequately adopted by witnesses as part of their testimony. Upon consideration of all evidence and noting that there was no objection from Defendant,<sup>23</sup> this Court granted, from the bench, Plaintiff's application to admit the 104 worksheets in their entirety into evidence.<sup>24</sup> (*Id.* at 1615.)

### III. CLASSIFICATION SCHEME

#### A. Presumption of Correctness

Customs enjoys a statutory presumption of correctness. An agency's decision is "presumed to be correct," and "[t]he burden of proving otherwise shall rest upon the party challenging such decision" under 28 U.S.C. § 2639(a)(1) (2000).<sup>25</sup> This presumption of correctness al-

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<sup>22</sup> Visible surface area is "what a person can actually see [ ] [w]hen the fixture is mounted in its normal mounted position." (Trial Tr. 1605, Oct. 28.) STR instructed its technician, Mike Kelting, to measure the fixture's "basic shape." (*Id.* at 1641.) He took the fixture's visible surface area measurements by "either holding it at an arm's length or possibly inverting it on a bench." (*Id.* at 1606.) Apparently, there were some instances where glass shades obscured the metal rims and where metal ovals was measured as rectangles thereby understating or overstating some measurements. (*Id.* at 1608–09.)

<sup>23</sup> Defendant did not object to admitting these worksheets into evidence but did dispute the accuracy of some portions. (Trial Tr. 1614, Oct. 28.)

<sup>24</sup> This Court granted Plaintiff's application noting some observations and commentaries: the worksheets were treated "as amended because they have been amended all over the place." (Trial Tr. 1614, Oct. 28.) Furthermore, the worksheets in their entirety were admitted into evidence with two exceptions: (1) on page one, the "Relevant Exhibits" and "Plaintiff's Witnesses" lines were "treated just for informational purposes only and not treated for evidentiary purposes;" and (2) on page three, fact witness Patricia Golembieski's paragraph was "not [ ] treated as substantive evidence, [the Court] rel[ie]d upon that which she testified to." (*Id.* at 1615.)

<sup>25</sup> 28 U.S.C. § 2639(a)(1) provides:

[I]n any civil action commenced in the Court of International Trade under section 515, 516, or 516A of the Tarriff Act of 1930, the decision of the secretary of the Treasury, the

locates the burden of proof to Plaintiff to present evidence that Customs' classification of the subjects goods was incorrect. The CAFC has discussed this statutory presumption and its resultant effect on litigation. It instructs:

The presumption of correctness is a procedural device that is designed to allocate, between the two litigants to a lawsuit, the burden of producing evidence in sufficient quantity. Specifically, the importer must produce evidence (the burden of production portion of the burden of proof) that demonstrates by a preponderance (the burden of persuasion portion of the burden of proof) that Customs' classification decision is incorrect. The presumption of correctness certainly carries force on any factual components of a classification decision, such as whether the subject imports fall within the scope of the tariff provision, because *facts* must be proven via *evidence*.

*Universal Elec., Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997) (footnote omitted). This presumption does not apply to pure questions of law. *See id.* Accordingly, Plaintiff bears the burden to produce sufficient evidence to rebut the statutory presumption of correctness accorded to Customs. Unless specified in the individual SKU discussions below, this Court finds that Plaintiff met its burden and rebutted the statutory burden of presumption.

### **B. General Rules of Interpretation**

Tariff classification of imported merchandise is governed by HTSUS General Rules of Interpretation ("GRI"). *See The Pillsbury Co. v. United States*, 431 F.3d 1377, 1379 (Fed. Cir. 2005); *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). The GRIs "are considered statutory provisions for all purposes." *Toy Biz*, 26 CIT at 819. The GRIs should be applied in numerical order. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999).

The HTSUS is organized systematically: first by headings, which "set forth general categories of merchandise;" then the headings are divided into subheadings, which provide a "more particularized segregation of the goods within each category." *Orlando Food*, 140 F.3d at 1439. This Court must follow the GRIs according to a set scheme:

The first step in analyzing the classification issue is to determine the applicable heading, if possible, by looking to the terms of the headings and section or chapter notes, in accordance with GRI 1. Provided that the product is classifiable under a

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administering authority, or the International Trade Commission is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision.

heading, the court must then look to the subheadings to find the correct classification of the merchandise in question.

*Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246, 1250 (Fed. Cir. 2004) (citation omitted). Here, the heading is not in dispute as parties stipulate that the proper HTSUS heading is 9405. (See Final Pretrial Order, Schedule C, ¶ 6.) This Court agrees.

Once the proper heading has been determined, the classification scheme moves into subheading segregation under GRI 6. See *Dolly, Inc. v. United States*, 27 CIT \_\_\_, 293 F. Supp. 2d 1340, 1343, 1351 (2003). Parties submit that the correct six-digit subheading is 9405.10 under the HTSUS. This Court is in agreement. The dispute arises, however, with the proper eight-digit subheading, which is the ultimate issue to be determined. Parties assert that the subject fixtures *prima facie* fall under one of the following two subheadings: 9405.10.60 or 9405.10.80. (Final Pretrial Order, Schedule D-1, 11, Schedule D-2, 15.) Again, this Court agrees.

If a subheading is at issue, GRI 6 instructs:

For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes, and *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

GRI 6 (1999). Parties agreed that the subject merchandise is composite goods of base metal and non-base metal, such as glass or plastic. (See Final Pretrial Order, Schedule D-1, 11, Schedule D-2, 15.) Despite the fact that the subject fixtures when imported do not include a lamp, which is necessary for performance, this Court finds that the subject goods are imported in their finished state and accordingly applies GRI 2(b).<sup>26</sup> This Court finds that the subject goods are composite and *prima facie* classifiable under two different subheadings. Consequently, GRI 2(b) directs us to GRI 3, which provides:

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<sup>26</sup> GRI 2(b) states:

Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule three.

3. When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
  - (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
  - (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
  - (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

GRI 3(a)–(c) (1999). The CAFC outlined the framework for GRI 3:

The [GRI] of the [HTSUS] help determine which subheading should govern the duty to be assessed on imports of these [subject goods]. According to the GRI 3(a), when ‘goods are, *prima facie*, classifiable under two or more headings,’ the court must choose the heading providing the most specific description. This is the so-called relative specificity test. GRI 3(a) provides an exception to the applicability of this test, however, when ‘two or more headings each refer . . . to only part of the items [ ].’ Pursuant to GRI 3(b), goods not classifiable under GRI 3(a) are classified by the ‘component which gives them their essential character.’ This is the so-called essential character test. GRI 3(c) provides a default rule for goods not classifiable after resort to either GRI 3(a) or (b).”

*Better Home II*, 119 F.3d at 970-71. The Explanatory Notes (“EN”)<sup>27</sup> instructs that GRI 3 methods of classification “operate in the order in which they are set out in the Rule.” *Harmonized Commodity De-*

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<sup>27</sup> Although not binding, the EN are instructive and persuasive in classification analyses. See *Bauer Nike Hockey*, 393 F.3d at 1250 (“[Courts] may look to the [EN] accompanying a tariff subheading as a persuasive, but not binding, interpretative guide.”) (citation omitted).

*scription and Coding System, Explanatory Notes* to GRI 3 (I). Because the two subheadings at issue each refer to only part of this composite good, this Court finds that GRI 3(b), the essential character test, is the applicable provision to determine classification, or in cases whereby essential character is indeterminable, then this will Court resort to GRI 3(c), the default provision.

Although the GRI do not define essential character, the EN to GRI 3(b) coupled with case law offer guidance. The EN explain that “[t]he factor which determines essential character will vary as between different types of goods. It may, for example, be determined by *the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.*” EN GRI 3(b), (VIII) (emphasis added). Although the EN provide an instructive list of sample factors to consider in an essential character analysis, it is not exhaustive.

Case law provides other possible considerations for an essential character inquiry. This court’s predecessor, the United States Customs Court (“Customs Court”), stated that “[t]he best evidence of the essential character of the article is the representative sample.” *United China & Glass Co. v. United States*, 61 Cust. Ct. 386, 389, C.D. 3637, 293 F. Supp.734 (1968).<sup>28</sup> In its analysis, the United China court also considered the article’s “name . . . other recognized names . . . invoice and catalogue descriptions . . . size, primary function, uses . . . and *ordinary common sense.*” *Id.* (emphasis added). This Court concludes that this exemplary list is useful for the forthcoming analyses. In a subsequent decision, the Customs Court explained that “[t]he character of an article is that attribute which strongly marks or serves to distinguish what it is. Its essential character is that which is indispensable to the structure, core or condition of the article, i.e., what it is.” *A.N. Deringer, Inc. v. United States*, 66 Cust. Ct. 378, 383, C.D. 4218 (1971). The court reiterated, however, that in an essential character determination, “the situation must be reviewed as a whole.” *Id.* at 384 (citation omitted).

#### IV. SKU ANALYSES

##### ***SKU Groupings:***

Before trial, parties placed some thirty-one SKUs into representative and represented categories. The eleven representative SKUs cover twenty represented SKUs by party stipulation. (*See* Joint Re-

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<sup>28</sup> Although this definition applied to the Tariff Schedule of the United States (“TSUS”) – HTSUS’s predecessor – there are no reported cases defining essential character under the HTSUS and thus later decisions have been guided by TSUS case law. *See, e.g., Better Home Plastics Corp. v. United States*, 20 CIT 221, 224, 916 F. Supp. 1265 (1996) (“Better Home I”), *aff’d*, 119 F.3d 969 (Fed. Cir. 1997); *Toy Biz*, 26 CIT at 827.

port.)<sup>29</sup> Plaintiff presented these eleven representative SKUs, all of which had physical samples as evidence, the first two days of trial. Thereafter, Plaintiff artificially grouped the remaining SKUs in an attempt at judicial efficiency. (See Am. Status Report Re: Order of Trial - Phase Two (“Phase II”).) While the order of the SKU analyses generally mirrors Plaintiff’s grouping order, the Court occasionally diverges to facilitate the flow of the discussion. This Court analyzes 104 SKUs.<sup>30</sup>

### ***Divisional SKUs:***

During trial, Plaintiff explained Home Depot’s SKU numbering system. The first time Home Depot orders a product its system assigns a SKU number in sequential order, regardless of whether the product is a light fixture or another item. (Trial Tr. 575, Oct. 20.) Each fixture also has a model number assigned by the vendor. (*Id.* at 569, 575.) A SKU number may have different model numbers if different vendors produce the same product.

Evidence presented at trial revealed that a few identical fixtures were assigned different SKU numbers. Mr. St. John explained that Home Depot did not have a centralized purchasing system at the time of importation of the subject merchandise but rather had nine regional divisions ordering products and assigning their own SKU numbers. (Trial Tr. 174–75, Oct. 17.) Decentralized buying resulted in the possibility of identical products being assigned different SKU numbers throughout the nine divisions. (Trial Tr. 1059, Oct. 26; Trial Tr. 1268–69, Oct. 27.) During trial, parties referred to the identical fixtures that were purchased by different divisions as “divisional SKUs.” (Trial Tr. 1059, Oct. 26.) Plaintiff submitted a list of divisional SKUs: SKUs 113–892 and 280–740; SKUs 385–477 and 385–544; SKUs 385–463 and 385–513; SKU 113–861 and agreed upon represented SKU 280–746. (Trial Tr. 1266–68, Oct. 27.) This Court accepts Plaintiff’s submission that these fixtures are identical with different SKU numbers as explained by the decentralized ordering system. Although Defendant did not consent to Plaintiff’s submission of divisional SKUs, it also did not offer any evidence to the contrary. (*Id.* at 1266, 1269–70.) Because they represent identical fix-

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<sup>29</sup>The agreed upon eleven representative and corresponding twenty represented SKUs are: 104–305 covering 491–770; 113–892 covering 113–908, 113–925, 113–942, 252–552; 240–210 covering 240–216, 280–746; 258–008 covering 356–093; 385–091 covering none; 385–186 covering 384–894, 385–141, 385–236, 385–303; 385–432 covering 385–429; 385–477 covering 384–961, 491–784, 794–187; 469–258 covering 469–528; 482–393 covering 379–609, 457–581; 794–885 covering 441–371. (Joint Report 2–6.) Because the represented SKUs were stipulated to in advance of trial, there was no evidence presented for them, except for SKU 280–746.

<sup>30</sup>As noted under “Findings of Fact at Established at Trial” (see *supra* § I.B.), there are 124 SKUs at issue in this case, but this Court need only consider evidence for 104 SKUs, as these determinations will cover the twenty represented SKUs.



tures, the Court will conduct one classification analysis for the set of divisional SKUs.

## A. INTERIOR FIXTURES

### 1. GLOBE<sup>31</sup>

This group of fixtures is known as “globe,” which refers to the glass component. The name of an article is a factor that case law instructs is persuasive indicia of essential character because “it is not uncommon that an article is called by the name denoted by its essential character.” *United China*, 61 Cust. Ct. at 389–90; *see supra* § III.B. Mr. Mintz advanced that this group of fixtures is substantially the same. (Trial Tr. 1231–32, Oct. 27.) Mr. St. John testified that “without the globe, [the fixture] has no structure,” and thus, the most outstanding characteristic of the fixture is the glass globe. (Trial Tr. 116, Oct. 17; Trial Tr. 950–56, Oct. 24.) Mr. Mintz explained that this fixture uses a “standard metal fitter.” (Trial Tr. 382, Oct. 18.) In the light fixture industry, a standard fitter is a “universal part which is used to support multiple glass shapes and is not specific to this lighting fixture.” (Pl. Ex. 63 at 3.) This Court gives less weight to the metal component when it includes a standard fitter because such a fitter is less likely to “strongly mark[ ] or serve[ ] to distinguish what [the fixture] is.”<sup>32</sup> *A.N. Deringer*, 66 Cust. Ct. at 383.

#### (a) *SKU 385–186 (Pl. Ex. W–63)*

SKU 385–186 is an agreed upon representative SKU covering SKUs 384–894, 385–141, 385–236, and 385–303. (Joint Report 4.) SKU 385–186 is a “[f]lush mounted ceiling fixture known as ‘6[-inch] Globe.’ The fixture consists of a 6[-inch] diameter translucent glass ‘globe’ shade that mounts into a fitter ring of smaller diameter and antique brass finish.” (Pl. Ex. W–63 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 217), photograph (Pl. Ex. 156) and SKU information packet (Pl. Ex. 63). Mr. St. John noted, “If you look on the package, it says it’s a 6-inch globe.” (Trial Tr. 115, Oct. 17.) Furthermore, “the best evidence of the essential character of an article is the representative sample.” *United China*, 61 Cust. Ct. at 389. Therefore, this Court closely examined the physical sample.<sup>33</sup> This Court gives weight to the fixture’s name and characteristics of the physical sample, if any, when determining essential character.<sup>34</sup>

The glass has a visible surface area of 103.9 square inches, which constitutes ninety-two percent of the whole, and weighs 6.0 ounces,

<sup>31</sup>This fixture is sometimes called “gumball,” according to Mr. St. John. (Pl. Ex. W–63 at 3.)

<sup>32</sup>This applies to all the standard fitters throughout this decision.

<sup>33</sup>This applies to all the physical samples presented throughout the trial.

<sup>34</sup>This applies to all fixtures with names and physical samples throughout this decision.

which constitutes fifty-six percent of the total weight. (Pl. Ex. W-63 at 1.) The metal has a visible surface area of 8.9 square inches, which constitutes eight percent of the whole, and weighs 2.8 ounces, which constitutes twenty percent of the total weight. (*Id.*) This Court finds that the glass has much greater visible surface area and weighs notably more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*)

The Court finds that the metal component: consists of a standard metal fitter of an antique brass finish; comprises approximately one-tenth of the total visible surface area; weighs approximately one-fifth of the entirety of the fixture; contributes minimally to decorative appearance and structure; houses the electrical components, and mounts the fixture to the ceiling. This Court finds that the glass component: consists of a globe-shaped shade that gives the fixture its name; comprises nine-tenths of the total visible surface area; weighs approximately three-fifths of the entirety of the fixture; directs and softens light through diffusion; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; and defines this fixture from design and marketability standpoints. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 385-186 is imparted by its glass. Accordingly, this Court holds that SKU 385-186 and its agreed upon represented SKUs 384-894, 385-141, 385-236, and 385-303 properly fall under HTSUS subheading 9405.10.80.

(b) *SKU 385-205 (Pl. Ex. W-64)*

SKU 385-205 is a “[f]lush mounted ceiling fixture consisting of a translucent glass ‘globe’ that mounts into a fitter ring of smaller diameter and brass finish.” (Pl. Ex. W-64 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 64.) Both Mr. Mintz and Mr. St. John testified that the only difference between SKUs 385-186 and 385-205 is the finish on the metal, with the former in antique brass and the latter in polished brass. (Trial Tr. 951, Oct. 24; Trial Tr. 1231, Oct. 27.) This Court agrees with the witnesses.

Upon examination of all the evidence presented, this Court finds that SKUs 385-186 and 385-205 are substantially identical fixtures. This Court finds that a different finish on an otherwise identical fixture does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 385-186 to SKU 385-205, this Court finds that the essential character of SKU 385-205 is

imparted by the glass. Accordingly, this Court holds that SKU 385-205 properly falls under HTSUS subheading 9405.10.80.

(c) *SKU 385-219 (Pl. Ex. W-65)*

SKU 385-219 is apparently a “[f]lush mounted ceiling fixture consisting of a translucent glass ‘globe’ that mounts into a fitter ring of smaller diameter.” (Pl. Ex. W-65 at 1.) The metal finish of this fixture is unknown. (*Id.*) Plaintiff produced as evidence a SKU information packet with an unclear black and white image. (Pl. Ex. 65.) This Court finds that the black and white image included in Plaintiff’s Exhibit 65 is of extremely low quality and thus not sufficient to support Plaintiff’s arguments.

Plaintiff’s counsel admitted that the image “is a rather poor quality photograph,” (Trial Tr. 952, Oct. 24), and Mr. Mintz testified that he could not discern the metal finish from the image (Trial Tr. 1231, Oct. 27). Upon its own examination of the image, this Court finds it can only guess, without certainty, what the image represents. As aforementioned, Customs enjoys a statutory presumption of correctness in its original classification determinations. Although an importer may overcome this presumption by a preponderance of the evidence, this Court finds that Plaintiff has not produced sufficient evidence for SKU 385-219 to rebut the statutory presumption of correctness enjoyed by Customs. Accordingly, this Court holds that Customs’ classification of SKU 385-219 under HTSUS subheading 9405.10.60 stands.

(d) *SKU 385-155 (Pl. Ex. W-62)*

SKU 385-155 is a “[f]lush mounted ceiling fixture consisting of a translucent glass ‘globe’ shade that mounts into a fitter ring of smaller diameter and brass finish.” (Pl. Ex. W-62 at 1.) This fixture “[i]ncludes a pull chain switch.” (*Id.*) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 62.) Mr. Mintz and Mr. St. John testified that there are two differences between SKUs 385-155 and 385-186: (1) SKU 385-155 has a brass finish while SKU 385-186 has an antique brass finish (*compare* Pl. Ex. W-62 at 1 *with* Pl. Ex. W-63 at 1); and (2) SKU 385-155 includes a pull chain (Trial Tr. 946, Oct. 24). Mr. St. John explained that the pull chain on this fixture “creates a different application in an area where there is no wall switch.” (*Id.* at 949.) The addition of this feature, however, does not change Mr. St. John’s opinion that the most outstanding characteristic of this fixture, as with the other globe fixtures, is the glass. (*Id.* at 949-50.)

Upon examination of all the evidence, this Court finds that SKUs 385-186 and 385-155 are substantially identical fixtures. This Court finds that a different finish and the addition of a pull chain switch on an otherwise identical fixture do not significantly affect the essential character analysis. Therefore, adopting and applying

the analysis of SKU 385–186 to SKU 385–155, this Court finds that the essential character of SKU 385–155 is imparted by the glass. Accordingly, this Court holds that SKU 385–155 properly falls under HTSUS subheading 9405.10.80.

(e) *SKU 384–930 (Pl. Ex. W–87)*

SKU 384–930 is apparently a “[f]lush mounted ceiling fixture consisting of a translucent, frosted glass ‘globe’ that mounts into a metal fitter ring of smaller diameter. [The] [m]etal has [a] polished brass finish. [The] [g]lass globe has [an] escutcheon shape molded into bottom portion.” (Pl. Ex. W–87 at 1.) Plaintiff produced as evidence a SKU information packet with a low quality image of the fixture. (Pl. Ex. 87.)

Mr. St. John observed that “there is a small escutcheon that’s been molded into the end of the glass[;] I’m going off the image here,” (Trial Tr. 939, Oct. 24) but later admitted, “there’s no way for me to confirm. The image is poor,” (*id.* at 942). Upon its own examination, this Court agrees that the image is poor. As with SKU 385–219, this Court finds that this image is of extremely low quality and thus inadequate to support Plaintiff’s arguments. With only a poor image and witness testimony unable to confirm the differences of this fixture compared with others in this globe group, this Court finds that Plaintiff has not produced sufficient evidence for SKU 384–930 to rebut the statutory presumption of correctness enjoyed by Customs. Accordingly, this Court holds that Customs’ classification of SKU 384–930 under HTSUS subheading 9405.10.60 stands.

## 2. BUBBLE

The fixtures in this bubble group are “in a similar family<sup>35</sup>” with “slightly different” shapes of glass and mounting plates. (Trial Tr. 1237, Oct. 27.) This Court finds instructive that the name of the fixtures in this group is “bubble,” which refers to the glass. *See supra* § III.B.

(a) *SKU 104–305 (Pl. Ex. W–1)*

SKU 104–305 is an agreed upon representative SKU covering SKU 491–770. (Joint Report 2.) SKU 104–305 is a “[f]lush mounted ceiling fixture known as a ‘14-Inch Bubble.’ The fixture is 14 inches

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<sup>35</sup>The term “family” slightly differed between Plaintiff’s witnesses. Mr. St. John referred to a family of fixtures as being “designed with the exact same components,” (Trial Tr. 1072, Oct. 26), “exactly the same shape, exactly the same profile, exactly the same glass, same cap, same ball . . . It would be the exact same fixture in, like, a small, medium and large style” (*id.* at 1108). Mr. Mintz instructed that family means configuration and style, plus “the variety of sizes and number of lamps,” (Trial Tr. 1327, Oct. 27), and asserted the most outstanding characteristic for an entire family is the same because “what applies to one really applies to all of them” (*id.* at 1281). However, Mr. Mintz asserted that family in a design sense sometimes includes different finishes on the metal. (*Id.* at 1324–26.)

in diameter, with a translucent white glass ‘bubble’ shade, surrounded by a metal trim ring with a polished brass finish.” (Pl. Ex. W-1 at 1.) As previously stated, this Court finds instructive that this fixture’s name is “14-inch bubble.” Plaintiff produced as evidence a physical sample (Pl. Ex. 188), photograph (Pl. Ex. 127) and SKU information packet (Pl. Ex. 1).

According to Mr. St. John, “the [metal] pan is typically used to cover the electrical box and disguise the mechanical materials, including the insulation in the back [ ], and mount the sockets. And the glass is used as a diffuser to disperse the light evenly across whatever room it’s placed in in addition to disguising the bulb and the very mechanical components, including the insulation pad that’s inside, the two sockets, and [ ] the insulated wire that’s inside, as well as covering up the actual mechanical mounting to the ceiling.” (Trial Tr. 67–68, Oct. 17.) Mr. Mintz testified that a customer’s purchasing decision is driven by the shape of the glass because “[i]t would be very odd for a customer to go in and say: I’d like to buy a brass trim, [sic] can we find a piece of glass that fits it.” (Trial Tr. 341–42, Oct. 18.)

The glass has a visible surface area of 122.8 square inches, which constitutes sixty percent of the whole, and weighs 20.5 ounces, which constitutes thirty-six percent of the total weight. (Pl. Ex. W-1 at 1.) The metal has a visible surface area of 80.8 square inches, which constitutes forty percent of the whole, and weighs 33.4 ounces, which constitutes fifty-eight percent of the total weight. (*Id.*) This Court finds that the glass has greater visible surface area than the metal, but the metal weighs more than the glass. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view, while the metal further functions to protect the ceiling and to attach the glass. (*Id.*)

This Court finds that the metal component: consists of a pan of a polished brass finish; comprises approximately two-fifths of the total visible surface area; weighs approximately three-fifths of the entirety of the fixture; contributes to the decorative appearance and structure; houses the electrical components; and mounts the fixture to the ceiling. This Court finds that the glass component: consists of a bubble shape that gives the fixture its name; comprises approximately three-fifths of the total visible surface area; weighs approximately one-third of the entirety of the fixture; directs and softens light through diffusion; protects the lamp; shields the lamp from view; contributes to decorative appearance and structure; and defines this fixture from design and marketability standpoints. Upon careful consideration of the totality of these various factors, this

Court finds that the essential character of SKU 104-305 is imparted by its glass. Accordingly, this Court holds that SKU 104-305 and its agreed upon represented SKU 491-770 properly fall under HTSUS subheading 9405.10.80.

(b) *SKU 104-306 (Pl. Ex. W-2)*

SKU 104-306 is a “[f]lush mounted ceiling fixture consisting of a translucent glass ‘bubble’ surrounded by a metal trim ring with a polished brass finish.” (Pl. Ex. W-2 at 1.) Plaintiff produced as evidence a SKU information packet with a grainy but adequate image. (Pl. Ex. 2.) Mr. St. John submitted that “SKU 104-306 is so similar to SKU 104-305 that my testimony is the same for [SKU]104-306 as far as [SKU]104-305, [however,] [SKU 104-306] has a different profile.”<sup>36</sup> (Trial Tr. 967, Oct. 24.)

Upon examination of all the evidence, this Court finds that SKUs 104-305 and 104-306 are substantially identical fixtures. This Court finds the slight difference in profile does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 104-305 to SKU 104-306, this Court finds that the essential character of SKU 104-306 is imparted by the glass. Accordingly, this Court holds that SKU 104-306 properly falls under HTSUS subheading 9405.10.80.

(c) *SKU 491-798 (Pl. Ex. W-101)*

SKU 491-798 is a “[f]lush mounted ceiling fixture consisting of a translucent white frosted glass ‘bubble’ shade, surrounded by a metal trim ring with a bronze finish.” (Pl. Ex. W-101 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 101.) This fixture has a profile similar to SKU 104-306. (Pl. Ex. W-101 at 1.) Mr. St. John declared that SKUs 104-306 and 491-798 is the same, except for the finish. (Trial Tr. 969, Oct. 24.) Mr. Mintz corroborated by stating that SKUs 491-798, 104-306 (*supra*) and 491-803 (*infra*) “are identical [ ] except for the finish on the mounting plate.” (Trial Tr. 1237, Oct. 27.) This Court agrees.

Upon examination of all the evidence, this Court finds that SKUs 491-798 and 104-306 are substantially identical fixtures. This Court finds that a different finish on an otherwise identical fixture does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 104-306 to SKU 491-798, this Court finds that the essential character of SKU 491-798 is imparted

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<sup>36</sup>The term “profile” slightly differed between Plaintiff’s witnesses. Mr. St. John sometimes referred to the profile of the pan and other times referred to the profile of the overall fixture. (See, e.g., Trial Tr. 962, Oct. 24.) Mr. Mintz, however, discussed profile in terms of the overall fixture as “the backplate plus the glass or plastic.” (Trial Tr. 1397, Oct. 27.)



by the glass. Accordingly, this Court holds that SKU 491–798 properly falls under HTSUS subheading 9405.10.80.

(d) *SKU 491–803 (Pl. Ex. W–102)*

SKU 491–803 is a “[f]lush mounted ceiling fixture consisting of a translucent white frosted glass ‘bubble’ shade, surrounded by a metal trim ring with a white finish.” (Pl. Ex. W–102 at 1.) Plaintiff produced as evidence a SKU information packet consisting of an adequate image of the fixture. (Pl. Ex. 102.) This fixture has a profile similar to SKUs 104–306 and 491–798. (Pl. Ex. W–102 at 1.) Mr. St. John testified that “[SKU 491–803] is just like [SKU 491–798] and just like [SKU 104–306], except it’s in a white finish.” (Trial Tr. 972, Oct. 24.)

Upon examination of all the evidence, this Court finds that SKUs 104–306, 491–798 and 491–803 are substantially identical fixtures. This Court finds that a different finish on the base metal of an otherwise identical fixture does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKUs 104–306 to SKU 491–803, this Court finds that the essential character of SKU 491–803 is imparted by the glass. Accordingly, this Court holds that SKU 491–803 properly falls under HTSUS subheading 9405.10.80.

### 3. MUSHROOM

This Court finds instructive that the name of these fixtures is “mushroom,” which refers to the glass. *See supra* § III.B. This mushroom group uses a standard fitter. (Trial Tr. 990, Oct. 26; Trial Tr. 1243, Oct. 27; Pl. Ex. W–75 at 3.) Therefore, according to Plaintiff’s witnesses, the most outstanding characteristic of this mushroom group is the glass shade. (Trial Tr. 985–96, Oct. 26; Trial Tr. 1246, Oct. 27.)

(a&b) *SKUs 385–477 (Pl. Ex. W–75) & 385–544 (Pl. Ex. W–77)*

SKUs 385–477 and 385–544 are divisional SKUs. As discussed in the divisional SKU section above, this Court accepts Plaintiff’s submission that SKUs 385–477 and 385–544 are identical fixtures that received different SKU numbers when regional divisions placed orders. *See supra* § IV. Finding that they are identical fixtures, this Court applies the same analysis to SKUs 385–477 and 385–544. Furthermore, SKU 385–477 is an agreed upon representative SKU covering SKUs 384–961, 491–784, and 794–187. (Joint Report 5.)

These fixtures are “[f]lush mounted ceiling fixture[s] known as an [sic] ‘7-[i]nch Mushroom.’ The[se] fixture[s] [are] 7 inches in diameter, with a translucent white glass bowl that mounts into a metal fitter. The translucent glass bowl extends beyond the diameter of the fitter and then narrows where it mounts into the fitter, creating a shape similar to that of a mushroom.” (Pl. Ex. W–75 at 1.) These fixtures have a white metal finish. (*Id.*) Plaintiff produced as evidence

a physical sample (Pl. Ex. 222), photograph (Pl. Ex. 161) and SKU information packets (Pl. Ex. 75; Pl. Ex. 77).

The glass has a visible surface area of 53.3 square inches, which constitutes sixty-five percent of the whole, and weighs 7.5 ounces, which constitutes fifty percent of the total weight. (Pl. Ex. W-75 at 1.) The metal has a visible surface area of 28.6 square inches, which constitutes thirty-five percent of the whole, and weighs 5.7 ounces, which constitutes thirty-eight percent of the total weight. (*Id.*) This Court finds that the glass has greater visible surface area and weighs more than the metal. While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (Pl. Ex. W-75 at 1; Pl. Ex. W-77 at 1.)

This Court finds that the metal component: consists of a standard metal fitter of a painted white finish; comprises approximately one-third of the total visible surface area; weighs approximately two-fifths of the entirety of the fixture; contributes to the decorative appearance and structure; houses the electrical components; and mounts the fixture to the ceiling. This Court finds that the glass component: consists of a stylized decorative shade that gives the fixture its name; comprises approximately two-thirds of the total visible surface area; weighs one-half of the entirety of the fixture; directs and softens light through diffusion; protects the lamp; shields the lamp from view; contributes to decorative appearance and structure; and defines this fixture from design and marketability standpoints. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKUs 385-477 and 385-544 is imparted by its glass. Accordingly, this Court holds that SKUs 385-544 and 385-477 and its agreed upon represented SKUs 384-961, 491-784, and 794-187 properly fall under HTSUS subheading 9405.10.80.

(c&d) *SKUs 385-463 (Pl. Ex. W-74) & 385-513 (Pl. Ex. W-76)*

SKUs 385-463 and 385-513 are divisional SKUs. As discussed above, this Court accepts Plaintiff’s submission that SKUs 385-463 and 385-513 are identical fixtures that received different SKU numbers when regional divisions placed orders. *See supra* § IV. Finding that they are identical fixtures, this Court applies the same analysis for SKUs 385-463 and 385-513. Plaintiff produced as evidence SKU information packets consisting of clear, color images of the fixtures. (Pl. Ex. 74; Pl. Ex. 76.) These identical fixtures have a different finish than those discussed immediately above but are otherwise the same. (Trial Tr. 994, Oct. 26.)

Mr. St. John testified that there are no differences between SKUs 385-463, 485-513, and 385-477. (*Id.*) This Court notes, however, that the metal finish on SKUs 385-463 and 385-513 is different

from that of SKU 385-477. As discussed above, this Court finds that a different finish on an otherwise identical fixture does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 385-477 to SKUs 385-463 and 385-513, this Court finds that the essential character of SKUs 385-463 and 385-513 is imparted by the glass. Accordingly, this Court holds that SKUs 385-463 and 385-513 properly fall under HTSUS subheading 9405.10.80.

(e) *SKU 385-334 (Pl. Ex. W-68)*

SKU 385-334 is a “7-inch mushroom[,] [f]lush mounted ceiling fixture consisting of a faceted glass shade that mounts into a metal fitter with a chrome finish. The glass shade extends beyond the diameter of the fitter and then narrows where it mounts into the fitter, creating a shape similar to that of a mushroom.” (Pl. Ex. W-68 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 68.) Mr. Mintz advanced that SKU 385-334 has the same shape as SKU 385-477, but SKU 385-334 “has a pressed or cast glass diffuser” and a fitter “in a polished chrome finish.” (Trial Tr. 1242, Oct. 27.)

Upon examination of all the evidence, this Court finds that SKUs 385-477 and 385-334 are substantially identical fixtures. This Court finds the color of finish and type of glass shade do not significantly affect the essential character analysis. Furthermore, this Court finds that the faceting in the glass shade favors the importance of the glass component. Therefore, adopting and applying the analysis of SKU 385-477 to SKU 385-334, this Court finds that the essential character of SKU 385-334 is imparted by the glass. Accordingly, this Court holds that SKU 385-334 properly falls under HTSUS subheading 9405.10.80.

(f) *SKU 385-365 (Pl. Ex. W-69)*

SKU 385-365 is a “7-inch mushroom[,] [f]lush mounted ceiling fixture consisting of a faceted glass shade that mounts into a metal fitter with a brass finish. The glass [shade] extends beyond the diameter of the fitter and then narrows where it mounts into the fitter, creating a shape similar to that of a mushroom.” (Pl. Ex. W-69 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 69.) According to Mr. Mintz, SKU 385-365 is “same fixture as [SKU 385-334] but except [sic] that [SKU 385-365] is polished brass. It’s got the same faux cut glass diffuser.” (Trial Tr. 1243, Oct. 27.) This Court agrees.

Upon examination of all the evidence, this Court finds that SKUs 385-334 and 385-365 are substantially identical fixtures. This Court finds that a different finish on an otherwise identical fixture does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 385-334 to SKU 385-365, this Court finds that the essential character of SKU 385-365 is imparted

by the glass. Accordingly, this Court holds that SKU 385–365 properly falls under HTSUS subheading 9405.10.80.

(g) *SKU 385–446 (Pl. Ex. W–73)*

SKU 385–446 is a “7-inch mushroom[,] [f]lush mounted ceiling fixture . . . The fixture is eight inches in diameter, with a translucent white frosted glass bowl shade that mounts into a metal fitter with a brass finish.” (Pl. Ex. W–73 at 1.) Although the fixture is eight inches in diameter, it “uses the same seven inch fitter as all the other mushroom[ ] [fixtures].” (*Id.*) Plaintiff produced as evidence a SKU information packet with an adequate image of the fixture. (Pl. Ex. 73.) This Court finds that the written content on the image corroborates witness testimony regarding the different finishes in the mushroom group of fixtures. (Pl. Ex. 73.) Mr. St. John offered that SKUs 385–477 and 385–446 are the same except for the finish on the metal. (Trial Tr. 990, Oct. 26.)

Upon examination of all the evidence, this Court finds that SKUs 385–477 and 385–446 are substantially identical fixtures. This Court finds that a different finish on an otherwise identical fixture does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 385–477 to SKU 385–446, this Court finds that the essential character of SKU 385–446 is imparted by the glass. Accordingly, this Court holds that SKU 385–446 properly falls under HTSUS subheading 9405.10.80.

#### 4. DOME

Mr. St. John testified that the fixtures in this dome group differ in their metal finish. (Trial Tr. 1099, Oct. 26.) Mr. St. John asserted, however, that the driving force behind a customer’s purchasing decision with respect to the domed fixtures is “typically the style of glass . . . [b]ecause of the diffusing and decorative elements of the product.” (*Id.* at 1101.) Mr. Mintz explained that the glass dome “has some sort of decorative swirl pattern in it.” (Trial Tr. 1398, Oct. 27.) He concluded that “the glass really provides the profile and the performance and the function of the fixture.” (*Id.* at 1398–99.) Mr. St. John offered that SKUs 385–625, 385–673, 385–690, 385–706, 385–768 and 385–771 are in the same family. (Trial Tr. 1105, 1107, 1109, Oct. 26.)

(a) *SKU 284–604 (Pl. Ex. W–38)*

SKU 284–604 is “[f]lush mounted ceiling fixture consisting of a faux alabaster glass shade, mounted into a metal trim ring of an off-white plaster finish.” (Pl. Ex. W–38 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 205), photograph (Pl. Ex. 144) and SKU information packet (Pl. Ex. 38). This fixture is held up by a twist lock connection. (Trial Tr. 1400, Oct. 27.) The glass dome pro-

vides the fixture's profile (*id.* at 1395) and shape (*id.* at 1398), according to Mr. Mintz.

The glass has a visible surface area of 122.1 square inches, which constitutes sixty-seven percent of the whole, and weighs 51.8 ounces, which constitutes sixty-six percent of the total weight. (Pl. Ex. W-38 at 1.) The metal has a visible surface area of 61.0 square inches, which constitutes thirty-three percent of the whole, and weighs 22.8 ounces, which constitutes twenty-nine percent of the total weight. (*Id.*) This Court finds that the glass has much greater visible surface area and weighs notably more than the metal. This Court also considers the factor "material's role in relation to the use of the good" as listed in the EN to GRI 3(b). While both the glass and metal "contribute[ ] to decorative appearance" and are "part of [the] structure," the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*)

This Court finds that the metal component: consists of a trim ring in an off-white plaster finish; comprises approximately one-third of the total visible surface area; weighs approximately one-third of the entirety of the fixture; contributes to the decorative appearance and structure; houses the electrical components; and mounts the fixture to the ceiling. This Court finds that the glass component: consists of a stylized decorative dome shade; comprises approximately two-thirds of the total visible surface area; weighs approximately two-thirds of the entirety of the fixture; reflects and refracts light; protects the lamp; contributes to the decorative appearance and structure; and defines this fixture from design and marketability standpoints. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 284-604 is imparted by its glass. Accordingly, this Court holds that SKU 284-604 properly falls under HTSUS subheading 9405.10.80.

(b) *SKU 385-012 (Pl. Ex. W-54)*

SKU 385-012 is apparently a "[f]lush mounted ceiling fixture that consists of a melon cut<sup>37</sup> glass bowl shade that is mounted into a metal trim ring at the base" of polished brass metal. (Pl. Ex. W-54 at 1.) Plaintiff produced as evidence a SKU information packet with a low quality image of the fixture. (Pl. Ex. 54.) This Court finds the image included in Plaintiff's Exhibit 54 is of extremely low quality and thus inadequate to support Plaintiff's arguments. Furthermore, this Court finds that the written content of Plaintiff's Exhibit 54 does not clearly relate this fixture.

Mr. Mintz admitted that Plaintiff's Exhibit 54 is "not a very good picture," but "by experience and seeing similar fixtures," he submit-

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<sup>37</sup> Mr. Mintz explained that melon-cut glass is "melon shape[d]," typically "translucent or frosted," with wide ribs similar to those on a melon or pumpkin. (Trial Tr. 1402-03, Oct. 27.)

ted this fixture is similar to SKU 385-589. (Trial Tr. 1400, Oct. 27.) This Court is not persuaded by such testimony. Although “[i]t is hornbook law that direct evidence of a fact is not necessary,” the trial court “has the responsibility to weigh the evidence and credibility of the witnesses in deciding the inferential reach of [ ] circumstantial evidence.” *Fuji Photo Film Co., Ltd. v. Jazz Photo Corp.*, 394 F.3d 1368, 1374 (Fed. Cir. 2005) (citation omitted). This Court finds insufficient that the witness has seen only similar fixtures with neither personal knowledge of this fixture nor corroborating evidence.

As previously discussed, Customs enjoys a statutory presumption of correctness in its original classification determinations. Although an importer may overcome this presumption by a preponderance of the evidence, this Court finds that Plaintiff has not produced sufficient evidence for SKU 385-012 to rebut this statutory presumption. Accordingly, this Court holds that Customs’ classification of SKU 385-012 under HTSUS subheading 9405.10.60 stands.

(c) *SKU 385-589 (Pl. Ex. W-78)*

SKU 384-589 is a “[f]lush mounted ceiling fixture consisting of a translucent glass dome mounted into a metal trim ring and with a metal finial<sup>38</sup> both of a white finish.” (Pl. Ex. W-78 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 78.) Mr. Mintz asserted that this fixture is similar to SKU 284-604 except that this fixture is held together with a finial rather than a twist lock connection. (Trial Tr. 1400, Oct. 27.) This Court notes that the finishes and styles are also slightly different. (Trial Tr. 1106, Oct. 26.)

Upon examination of all the evidence, this Court finds that SKUs 284-604 and 385-589 are substantially identical fixtures. This Court finds the noted differences are minimal and do not significantly affect the essential character analysis. Adopting and applying the analysis of SKU 284-604 to SKU 385-589, this Court finds that the essential character of SKU 385-589 is imparted by the glass. Accordingly, this Court holds that SKU 385-589 properly falls under HTSUS subheading 9405.10.80.

(d) *SKU 385-608 (Pl. Ex. W-79)*

SKU 385-608 is a “[f]lush mounted ceiling fixture consisting of a frosted glass dome mounted into a metal trim ring and with a metal finial, both of a brass finish.” (Pl. Ex. W-79 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 79.) Mr. Mintz testified that SKU 385-608

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<sup>38</sup>A “finial” is a small knob at the bottom of the fixture that holds the components in place. (Trial Tr. 1367-68, Oct. 27.)



“is very similar to” SKU 385-589 except for a slightly different backplate and finish. (Trial Tr. 1401, Oct. 27.)

Upon examination of all the evidence, this Court finds that SKUs 385-589 and 385-608 are substantially identical fixtures. This Court finds that a different finish and a slight variance in the backplate do not significantly affect the essential character analysis as discussed above. Adopting and applying the analysis of SKU 385-589 to SKU 385-608, this Court finds that the essential character of SKU 385-608 is imparted by the glass. Accordingly, this Court holds that SKU 385-608 properly falls under HTSUS subheading 9405.10.80.

(e) *SKU 385-625 (Pl. Ex. W-80)*

SKU 385-625 is a “[f]lush mounted ceiling fixture consisting of a clear glass dome with swirl fluting, mounted into a metal trim ring and with a metal finial, both of a brass finish.” (Pl. Ex. W-80 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 80.) Mr. Mintz testified that this fixture “appears to be very similar” to the SKU 385-589 except for the polished brass finish on the metal pan. (Trial Tr. 1401, Oct. 27.) Upon its own comparison of these two fixtures, however, this Court notes a difference also in the glass – clear versus frosted – and perhaps a slight difference in the profile. (*Compare* Pl. Ex. 78 with Pl. Ex. 80.)

Upon examination of all the evidence, this Court finds that SKUs 385-589 and 385-625 are substantially identical fixtures. Although there are a few differences, this Court finds that these differences do not significantly affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 385-589 to SKU 385-625, this Court finds that the essential character of SKU 385-625 is imparted by the glass. Accordingly, this Court holds that SKU 385-625 properly falls under HTSUS subheading 9405.10.80.

(f) *SKU 385-673 (Pl. Ex. W-81)*

SKU 385-673 is a “[f]lush mounted ceiling fixture consisting of a frost[ed] sw[ir]l glass dome mounted into a metal trim ring and with a metal finial, both of a white finish.” (Pl. Ex. W-81 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 81.) Mr. St. John testified that SKU 385-673 is identical to SKU 385-625, except for the white finish and the frosted swirl pattern on the glass dome. (Trial Tr. 1104, Oct. 26.) He asserted that SKUs 385-673, 385-625 (*supra*) and 385-690 (*infra*) are in the same family and have the same style. (Trial Tr. 1105, Oct. 26.)

Upon examination of all the evidence, this Court finds SKUs 385-625 and 385-673 are substantially identical fixtures. This Court finds that a different finish and frosted glass on an otherwise identi-

cal fixture do not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 385-625 to SKU 385-673, this Court finds that the essential character of SKU 385-673 is imparted by the glass. Accordingly, this Court holds that SKU 385-673 properly falls under HTSUS subheading 9405.10.80.

(g) *SKU 385-690 (Pl. Ex. W-82)*

SKU 385-690 is a “[f]lush mounted ceiling fixture consisting of a frosted swirl glass dome mounted into a metal trim ring and with a metal finial, both of a brass finish.” (Pl. Ex. W-82 at 1.) Plaintiff produced as evidence a SKU information packet with a clear, color image of the fixture. (Pl. Ex. 82.) Mr. Mintz claimed that this fixture is “very similar” to the other dome fixtures. (Trial Tr. 1401, Oct. 27.)

Upon examination of all the evidence, this Court finds that SKUs 385-608 and 385-690 are substantially identical fixtures. Therefore, adopting and applying the analysis of SKU 385-608 to SKU 385-690, this Court finds that the essential character of SKU 385-690 is imparted by the glass. Accordingly, this Court holds that SKU 385-690 properly falls under HTSUS subheading 9405.10.80.

(h) *SKU 385-706 (Pl. Ex. W-83)*

SKU 385-706 is a “[f]lush mounted ceiling fixture of 13.25 inches in diameter. The fixture consists of a glass shade with close-set ridges in a ‘swirl’ pattern, surrounded by a metal trim ring with a polished brass finish, and capped by a knob, also of brass finish.” (Pl. Ex. W-83 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 223), photograph (Pl. Ex. 162) and SKU information packet (Pl. Ex. 83).

The glass has a visible surface area of 123.8 square inches, which constitutes sixty-three percent of the whole, and weighs 45.5 ounces, which constitutes seventy-two percent of the total weight. (Pl. Ex. W-63 at 1.) The metal has a visible surface area of 71.0 square inches, which constitutes thirty-seven percent of the whole, and weighs 14.6 ounces, which constitutes twenty-three percent of the total weight. (*Id.*) This Court finds that the glass has much greater visible surface area and weighs notably more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and distribute light through refraction and diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*)

This Court finds that the metal component: consists of a trim ring, cap and knob of a polished brass finish; comprises approximately one-third of the total visible surface area; weighs approximately one-fourth of the entirety of the fixture; contributes to decorative appearance and structure; mounts the fixture to the ceiling; and houses the

electrical components. This Court finds that the glass component: consists of a stylized decorative dome shade; comprises approximately three-fifths of the total visible surface area; weighs approximately three-fourths of the entirety of the fixture; directs and distributes light through refraction and diffusion; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; and defines this fixture from design and marketability standpoints. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 385-706 is imparted by its glass. Accordingly, this Court holds that SKU 385-706 properly falls under HTSUS subheading 9405.10.80.

(i) *SKU 385-740 (W-84)*

SKU 385-740 is a 11.25 inch diameter flush mounted ceiling fixture consisting “of a translucent white frosted glass dome shade with close-set fluting in a ‘swirl’ pattern, surrounded by metal trim ring” capped by a finial, both of a white finish. (Pl. Ex. W-84 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 224), photograph (Pl. Ex. 163) and SKU information packet (Pl. Ex. 84).

The glass has a visible surface area of 73.5 square inches, which constitutes sixty-six percent of the whole, and weighs 29.2 ounces, which constitutes sixty-eight percent of the total weight. (Pl. Ex. W-84 at 1.) The metal has a visible surface area of 37.0 square inches, which constitutes thirty-four percent of the whole, and weighs 11.9 ounces, which constitutes twenty-eight percent of the total weight. (*Id.*) This Court finds that the glass has much greater visible surface area and weighs notably more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*)

This Court finds that the metal component: consists of a trim ring, cap and knob of a white finish; comprises approximately one-third of the total visible surface area; weighs approximately one-fourth of the entirety of the fixture; contributes to the decorative appearance and structure; mounts the fixture to the ceiling; and houses the electrical components. This Court finds that the glass component: consists of a stylized decorative dome shade; comprises two-thirds of the visible surface area; weighs approximately two-thirds of the entirety of the fixture; directs and softens light through diffusion; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; and defines this fixture from design and marketability standpoints. Upon careful consideration of the totality of these various factors, this Court finds that the essential character

of SKU 385-740 is imparted by its glass. Accordingly, this Court holds that SKU 385-740 properly falls under HTSUS subheading 9405.10.80.

(j) *SKU 385-768 (Pl. Ex. W-85)*

SKU 385-768 is a “[f]lush mounted ceiling fixture consisting of a frosted swirl glass dome mounted into a metal trim ring and with a metal finial, both of a brass finish.” (Pl. Ex. W-85 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 85.) SKU 385-768 is similar to the other fixtures in this dome group. (Trial Tr. 1107, Oct. 26; Trial Tr. 1402, Oct. 27.) According to Mr. Mintz, this fixture’s backplate is slightly different. (Trial Tr. 1402, Oct. 27.)

Upon examination of all the evidence, this Court finds SKUs 385-768 and 385-740 are substantially identical fixtures. This Court finds that a different finish and a slight variance in the backplate on otherwise identical fixtures do not significantly affect the essential character analysis as previously discussed. Therefore, adopting and applying the analysis of SKU 385-740 to SKU 385-768, this Court finds that the essential character of SKU 385-768 is imparted by the glass. Accordingly, this Court holds that SKU 385-768 properly falls under HTSUS subheading 9405.10.80.

(k) *SKU 385-771 (Pl. Ex. W-86)*

SKU 385-771 is a “[f]lush mounted ceiling fixture consisting of a clear glass dome, with swirled, vertical fluting, mounted into a metal trim ring and with a metal finial, both a brass finish.” (Pl. Ex. W-86 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 86.) SKU 385-771 is similar to the other fixtures in this dome group. (Trial Tr. 1107, Oct. 26; Trial Tr. 1403, Oct. 27.)

Upon examination of all the evidence, this Court finds SKUs 385-625 and 385-771 are substantially identical fixtures. The only difference seems to be that the brass is a little darker in the former but it is unclear whether this an effect created by varied lighting when the photographs were taken. This Court finds this possible difference is inconsequential. Therefore, adopting and applying the analysis of SKU 385-625 to SKU 385-771, this Court finds that the essential character of SKU 385-771 is imparted by the glass. Accordingly, this Court holds that SKU 385-771 properly falls under HTSUS subheading 9405.10.80.

(l) *SKU 494-935 (Pl. Ex. W-104)*

SKU 494-935 is a “[f]lush mounted ceiling fixture consisting of a frosted glass dome, with fluting, mounted into a metal trim ring and with a metal finial, both of a gold finish.” (Pl. Ex. W-104 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a

clear, color image of the fixture. (Pl. Ex. 104.) SKU 494–935 is the same idea but it “has a completely different type of glass” than the others in the dome group. (Trial Tr. 1107, Oct. 26.) Mr. St. John explained this fixture has “a leaf pattern molded into the centrifugal glass” and described the finish of this fixture as antique brass. (*Id.*)

Upon examination of all the evidence, this Court finds SKUs 385–740 and 494–935 are substantially identical fixtures. This Court finds that the differences in metal finish and glass texture on otherwise identical fixtures do not significantly affect the essential character analysis as previously discussed. Therefore, this Court adopts and applies the analysis of SKU 385–740 to SKU 494–935. Consequently, this Court finds that the essential character of SKU 494–935 is imparted by the glass. Accordingly, this Court holds that SKU 494–935 properly falls under HTSUS subheading 9405.10.80.

(m) *SKU 494–949 (Pl. Ex. W–105)*

SKU 494–949 is a “[f]lush mounted ceiling fixture consisting of a frosted glass dome, with fluting, mounted into a metal trim ring and with a metal finial, both of an [a]ntique [b]rass finish.” (Pl. Ex. W–105 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 105.) According to Mr. Mintz, SKU 494–949 is similar to SKU 494–935 and appears to have the “same fitter or backplate as [SKU 494–935].” (Trial Tr. 1404, Oct. 27.) He testified that “[i]f there are any differences [between SKUs 494–935 and 494–949], they are not significant.” (*Id.*) This Court agrees.

Upon examination of all the evidence, this Court finds SKUs 494–935 and 494–949 are substantially identical fixtures. Therefore, adopting and applying the analysis of SKU 494–935 to SKU 494–949, this Court finds that the essential character of SKU 494–949 is imparted by the glass. Accordingly, this Court holds that SKU 494–949 properly falls under HTSUS subheading 9405.10.80.

## 5. DRUM

This drum group “has a historical Art Deco reference, which is fully established by the design of the glass shade. . . . [T]he glass shade is intricately detailed and very distinctive. The use of the white painted bands and different geometric patterns of faceted glass establish the Art Deco design.” (Pl. Ex. W–72 at 3; *see also* Trial Tr. 130, 132, Oct. 17.) Plaintiff’s witnesses testified that the standard fitters in this drum fixture group are the same as those in the mushroom fixture group. (Trial Tr. 132–33, Oct. 17; 395, Oct. 18.) This Court finds instructive that the name of the fixtures in this group is “drum,” which refers to the glass. *See supra* § III.B.

(a) *SKU 385–432 (Pl. Ex. W–72)*

SKU 385–432 is an agreed upon representative SKU covering

SKU 385-429. (Joint Report 4.) This fixture is a “[f]lush mounted ceiling fixture known as ‘7-inch Drum.’ The fixture is 7 inches diameter, with a glass ‘drum’ shade that mounts into a [chrome-finished] metal fitter of about the same diameter. The circumference of the drum consists of four alternating bands of glass: two painted white glass bands, a band of glass diamond shapes and interlocking diagonal channels and a band of vertical flutes. The bottom of the drum (that which would be seen by an observer directly below) consists of 5 concentric rings of vertical flutes set at an angle into the center.” (Pl. Ex. W-72 at 1.) This Court finds instructive that this fixture’s name is “7-inch drum.” Plaintiff produced as evidence a physical sample (Pl. Ex. 221), photograph (Pl. Ex. 160) and SKU information packet (Pl. Ex. 72).

The glass has a visible surface area of 52.7 square inches, which constitutes eighty-four percent of the whole, and weighs 15.4 ounces, which constitutes sixty-eight percent of the total weight. (Pl. Ex. W-72 at 1.) The metal has a visible surface area of 10.1 square inches, which constitutes sixteen percent of the whole, and weighs 5.3 ounces, which constitutes twenty-four percent of the total weight. (*Id.*) This Court finds that the glass has much greater visible surface area and weighs notably more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and distribute light through refraction and diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*) According to Mr. Mintz, “[t]he glass shade is so heavily articulated by a variety of prisms, flutes, concentric rings, painted bands, clearly that’s the main decorative element[s]” (Trial Tr. 394, Oct. 18) and the “articulated drum . . . will both glow in the painted bands and sparkle in the clear prismatic and fluted bands” (*id.* at 396).

This Court finds that the metal component: consists of a standard metal fitter of a chrome finish; comprises approximately one-fifth of the total visible surface area; weighs approximately one-fourth of the entirety of the fixture; contributes to the decorative appearance and structure; houses the electrical components, and mounts the fixture to the ceiling. This Court finds that the glass component: consists of a highly stylized decorative shade with four alternating bands, two of which are painted white, that gives the fixture its name; comprises approximately four-fifths of the total visible surface area; weighs approximately two-thirds of the entirety of the fixture; directs and distributes light through refraction and diffusion; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; and defines this fixture from design and marketability standpoints. Upon careful consideration of the totality of these various factors, this Court finds that the essential character



of SKU 385–432 is imparted by its glass. Accordingly, this Court holds that SKU 385–432 and its agreed upon represented SKU 385–429 properly fall under HTSUS subheading 9405.10.80.

(b) *SKU 385–396 (Pl. Ex. W–70)*

SKU 385–396 is also a “drum” fixture. (Pl. Ex. W–70 at 1.) The description Home Depot provided for this fixture is nearly identical to that for SKU 385–432; however, Home Depot did not specify this fixture’s diameter. (*Id.*) Another difference is that this fixture has a white metal finish. (*Id.*) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 70.) Both Mr. St. John and Mr. Mintz confirmed that the only difference between SKUs 385–432 and 385–396 is the finish on the metal. (Trial Tr. 996–97, Oct. 26; Trial Tr. 1247, Oct. 27.) This Court agrees with the witnesses.

Upon examination of all the evidence, this Court finds that SKUs 385–432 and 385–396 are substantially identical fixtures. This Court finds that a different finish on an otherwise identical fixture does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 385–432 to SKU 385–396, this Court finds that the essential character of SKU 385–396 is imparted by the glass. Accordingly, this Court holds that SKU 385–396 properly falls under HTSUS subheading 9405.10.80.

## 6. HALOPHANE STYLE

Mr. St. John testified that these fixtures are known as Halophane because they all have at least one piece of Halophane style glass. (Trial Tr. 1113, Oct. 26.) This Court finds instructive that these fixtures are known as “Halophane,” which refers to the glass. Mr. St. John explained that these fixtures are imitation because true Halophane is glass that has been chemically treated. (*Id.* at 1112.) Halophane “was originally developed as a large area, high bay, warehouse light.” (*Id.*) Mr. Mintz elucidated the name Halophane originates from the company that invented this type of glass in the 1920s. (Trial Tr. 1379, Oct. 27.) Halophane has become a generic term for a glass refractor with vertical ribbed prisms in the lighting industry. (*Id.*) Mr. Mintz asserted “the reason that anybody would buy any of these [Halophane] fixtures is because . . . they like the appearance of the [H]alophane or the [H]alophane style refractor.” (*Id.* at 1385.)

(a) *SKU 369–692 (Pl. Ex. W–49)*

SKU 369–692 is a “[f]lush mounted wall fixture consisting of a ridged [H]alophane glass shade set into a metal fitter that is attached by a thin, curved metal stem into a metal mounting plate, all of a polished brass finish.” (Pl. Ex. W–49 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 211), photograph (Pl. Ex. 150) and a SKU information packet (Pl. Ex. 49). The Court noted a dis-

crepancy in the evidence. While the photographs depict a glass shade with a metal trim, the physical sample of this fixture lacks a metal trim around the shade. Mr. Mintz testified that he saw the metal ring when he first viewed the sample, and he described that “it was a polished brass finish trim ring that sat on the bottom edge of the refractor . . . [and was] maybe 5/8 to 3/4 of an inch wide.” (Trial Tr. 1380, Oct. 27.) This Court accepts the testimony that this fixture included a polished brass metal ring when it was imported. Mr. St. John offered that the “base plate and arm are standard items that are used in a variety of different fixtures, and which have no particular style in and of themselves.” (Pl. Ex. 49 at 3.)

The glass has a visible surface area of 66.4 square inches, which constitutes forty-nine percent of the whole, and weighs 17.2 ounces, which constitutes sixty-three percent of the total weight. (Pl. Ex. W-49 at 1.) The metal has a visible surface area of 68.1 square inches, which constitutes fifty-one percent of the whole, and weighs 7.8 ounces, which constitutes twenty-nine percent of the total weight. (*Id.*) It is unclear whether these measurements include the metal trim ring that is missing from the physical sample. Therefore, this Court finds that the visible surface area is too close to favor either component but a weight comparison favors the glass. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and distribute the light through refraction, to protect the lamp, and to shield the lamp from view. (*Id.*)

This Court finds that the metal component: consists of a mounting plate, curved stem, standard fitter and metal trim ring of a polished brass finish; weighs approximately one-third of the entirety of the fixture; contributes to the decorative appearance and structure; affixes the fixture to the wall; and houses the electrical components. This Court finds that the glass component: consists of a highly stylized decorative historical shade that gives the fixture its name; weighs approximately two-thirds of the entirety of the fixture; directs and distributes light through refraction; protects the lamp; shields the lamp from view; breaks up light; and defines and distinguishes this fixture by its Halophane glass. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 369-692 is imparted by its glass. Accordingly, this Court holds that SKU 369-692 properly falls under HTSUS subheading 9405.10.80.

(b) *SKU 522-787 (Pl. Ex. W-106)*

SKU 522-787 is a “[h]anging ceiling fixture consisting of a Halophane glass shade that is suspended by a metal mounting cap with a polished brass finish. (Pl. Ex. W-106 at 1.) Although Mr.

Mintz noted that Halophane refractors “are curved not straight sided” (Trial Tr. 1382, Oct. 27), he testified that the glass on this fixture has ribs “and to that extent someone might think that it could be classified as a [H]alophane refractor” (*id.*). Plaintiff marked for identification a physical sample of this fixture (Pl. Ex. 239) but failed to move it into evidence. Therefore, the Court did not consider it in this analysis. Plaintiff did produce as evidence a photograph (Pl. Ex. 178) and SKU information packet (Pl. Ex. 106). Upon examination of these exhibits, Plaintiff’s Exhibit 178 appears to be missing the metal chain by which the glass shade is suspended. (*Compare* Pl. Ex. 106 *with* Pl. Ex. 178; *see also* Trial Tr. 1082, Oct. 27.)

Mr. St. John insisted that the Halophane glass shade comprises almost the fixture’s entire visible surface area. (Pl. Ex. W-106 at 3.) The glass has a visible surface area of 341.7 square inches, which constitutes seventy-five percent of the whole, and weighs 78.9 ounces, which constitutes eighty-six percent of the total weight. (*Id.*) The metal has a visible surface area of 115.1 square inches, which constitutes twenty-five percent of the whole, and weighs 9.5 ounces, which constitutes ten percent of the total weight. (*Id.*) Although it is unclear whether the metal chain was included in these measurements, any impact the chain might have on the measurements is insignificant and would not affect the outcome. Further, this Court finds that the glass has much greater visible surface area and weighs notably more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and distribute the light through refraction and to protect the lamp. (*Id.*)

This Court finds that the metal component: consists of a mounting cap of a polished brass finish; comprises one-fourth of the total visible surface area; weighs one-tenth of the entirety of the fixture; contributes to the decorative appearance and structure; and suspends the fixture from the ceiling. This Court finds that the glass component: consists of a highly stylized decorative historical shade that gives the fixture its name; comprises three-fourths of the total visible surface area; weighs approximately four-fifths of the entirety of the fixture; directs and distributes light through refraction; protects the lamp; establishes the fixture’s scale; and defines and distinguishes this fixture by its Halophane glass. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 522-787 is imparted by its glass. Accordingly, this Court holds that SKU 522-787 properly falls under HTSUS subheading 9405.10.80.

(c) *SKU 629-590 (Pl. Ex. W-112)*

SKU 629-590 is a “[w]all sconce consisting of a [H]alophane glass

diffuser affixed to a metal mounting plate with a polished brass finish.” (Pl. Ex. W-112 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 243), photograph (Pl. Ex. 182) and SKU information packet (Pl. Ex. 112). Mr. St. John explained that this fixture is a “[H]alophane quarter sphere<sup>39</sup> wall sconce.” (Trial Tr. 1115, Oct. 26.) Mr. Mintz further offered that this fixture is a wall sconce with “a ribbed prismatic refractor against a polished metal trapezoidal mounting plate.” (Trial Tr.1383, Oct. 27.)

The glass has a visible surface area of 54.1 square inches, which constitutes fifty-three percent of the whole, and weighs 13.8 ounces, which constitutes fifty-six percent of the total weight. (Pl. Ex. W-112 at 1.) The metal has a visible surface area of 47.1 square inches, which constitutes forty-seven percent of the whole, and weighs 9.9 ounces, which constitutes forty percent of the total weight. (*Id.*) Upon examination of the physical sample, this Court finds that the metal backplate is visible through the glass, and it appears to comprise as much, if not more, surface area than the glass. This Court also finds that the measurements for weight, however, suitably favor the glass over the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and distribute the light through the refraction, to protect the lamp excluding the top view, and to shield the lamp from view. (*Id.*)

This Court finds that the metal component: consists of a trapezoidal-shaped backplate of a polished brass; comprises approximately one-half of the total visible surface area but is almost entirely visible through the glass; weighs approximately two-fifths of the entirety of the fixture; contributes to the decorative appearance and structure; affixes the fixture to the wall; houses the electrical components; and contributes to the fixture’s scale with the backplate. This Court finds that the glass component: consists of a highly stylized decorative historical shade that gives the fixture its name; comprises approximately one-half of the total visible surface area; weighs approximately one-half of entirety of the fixture; directs and distributes light through refraction; protects the lamp; contributes to the fixture’s scale with the curved shape of the shade; and defines and distinguishes this fixture from others by its Halophane style glass.

Upon careful consideration of the totality of these various factors, this Court finds that both the glass and metal are equally important. When a court determines that two or more subheadings merit equal consideration, the GRI is structured with a default provision. “When

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<sup>39</sup>Mr. St. John explained that quarter sphere is when a complete ball is cut in quarters. (Trial Tr. 1115, Oct. 26.)

goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.” GRI 3(c). Since both the glass and metal components merit equal consideration, this Court finds that application of GRI 3(c) is appropriate for this fixture. *See, e.g., Orlando Foods v. United States*, 140 F.3d 1437, 1442 (Fed. Cir. 1998) (“GRI 3(c) . . . provides that if determination of relative specificity is not possible, goods should be classified according to the heading which occurs last in numerical order.”) The classifications at issue in this case are subheading 9405.10.60 for light fittings “of base metal” “other than of brass” and subheading 9405.10.80 for light fittings of “other” than “of base metal.” This Court notes that subheading 9405.10.80 occurs last in numerical order. Accordingly, this Court holds that SKU 629–590 falls under HTSUS subheading 9405.10.80 through application of GRI 3(c).

(d) *SKU 828–726 (Pl. Ex. W–125)*

SKU 828–726 is a “[h]anging ceiling fixture consisting of an umbrella-shaped fluted Halophane glass shade with a metal trim ring of polished brass finish, which mounts into a metal fitter, also of brass finish.” (Pl. Ex. W–125 at 1.) Notwithstanding Plaintiff’s withdrawal of the physical sample (Pl. Ex. 248),<sup>40</sup> Plaintiff produced a photograph (Pl. Ex. 187) and SKU information packet (Pl. Ex. 125). This Court notes that the images of the fixture differ slightly in Plaintiff’s evidence. Plaintiff’s Exhibit 125 depicts a bowl-shaped shade with a metal trim ring and suspension chain. Plaintiff’s Exhibit 187 depicts a funnel-shaped shade with neither a trim ring nor a chain. Nevertheless, these differences do not impact this Court’s conclusion.

Mr. St. John insisted that the Halophane glass shade comprises nearly all of the fixture’s visible surface area. (Pl. Ex. W–125 at 3.) The glass has a visible surface area of 365.2 square inches, which constitutes seventy-nine percent of the whole, and weighs 143.3 ounces, which constitutes ninety percent of the total weight. (*Id.* at 1.) The metal has a visible surface area of 97.1 square inches, which constitutes twenty-one percent of the whole, and weighs 13.3 ounces, which constitutes eight percent of the total weight. (*Id.*) Despite the fact there may be a missing metal chain originally included with this fixture, this Court finds that the glass has much greater visible surface area and weighs notably more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,”

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<sup>40</sup> On the final day of trial, Plaintiff submitted to this Court a list of withdrawn exhibits, including Plaintiff’s Exhibit 248, which was only marked for identification during the tenure of the trial. (Trial Tr. 1785, Nov. 2.)

the glass further functions to direct and distribute the light through the refraction, to protect the lamp, and to shield lamp from view. (*Id.*)

This Court finds that the metal component: consists of a mounting cap of polished brass finish; comprises approximately one-fifth of the total visible surface area; weighs approximately one-tenth of the entirety of the fixture; contribute to the decorative appearance and structure; and suspends the fixture from the ceiling. This Court finds that the glass component: consists of a highly stylized decorative historical shade that gives the fixture its name; comprises four-fifths of the total visible surface area; weighs nine-tenths of the entirety of the fixture; directs and distributes light through refraction; protects the lamp; shields lamp from partial view; establishes the fixture's scale; and defines and distinguishes this fixture by its Halophane style glass. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 828-726 is imparted by its glass. Accordingly, this Court holds that SKU 828-726 properly falls under HTSUS subheading 9405.10.80.

(e) *SKU 828-734 (Pl. Ex. W-126)*

SKU 828-734 is a “[w]all-fixture consisting two fluted Halophane glass shades, each with a metal bottom trim ring and mounted into a fitter that attaches to a small metal center-bar and escutcheon plate<sup>41</sup> by means of a thin, curved metal stem.” (Pl. Ex. W-126 at 1.) Plaintiff produced as evidence a SKU information packet which includes an adequate image of this fixture. (Pl. Ex. 126.) Mr. St. John testified that SKU 828-734 is a two-lamp version of SKU 369-692. (Trial Tr. 1116, Oct. 26.) This Court agrees.

This Court finds that SKUs 369-692 and 828-734 are substantially identical fixtures. This Court finds that the difference of the number of lamps on otherwise identical fixtures does not significantly affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 369-692 to SKU 828-734, this Court finds that the essential character of SKU 828-734 is imparted by its glass. Accordingly, this Court holds that SKU 828-734 properly falls under HTSUS subheading 9405.10.80.

## 7. VICTORIAN STYLE<sup>42</sup>

Mr. Mintz explained that the this fixture's style is called Victorian in the industry because “it's a fancy design. Victorian fabrics, Victo-

<sup>41</sup> An “escutcheon plate” is a decorative backplate. (Trial Tr. 1280, Oct. 27.)

<sup>42</sup> Although Plaintiff named this group “Victorian Fluted” (see Phase II 3), this Court elects to drop the term fluted since Plaintiff's own witnesses had differing definitions for fluted but they both agreed that all the fixtures in this group are Victorian. (*Compare* Trial Tr. 1004, Oct. 26, *with* Trial Tr.1261-62, Oct. 27.)



rian wallpaper [ ] had a lot of flower motifs and [were] very decorative.” (Trial Tr. 1252–53, Oct. 27.) Mr. Mintz advanced that the first six fixtures in this group have identical shades. (*Id.* at 1262.) He explained that the fixtures in this group have “substantially the same glass shade” which provides the “‘Victorian’ characteristic” (*id.*) and “distinctive appearance” (*id.* at 1264). This group of fixtures uses a standard fitter. (*Id.* at 1263; Trial Tr. 1007, Oct. 26.)

(a) *SKU 361–570 (Pl. Ex. W–43)*

SKU 361–570 is a “[f]lush mounted ceiling fixture consisting of a translucent, white, frosted glass shade, with ridges, pebbling and fluting set into a ridged, metal mounting plate of a[n] antique brass finish.” (Pl. Ex. W–43 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 207), photograph (Pl. Ex. 146) and SKU information packet (Pl. Ex. 43.) Although admitting that “the [metal] canopy is decorative,” Mr. Mintz declared that the canopy “is subordinate in decorative appearance to the shade.” (Pl. Ex. W–43 at 3.)

The glass has a visible surface area of 37.7 square inches, which constitutes forty percent of the whole, and weighs 7.1 ounces, which constitutes fifty-five percent of the total weight. (Pl. Ex. W–43 at 1.) The metal has a visible surface area of 56.7 square inches, which constitutes sixty percent of the whole, and weighs 3.9 ounces, which constitutes thirty percent of the total weight. (*Id.*) This Court finds that the metal has greater visible surface area than the glass, but the glass weighs more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*)

This Court finds that the metal component: consists of a standard fitter and decorative canopy of an antique brass finish; comprises approximately three-fifths of the total visible surface area; weighs approximately one-third of the entirety of the fixture; contributes to the decorative appearance and structure; houses the electrical components, and mounts the fixture to the ceiling. This Court finds that the glass component: consists of a highly stylized Victorian era shade; comprises approximately two-fifths of the total visible surface area; weighs approximately one-half of the entirety of the fixture; directs and softens light through diffusion; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; and defines this fixture from design and marketability standpoints. This Court finds that the Victorian style shade distinguishes this fixture. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 361–570 is imparted by its glass. Accordingly, this Court holds

that SKU 361-570 properly falls under HTSUS subheading 9405.10.80.

(b) *SKU 361-617 (Pl. Ex. W-44)*

SKU 361-617 is a “[f]lush mounted ceiling fixture consisting of three translucent, white, frosted glass shades, with ridges, pebbling and fluting set into a ridged, metal mounting plate of a[n] antique brass finish.” (Pl. Ex. W-44 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 208), photograph (Pl. Ex. 147) and SKU information packet (Pl. Ex. 44). Mr. St. John submitted that this fixture is “essentially the same fixture [as SKU 361-570]; however, it has three [ ] Victorian fluted glass shades.” (Trial Tr. 1000, Oct. 26.) Mr. Mintz further explained that this fixture appears to have “the same finish on the fitter, but it’s a 3 lamp cluster rather than a single.” (Trial Tr. 1253, Oct. 27.) He also noted that SKUs 361-570 and 361-617 have the same glass shades. (*Id.*) This Court agrees with the witnesses.

The glass has a visible surface area of 113.1 square inches, which constitutes fifty-four percent of the whole, and weighs 20.4 ounces, which constitutes fifty-nine percent of the total weight. (Pl. Ex. W-44 at 1.) The metal has a visible surface area of 95.9 square inches, which constitutes forty-six percent of the whole, and weighs 8.5 ounces, which constitutes twenty-five percent of the total weight. (*Id.*) This Court finds that the glass has greater visible surface area and weighs notably more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*)

This Court finds that the metal component: consists of three standard fitters and a decorative canopy of an antique brass finish; comprises approximately one-half of the total visible surface area; weighs one-fourth of the entirety of the fixture; contributes to the decorative appearance and structure; houses the electrical components, and affixes the fixture to the wall. This Court finds that the glass component: consists of three highly stylized Victorian era shades; comprises approximately one-half of the total visible surface area; weighs approximately three-fifths of the entirety of the fixture; directs and softens light through diffusion; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; and defines this fixture from design and marketability standpoints. This Court finds that the Victorian style shades distinguishes this fixture. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 361-617 is imparted by its glass. Accordingly, this Court holds

that SKU 361-617 properly falls under HTSUS subheading 9405.10.80.

(c) *SKU 361-620 (Pl. Ex. W-45)*

SKU 361-620 is a “[f]lush mounted ceiling fixture consisting of three translucent, white, frosted glass shades, with ridges, pebbling and fluting set into a ridged, metal mounting plate of a brass finish.” (Pl. Ex. W-45 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 209), photograph (Pl. Ex. 148) and SKU information packet (Pl. Ex. 45). Mr. St. John asserted that this fixture is the same as SKU 361-617 but in a polished brass finish rather than an antique brass finish. (Trial Tr. 1001, Oct. 26.)

This fixture’s visible surface area and weight measurements and the material’s roles in relation to the use of the good are identical to SKU 361-617. (*Compare* Pl. Ex. W-44 at 1 *with* Pl. Ex. W-45 at 1.) Upon examination of all the evidence, this Court finds that SKUs 361-617 and 361-620 are substantially identical fixtures. This Court finds that a different finish on an otherwise identical fixture does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 361-617 to SKU 361-620, this Court finds that the essential character of SKU 361-620 is imparted by the glass. Accordingly, this Court holds that SKU 361-620 properly falls under HTSUS subheading 9405.10.80.

(d) *SKU 361-634 (Pl. Ex. W-46)*

SKU 361-634 is a “[f]lush mounted wall fixture consisting of a translucent, white, frosted glass shade, with ridges, pebbling and fluting set into a metal fitter that is attached by a thin, curved metal stem into a ridge, metal mounting plate” (Pl. Ex. W-46 at 1), all of an antique brass finish (Trial Tr. 1256, Oct. 27). Plaintiff produced as evidence a physical sample (Pl. Ex. 210), photograph (Pl. Ex. 149) and SKU information packet (Pl. Ex. 46). Mr. Mintz offered that this fixture is a wall sconce version as SKU 361-570. (Trial Tr. 1255, Oct. 27.) Mr. St. John explained that “once again you have the same piece of glass [as other fixtures in this group], the same backplate, you simply add a light tubing arm to the fixture.” (Trial Tr. 1001-02, Oct. 26.)

The glass has a visible surface area of 30.6 square inches, which constitutes thirty-seven percent of the whole, and weighs 6.9 ounces, which constitutes forty-six percent of the total weight. (Pl. Ex. W-46 at 1.) The metal has a visible surface area of 53.2 square inches, which constitutes sixty-three percent of the whole, and weighs 6.2 ounces, which constitutes forty-one percent of the total weight. (*Id.*) This Court finds that the metal has more visible surface area than the glass, but the glass weighs slightly more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and

metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*)

This Court finds that the metal component: consists of a standard fitter, curved stem, and decorative canopy of an antique brass finish; comprises than two-thirds of the total visible surface area; weighs approximately two-fifths of the entirety of the fixture; contributes to the decorative appearance and structure; houses the electrical components; and affixes the fixture to the wall. This Court finds that the glass component: consists of a highly stylized Victorian era shade; comprises approximately one-third of the total visible surface area; weighs approximately one-half of the entirety of the fixture; directs and softens light through diffusion; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; and defines this fixture from design and marketability standpoints. Notwithstanding the contribution of the curved metal arm in this fixture, this Court finds that the Victorian style shade distinguishes this fixture. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 361-634 is imparted by its glass. Accordingly, this Court holds that SKU 361-634 properly falls under HTSUS subheading 9405.10.80.

(e) *SKU 361-651 (Pl. Ex. W-47)*

SKU 361-651 is a “[f]lush mounted wall fixture consisting of a translucent, glass shade with ridges, pebbling and fluting set into a metal fitter that is attached by a thin, curved metal stem into a ridge, metal mounting plate.” (Pl. Ex. W-47 at 1.) Plaintiff produced as evidence a SKU information packet consisting of an adequate image of the fixture. (Pl. Ex. 47.) Mr. St. John asserted that this fixture is identical to SKU 361-634, except this fixture has a polished brass finish. (Trial Tr. 1002, Oct. 26.) Mr. Mintz confirmed that the only difference between these two fixtures is the finish on the metal. (Trial Tr. 1256, Oct. 27.)

Upon examination of all the evidence, this Court finds that SKUs 361-634 and 361-651 are substantially identical fixtures. This Court finds that a different finish on an otherwise identical fixture does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 361-634 to SKU 361-651, this Court finds that the essential character of SKU 361-651 is imparted by the glass. Accordingly, this Court holds that SKU 361-651 properly falls under HTSUS subheading 9405.10.80.

(f) *SKU 361-665 (Pl. Ex. W-48)*

SKU 361-665 is a “[f]lush mounted wall fixture consisting of two translucent glass shades, with ridges, pebbling and fluting set into

metal fitters that are attached by thin, curved metal stems into a ridged, metal mounting plate, all of a brass finish.” (Pl. Ex. W-48 at 1.) Plaintiff produced as evidence a SKU information packet consisting of an adequate image of the fixture. (Pl. Ex. 48.) Mr. Mintz posited that “[SKU 361-665] is similar to [SKU 361-634], only it has 2 lamps, 2 shades, 2 arms. And it is antique brass.” (Trial Tr. 1256, Oct. 27.) This Court agrees with the witness.

Upon its own examination of the evidence, this Court finds that SKUs 361-634 and 361-665 are substantially identical fixtures. This Court finds that the number of shades and arms on otherwise identical fixtures does not significantly affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 361-634 to SKU 361-665, this Court finds that the essential character of SKU 361-665 is imparted by the glass. Accordingly, this Court holds that SKU 361-665 properly falls under HTSUS subheading 9405.10.80.

(g) *SKU 586-307 (Pl. Ex. W-111)*

SKU 586-307 is a “[f]lush mounted wall sconce consisting of a translucent white frosted glass shade mounted in a metal base affixed to a metal mounting plate, each with a polished brass finish with [an] on/off switch.” (Pl. Ex. W-111 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 242), photograph (Pl. Ex. 181) and SKU information packet (Pl. Ex. 111). Mr. St. John claimed that this fixture is “very similar to [SKU 361-634], except the glass shade is supported slightly differently. It’s still a one light sconce and we have added an on-and-off switch to it . . . And the glass [shade] is slightly different. However, it is still a Victorian flute.” (Trial Tr. 1002, Oct. 26.) He explained that this fixture’s glass is blown – “air is blown into the glass to mold it into this shape” – and it “is only partially frosted with a grape pattern in it.” (*Id.* at 1003.)

The glass has a visible surface area of 49.2 square inches, which constitutes fifty-five percent of the whole, and weighs 5.0 ounces, which constitutes forty-six percent of the total weight. (Pl. Ex. W-111 at 1.) The metal has a visible surface area of 40.6 square inches, which constitutes forty-five percent of the whole, and weighs 4.0 ounces, which constitutes thirty-seven percent of the total weight. (*Id.*) This Court finds that the visible surface area and weight favors the glass over the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*)

This Court finds that the metal component: consists of a base and mounting plate of a polished brass finish; comprises approximately one-half of the total visible surface area; weighs approximately one-

third of the entirety of the fixture; contributes to the decorative appearance and structure; houses the electrical components, and affixes the fixture to the wall. This Court finds that the glass component: consists of a blown, highly stylized Victorian era shade; comprises approximately one-half of the total visible surface area; weighs approximately one-half of the entirety of the fixture; directs and softens light through diffusion; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; and defines this fixture from design and marketability standpoints. This Court finds that the Victorian style shade distinguishes this fixture. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 586-307 is imparted by its glass. Accordingly, this Court holds that SKU 586-307 properly falls under HTSUS subheading 9405.10.80.

(h) *SKU 692-320 (Pl. Ex. W-116)*

SKU 692-320 is apparently a “[f]lush mounted wall sconce consisting of a translucent white frosted glass shade mounted in a metal base affixed to a metal mounting plate, of unknown finish with [an] on/off switch.” (Pl. Ex. W-116 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a low quality photograph. (Pl. Ex. 116.) Mr. Mintz stated that he believes the last two fixtures have identical shades. (Trial Tr. 1262, Oct. 27.)

Mr. Mintz surmised that SKUs 586-307 and 692-320 are identical. (*Id.*) However, upon further questioning from the Court, Mr. Mintz admitted that he was uncertain. (*Id.* at 1263.) Although Mr. St. John offered testimony that this group’s most important feature from a performance perspective is the glass shades, (Trial Tr. 1009, Oct. 26), this Court finds this general testimony insufficient without any corroborating evidence. Upon its own examination of Plaintiff’s Exhibit 116 and consideration of witness testimony, this Court finds the evidence inadequate to determine the characteristics of the fixture.

As previously discussed, Customs enjoys a statutory presumption of correctness in its original classification determinations. Although an importer may overcome this presumption by a preponderance of the evidence, this Court finds that Plaintiff has not produced sufficient evidence for SKU 692-320 to rebut this statutory presumption. Accordingly, this Court holds that Customs’ classification of SKU 692-320 under HTSUS subheading 9405.10.60 stands.

### **8. FLUSH MOUNT BOUND GLASS**

Mr. St. John testified that the flush mount bound glass fixtures have beveled glass edges, which was the “fashion back in the ‘70s



and '80s. It was all about the beveled glass.<sup>43</sup> It was the traditional style at a price point at the time.” (Trial Tr. 107, Oct. 17.) Mr. Mintz asserted that this flush mount bound group is of the same family but “these fixtures vary in their size and in their finish.” (Trial Tr. 1324–25, Oct. 27.) He explained that “[i]t is basically the same design which is a very thin metal frame which supports glass panels which are beveled edged. And it’s clear to me that the design of the frame is such that it’s intended to minimize the mass and appearance of the frame.” (*Id.* at 1325.)

(a) *SKU 385-091 (Pl. Ex. W-59)*

SKU 385–091 is listed as an agreed upon representative SKU in the Joint Report but there are no represented SKUs listed. (Joint Report 3–4.) This fixture is a “[f]lush mounted ceiling fixture, 11 inches across. The fixture consists of a housing of beveled glass panels held in place by thin metal members, and a metal mounting plate with attached lamp holders.” (Pl. Ex. W–59 at 1.) The metal component is of a white finish. (*Id.*) The fixture has four lamps. (Pl. Ex. W–59 at 3.) Plaintiff produced as evidence a physical sample (Pl. Ex. 215), photograph (Pl. Ex. 154) and SKU information packet (Pl. Ex. 59). Mr. St. John testified that this fixture was discontinued about three years ago. (Trial Tr. 105, Oct. 17.)

Regarding the design of the fixture, Mr. St. John explained “the [painted white steel] metal trim that you see here is simply attached to the glass so it can be soldered together. If it were possible to make a permanent attachment of the glass without the metal, there would be no metal.” (*Id.* at 106.) Mr. Mintz admitted the “glass is not a free-standing item” (Trial Tr. 377, Oct. 18), “[b]ut every attempt has been made to minimize it” (*id.* at 374). He asserted that “by virtue of the fact that the glass has a beveled edge [it] is the most important design feature.” (*Id.* at 373.)

The glass has a visible surface area of 123.4 square inches, which constitutes fifty percent of the whole, and weighs 39.4 ounces, which constitutes seventy-two percent of the total weight. (Pl. Ex. W–59 at 1.) The metal has a visible surface area of 121.1 square inches, which constitutes fifty percent of the whole, and weighs 14.3 ounces, which constitutes twenty-six percent of the total weight. (*Id.*) This Court finds that the glass and metal are equal in visible surface area, but the glass weighs notably more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and distribute light

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<sup>43</sup> According to Mr. St. John, “beveled edges are part of the refraction[,] that help spread the light out in a larger area.” (Trial Tr. 108, Oct. 17.)

through refraction and to protect the lamp. (*Id.*)

This Court finds that the metal component: consists of a thin member framework, cap and knob of a white painted finish; comprises approximately one-half of the total visible surface area; weighs approximately one-fourth of the entirety of the fixture; contributes to the decorative appearance and structure; houses the electrical components, mounts the fixture to the ceiling; and holds the glass panels in place. This Court finds that the glass component: consists of beveled glass panels soldered together; comprises one-half of the total visible surface area; weighs approximately three-fourths of the entirety of the fixture; directs and distributes light through refraction; protects the lamp; contributes to the decorative appearance and structure; and defines this fixture from design and marketability standpoints. This Court finds that the beveled glass panels distinguish this fixture. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 385-091 is imparted by its glass. Accordingly, this Court holds that SKU 385-091 properly falls under HTSUS subheading 9405.10.80.

(b) *SKU 385-057 (Pl. Ex. W-55)*

SKU 385-057 is a “[f]lush mounted ceiling fixture consisting of a housing of beveled glass panels held in place by thin metal members, and a metal mounting plate with attached lamp holders.” (Pl. Ex. W-55 at 1.) Plaintiff produced as evidence a SKU information packet consisting of an adequate image of the fixture. (Pl. Ex. 55.) Plaintiff’s witnesses offered inconsistent testimony regarding the finish of this fixture. Mr. St. John testified that the finish is “verdigris” (Trial Tr. 1065, Oct. 26) while Mr. Mintz submitted that the finish is “polished brass” (Trial Tr. 1325, Oct. 27). Upon its own examination, this Court finds that the image is not clear enough to determine the color of the finish. However, the Court finds this inconsistency does not affect the outcome of the analysis.

Mr. Mintz testified that this fixture is a smaller version of SKU 385-091 – this fixture is nine inches in diameter with three lamps. (Trial Tr. 1325, Oct. 27; *see also* Pl. Ex. W-55.) Upon examination of all the evidence, this Court finds that SKUs 385-091 and 385-057 are substantially identical fixtures. This Court finds the differences of finish on the metal and relative smaller size do not significantly affect the essential character analysis as discussed directly above. Therefore, adopting and applying the analysis of SKU 385-091 to SKU 385-057, this Court finds that the essential character of SKU 385-057 is imparted by the glass. Accordingly, this Court holds that SKU 385-057 properly falls under HTSUS subheading 9405.10.80.

(c) *SKU 385-060 (Pl. Ex. W-56)*

SKU 385-060 is a “[f]lush mounted ceiling fixture consisting of a

housing of beveled glass panels held in place by thin metal members, and a metal mounting plate with attached lamp holders [of a] white metal finish.” (Pl. Ex. W-56 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color photocopy of the fixture. (Pl. Ex. 56.) Plaintiff’s witnesses asserted that SKU 385-060 is essentially the same as SKU 385-091, except perhaps with a different number of lamps. (Trial Tr. 1069, Oct. 26; Trial Tr. 1287, Oct. 27.)

Upon examination of all the evidence, this Court finds that SKUs 385-091 and 385-060 are substantially identical fixtures. This Court finds that a different number of lamps in an otherwise identical fixture do not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 385-091 to SKU 385-060, this Court finds that the essential character of SKU 385-060 is imparted by the glass. Accordingly, this Court holds that SKU 385-060 properly falls under HTSUS subheading 9405.10.80.

(d) *SKU 385-074 (Pl. Ex. W-57)*

SKU 385-074 is a “[f]lush mounted ceiling fixture consisting of a housing of beveled glass panels held in place by thin metal members, and a metal mounting plate with attached lamp holders [of a] polished brass metal finish.” (Pl. Ex. W-57 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a color photocopy of the fixture. (Pl. Ex. 57.) Both Mr. St. John and Mr. Mintz testified that the only difference between SKUs 385-091 and 385-074 is the color of the finish. (Trial Tr. 1065, Oct. 26; Trial Tr. 1325, Oct. 27.)

Upon examination of all the evidence, this Court finds that SKUs 385-091 and 385-074 are substantially identical fixtures. This Court finds that a different finish on an otherwise identical fixture does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 385-091 to SKU 385-074, this Court finds that the essential character of SKU 385-074 is imparted by the glass. Accordingly, this Court holds that SKU 385-074 properly falls under HTSUS subheading 9405.10.80.

(e) *SKU 385-088 (Pl. Ex. W-58)*

SKU 385-088 is a “[f]lush mounted ceiling fixture consisting of a housing of beveled glass panels held in place by thin metal members, and a metal mounting plate with attached lamp holders [of a] verde metal finish.” (Pl. Ex. W-58 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a low quality image of the fixture. (Pl. Ex. 58.)

Mr. St. John testified that the only difference between SKUs 385-091 and 385-088 is the color of the finish. (Trial Tr. 1065, Oct. 26.) This Court finds the image inadequate to determine the color of the finish. (Pl. Ex. 58 at 1.) The text of the SKU information packet, however, indicates that SKUs 385-088, 385-091 and 385-124 are

similar but for their finishes. (*Id.*) Upon examination of all the evidence, this Court finds that SKUs 385-091 and 385-088 are substantially identical fixtures. This Court finds that a different finish on an otherwise identical fixture does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 385-091 to SKU 385-088, this Court finds that the essential character of SKU 385-088 is imparted by the glass. Accordingly, this Court holds that SKU 385-088 properly falls under HTSUS subheading 9405.10.80.

(f) *SKU 385-124 (Pl. Ex. W-60)*

SKU 385-124 is a “[f]lush mounted ceiling fixture consisting of a housing of beveled glass panels held in place by thin metal members, and a metal mounting plate with attached lamp holders [with a] polished brass metal finish.” (Pl. Ex. W-60 at 1.) Plaintiff produced as evidence a SKU information packet with a low quality image of the fixture. (Pl. Ex. 60.)

Both Mr. St. John and Mr. Mintz testified that the only difference between SKUs 385-091 and 385-124 is the color of the finish. (Trial Tr. 1065, Oct. 26; Trial Tr. 1325, Oct. 27.) This Court finds the image inadequate to determine the color of the finish. (Pl. Ex. 60 at 1.) As noted above, the text of the SKU information packet, however, indicates that SKUs 385-088, 385-091 and 385-124 are the similar but for their finishes. (*Id.*) Although admitting he could not determine the finish from the photograph, Mr. St. John asserted that the finish on this fixture is polished brass because “the SKU number refers to model F 173 PB, PB stands for polished brass.” (Trial Tr. 1066, Oct. 26.) Upon examination of all the evidence, this Court finds that SKUs 385-091 and 385-124 are substantially identical fixtures. This Court finds that a different finish on an otherwise identical fixture does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 385-091 to SKU 385-124, this Court finds that the essential character of SKU 385-124 is imparted by the glass. Accordingly, this Court holds that SKU 385-124 properly falls under HTSUS subheading 9405.10.80.

## 9. SEMI-CIRCULAR WALL SCONCE

The semi-circular portion refers to the glass in this group of wall sconces. Mr. St. John testified that the difference within this group is only the style and shape of the glass. (Trial Tr. 1128, Oct. 26.)

(a) *SKU 746-871 (Pl. Ex. W-117)*

SKU 746-871 is a “[w]all sconce consisting of a glass diffuser mounted into a metal bottom mounting cap.” (Pl. Ex. W-117 at 1.) Plaintiff withdrew its Exhibit 184 which was intended to be a photograph of the fixture. (Trial Tr. 1123, 1130, Oct. 26.) Furthermore, because Plaintiff failed to offer into evidence a physical sample of the

fixture – Plaintiff’s Exhibit 245 – that was marked for identification, this Court cannot consider it. Plaintiff did produce as evidence a SKU information packet with an adequate image of the fixture. (Pl. Ex. 117.) Mr. St. John described this fixture as an “1-light wall sconce with white-cased glass” that has “a polished brass decorative cap and ball that holds it to its backplate.” (Trial Tr. 1127, Oct. 26.) Mr. Mintz further described this fixture as “one-half of a translucent glass urn shape.” (Trial Tr. 1391, Oct. 27.) He claimed “that the appearance, performance and marketability of this fixture are based almost entirely on the size, shape and appearance of the glass.” (Pl. Ex. W-117 at 3.)

The glass has a visible surface area of 92.8 square inches, which constitutes ninety-two percent of the whole, and weighs 16.2 ounces, which constitutes eighty-two percent of the total weight. (*Id.* at 1.) The metal has a visible surface area of 7.6 square inches, which constitutes eight percent of the whole, and weighs 1.4 ounces, which constitutes seven percent of the total weight. (*Id.*) This Court finds that the glass has much greater visible surface area and weighs notably more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*)

This Court finds that the metal component: consists of a cap and ball of a polished brass finish; comprises approximately one-tenth of the total visible surface area; weighs approximately one-tenth of the entirety of the fixture; and contributes minimally to the decorative appearance and structure. This Court finds that the glass component: consists of a translucent shade of half an urn shape; comprises approximately nine-tenths of the total visible surface area; weighs approximately four-fifths of the entirety of the fixture; directs and softens light through diffusion; protects the lamp; contributes to the decorative appearance and structure; establishes the fixture’s scale, shape and style; and defines and distinguishes this fixture from a design and marketing perspective. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 746-871 is imparted by its glass. Accordingly, this Court holds that SKU 746-871 properly falls under HTSUS sub-heading 9405.10.80.

(b) *SKU 492-742 (Pl. Ex. W-103)*

SKU 492-742 is a “[w]all sconce consisting of a frosted, ribbed glass bowl with a metal mounting and trim ring and a metal bottom cap, both of a polished brass finish.” (Pl. Ex. W-103 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 238), photograph (Pl. Ex. 177) and SKU information packet (Pl. Ex. 103). Mr. Mintz

further described this fixture's glass as consisting of a "semi-[circular piece of glass." (Trial Tr. 1391, Oct. 27.) He claimed that the "appearance, performance and marketability of this lighting fixture are based almost entirely on the size, shape and appearance of the glass." (Pl. Ex. W-103 at 3.)

The glass has a visible surface area of 44.2 square inches, which constitutes eighty-three percent of the whole, and weighs 14.1 ounces, which constitutes eighty-five percent of the total weight. (*Id.* at 1.) The metal has a visible surface area of 8.8 square inches, which constitutes seventeen percent of the whole, and weighs 1.8 ounces, which constitutes eleven percent of the total weight. (*Id.*) This Court finds that the glass has much greater visible surface area and weighs notably more than the metal. This Court also considers the factor "material's role in relation to the use of the good" as listed in the EN to GRI 3(b). While both the glass and metal "contribute[ ] to decorative appearance" and are "part of [the] structure," the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (Pl. Ex. W-103 at 1.)

This Court finds that the metal component: consists of a trim ring, cap and ball of a polished brass finish; comprises approximately one-fifth of the total surface area; weighs approximately one-tenth of the entirety of the fixture; and functions to contribute to the decorative appearance and structure. This Court finds that the glass component: consists of a frosted, ribbed glass bowl of semi-circular shape; comprises approximately four-fifths of the total visible surface area; weighs approximately four-fifths of the entirety of the fixture; functions to direct and soften light through diffusion; protects the lamp; contributes to the decorative appearance and structure; establishes the fixture's entire scale, shape and style; and defines and distinguishes this fixture from a design and marketing perspective. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 492-742 is imparted by its glass. Accordingly, this Court holds that SKU 492-742 properly falls under HTSUS subheading 9405.10.80.

(c) *SKU 537-296 (Pl. Ex. W-107)*

SKU 537-296 is a "[w]all sconce consisting of a frosted glass diffuser with internal (non-visible) mounting mechanism." (Pl. Ex. W-107 at 1.) This Court granted Plaintiff's application to withdraw its Exhibits 179 and 240 during trial "because those exhibits do not exist with respect to this fixture." (Trial Tr. 1129-30, Oct. 26.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 107.) Mr. St. John described this fixture as "probably 99.9 percent visible glass with only two decorative white caps that hold it to its backplate." (Trial Tr. 1128, Oct. 26.) Mr. Mintz further described this fixture's glass as a "half of a circle of a shape which appears to be alabaster or faux



alabaster . . . [A]nd all you see is the shape of the glass . . . [except for] a small knob on each corner.” (Trial Tr. 1392, Oct. 27.) Mr. Mintz claimed that the “appearance, performance and marketability of this fixture are based almost entirely on the size, shape and appearance of the glass.” (Pl. Ex. W-107 at 3.) This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.* at 1.) The glass also contributes to the decorative appearance. (*Id.*)

This Court finds that the metal component: consists of two small knobs; and affixes the fixture to the wall. This Court finds that the glass component: consists of an alabaster or faux alabaster semi-circular shade; directs and softens light through diffusion; protects the lamp; contributes to the structure; constitutes the fixture’s decorative appearance; establishes the fixture’s scale, shape and style; and defines and distinguishes this fixture from a design and marketing perspective. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 537-296 is imparted by its glass. Accordingly, this Court holds that SKU 537-296 properly falls under HTSUS subheading 9405.10.80.

## 10. HAMILTON STYLE WALL SCONCE

### *SKU 482-397 (Pl. Ex. W-94)*

SKU 482-397 is a “[w]all-mounted fixture that consists of a bell-shaped glass shade that is frosted with a swirl pattern, and that is mounted into a white metal fitter connected to a white metal mounting plate by a slim, curved stem.” (Pl. Ex. W-94 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 231), photograph (Pl. Ex. 170) and SKU information packet (Pl. Ex. 94). Hamilton style is defined by simulated rope. (Trial Tr. 1078-79, Oct. 26.) As with SKU 482-393 (*infra*), this fixture is a regional product only sold in Florida. (*Id.* at 1077-78.) In addition to the swirl pattern, the glass shade has “two horizontal bands impressed into the glass along the edge of the shade.” (Trial Tr. 1340, Oct. 27.) Mr. St. John offered that the glass shade is “the most important to the performance of this fixture.” (Trial Tr. 1076, Oct. 26.) However, Mr. St. John testified that neither the glass nor the metal are the most outstanding characteristic but rather these components “work together create the [H]amilton look, this little metal roping indicative of the [H]amilton family.” (*Id.* at 1078-79.) Mr. Mintz, although acknowledging the “special effort . . . to add [the Hamilton] design detail” of the faux rope, slightly favored the glass because of its multiple functions and “the relative size of the glass as compared to the metal details.” (Trial Tr. 1340-41, Oct. 27.)

The glass has a visible surface area of 81.4 square inches, which constitutes sixty-three percent of the whole, and weighs 16.4 ounces, which constitutes fifty-nine percent of the total weight. (Pl. Ex. W-94 at 1.) The metal has a visible surface area of 47.7 square inches, which constitutes thirty-seven percent of the whole, and weighs 9.4 ounces, which constitutes thirty-four percent of the total weight. (*Id.*) This Court finds that the glass has greater visible surface area and weighs more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and distribute light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*)

This Court finds that the metal component: consists of a mounting plate, curved arm and decorative fitter with two strands of Hamilton style faux rope of a painted white finish; comprises approximately one-third of the total visible surface area; weighs approximately one-third of the entirety of the fixture; contributes to the decorative appearance and structure; houses the electrical components; affixes the fixture to the wall; and distinguishes this fixture by the Hamilton design. This Court finds that the glass component: consists of a large bell-shaped shade with a frosted swirl pattern and two horizontal bands impressed into the glass along the edge of the shade; comprises approximately two-thirds of the total visible surface area; weighs approximately three-fifths of entirety of the fixture; directs and softens light through diffusion; protects the lamp; shields the lamp from view; and contributes to the decorative appearance and structure.

Upon careful consideration of the totality of these various factors, this Court finds that both the glass and metal are equally important. Since both the glass and metal components merit equal consideration, this Court finds that application of GRI 3(c) is appropriate for this fixture. *See, e.g., Orlando*, 140 F.3d at 1442. The applicable classifications are subheadings 9405.10.60 and 9405.10.80. This Court notes that subheading 9405.10.80 occurs last in numerical order. Accordingly, this Court holds that SKU 482-397 falls under HTSUS subheading 9405.10.80 through application of GRI 3(c).

## 11. WALL SCONCE

Mr. St. John explained that this group of fixtures is predominantly placed in bathrooms. (Trial Tr. 1083, Oct. 26.) He also testified that this fixture “is a very basic – almost a commodity style product and there are twenty to thirty different vendors who wholesale this product with twenty or thirty different pieces of glass in it. . . . They are different fixtures based on the glass.” (*Id.* at 1084.) This Court notes, however, the design details on the metal backplate and the style of the metal arms are also notable differences in this wall sconce group.

These fixtures “are the same family, just different finishes.” (*Id.* at 1081.) The first four fixtures – SKUs 487–110, 487–176, 487–209, and 487–221<sup>44</sup> – are an one, two, three, four-light family in a chrome finish, and final four fixtures – SKUs 246–610, 246–641, 246–651 and 246–674 – are an one, two, three, four-light family in a brown finish. (*Id.* at 1080.)

(a) *SKU 487-110 (Pl. Ex. W-95)*

SKU 487–110 is a wall sconce consisting of two translucent, opal white, glass shades set into a fluted, metal mounting plate of a chrome finish by thin, curved metal stems with mounting caps.” (Pl. Ex. W–95 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 232), photograph (Pl. Ex. 171) and SKU information packet (Pl. Ex. 95). Mr. St. John testified that SKUs 487–110, 487–176, 487–209, and 487–221 “are a[n] 1, 2, 3 and 4-light version of the same fixture. And are in the same family.” (Trial Tr. 1080, Oct. 26.) Mr. Mintz parroted Mr. St. John’s testimony that these fixtures are in the same family but varying in the number of gangs.<sup>45</sup> (Trial Tr. 1344, Oct. 27.)

The glass has a visible surface area of 95.4 square inches, which constitutes fifty-nine percent of the whole, and weighs 9.8 ounces, which constitutes forty-four percent of the total weight. (Pl. Ex. W–95 at 1.) The metal has a visible surface area of 65.9 square inches, which constitutes forty-one percent of the whole, and weighs 8.9 ounces, which constitutes forty percent of the total weight. (*Id.*) This Court finds that the glass has greater visible surface area and weighs slightly more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*)

This Court finds that the metal component: consists of a decorative mounting plate and two curved arms of a chrome finish; comprises approximately two-fifths of the total visible surface area; weighs approximately two-fifths of the entirety of the fixture; contributes to the decorative appearance and structure; affixes the fixture to the wall; holds the electrical components; and contributes to the fixture’s scale. This Court finds that the glass component: con-

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<sup>44</sup>This Court notes that there is a discrepancy in the evidence whether the first four fixtures in this group – SKUs 487–110, 487–176, 487–209, and 487–221 – are wall or ceiling fixtures (compare page one with page three of the corresponding worksheets). After reviewing all of the evidence, this Court concludes that this group is wall fixtures and treats them as such in the analyses.

<sup>45</sup>“Gang” in this context refers to the number of metal arms, glass shades and lamps of each fixture. (Trial Tr. 1344, Oct. 27.)

sists of two bell-shaped shades of milky white glass; comprises approximately three-fifths of the total visible surface area; weighs approximately three-fifths of the entirety of the fixture; directs and softens light through diffusion; protects the lamp; contributes to the decorative appearance and structure; and contributes to the fixture's scale.

Upon careful consideration of the totality of these various factors, this Court finds that both the glass and metal are equally important. Since both the glass and metal components merit equal consideration, this Court finds that application of GRI 3(c) is appropriate for this fixture. *See, e.g., Orlando*, 140 F.3d at 1442. The applicable classifications are subheadings 9405.10.60 and 9405.10.80. This Court notes that subheading 9405.10.80 occurs last in numerical order. Accordingly, this Court holds that SKU 487-110 falls under HTSUS subheading 9405.10.80 through application of GRI 3(c).

(b) *SKU 487-176 (Pl. Ex. W-96)*

SKU 487-176 is a wall sconce "consisting of two translucent, opal white, glass shades set into a fluted, metal mounting plate of a chrome finish by thin, curved metal stems with mounting caps." (Pl. Ex. W-96 at 1.) This Court granted Plaintiff's application to withdraw its Exhibits 172 and 223 during trial because these exhibits represented a SKU number not at issue in this case. (Trial Tr. 1346-47, Oct. 27.) Plaintiff produced as evidence a SKU information packet with an adequate image of the fixture. (Pl. Ex. 96.)

This Court disregards the surface area and weight measurements for this fixture listed on Plaintiff's Exhibit W-96 because these figures represent an exhibit that was withdrawn. This Court also considers the factor "material's role in relation to the use of the good" as listed in the EN to GRI 3(b). While both the glass and metal "contribute[ ] to decorative appearance" and are "part of [the] structure," the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.* at 1.)

Mr. Mintz believed SKUs 487-110 and 487-176 to be the same. (Trial Tr. 1352, Oct. 27.) Upon examination of all the evidence, this Court finds that SKUs 487-110 and 487-176 are substantially identical fixtures. Therefore, adopting and applying the analysis of SKU 487-110 to SKU 487-176, this Court finds that both the glass and metal are equally important. Since both the glass and metal components merit equal consideration, this Court finds that application of GRI 3(c) is appropriate for this fixture. *See, e.g., Orlando*, 140 F.3d at 1442. The applicable classifications are subheadings 9405.10.60 and 9405.10.80. This Court notes that subheading 9405.10.80 occurs last in numerical order. Accordingly, this Court holds that SKU 487-176 falls under HTSUS subheading 9405.10.80 through application of GRI 3(c).

(c) *SKU 487-209 (Pl. Ex. W-97)*

SKU 487-209 is a wall sconce “consisting of three translucent, opal white, glass shades set into a fluted, metal mounting plate of a chrome finish by thin, curved metal stems with mounting caps.” (Pl. Ex. W-97 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 234), photograph (Pl. Ex. 173) and SKU information packet (Pl. Ex. 97). Mr. Mintz described SKU 487-209 as a three gang<sup>46</sup> version of SKUs 487-110 and 487-176. (Trial Tr. 1349, Oct. 27.)

The glass has a visible surface area of 143.1 square inches, which constitutes sixty-three percent of the whole, and weighs 17.4 ounces, which constitutes fifty-one percent of the total weight. (Pl. Ex. W-97 at 1.) The metal has a visible surface area of 84.2 square inches,<sup>47</sup> which constitutes thirty-seven percent of the whole, and weighs 11.3 ounces, which constitutes thirty-three percent of the total weight. (*Id.*) This Court finds that the glass has much greater visible surface area and weighs more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*)

This Court finds that the metal component: consists of a decorative mounting plate and three curved arms of a chrome finish; comprises approximately one-third of the total visible surface area; weighs approximately one-third of the entirety of the fixture; contributes to the decorative appearance and structure; affixes the fixture to the wall; holds the electrical components; and contributes to the fixture’s scale. This Court finds that the glass component: consists of three bell-shaped shades of milky white glass; comprises approximately two-thirds of the total visible surface area; weighs approximately one-half of the total weight of the fixture; directs and softens light through diffusion; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; and contributes to the fixture’s scale.

Upon careful consideration of the totality of these various factors, this Court finds that both the glass and metal are equally important. Since both the glass and metal components merit equal consideration, this Court finds that application of GRI 3(c) is appropriate for

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<sup>46</sup> As explained above, “gang” refers to the number of metal arms, glass shades and lamps of each fixture. (Trial Tr. 1344, Oct. 27.)

<sup>47</sup> This Court notes that, according to Mr. Kozloski, this fixture’s metal component was overstated because the metal backplate was measured as a rectangular shape rather than an oval shape for the visible surface area figure. (Trial Tr. 1651, Oct. 28.) The record does not reflect whether this overstatement applies to all the metal measurements in this group or only this particular fixture. The Court need not decide, however, since it does not affect the outcome of the analysis.

this fixture. *See, e.g., Orlando*, 140 F.3d at 1442. The applicable classifications are subheadings 9405.10.60 and 9405.10.80. This Court notes that subheading 9405.10.80 occurs last in numerical order. Accordingly, this Court holds that SKU 487-209 falls under HTSUS subheading 9405.10.80 through application of GRI 3(c).

(d) *SKU 487-221 (Pl. Ex. W-98)*

SKU 487-221 is a wall sconce “consisting of four translucent, opal white, glass shades set into a fluted, metal mounting plate of a chrome finish by thin, curved metal stems with mounting caps.” (Pl. Ex. W-98 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 235), photograph (Pl. Ex. 174) and SKU information packet (Pl. Ex. 98). Mr. Mintz described SKU 487-221 as a four gang version of SKUs 487-110, 487-176, and 487-209. (Trial Tr. 1349, Oct. 27.) Upon its own observation, this Court notes this fixture’s two outer curved arms appear slightly longer, thinner and wider than on SKU 487-209.

The glass has a visible surface area of 184.0 square inches, which constitutes sixty-one percent of the whole, and weighs 24.2 ounces, which constitutes fifty-one percent of the total weight. (Pl. Ex. W-98 at 1.) The metal has a visible surface area of 119.2 square inches, which constitutes thirty-nine percent of the whole, and weighs 16.2 ounces, which constitutes thirty-four percent of the total weight. (*Id.*) This Court finds that the glass has greater visible surface area and weighs more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*)

This Court finds that the metal component: consists of a decorative mounting plate and four curved arms of a chrome finish, the outer two arms creating notable width to the fixture; comprises approximately two-thirds of the total visible surface area; weighs approximately one-third of the entirety of the fixture; contributes to the decorative appearance and structure; affixes the fixture to the wall; holds the electrical components; and contributes to the fixture’s scale. This Court finds that the glass component: consists of four bell-shaped shades of milky white glass; comprises approximately three-fifths of the total visible surface area; weighs approximately one-half of the entirety of the fixture; directs and softens light through diffusion; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; and contributes to the fixture’s scale.

Upon careful consideration of the totality of these various factors, this Court finds that both the glass and metal are equally important. Since both the glass and metal components merit equal consider-



ation, this Court finds that application of GRI 3(c) is appropriate for this fixture. *See, e.g., Orlando*, 140 F.3d at 1442. The applicable classifications are subheadings 9405.10.60 and 9405.10.80. This Court notes that subheading 9405.10.80 occurs last in numerical order. Accordingly, this Court holds that SKU 487-221 falls under HTSUS subheading 9405.10.80 through application of GRI 3(c).

(e) *SKU 246-610 (Pl. Ex. W-21)*

SKU 246-610 is a “[w]all fixture consisting of one bell-shaped shade of milky white glass, mounted into a metal fitter that is affixed by a thin, curved metal stem to a metal back-plate, all of which are of a brown finish.” (Pl. Ex. W-21 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color photocopy of the fixture. (Pl. Ex. 21.) Mr. St. John testified that SKUs 246-610, 246-641, 246-651 and 246-674 “are 1, 2, 3 and 4-light versions of the same fixture . . . [a]nd are the same family . . . in a brown patina finish.” (Trial Tr. 1080, Oct. 26.) Mr. Mintz corroborated that the aforementioned fixtures were one family of fixtures but offered that the finish was “antique bronze” rather than “brown patina.” (Trial Tr. 1350, Oct. 27.)

This Court considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure.” (Pl. Ex. W-21 at 1). The glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*) This Court finds that the metal component: consists of a decorative mounting plate and a curved arm of a brown patina finish; contributes to the decorative appearance and structure; affixes the fixture to the wall; holds the electrical components; and contributes to the fixture’s scale. This Court finds that the glass component: consists of a bell-shaped shade of milky white glass; directs and softens light through diffusion; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; and contributes to the fixture’s scale.

Upon careful consideration of the totality of these various factors, this Court finds that both the glass and metal are equally important. Since both the glass and metal components merit equal consideration, this Court finds that application of GRI 3(c) is appropriate for this fixture. *See, e.g., Orlando*, 140 F.3d at 1442. The applicable classifications are subheadings 9405.10.60 and 9405.10.80. This Court notes that subheading 9405.10.80 occurs last in numerical order. Accordingly, this Court holds that SKU 246-610 falls under HTSUS subheading 9405.10.80 through application of GRI 3(c).

(f) *SKU 246-641 (Pl. Ex. W-22)*

SKU 246-641 is a “[w]all fixture consisting of two bell-shaped shades of milky white glass, mounted into metal fitters that are af-

fixed by two thin, curved metal stems to a metal back-plate, all of which are of a brown finish.” (Pl. Ex. W-22 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 22.) Both Mr. Mintz and Mr. St. John agreed that this fixture is similar to SKUs 487-110 and 487-176 (*supra*), except for the finish. (Trial Tr. 1080, Oct. 26; Trial Tr. 1350, Oct. 27.)

Upon examination of all the evidence, this Court finds SKUs 487-110, 487-176 and 246-641 are substantially identical fixtures. As previously noted, this Court finds that a different finish on an otherwise identical fixture does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 487-110 to SKU 246-641, this Court finds that both the glass and metal are equally important. Since both the glass and metal components merit equal consideration, this Court finds that application of GRI 3(c) is appropriate for this fixture. *See, e.g., Orlando*, 140 F.3d at 1442. The applicable classifications are subheadings 9405.10.60 and 9405.10.80. This Court notes that subheading 9405.10.80 occurs last in numerical order. Accordingly, this Court holds that SKU 246-641 falls under HTSUS subheading 9405.10.80 through application of GRI 3(c).

(g) *SKU 246-651 (Pl. Ex. W-23)*

SKU 246-651 is a “[w]all fixture consisting of three bell-shaped shades of milky white glass, mounted into metal fitters that are affixed by thin, curved metal stems to a metal back-plate, all of which are of a brown finish.” (Pl. Ex. W-23 at 1.) Plaintiff produced as evidence a SKU information packet consisting of an adequate image of the fixture. (Pl. Ex. 23.) Both Mr. Mintz and Mr. St. John agreed that this fixture is similar to SKU 487-209 (*supra*), except for the finish. (Trial Tr. 1080, Oct. 26; Trial Tr. 1350, Oct. 27.)

Upon examination of all the evidence, this Court finds SKUs 487-209 and 246-651 are substantially identical fixtures. As discussed above, this Court finds that a different finish on an otherwise identical fixture does not affect the essential character analysis. Adopting and applying the analysis of SKU 487-209 to SKU 246-651, this Court finds that both the glass and metal are equally important. Since both the glass and metal components merit equal consideration, this Court finds that application of GRI 3(c) is appropriate for this fixture. *See, e.g., Orlando*, 140 F.3d at 1442. The applicable classifications are subheadings 9405.10.60 and 9405.10.80. This Court notes that subheading 9405.10.80 occurs last in numerical order. Accordingly, this Court holds that SKU 246-651 falls under HTSUS subheading 9405.10.80 through application of GRI 3(c).

(h) *SKU 246-674 (Pl. Ex. W-24)*

SKU 246-674 is a “[w]all fixture consisting of four bell-shaped

shades of milky white glass, mounted into metal fitters that are affixed by four thin, curved metal stems to a metal back-plate, all of which are of a brown finish.” (Pl. Ex. W-24 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 24.) Both Mr. Mintz and Mr. St. John agreed that this fixture is similar to SKU 487-221 (*supra*), except for the finish. (Trial Tr. 1080, Oct. 26; Trial Tr. 1350, Oct. 27.) Upon comparison of these two fixtures, however, there appears to be slight differences in the two outer arms, which could be attributed to the different angles of the photographs. This Court finds, however, these potential differences inconsequential to the outcome.

Upon examination of all the evidence, this Court finds SKUs 487-221 and 246-674 are substantially identical fixtures. As previously discussed, this Court finds that a different finish on an otherwise identical fixture does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 487-221 to SKU 246-674, this Court finds that both the glass and metal are equally important. Since both the glass and metal components merit equal consideration, this Court finds that application of GRI 3(c) is appropriate for this fixture. *See, e.g., Orlando*, 140 F.3d at 1442. The applicable classifications are subheadings 9405.10.60 and 9405.10.80. This Court notes that subheading 9405.10.80 occurs last in numerical order. Accordingly, this Court holds that SKU 246-674 falls under HTSUS subheading 9405.10.80 through application of GRI 3(c).

## 12. FLOWER PETAL WALL SCONCE

Mr. Mintz testified that this group of fixtures is in the same family, with a varying number of lamps. (Trial Tr. 1344, Oct. 27.) Both Mr. St. John and Mr. Mintz described the glass shades in this group as resembling a flower. (Pl. Ex. W-109 at 3; Trial Tr. 1086, Oct. 26.) Mr. St. John asserted that the fixtures in this group “are the exact same [sic] family.” (*Id.* at 1085.) He explained that SKU 561-670 has two lamps, SKU 561-682 has three lamps, and SKU 561-748 has a single lamp. (*Id.*)

### (a) SKU 561-748 (Pl. Ex. W-109)

SKU 561-748 is a “[w]all sconce consisting of a glass diffuser affixed to a metal mounting cap with a polished brass finish.” (Pl. Ex. W-109 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a relatively low quality image. (Pl. Ex. 109.) The Court indicated during trial that the image was of low quality. (Trial Tr. 1087, Oct. 26.) Mr. Mintz also found the image “not a very good photograph.” (Trial Tr. 1359, Oct. 27.) Although Mr. St. John admitted the “the picture of this fixture is of poor quality,” he “recognize[d] it as a wall sconce with a stylized glass shade which [creates] the motif and look of this fixture.” (Pl. Ex. W-109 at 3.) Therefore, this

Court finds that Mr. St. John has personal knowledge of this fixture. (Trial Tr. 1087, Oct. 26.) Furthermore, Home Depot currently sells this fixture. (*Id.*)

Mr. St. John explained this fixture does not have the polished brass backplate as do the others in this group. (*Id.* at 1085.) However, Mr. Mintz testified during trial, “I cannot tell if there’s a backplate and I cannot tell if it’s the exact same shape” as the other fixtures in this group (Trial Tr. 1358, Oct. 27) and concluded that “it appears to me not to be the same” (*id.* at 1359.) Notwithstanding the uncertainty of the existence of a backplate, this Court finds that Mr. St. John’s personal knowledge of the fixture more persuasive than Mr. Mintz’s conjecture based upon the image.

This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (Pl. Ex. W-109 at 1.) This Court finds that the metal component: consists of mounting cap of a polished brass finish; and contributes minimally to the decorative appearance and structure. This Court finds that the glass component: consists of a flower-shaped shade; directs and softens light through diffusion; protects the lamp; shields the lamp from view; contributes to most of the decorative appearance and structure; and establishes the fixture’s scale. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 561-748 is imparted by its glass. Accordingly, this Court holds that SKU 561-748 properly falls under HTSUS subheading 9405.10.80.

(b) *SKU 561-670 (Pl. Ex. W-108)*

SKU 561-670 is a “[f]lush mounted wall sconce fixture consisting of two translucent, white, frosted glass shades mounted to a metal mounting plate and with metal bottom caps, both of a polished brass finish.” (Pl. Ex. W-108 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a low quality image. (Pl. Ex. 108.) Although he admitted the “the picture of this fixture is of poor quality,” Mr. St. John testified that he has personal knowledge of this fixture. (Trial Tr. 1087, Oct. 26.) He recalled holding the fixture in his hands and pointed out his decision to discontinue it. (Trial Tr. 1087, Oct. 26.) Mr. Mintz testified that “[t]he backplate . . . is just a simple rectangle. That makes it less decorative and almost utilitarian, notwithstanding that it’s polished brass. The decorative element of [this] fixture[ ] is the glass shade.” (Trial Tr. 1358, Oct. 27.)

This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and

soften light through diffusion, to protect the lamp, and to shield the lamp from view. (Pl. Ex. W-108 at 1.) This Court finds that the metal component: consists of a mounting backplate with metal bottom caps of a polished brass finish; contributes minimally to the decorative appearance; and establishes the fixture's structure and scale. This Court finds that the glass component: consists of two highly stylized flower-shaped shades; directs and softens light through diffusion; protects the lamp; shields the lamp from view; and contributes to most of the decorative appearance. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 561-670 is imparted by its glass. Accordingly, this Court holds that SKU 561-670 properly falls under HTSUS subheading 9405.10.80.

(c) *SKU 561-682 (Pl. Ex. W-110)*

SKU 561-682 is a “[f]lush mounted wall sconce fixture consisting of three translucent, white, frosted glass shades mounted to a metal mounting plate and with metal bottom caps, both of a polished brass finish.” (Pl. Ex. W-110 at 1.) Plaintiff produced as evidence a SKU information packet consisting of low quality image. (Pl. Ex. 110.) As with the fixture above, Mr. St. John personally discontinued this fixture. (Trial Tr. 1087, Oct. 26.) Again, Mr. Mintz testified that “[t]he backplate . . . is just a simple rectangle. That makes it less decorative and almost utilitarian, notwithstanding that it’s polished brass. The decorative element of [this] fixture [ ] is the glass shade.”<sup>48</sup> (Trial Tr. 1358, Oct. 27.)

This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (Pl. Ex. W-110 at 1.) This Court finds that the metal component: consists of mounting backplate with metal bottom caps of a polished brass finish; contributes minimally to the decorative appearance; and establishes the fixture’s structure and scale. This Court finds that the glass component: consists of three highly stylized flower-shaped shades; directs and softens light through diffusion; protects the lamp; shields the lamp from view; and contributes to most of the decorative appearance. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 561-682 is imparted by its glass. Accordingly,

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<sup>48</sup>The Court notes that while the description of this fixture and Plaintiff’s Exhibit 110 indicate that SKU 561-628 has three glass shades, Mr. Mintz’s description indicates only two shades. The Court treats this as a minor discrepancy that does not affect the outcome of this analysis.

this Court holds that SKU 561–682 properly falls under HTSUS sub-heading 9405.10.80.

### 13. GLASS PRISM FIXTURE

#### (a) *SKU 258–008 (Pl. Ex. W–27)*

SKU 258–008 is an agreed upon representative SKU covering SKU 356–093. (Joint Report 3.) SKU 258–008 is a “[h]anging two-tier fixture consisting of twenty decoratively etched and beveled glass panel shades, mounted by thin metal rods around two metal base tiers, each with an array of several lamp holders.” (Pl. Ex. W–27 at 1.) The metal components are of a polished brass finish. (Trial Tr. 100, Oct. 17.) Plaintiff produced as evidence a physical sample (Pl. Ex. 202), photograph (Pl. Ex. 141) and SKU information packet (Pl. Ex. 27). Home Depot currently carries this fixture. (Trial Tr. 97, Oct. 17.) Mr. St. John explained that “[w]ithout the glass there would be no fixture. The glass panels [ ] establish the fixture, establish[ ] its scale in both height and width. And the intention is to create a fixture that comes in a very small box that once assembled has a larger scale feel.” (*Id.* at 98.) Mr. Mintz advanced that the “[g]lass panels are [ ] what give the fixture its dimension, its overall scale and actually its style. They also refract the light [ ] through the beveled edges which causes a certain amount of sparkle and glitter.” (Trial Tr. 362, Oct. 18.) According to Mr. Mintz, the glass alone designates the decorate appearance of this fixture. (*Id.* at 362, 364.)

The glass has a visible surface area of 490 square inches, which constitutes fifty-two percent of the whole, and weighs 146.5 ounces, which constitutes seventy-one percent of the total weight. (Pl. Ex. W–27 at 1.) The metal has a visible surface area of 454.4 square inches, which constitutes forty-eight percent of the whole, and weighs 50.1 ounces, which constitutes twenty-five percent of the total weight. (*Id.*) This Court finds that the glass and metal are nearly equal in visible surface area, but the glass weighs notably more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal are “part of [the] structure,” the glass further functions to direct and distribute light through refraction. (Pl. Ex. W–27 at 1.)

This Court finds that the metal component: consists of a lamp holder base, center column and thin rods creating two tiers of a polished brass finish; comprises approximately one-half of the total visible surface area; weighs approximately one-fourth of the entirety of the fixture; contributes to structure; contributes minimally to the decorative appearance; houses the electrical components; and contributes to the fixture’s scale. This Court finds that the glass component: consists of twenty octagonal-shaped clear glass panels with starburst-like etchings in the center and beveled edges; comprises approximately one-half the total visible surface area; weighs ap-



proximately three-fourths of the total weight of the fixture; directs and softens light through refraction; designates the decorative appearance; and contributes to the fixture's scale. Upon careful consideration of the totality of these various factors, this Court finds that the twenty beveled edge and decoratively etched glass panels distinguish this fixture. This Court finds that the essential character of SKU 258-008 is imparted by its glass. Accordingly, this Court holds that SKU 258-008 and its agreed upon represented SKU 356-093 properly fall under HTSUS subheading 9405.10.80.

(b) *SKU 794-885 (Pl. Ex. W-124)*

SKU 794-885 is an agreed upon representative SKU covering SKU 441-371. (Joint Report 6.) SKU 794-885 a three light “[h]anging ceiling fixture consisting of six etched and beveled glass panels that are suspended by thin metal members from a central metal stem and lamp holder base, all of which are of a polished brass finish.” (Pl. Ex. W-124 at 1; Trial Tr. 166, Oct. 17.) Plaintiff produced as evidence a physical sample (Pl. Ex. 247), photograph (Pl. Ex. 186) and SKU information packet (Pl. Ex. 124). This fixture is typically hung in “[a] hallway or small foyer.” (Trial Tr. 166, Oct. 17.) Furthermore, Home Depot currently sells this fixture. (*Id.*)

Mr. Mintz asserted that the glass panels are the most outstanding characteristic because “they have beveled edges, appear to have some etching or design incised in the middle of the panels which also will refract light and sparkle,” and “[i]t’s the glass which gives the fixture its dimension, its volume and its decorative appearance.” (Trial Tr. 421-22, Oct. 18.) Mr. Mintz added that “[a]bsent the glass, it’s just a metal rod.” (*Id.* at 422.) Mr. St. John concluded that “the glass makes it the fixture that it is.” (Trial Tr. 170, Oct. 17.)

The glass has a visible surface area of 147 square inches, which constitutes fifty-one percent of the whole, and weighs 42 ounces, which constitutes sixty-two percent of the total weight. (Pl. Ex. W-124 at 1.) The metal has a visible surface area of 139.7 square inches, which constitutes forty-nine percent of the whole, and weighs 22.5 ounces, which constitutes thirty-three percent of the total weight. (*Id.*) This Court finds that the glass and metal are nearly equal in visible surface area, but the glass weighs more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal are “part of the structure,” the glass further functions to direct and distribute light through refraction. (*Id.*)

This Court finds that the metal component: consists of a lamp holder base, center column and thin rods of a polished brass finish; comprises approximately one-half of the total visible surface area; weighs approximately one-third of the entirety of the fixture; contributes to structure; houses the electrical components; and contributes to the fixture’s scale. This Court finds that the glass component:

consists of six octagonal-shaped clear glass panels with starburst-like etchings in the center and beveled edges; comprises approximately one-half of the total visible surface area; weighs approximately three-fifths of the total weight of the fixture; directs and softens light through refraction; contributes to structure; designates the decorative appearance; and contributes to the fixture's scale. Upon careful consideration of the totality of these various factors, this Court finds that the beveled edged and decoratively etched glass panels distinguish this fixture. This Court finds that the essential character of SKU 794-885 is imparted by its glass. Accordingly, this Court holds that SKU 794-885 and its agreed upon represented SKU 441-371 properly fall under HTSUS subheading 9405.10.80.

(c) *SKU 235-024 (Pl. Ex. W-15)*

SKU 235-024 is a “[w]all fixture consisting of decoratively etched and beveled glass panels, mounted by thin metal rods around a metal back plate with two lamp holders.” (Pl. Ex. W-15 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 15.) Mr. St. John contended that this fixture “is a wall sconce version of the pendant [SKU 794-885].” (Trial Tr. 1136-37, Oct. 16.) He described this fixture as “50 percent of [SKU 794-885] mounted on the wall.” (*Id.* at 1137.) Mr. Mintz further explained that this fixture is “a wall bracket which has 3 panels of glass which are etched as are the ones in [SKU 794-885]. It’s only 3 sided as compared to the pendant fixture [SKU 794-885], which is 6 sided.” (Trial Tr. 1375, Oct. 27.) Mr. Mintz noted that this fixture differs slightly from SKU 794-885 in that “it has a rectangular glass panels . . . [with] square ends.” (*Id.*) Mr. Mintz asserted that the most outstanding characteristic is the glass panels because “[a]ll the design is in the glass panels, the etching in the glass panels, that’s what makes the light sparkle. That would refract the light. That’s what gives the fixture its mass.”<sup>49</sup> (*Id.* at 1377-78.)

This Court considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and distribute light through refraction and diffusion. (Pl. Ex. W-15 at 1.) This Court finds that the metal component: consists of metal backplate with lamp holders and thin rods; contributes to decorative appearance and structure; and houses the electrical components. This Court finds that the glass component: consists of three decoratively etched and beveled edge clear glass panels; directs and softens light through refraction; contributes to decorative appearance and struc-

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<sup>49</sup>Mr. Mintz explained that “[m]ass is [ ] the outside bulk or appearance.” (Trial Tr. 1378, Oct. 27.)

ture; and establishes the fixture's scale. Upon careful consideration of the totality of these various factors, this Court finds that the beveled edge and decoratively etched glass panels distinguish this fixture. This Court finds that the essential character of SKU 235-024 is imparted by its glass. Accordingly, this Court holds that SKU 235-024 properly falls under HTSUS subheading 9405.10.80.

#### 14. KITCHEN PENDANTS BOUND GLASS

Mr. St. John explained that "bound glass" means copper foil adhered "around the edge and then use that copper to solder the panels together." (Trial Tr. 1073, Oct. 26.) Mr. Mintz noted that these fixtures differ in the number of vertical segments on the glass shade. (Trial Tr. 1332-33, Oct. 27.) Because the detailing and the scale are different, Mr. Mintz declared that these fixtures were not in the same family from a design perspective. (*Id.* at 1336.) He offered, however, that these fixtures are the same "design theme of a minimal framework supporting beveled glass panels which in assembly make up a shade, which enclose a stem and socket and arms." (*Id.*) Mr. St. John testified that the most outstanding characteristic of the fixtures in this group is the beveled glass "because there is really no bell-shaped fixture without the glass. (Trial Tr. 1073-74, Oct. 26.)

##### (a) *SKU 258-628 (Pl. Ex. W-28)*

SKU 258-628 is a "hanging ceiling fixture consisting of bell-shaped housing made of beveled glass panels held together by thin metal members, covering a metal stem and connected lamp holders." (Pl. Ex. W-28 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 28.) Mr. St. John explained this fixture is "a breakfast table pendant made with beveled glass panels in a delicate framework." (Pl. Ex. W-28 at 3.) This Court considers the factor "material's role in relation to the use of the good" as listed in the EN to GRI 3(b). While both the glass and metal "contribute[ ] to decorative appearance" and are "part of [the] structure," the glass further functions to direct and distribute light through refraction and to protect the lamp. (*Id.* at 1.) Mr. St. John notes, however, that the metal is "primarily [ ] used to adhere the glass into the shape that it exists." (Trial Tr. 1074, Oct. 26.)

This Court finds that the metal component: consists of a thin member framework and lampholders of a white finish; contributes minimally to the decorative appearance and structure; suspends the fixture from the ceiling; and contributes to the fixture's scale and shape. This Court finds that the glass component: consists of beveled panels in three vertical segments with scalloped edges creating the shade of this fixture; contributes to the decorative appearance and structure; directs and distributes light through refraction; protects the lamp; contributes to the fixture's scale and shape; creates the fix-

ture's style; and defines and distinguishes this fixture from a design and marketing perspective. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 258-628 is imparted by its glass. Accordingly, this Court holds that SKU 258-628 properly falls under HTSUS subheading 9405.10.80.

(b) *SKU 258-776 (Pl. Ex. W-29)*

SKU 258-776 is a “[h]anging ceiling fixture consisting of a bell-shaped housing made of beveled glass panels held together by thin metal members, covering a metal stem and connected lampholders.” (Pl. Ex. W-29 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 29.) Mr. St. John testified that this fixture is a smaller version of SKU 258-628, and they are in the same family. (Trial Tr. 1072, Oct. 26.)

This Court finds that SKUs 258-628 and 258-776 are substantially identical fixtures. This Court finds the differences in detailing and scaling are minimal and do not significantly affect the essential character analysis as discussed directly above. Therefore, adopting and applying the analysis of SKU 258-628 to SKU 258-776, this Court finds that the essential character of SKU 258-776 is imparted by its glass. Accordingly, this Court holds that SKU 258-776 properly falls under HTSUS subheading 9405.10.80.

(c) *SKU 259-225 (Pl. Ex. W-30)*

SKU 259-225 is a “[h]anging ceiling fixture consisting of a dome-shaped shade made of both flat and curved beveled glass panels – some with decorative etching/screening – held together by thin metal members, covering a metal stem and connected lamp holders.” (Pl. Ex. W-30 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 30.) Mr. St. John explained that this fixture is “of similar design” as SKUs 258-628 and 258-776. (Trial Tr. 1073, Oct. 26.) Mr. Mintz, however, described these fixtures as “distant cousins.” (Trial Tr. 1335, Oct. 27.) He pointed out that this fixture has “no down light component” and has a “much more bell shaped” shade compared with SKUs 258-628 and 258-776. (*Id.* at 1334.) Upon its own comparison of the fixtures, this Court notes that this fixture’s metal framework has a different finish (brass as opposed to white) and also appears to be more visually prominent.

This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and distribute light through refraction and diffusion and to protect the lamp. (Pl. Ex. W-30 at 1.) This Court finds that the metal compo-

ment: consists of a thin member framework, stem and lampholders of a brass finish; contributes to the decorative appearance and structure; suspends the fixture from the ceiling; contributes to the fixture's scale and shape. This Court finds that the glass component: consists of beveled panels in three vertical segments with scalloped edges creating the shade of this fixture; contributes to the decorative appearance and structure; directs and distributes light through refraction; protects the lamp; contributes to the fixture's scale and shape; creates the fixture's style; and defines and distinguishes this fixture from a design and marketing perspective. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 259-225 is imparted by its glass. Accordingly, this Court holds that SKU 259-225 properly falls under HTSUS subheading 9405.10.80.

(d) *SKU 259-301 (Pl. Ex. W-31)*

SKU 259-301 is a “[h]anging ceiling fixture consisting of a dome-shaped shade made of both flat and curved beveled glass panels – some with decorative etching/screening – held together by thin metal members, covering a metal stem and connected lamp holders.” (Pl. Ex. W-31 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of this fixture. (Pl. Ex. 31.) Mr. Mintz stated that “each facet of the shade consists only of two panels, a bottom panel which has a skirt and a curved bottom, and has etched glass in it, and the upper panel is trapezoidal and curved [and] plain and also has beveled glass. And there is no down light component.” (Trial Tr. 1334, Oct. 27.) This Court considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and distribute light through refraction and diffusion and to protect the lamp. (Pl. Ex. W-31 at 1.)

This Court finds that the metal component: consists of a thin framework and lampholders; contributes to the decorative appearance and structure; suspends the fixture from the ceiling; and contributes to the fixture's scale, shape and style. This Court finds that the glass component: consists of beveled panels in two vertical segments with decoratively etched scalloped edges creating a shade for the fixture; contributes to the decorative appearance and structure; directs and distributes light through refraction and diffusion; protects the lamp; contributes to the fixture's scale and shape; creates the fixture's style; and defines and distinguishes this fixture from a design and marketing perspective. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 259-301 is imparted by its glass. Accordingly, this Court holds that SKU 259-301 properly falls under HTSUS subheading 9405.10.80.

## 15. PENDANT

Mr. Mintz testified that the first three fixtures in this pendant group – SKUs 482–393, 231–088 and 790–113 – are the same concept in that they all “consist of a pendant fixture which has multiple suspension parts, which terminate in a wide ring, against which the glass diffuser is held by means of the fitting.” (Trial Tr. 1373, Oct. 27.) The fourth fixture – SKU 690–030 – is a different concept than the other fixtures in this group. (*Id.*) Mr. Mintz asserted, however, that the most outstanding characteristic of all the fixtures in this group is “the metal suspension system.” (*Id.* at 1372.)

### (a) *SKU 482–393 (Pl. Ex. W–93)*

SKU 482–393 is an agreed upon representative SKU covering SKUs 379–609 and 457–581. (Joint Report 6.) SKU 482–393 is a “[h]anging ceiling fixture that consists of a frosted glass bowl that is mounted into a white metal trim ring and is also capped with a white metal finial. The bowl and trim ring are suspended by a white metal framework.” (Pl. Ex. W–93 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 230), photograph of the fixture’s metal framework (Pl. Ex. 169), and SKU information packet with a low quality image of the entire fixture (Pl. Ex. 93 at 11).

The glass has a visible surface area of 147.3 square inches, which constitutes thirty percent of the whole, and weighs 28.5 ounces, which constitutes twenty-five percent of the total weight. (Pl. Ex. W–93 at 1.) The metal has a visible surface area of 341.9 square inches, which constitutes seventy percent of the whole, and weighs 78 ounces, which constitutes sixty-nine percent of the total weight. (*Id.*) This Court finds that the metal has much greater visible surface area and weighs notably more than the glass. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*) However, from a design perspective, Mr. Mintz posited that the glass diffuser and metal framework work together to define the “appearance, performance and marketability of this lighting fixture.” (*Id.* at 3.)

This Court finds that the glass component: consists of a frosted glass bowl; comprises approximately one-third of the total visible surface area; weighs one-fourth of the entirety of the fixture; directs and softens light through diffusion; protects the lamp; and contributes minimally to the decorative appearance and structure. This Court finds that the metal component: consists of a highly stylized framework, cap and ball of a white finish; comprises approximately two-thirds of the total visible surface area; weighs approximately two-thirds of the fixture; contributes mainly to the decorative ap-



pearance and structure; suspends the fixture from the ceiling; houses the electrical components; establishes the fixture's scale; creates the fixture's style; and defines and distinguishes this fixture from a design and marketing perspective. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 482-393 is imparted by its metal. Accordingly, this Court holds that representative SKU 482-393 and its agreed upon represented SKUs 379-609 and 457-581 properly fall under HTSUS subheading 9405.10.60, affirming Customs' classification.

(b) *SKU 231-088 (Pl. Ex. W-10)*

SKU 231-088 is a “[h]anging ceiling fixture that consists of a beveled glass bowl that is mounted into a metal trim ring and is also capped with a metal finial. The bowl and trim ring are suspended by a metal framework.” (Pl. Ex. W-10 at 1.) Plaintiff produced a SKU information packet consisting of a clear, color image of the fixture. (*Id.*) Mr. Mintz testified that he had the “same opinion for [SKU] 231-088 as [he did] for SKU 482-393” because they are similar. (*Id.* at 3.)

This Court notes the differences of the style of glass – frosted versus beveled – and the color of finish – painted white versus polished brass – between these fixtures. However, this Court finds that SKUs 482-393 and 231-088 are substantially identical fixtures. This Court finds that a different type of glass and color of finish on an otherwise identical fixture does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 482-393 to SKU 231-088, this Court finds that the essential character of SKU 231-088 is imparted by its metal. Accordingly, this Court holds that SKU 231-088 properly falls under HTSUS subheading 9405.10.60, affirming Customs' classification.

(c) *SKU 790-113 (Pl. Ex. W-122)*

SKU 790-113 is a “[h]anging ceiling fixture consisting of a frosted and fluted glass diffusing dome that mounted by a metal trim ring, stem and finial to a metal pendant framework.” (Pl. Ex. W-122 at 1.) Plaintiff produced a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 122.) Mr. Mintz testified that this fixture is similar to SKUs 482-393 and 231-088. (Trial Tr. 1373, Oct. 27.) Notwithstanding the different type of glass, this Court finds that SKUs 482-393 and 790-113 are substantially identical fixtures. Therefore, this Court adopts and applies the analysis of SKU 482-393 to SKU 790-113. Consequently, this Court finds that the essential character of SKU 790-113 is imparted by its metal. Accordingly, this Court holds that SKU 790-113 properly falls under HTSUS subheading 9405.10.60, affirming Customs' classification.

(d) *SKU 690-030 (Pl. Ex. W-115)*

SKU 690-030 is a “[h]anging ceiling fixture consisting of a frosted glass diffusing dome that mounts to a dark metal pendant framework by means of a metal stem and finial.” (Pl. Ex. W-115 at 1.) Plaintiff produced as evidence SKU information packet consisting of an adequate image of this fixture . (Pl. Ex. 115.) As noted above, this fixture is of a different concept than the other fixtures in this pendant group. According to Mr. St. John, “the glass bowl is a very important element as the light framework is not significant enough to be a decorative fixture alone.” (Pl. Ex. W-115 at 3.) Mr. Mintz stated, however, that “the appearance, performance and marketability of this lighting fixture are based on the size, finish and configuration of the decorative pendant framework as well as the glass diffuser.” (*Id.*) According to Mr. Mintz, the glass bowl and metal framework work together to “define the decorative and functional aspects of the lighting fixture.” (*Id.*)

During trial, Mr. Mintz further asserted that fixture’s design is different than the other pendant fixtures. He explained that this fixture’s “glass is held up by the finial and probably just touches these points where the suspension members come down to the edge of the glass. But the top of the glass is not framed or butted up against any kind of a metal trim.” (Trial Tr. 1374, Oct. 27.) Upon this Court’s own examination of the evidence, this Court acknowledges this difference. Nevertheless, this Court finds that SKU 690-030 is substantially similar to SKUs 482-393, 231-088 and 790-113. This Court finds the aforementioned difference does not significantly affect the essential character analysis. Therefore, this Court applies the same analysis to SKU 690-030 as it did to the others in this pendant group. Consequently, this Court finds that the essential character of SKU 690-030 is imparted by its metal. Accordingly, this Court holds that SKU 690-030 properly falls under HTSUS subheading 9405.10.60, affirming Customs’ classification.

**16. MIRRORED BATH BAR**

Mr. Mintz testified that the fixtures in this group “are all of a family, and so what applies to one [ ] applies to all.” (Trial Tr. 1281, Oct. 27.) He asserted that the most outstanding characteristic of this family is the “faux cut glass shades because they give it a very distinctive appearance.” (*Id.*) This fixture group also has a glass mirrored inset on the metal backplate. Mr. Mintz explained that the “mirrored back has a beveled edge so you get an additional kind of refracted reflection. That makes all the glass very, very important.” (*Id.* at 1282.) According to Mr. St. John, the mirror inset is “a beveled glass mirror that runs down the center of the backplate and it does several things. It actually reflects the refracted light out of the cut crystal globes.” (Trial Tr. 1018, Oct. 26.)

(a) *SKU 232-963 (Pl. Ex. W-11)*

SKU 232-963 is a “[w]all fixture with four bell-shaped shades of faceted glass, affixed by thin, curved metal stems to a metal backplate, both of which are of a brass finish.” (Pl. Ex. W-11 at 1.) This fixture also has a glass mirrored inset. (*Id.*) Plaintiff produced as evidence a physical sample (Pl. Ex. 194), photograph (Pl. Ex. 133), and SKU information packet (Pl. Ex. 11). This “extremely bright” fixture is typically placed in large bathrooms because the cut crystal shades refract light and the inset mirror creates additional light. (Trial Tr. 1018, Oct. 26.) The glass shades also “create [ ] the very formal feeling” of this product. (*Id.*) Mr. St. John further asserted that the glass shades work in combination with the beveled glass mirror “to dramatically throw the light further out in the room.” (*Id.* at 1019.)

The glass has a visible surface area of 240.0 square inches, which constitutes forty-seven percent of the whole, and weighs 54.5 ounces, which constitutes forty-three percent of the total weight. (Pl. Ex. W-11 at 1.) The metal has a visible surface area of 275.0 square inches, which constitutes fifty-three percent of the whole, and weighs 63.5 ounces, which constitutes fifty-one percent of the total weight. (*Id.*) It appears, however, from an examination of the evidence that these glass measurements did not include the glass mirrored inset. (Pl. Ex. 251 at 52.) Since the Court finds that the mirrored inset is an important part of the fixture, and the measurements do not appear to include it, this Court will disregard the visible surface area and weight measurements for this fixture. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and distribute light through refraction, to protect the lamp, and to shield the lamp from view. (Pl. Ex. W-11 at 1.) Furthermore, the mirrored inset in the backplate multiplies the images of the glass shades. (*Id.*)

This Court finds that the metal component: consists of a backplate, four curved stems and fitters of a polished brass finish; contributes to the decorative appearance and structure; affixes the fixture to the wall; houses the electrical components; and contributes to the fixture’s scale. This Court finds that the glass component: consists of four faceted glass shades and a mirrored inset centered along the backplate; directs and softens light through refraction; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; contributes to the fixture’s scale; and provides the fixture’s formal feel. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 232-963 is imparted by its glass. Accordingly, this Court holds that SKU 232-963 properly falls under HTSUS sub-heading 9405.10.80.

(b) *SKU 233-013 (Pl. Ex. W-12)*

SKU 233-013 is a “[w]all fixture with one bell-shaped shade of faceted glass, mounted into a metal fitter that is affixed by a thin, curved metal stem to a glass back-plate with a metal mounting plate. All metal parts are of a brass finish.” (Pl. Ex. W-12 at 1.) This fixture also has a glass mirrored inset. (*Id.*) Plaintiff produced as evidence a physical sample (Pl. Ex. 195), photograph (Pl. Ex. 134), and SKU information packet (Pl. Ex. 12). Upon examination of all the evidence, this Court notes that there is a discrepancy in the images of the fixtures. This Court finds the physical sample, Plaintiff’s Exhibit 195, matches Plaintiff’s Exhibit 134. Therefore, the Court will disregard the image in Plaintiff’s Exhibit 12 in this analysis.

Mr. Mintz stated that SKU 233-013 “is very similar [to SKU 232-963], except that it’s a single lamp.” (Trial Tr. 1279, Oct. 27.) He added that the escutcheon plate is mounted vertically rather than horizontally. (*Id.* at 1280.) As with SKU 232-963 (*supra*), it appears the mirrored inset was not included in the measurements, and thus this Court will disregard the visible surface area and weight measurements for this fixture. (*See* Pl. Ex. 251 at 53.) This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and distribute light through refraction, to protect the lamp, and to shield the lamp from view. (Pl. Ex. W-12 at 1.) As aforementioned, the mirrored inset in the backplate multiplies the images of the glass shades. (*Id.*)

This Court finds that the metal component: consists of a backplate, curved arm and fitter of a polished brass finish; contributes to the decorative appearance and structure; affixes the fixture to the wall; houses the electrical components; and contributes to the fixture’s scale. This Court finds that the glass component: consists of one faceted glass shade and a mirrored inset centered on the backplate; directs and softens light through refraction; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; contributes to the fixture’s scale; and provides the fixture’s formal feel. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 233-013 is imparted by its glass. Accordingly, this Court holds that SKU 233-013 properly falls under HTSUS sub-heading 9405.10.80.

(c) *SKU 233-174 (Pl. Ex. W-13)*

SKU 233-174 is a “[w]all fixture with two bell-shaped shades of faceted glass, mounted into metal fitters that are affixed by thin, curved metal stems to a metal back-plate, all of which are a brass finish.” (Pl. Ex. W-13 at 1.) This fixture also has a mirrored inset. (*Id.*) Plaintiff produced as evidence a SKU information packet con-

sisting of a clear, color image of the fixture. (Pl. Ex. 13.) As mentioned above, Mr. Mintz asserted that the most outstanding characteristic of this fixture is the “faux cut glass shades because they give it a very distinctive appearance.” (Trial Tr. 1281, Oct. 27.) This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and distribute light through refraction, to protect the lamp, and to shield the lamp from view. (Pl. Ex. W-13 at 1.) As mentioned above, the mirror inset in the backplate multiplies the images of the glass shades. (*Id.*)

This Court finds that the metal component: consists of a backplate, two curved stem and fitters of a polished brass finish; contributes to the decorative appearance and structure; affixes the fixture to the wall; houses the electrical components; and contributes to the fixture’s scale. This Court finds that the glass component: consists of two faceted glass shades and a mirrored inset centered along the backplate; directs and softens light through refraction; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; contributes to the fixture’s scale; and provides the fixture’s formal feel. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 233-174 is imparted by its glass. Accordingly, this Court holds that SKU 233-174 properly falls under HTSUS sub-heading 9405.10.80.

(d) *SKU 233-196 (Pl. Ex. W-14)*

SKU 233-196 is a “[w]all fixture with three bell-shaped shades of faceted glass, mounted into metal fitters that are affixed by thin, curved metal stems to a metal back-plate, all of which are a brass finish.” (Pl. Ex. W-14 at 1.) This fixture also has a mirrored inset. (*Id.*) Plaintiff produced as evidence a physical sample missing the glass shades (Pl. Ex. 196), photograph of the fixture without the glass shades (Pl. Ex. 135), and SKU information packet with an adequate image of the entire fixture. (Pl. Ex. 14.) As previously noted, Mr. Mintz asserted that the most outstanding characteristic of this fixture is the “faux cut glass shades because they give it a very distinctive appearance.” (Trial tr. 1281, Oct. 27.)

Because the figures appear to exclude the mirrored inset, this Court will disregard the visible surface area and weight measurements for this fixture. (*See* Pl. Ex. 251 at 54.) This Court considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and distribute light through refraction, to protect the lamp, and to shield the lamp from view. As mentioned above, the mirror inset in the backplate multiplies the images of the glass shades. (Pl. Ex. W-14 at 1.)

Notwithstanding that the physical sample and one of the images is missing the glass shades, this Court is persuaded that this fixture in its imported state included three faceted glass shades. This Court finds that the metal component: consists of a backplate, three curved stems and fitters of a polished brass finish; contributes to the decorative appearance and structure; affixes the fixture to the wall; houses the electrical components; and contributes to the fixture's scale. This Court finds that the glass component: consists of three faceted glass shades and a mirrored inset centered along the backplate; directs and softens light through refraction; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; contributes to the fixture's scale; and provides the fixture its "formal feel." Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 233-196 is imparted by its glass. Accordingly, this Court holds that SKU 233-196 properly falls under HTSUS sub-heading 9405.10.80.

#### 17. RESTORATION BATH BAR

Mr. St. John testified that these fixtures are known as "restoration." (Trial Tr. 1014, Oct. 26.) He explained that the metal components – "the arm break" and "smooth tubing" – creates the restoration style. (*Id.*) The fixtures in this group have a brushed chrome finish.<sup>50</sup> (Trial Tr. 150, Oct. 17.)

##### (a) *SKU 469-258 (Pl. Ex. W-91)*

SKU 469-258 is an agreed upon representative SKU covering SKU 469-528. (Joint Report 6.) SKU 469-258 is a "[w]all-mounted fixture consisting of two bell-shaped glass shades, frosted and with a swirl pattern, mounted into fitters affixed to a metal cross-bar, which is itself mounted to a metal mounting bracket and escutcheon plate." (Pl. Ex. W-91 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 228), photograph (Pl. Ex. 167), and SKU information packet (Pl. Ex. 91).

Mr. St. John admitted that on this fixture, "the [metal] arms are definitely important, probably as important as the glass globes." (*Id.*) From a design perspective, Mr. Mintz gave "equal weight to the metal and the glass." (Trial Tr. 411, Oct. 18.) He stated that "the escutcheon plate and the cross bar are detailed in a way which makes them very important in the design of this fixture, the appearance, what would attract somebody." (*Id.*) He noted that the glass shades are "equally important" because they are frosted and "have a swirl pattern." (*Id.*)

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<sup>50</sup> Although sometimes referred to as "brushed nickel," Mr. St. John explained during trial that the finish is actually brushed chrome. (Trial Tr. 150, Oct. 17.)



The glass has a visible surface area of 95.4 square inches, which constitutes forty-five percent of the whole, and weighs 9.7 ounces, which constitutes nineteen percent of the total weight. (Pl. Ex. W-91 at 1.) The metal has a visible surface area of 117.9 square inches, which constitutes fifty-five percent of the whole, and weighs 38.8 ounces, which constitutes seventy-four percent of the total weight. (*Id.*) This Court finds that the metal has greater visible surface area and weighs notably more than the glass. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribut[e] ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*)

This Court finds that the glass component: consists of two bell-shaped frosted glass shades with a swirl pattern; comprises approximately two-fifths of the total visible surface area; weighs one-fifth of the entirety of the fixture; directs and softens light through diffusion; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; and contributes to the fixture’s scale. This Court finds that the metal component: consists of mounting plate with stem and cross-bar of a brushed chrome finish that gives the fixture its name; comprises approximately one-half of the total visible surface area; weighs about three-fourths of the entirety of the fixture; contributes to the decorative appearance and structure; affixes the fixture to the wall; houses the electrical components; largely establishes the fixture’s scale; and distinguishes this fixture from a design and marketability stand. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 469-258 is imparted by its metal. Accordingly, this Court holds that SKU 469-258 and its agreed upon represented SKU 469-528 properly fall under HTSUS subheading 9405.10.60, affirming Customs’ classification.

(b) *SKU 469-231 (Pl. Ex. W-90)*

SKU 469-231 is a “[w]all-mounted fixture consisting of a translucent, white, faux alabaster glass shade, with a swirl pattern, set into a metal fitter that attaches to a metal escutcheon plate by means of a tubular, metal member.” (Pl. Ex. W-90 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 227), photograph (Pl. Ex. 166), and SKU information packet (Pl. Ex. 90). This fixture is a one-lamp version of SKU 469-258. (Trial Tr. 1013, Oct. 26.)

The glass has a visible surface area of 45.9 square inches, which constitutes thirty-nine percent of the whole, and weighs 15.5 ounces, which constitutes seventy percent of the total weight. (Pl. Ex. W-90 at 1.) The metal has a visible surface area of 71.9 square inches, which constitutes sixty-one percent of the whole, and weighs 4.9 ounces, which constitutes twenty-two percent of the total weight.

(*Id.*) This Court finds that the metal has greater visible surface area than the glass, but the glass weighs notably more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*)

This Court finds that the glass component: consists of one bell-shaped shade of faux alabaster decorated with a swirl pattern; comprises approximately two-fifths of the total visible surface area; weighs approximately two-thirds of the entirety of the fixture; directs and softens light through diffusion; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; and largely establishes the fixture’s scale. This Court finds that the metal component: consists of a backplate and large arm break of a brushed chrome finish that gives the fixture its name; comprises approximately three-fifths of the total visible surface area; weighs approximately one-fifth of the entirety of the fixture; contributes to the decorative appearance and structure; affixes the fixture to the wall; houses the electrical components; contributes to the fixture’s scale; creates the fixture’s style; and distinguishes this fixture from design and marketability standpoints. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 469–231 is imparted by its metal. Accordingly, this Court holds that SKU 469–231 properly falls under HTSUS subheading 9405.10.60, affirming Customs’ classification.

### 18. BRASS END BATH BAR

Mr. St. John testified that this group is “a series of different bath brackets.” (Trial Tr. 1028, Oct. 26.) Mr. St. John explained that these fixtures have “chrome and polished base metal features with glass shades.” (*Id.*) The ends of the metal backplate are capped with brass finish. (*Id.*) He declared last three fixtures in this group – SKUs 768–057, 774–235 and 774–553 – are “in the same family.” (*Id.* 1030.) In this family, the fixtures’ shades are “a frosted, draped glass,” which is “a particular style of glass that actually has folds in the corner that is meant to mimic the way drapes actually gather together.” (*Id.* at 1030, 1033–34.)

#### (a) *SKU 143–553 (Pl. Ex. W–9)*

SKU 143–553 is a “[w]all-mounted fixture known as a ‘Bath Bar,’ 24 inches in length. The fixture consists of three bell-shaped, fluted glass shades that mount into metal fitters attached by slim, curved metal stems to a metal back-plate. The fitters, stems and main back-plate are of a chrome finish while the back-plate’s end caps

are a brass finish.”<sup>51</sup> (Pl. Ex. W-9 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 193), photograph (Pl. Ex. 132), and SKU information packet (Pl. Ex. 9). Mr. Mintz claimed that “the appearance, performance and marketability of this lighting fixture are based largely on the appearance and performance of the glass shades as well as the decorative shape and finish of the supporting mounting plate.” (Pl. Ex. W-9 at 3.)

The glass has a visible surface area of 166.6 square inches, which constitutes forty-eight percent of the whole, and weighs 62.8 ounces, which constitutes sixty-three percent of the total weight. (Pl. Ex. W-9 at 1.) The metal has a visible surface area of 179.5 square inches, which constitutes fifty-two percent of the whole, and weighs 30.4 ounces, which constitutes thirty-one percent of the total weight. (*Id.*) This Court notes that there is an asterisk next to the metal component’s weight “% of whole,” which reads thirty-one percent, and this asterisk indicates the government’s disagreement. However, Mr. Kozloski testified that he checked the measurements, and they are now corrected. This Court accepts the corrected measurements. This Court finds that the glass and metal are nearly equal in visible surface area, but the glass weighs notably more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and distribute light through refraction, to protect the lamp, and to shield the lamp from view. (Pl. Ex. W-9 at 1.)

This Court finds that the glass component: consists of three bell-shaped, prismatic shades; comprises approximately one-half of the total visible surface area; weighs approximately two-thirds of the entirety of the fixture; directs and distributes light through refraction; protects the lamp; shields the lamp from view; and contributes to the decorative appearance and structure. This Court finds that the metal component: consists of curved stems and backplate of a chrome finish and fan-shaped ends of a polished brass finish; comprises approximately one-half of the total visible surface area; weighs approximately one-third of the entirety of the fixture; contributes to the decorative appearance and structure; affixes the fixture to the wall; houses the electrical components; contributes to the fixture’s scale; and distinguishes this fixture from design and marketability standpoints. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 143-553 is imparted by its metal. Accordingly, this Court holds that SKU 143-553 properly falls under HTSUS subheading 9405.10.60, affirming Customs’ classification.

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<sup>51</sup> The brass ends of these bath bars are not actually brass but rather “steel that has been electroplated.” (Trial Tr. 1032, Oct. 26.)

(b) *SKU 768-057 (Pl. Ex. W-119)*

SKU 768-057 is a “[w]all-mounted fixture consisting of two translucent frosted glass shades mounted into metal fitters that affix to a chrome crossbar by means of thin, curved metal stems of a brass finish.” (Pl. Ex. W-119 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 119.)

Mr. Mintz stated that “the metal and glass contribute equally to the look of this fixture.” (Pl. Ex. W-119 at 3.) Mr. St. John affirmed the components’ equality by stating that “this fixture was probably selected based upon this distinctive shade style as much as the decorative bar.” (*Id.*) This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.* at 1.)

This Court finds that the glass component: consists of two translucent frosted, draped shades; directs and softens light through diffusion; protects the lamp; shields the lamp from view; and contributes to the decorative appearance and structure. This Court finds that the metal component: consists of two curved stems of a polished brass finish that are attached to a tubular crossbar and mounting plate of a chrome finish; affixes the fixture to the wall; houses the electrical components; contributes to the fixture’s scale; and distinguishes this fixture from design and marketability standpoints. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 768-057 is imparted by its metal. Accordingly, this Court holds that SKU 768-057 properly falls under HTSUS subheading 9405.10.60, affirming Customs’ classification.

(c) *SKU 774-235 (Pl. Ex. W-120)*

SKU 774-235 is a “[f]lush mounted wall fixture consisting of three translucent white, frosted, glass shades mounted into metal fitters that are affixed to a chrome metal mounting bar by thin, curved metal stems, of a polished brass finish.” (Pl. Ex. W-120 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 120.) As noted above, this fixture is “in the same family” as SKUs 768-057 (*supra*) and 774-553 (*infra*). (Trial Tr. 1030, Oct. 26.)

The testimony regarding the importance and the functions of the metal and glass components is the same for this fixture as for SKU 768-057. This Court notes that the only apparent difference between SKUs 774-235 and 768-057 is the number of lamps. This Court finds that the glass component: consists of three translucent frosted, draped shades; directs and softens light through diffusion; protects the lamp; shields the lamp from view; and contributes to the decora-

tive appearance and structure. This Court finds that the metal component: consists of three curved stems of a polished brass finish that are attached to a tubular crossbar and mounting plate of a chrome finish; affixes the fixture to the wall; houses the electrical components; contributes to the fixture's scale; and distinguishes this fixture from design and marketability standpoints. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 774-235 is imparted by its metal. Accordingly, this Court holds that SKU 774-235 properly falls under HTSUS subheading 9405.10.60, affirming Customs' classification.

(d) *SKU 774-553 (Pl. Ex. W-121)*

SKU 774-553 is a “[f]lush mounted wall fixture consisting of four translucent white, frosted, glass shades mounted into metal fitters and affixed to a chrome metal mounting bar by thin, curved metal stems, of a polished brass finish.” (Pl. Ex. W-121 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 121.) This fixture is “in the same family” as SKUs 768-057 and 774-235. (Trial Tr. 1030, Oct. 26.)

The testimony regarding the importance and the functions of the metal and glass components is the same for this fixture as for SKUs 768-057 and 774-235. This Court notes that the only apparent difference between this fixture and SKUs 768-057 and 774-235 is the number of lamps. The testimony regarding the importance and the functions of the metal and glass components is the same for this fixture as for SKUs 768-057 and 774-235. This Court finds that the glass component: consists of four swirl patterned frosted, draped shades; directs and softens light through diffusion; protects the lamp; shields the lamp from view; and contributes to the decorative appearance and structure. This Court finds that the metal component: consists of four curved stems of a polished brass finish that are attached to a tubular crossbar and mounting plate of a chrome finish; affixes the fixture to the wall; houses the electrical components; contributes to the fixture's scale; and distinguishes this fixture from design and marketability standpoints. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 774-553 is imparted by its metal. Accordingly, this Court holds that SKU 774-553 properly falls under HTSUS subheading 9405.10.60, affirming Customs' classification.

### **19. VARIOUS BATH BAR**

The commonality in this group is that these fixtures “have metal back plates with glass shades.” (Trial Tr. 1040, Oct. 26.) The second and third fixtures – SKUs 263-110 and 263-107 – “are [ ] from the same family.” (*Id.* at 1041.) The remaining three fixtures, however, are “individuals.” (*Id.*)

(a) *SKU 235-256 (Pl. Ex. W-16)*

SKU 235-256 is a “[w]all fixture with four modified bell-shaped shades of frosted glass with a swirl pattern, mounted into metal fitters that are affixed by thin, curved metal arms to a metal mounting bar, all of which are a brass finish.” (Pl. Ex. W-16 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 197), photograph (Pl. Ex. 136), and SKU information packet (Pl. Ex. 16.) Mr. Mintz further described the metal component as “a very decorated and decorative crossbar, polished brass finish with sort of an arrow head end, and a curlicue arm that surrounds the arrowhead. And further there are 4 bands of what I think are meant to be simulated wrappings of holding the items together as though it were a sheaf of something, also in the polished brass finish.” (Trial Tr. 1297, Oct. 27.) He stated that the metal design is very prominent, detailed, and articulated. (*Id.* at 1298.)

The glass has a visible surface area of 241.9 square inches, which constitutes fifty-nine percent of the whole, and weighs 40.8 ounces, which constitutes forty-five percent of the total weight. (Pl. Ex. W-16 at 1.) The metal has a visible surface area of 169.7 square inches, which constitutes forty-one percent of the whole, and weighs 40.6 ounces, which constitutes forty-five percent of the total weight. (*Id.*) This Court finds that the glass has greater visible surface area than the metal, but the glass and metal are equal in weight. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.* at 1.) Mr. Mintz testified that this fixture’s glass and metal components equally contribute to the design. (Trial Tr. 1298, Oct. 27.)

This Court finds that the glass component: consists four modified bell-shaped shades of glass with a swirl pattern; comprises approximately three-fifths of the total visible surface area; weighs approximately two-fifths of the entirety of the fixture; directs and softens light through diffusion; protects the lamp; shields the lamp from view; and contributes to the decorative appearance and structure. This Court finds that the metal component: consists of four fitters attached to four curved arms that are attached to a tubular crossbar with four decorative vertical bands and intricately detailed ends and a flat circular mounting plate centered in the backplate, all of a highly polished brass finish; comprises approximately two-fifths of the total visible surface area; weighs approximately two-fifths of the entirety of the fixture; defines the decorative appearance; contributes to structure; affixes the fixture to the wall; houses the electrical components; contributes to the fixture’s scale; and distinguishes this fixture from design and marketability standpoints. Upon careful



consideration of the totality of these various factors, this Court finds that the essential character of SKU 235–256 is imparted by its metal. Accordingly, this Court holds that SKU 235–256 properly falls under HTSUS subheading 9405.10.60, affirming Customs' classification.

(b) *SKU 263–110 (Pl. Ex. W–33)*

SKU 263–110 is a “[w]all fixture consisting of four bell-shaped shades of faux alabaster glass,<sup>52</sup> mounted into metal fitters that are affixed by thin, curved metal stems to a metal horizontal back-plate, all of which are of an off-white textured finish.” (Pl. Ex. W–33 at 1.) Mr. Mintz further described the shades as having a “ribbed pattern.” (Trial Tr. 1301, Oct. 27.) Plaintiff produced as evidence a physical sample (Pl. Ex. 203), photograph (Pl. Ex. 142), and SKU information packet (Pl. Ex. 33).

The glass has a visible surface area of 289.8 square inches, which constitutes fifty-six percent of the whole, and weighs 70.8 ounces, which constitutes fifty-nine percent of the total weight. (Pl. Ex. W–33 at 1.) The metal has a visible surface area of 231.0 square inches, which constitutes forty-four percent of the whole, and weighs 39.7 ounces, which constitutes thirty-three percent of the total weight. (*Id.*) This Court finds that the glass has greater visible surface area and weighs more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (*Id.*) Mr. Mintz testified that “the appearance, performance and marketability of this lighting fixture are based largely on the appearance and performance of the glass shades as well as the decorative shape and finish of the supporting mounting plate.” (Pl. Ex. W–33 at 3.)

This Court finds that the glass component: consists four bell-shaped shades of ribbed faux alabaster glass; comprises approximately three-fifths of the total visible surface area; weighs approximately three-fifths of the entirety of the fixture; directs and softens light through diffusion; protects the lamp; shields the lamp from view; and contributes to the decorative appearance and structure. This Court finds that the metal component: consists of four curved metal arms attached to a plain crossbar and mounting plate of a textured off-white finish; comprises approximately two-fifths of the total visible surface area; weighs approximately one-third of the entirety of the fixture; contributes to the decorative appearance and

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<sup>52</sup>Mr. St. John described the glass as “melon cut.” (Trial Tr. 1043, Oct. 26.)

structure; affixes the fixture to the wall; houses the electrical components; and contributes to the fixture's scale and design.

Upon careful consideration of the totality of these various factors, this Court finds that both the glass and metal are equally important. Since both the glass and metal components merit equal consideration, this Court finds that application of GRI 3(c) is appropriate for this fixture. *See, e.g., Orlando*, 140 F.3d at 1442. The applicable classifications are subheadings 9405.10.60 and 9405.10.80. This Court notes that subheading 9405.10.80 occurs last in numerical order. Accordingly, this Court holds that SKU 263-110 falls under HTSUS subheading 9405.10.80 through application of GRI 3(c).

(c) *SKU 263-107 (Pl. Ex. W-32)*

SKU 263-107 is a "[w]all fixture consisting of three bell-shaped shades of frosted glass, mounted into metal fitters that are affixed by thin, curved metal stems to a metal horizontal backplate, all of which are of an off-white textured finish." (Pl. Ex. W-32 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 32.) As noted above, Mr. St. John asserted that this fixture and SKU 263-110 (*supra*) are of the same family. (Trial Tr. 1041-42, Oct. 26.) He testified that these fixtures are identical except that SKU 263-107 is "a three light version" while SKU 263-110 is "a four light version." (*Id.* at 1041.) This Court also considers the factor "material's role in relation to the use of the good" as listed in the EN to GRI 3(b). While both the glass and metal "contribute[ ] to decorative appearance" and are "part of [the] structure," the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (Pl. Ex. W-32 at 1.) Mr. Mintz testified that "the appearance, performance and marketability of this lighting fixture are based largely on the appearance and performance of the glass shades as well as the decorative shape and finish of the supporting mounting plate." (*Id.* at 3.)

This Court finds that the glass component: consists three bell-shaped shades of frosted glass; directs and softens light through diffusion; protects the lamp; shields the lamp from view; and contributes to the decorative appearance and structure. This Court finds that the metal component: consists of three curved metal arms attached to a plain crossbar and mounting plate of a textured off-white finish; contributes to the decorative appearance and structure; affixes the fixture to the wall; houses the electrical components; and contributes to the fixture's scale and design.

Upon careful consideration of the totality of these various factors, this Court finds that both the glass and metal are equally important. Since both the glass and metal components merit equal consideration, this Court finds that application of GRI 3(c) is appropriate for this fixture. *See, e.g., Orlando*, 140 F.3d at 1442. The applicable clas-

sifications are subheadings 9405.10.60 and 9405.10.80. This Court notes that subheading 9405.10.80 occurs last in numerical order. Accordingly, this Court holds that SKU 263–107 falls under HTSUS subheading 9405.10.80 through application of GRI 3(c).

(d) *SKU 377–882 (Pl. Ex. W–50)*

SKU 377–882 is a “[b]ath bar wall fixture consisting of four translucent bell-shaped glass shades, each mounted into a metal fitter and attached by a thin, curved stem to a flat metal backplate, all of a brass finish.” (Pl. Ex. W–50 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 50.) Mr. St. John testified that he is “very familiar” with this fixture because he took part in the decision to discontinue it. (Trial Tr. 1051, Oct. 26.) He further explained that this fixture is “polished brass vanity bar with draped frosted glass.”<sup>53</sup> (*Id.* at 1050.)

This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and soften light through diffusion, to protect the lamp, and to shield the lamp from view. (Pl. Ex. W–50 at 1.) Mr. Mintz testified that “the appearance, performance and marketability of this lighting fixture are based largely on the appearance and performance of the glass shades as well as the finish of the supporting mounting plate.” (*Id.* at 3.)

This Court finds that the glass component: consists four translucent shades with a drape pattern molded into the glass; directs and softens light through diffusion; protects the lamp; shields the lamp from view; and contributes to the decorative appearance and structure. This Court finds that the metal component: consists of four curved metal arms attached to a plain, rectangular backplate of a polished brass finish; contributes to the decorative appearance and structure; affixes the fixture to the wall; houses the electrical components; and contributes to the fixture’s scale. Mr. Mintz observed that “although the metal backplate is substantial in surface area, it is devoid of decoration.” (Trial Tr. 1308, Oct. 27.)

Upon careful consideration of the totality of these various factors, this Court finds that both the glass and metal are equally important. Since both the glass and metal components merit equal consideration, this Court finds that application of GRI 3(c) is appropriate for this fixture. *See, e.g., Orlando*, 140 F.3d at 1442. The applicable classifications are subheadings 9405.10.60 and 9405.10.80. This Court notes that subheading 9405.10.80 occurs last in numerical order. Ac-

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<sup>53</sup>Mr. St. John explained that the shades have “physical garland drapes that go around it, molded into the glass.” (Trial Tr. 1051, Oct. 26.)

cordingly, this Court holds that SKU 377–882 falls under HTSUS subheading 9405.10.80 through application of GRI 3(c).

(e) *SKU 686–386 (Pl. Ex. W-114)*

SKU 686–386 is a “[w]all-mounted fixture consisting of three glass shades mounted in metal fitters that are affixed to a metal cross-bar and escutcheon plate by thin curved metal arms. All metal parts are of a pewter finish.” (Pl. Ex. W-114 at 1.) The metal cross-bar also has a scroll-like metal piece affixed across its top. (Trial Tr. 1314, Oct. 27.) Plaintiff produced as evidence a SKU information packet consisting of an adequate image of the fixture. (Pl. Ex. 114.) Upon an examination of the evidence, this Court notes that the bell-shaped shades of the fixture are inverted (the lamps and shades face upwards).

This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the glass further functions to protect the lamp. (Pl. Ex. W-114 at 1.) Mr. Mintz testified that “the appearance, performance and marketability of this lighting fixture are based on the size, finish and configuration of the escutcheon plate, crossbar and decorative details.” (Pl. Ex. W-114 at 3; *see also* Trial Tr. 1315, Oct. 27.) Mr. St. John stated that the most outstanding feature on this fixture is the glass. (Trial Tr. 1045–46, Oct. 26.)

This Court finds that the glass component: consists of three clear, bell-shaped and inverted glass shades; contributes to the decorative appearance and structure; and protects the lamps. This Court finds that the metal component: consists of three curved arms affixed to crossbar with metal scroll-like detailing and escutcheon plate; contributes to the decorative appearance and structure; affixes the fixture to the wall; houses the electrical components; and contributes to the fixture’s scale. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 686–386 is imparted by its metal. Accordingly, this Court holds that SKU 686–386 properly falls under HTSUS subheading 9405.10.60, affirming Customs’ classification.

(f) *SKU 630–304 (Pl. Ex. W-113)*

This is the lone fixture where the main contender against the metal component for essential character is wood rather than glass or plastic. SKU 630–304 is a “[f]lush mounted wall fixture known as a ‘Bathroom Bar.’” (Pl. Ex. W-113 at 1.) This fixture is designed to use bare lamps and consists of an oak wood bar into which metal lamp holders and a mounting plate are set. (*Id.*) Plaintiff produced as evidence a SKU information packet consisting of an adequate image of the fixture. (Pl. Ex. 113). According to Mr. Mintz, “the decorative look of [the] fixture is entirely dependent on which lamp you use. Some

people use a clear lamp with a glowing filament. Most people use a softly diffused lamp. The idea is to simulate a makeup light in a theatrical dressing room.” (Trial Tr. 1389, Oct. 27.) The Mr. Mintz testified that “the most outstanding characteristic” is the wood “[b]ecause basically that’s all there is.” (*Id.* at 1389–90.)

This Court finds that the metal component: consists of a mounting plate that is not visible; and affixes the fixture to the wall. This Court finds that the wood component: consists of the entire visible backplate; contributes to the decorative appearance and structure; constitutes the only visible component; and defines and distinguishes this fixture. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 630–304 is imparted by its wood. Accordingly, this Court holds that SKU 630–304 properly falls under HTSUS subheading 9405.10.80.

## 20. RACETRACK BATH BAR

This group constitutes the family of fixtures that has plastic rather than glass or wood as one of the two main components to consider for essential character. (Trial Tr. 1090, Oct. 26.) The “racetrack” design refers to the backplate, which has “little wavy elevations around the side.” (*Id.* at 1089.) This Court finds instructive that the name of the fixtures in this group is “racetrack,” which refers to the metal. *See supra* § III.B. Mr. Mintz asserted that this group is “truly a family of fixtures.” (Trial Tr. 1362, Oct. 27.) Mr. Mintz posited that the fixtures in this group are identical except for the size. (*Id.*) SKU 342–071 has three lamps, SKU 342–103 has four lamps, and SKU 342–104 has five lamps. (*Id.*)

### (a) *SKU 342–071 (Pl. Ex. W–39)*

SKU 342–071 is a “[b]ath bar wall fixture consisting of a ribbed plastic<sup>54</sup> shade mounted onto a metal back-plate into which three lamp holders are set so as to be covered by the shade.” (Pl. Ex. W–39 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 39.) This fixture is a basic polished brass racetrack. (Trial Tr. 1089, Oct. 26.) According to Mr. St. John, the “plastic acrylic lens [ ] is the only thing that separates it, provides differentiation at a retail level, allowing it to compete with other retailers in the marketplace, so the acrylic lens is really the most important part of the fixture.” (*Id.* at 1090.) Mr. Mintz affirmed the importance of the plastic shade because it is “very distinctive and very special,” and it is “highly stylized, highly designed, [ ] clearly custom-made as opposed to the backplate which

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<sup>54</sup>Mr. Mintz informed the Court that “acrylic is plastic” so these terms will be treated interchangeably throughout this decision. (Trial Tr. 1362, Oct. 27.)

is so similar to a back plate that we saw earlier in a bath bar that I would not be surprised if it is the same.” (Trial Tr. 1362–63, Oct. 27.)

This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[ ] to decorative appearance” and are “part of [the] structure,” the plastic further functions to direct and distribute light through refraction, to protect the lamp, and to shield the lamp from view. (Pl. Ex. W–39 at 1.) Mr. Mintz declared that “[e]ven though the back plate is decorative, the acrylic wave form shade is so distinctive and so stylized that that is what dominates the design. You either would like that and buy it. Or you would not like it and not buy it.” (Trial Tr.1363, Oct. 27.)

This Court finds that the metal component: consists of a backplate of a polished brass finish that gives the fixture its name; contributes to the decorative appearance and structure; affixes the fixture to the wall; houses the electrical components; and contributes to the fixture’s scale. This Court finds that the acrylic component: consists of a wavy, ribbed plastic shade; directs and softens light through diffusion; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; contributes to the fixture’s scale; and distinguishes this fixture from design and marketability standpoints. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 342–071 is imparted by its acrylic. Accordingly, this Court holds that SKU 342–071 properly falls under HTSUS subheading 9405.10.80.

(b) *SKU 342–103 (Pl. Ex. W–40)*

SKU 342–103 is a “[b]ath bar wall fixture consisting of a wavy ribbed shade mounted onto a metal back–plate into which three lamp holders are set so as to be covered by the shade.” (Pl. Ex. W–40 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 40.) This Court notes that the testimony for this fixture mirrors that for SKU 342–071.

This Court finds that the metal component: consists of a backplate of a polished brass finish that gives the fixture its name; contributes to the decorative appearance and structure; affixes the fixture to the wall; houses the electrical components; and contributes to the fixture’s scale. This Court finds that the acrylic component: consists of a wavy, ribbed lens shade; directs and softens light through diffusion; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; contributes to the fixture’s scale; and distinguishes this fixture from design and marketability standpoints. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 342–103 is imparted by its acrylic. Accordingly, this Court holds that SKU 342–103 properly falls under HTSUS subheading 9405.10.80.



(c) *SKU 342-104 (Pl. Ex. W-41)*

SKU 342-104 is a “[b]ath bar wall fixture consisting of a ribbed plastic shade mounted onto a metal back-plate into which five lamp holders are set so as to be covered by the shade.” (Pl. Ex. W-41 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 41.) Mr. Mintz described this fixture as identical to SKUs 342-071 and 342-103 except for the number of lamps. (Trial Tr. 1362, Oct. 27.) This Court agrees.

This Court finds that the metal component: consists of a backplate of a polished brass finish that gives the fixture its name; contributes to the decorative appearance and structure; affixes the fixture to the wall; houses the electrical components; and contributes to the fixture’s scale. This Court finds that the acrylic component: consists of a wavy, ribbed lens shade; directs and softens light through diffusion; protects the lamp; shields the lamp from view; contributes to the decorative appearance and structure; contributes to the fixture’s scale; and distinguishes this fixture from design and marketability standpoints. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKU 342-104 is imparted by its acrylic. Accordingly, this Court holds that SKU 342-104 properly falls under HTSUS subheading 9405.10.80.

## **B. EXTERIOR FIXTURES**

### **1. JELLY JAR**

This group of fixtures is called “jelly jar” or “pickle jar.” (Pl. Ex. W-5 at 1, 3; Pl. Ex. W-36 at 1.) As discussed under the interior fixtures section, this Court finds instructive that the name of the fixtures in this group is “jelly jar,” which refers to the glass. *See supra* § III.B.

(a&b) *SKUs 113-892 (Pl. Ex. W-5) & 280-740 (Pl. Ex. W-36)*

SKUs 113-892 and 280-740 are divisional SKUs. As discussed in the divisional SKU section above, this Court accepts Plaintiff’s submission that SKUs 113-892 and 280-740 are identical fixtures explained by the divisional ordering system. *See supra* § IV. Finding that they are identical fixtures, this Court applies the same analysis for SKUs 113-892 and 280-740. SKU 113-892 is also an agreed upon representative SKU covering SKUs 113-908, 113-925, 113-942, and 252-552. (Joint Report 2.)

These are “[f]lush mounted wall fixture[s] known as ‘Jelly Jar.’ The[se] fixture[s] ha[ve] a jelly jar-shaped shade of clear glass with horizontal fluting, surrounded by a metal fitter linked to a mounting plate, each with antique brass finish.” (Pl. Ex. W-36 at 1.) Plaintiff produced as evidence a physical sample (Pl. Ex. 189), photograph (Pl. Ex. 128) and SKU information packets (Pl. Ex. 5; Pl. Ex. 36). According to Mr. St. John, Home Depot is able to market these SKUs

as an exterior fixture because of the glass jelly jar. (*Id.* at 82.) Since the glass jelly jar serves to protect the lamp from moisture, this fixture carries the Underwriter Laboratory (“UL”) label which makes it suitable for damp locations. (*Id.*) Mr. St. John also declared that the glass jelly jar defines these fixtures from design and marketability standpoints. (Pl. Ex. W-5 at 3; Pl. Ex. W-36 at 3.) Mr. Mintz further explained that the metal base is a “standard fitter” and, thus, asserted that it is the glass that makes these fixtures “unique” with the “nautical motif.” (Trial Tr. 350-52, Oct. 18.) Furthermore, the glass component establishes the scale of the fixture, according to Mr. St. John. (Trial Tr. 80-81, Oct. 17.)

The glass has a visible surface area of 45.1 square inches, which constitutes forty-nine percent of the whole, and weighs 10.1 ounces, which constitutes sixty-one percent of the total weight. (Pl. Ex. W-5 at 1.) The metal has a visible surface area of 47.7 square inches, which constitutes fifty-one percent of the whole, and weighs 4.5 ounces, which constitutes twenty-seven percent of the total weight. (*Id.*) This Court finds that the glass and metal are nearly equal in visible surface area, but the glass weighs notably more than the metal. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and refract light through the flutes, to protect the lamp, and to protect the electrical components from dampness. (*Id.*) Mr. Mintz opined that the glass jelly jar is the “component most essential to the use, visual impression, function and performance of th[ese] lighting fixture[s].” (Pl. Ex. W-5 at 3; Pl. Ex. W-36 at 3.)

This Court finds that the metal component: consists of a standard fitter; comprises approximately one-half of the total visible surface area; weighs approximately one-fourth of the entirety of the fixture; contributes to the decorative appearance and structure; affixes the fixture to the wall; and houses the electrical components. This Court finds that the glass component: consists of a stylized jelly jar-shaped shade that gives the fixtures its name; comprises approximately one-half of the visible surface area; weighs approximately three-fifths of the entirety of the fixture; reflects and refracts light; protects the lamp; protects the electrical components from dampness; contributes to the decorative appearance and structure; establishes the fixture’s scale; defines this fixture from design and marketability standpoints; and distinguishes this fixture by its jar shape and nautical motif. Upon careful consideration of the totality of these various factors, this Court finds that the essential character of SKUs 113-892 and 280-740 is imparted by its glass. Accordingly, this Court holds that SKU 280-740 and representative SKU 113-892 and its agreed upon represented SKUs 113-908, 113-925, 113-942, and 252-552 properly fall under HTSUS subheading 9405.10.80.

(c) *SKU 252-550 (Pl. Ex. W-25)*

SKU 252-550 is a “[f]lush mounted wall fixture known as ‘Jelly Jar.’ The fixture has a jelly jar-shaped shade of clear glass with horizontal fluting, surrounded by a metal fitter linked to a mounting plate, each with black finish.” (Pl. Ex. W-25 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear image of the fixture. (Pl. Ex. 25.) Mr. St. John and Mr. Mintz offered that this fixture is the same as SKU 113-892, except that the finish is black. (*Compare* Pl. Ex. W-25 at 1 *with* Pl. Ex. W-5 at 1; Trial Tr. 933, Oct. 24; Trial Tr. 1224, Oct. 27.)

Upon examination of all the evidence, this Court agrees with the witnesses. This Court finds that SKUs 113-892 and 252-550 are substantially identical fixtures. This Court finds that a different finish on an otherwise identical fixture does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 113-892 to SKU 252-550, this Court finds that the essential character of SKU 252-550 is imparted by the glass. Accordingly, this Court holds that SKU 252-550 properly falls under HTSUS subheading 9405.10.80.

## 2. BULKHEAD

*SKU 240-238 (Pl. Ex. W-19)*

SKU 240-238 is a “[f]lush mounted wall fixture consisting a translucent, glass lens, mounted into a black metal housing out of which four thin members crisscross the lens.” (Pl. Ex. W-19 at 1.) This type of fixture is referred to as a “bulkhead fixture” in the lighting industry (Trial Tr. 1075, Oct. 26, Trial Tr. 1337, Oct. 27). Plaintiff produced as evidence a SKU information packet consisting of an adequate image of the fixture. (Pl. Ex. 19.) According to Mr. St. John, this fixture is “meant to be a replica of an actual naval bulkhead light.” (Trial Tr. 1076, Oct. 26.) He explained that customers often place this fixture around swimming pools and exterior doors (Pl. Ex. W-19 at 3) because its gaskets make it waterproof (Trial Tr. 1075, Oct. 26). The gaskets allow this fixture to be UL labeled for “wet locations,” providing more protection than a mere damp location fixture. (*Id.* at 1060.) Mr. St. John elaborated that the glass has “prismatic cuttings in it so you get almost 180 degrees of light from it.” (*Id.* at 1075.) Although this Court notes that the fixture was neither imported in an illuminated state nor illuminated for illustration anytime during the trial, this Court finds persuasive Mr. St. John’s testimony regarding the importance of the glass in the fixture’s illuminated state to the performance of the fixture.

Mr. St. John also advanced that the glass has more visible surface area than the metal, but the glass and metal components work together for the design purpose. (Trial Tr. 1077, Oct. 24.) Mr. St. John stated the glass and metal are distinct components, separated by ap-

proximately an eighth of an inch. (*Id.* at 1076.) Mr. Mintz corroborated that the metal cage distinguishes this fixture with a domed glass from a design perspective. (Trial Tr. 1338, Oct. 27.) Mr. Mintz also stated that the metal framework serves to protect the shade and lamp, articulating that “a large object would be deflected by that wire guard, [although] a small object would not be.” (*Id.* at 1412–13.)

This Court finds that the glass component: consists of a translucent glass lens with ridges; directs and softens light through diffusion; protects the lamp; protects the electrical components from wetness; contributes to the decorative appearance and structure. This Court finds that the metal component: consists of a backplate and cage of a black finish that constitutes the framework of the fixture; contributes to the decorative appearance and structure; houses the electrical components; establishes the fixture’s scale; protects the glass shade and lamp; defines this fixture from design and marketability standpoints; and distinguishes this fixture as a bulkhead design. This Court finds the metal components are the most important for design and structure. Because this is an exterior fixture, this Court finds the glass component the most important for function and use.

Upon careful consideration of the totality of these various factors, this Court finds that both the glass and metal are equally important. Since both the glass and metal components merit equal consideration, this Court finds that application of GRI 3(c) is appropriate for this fixture. *See, e.g., Orlando*, 140 F.3d at 1442. The applicable classifications are subheadings 9405.10.60 and 9405.10.80. This Court notes that subheading 9405.10.80 occurs last in numerical order. Accordingly, this Court holds that SKU 240–238 falls under HTSUS subheading 9405.10.80 through application of GRI 3(c).

### 3. LANTERN

This group of fixtures is known in the lighting industry as “lantern.”<sup>55</sup> The fixtures in this group are substantially identical. (Trial Tr. 1317–18, Oct. 27.) Lanterns are “intended for use in damp locations.” (*Id.* at 1319; *see also* Trial Tr. 87–88, Oct. 17.) Without the glass component, these lantern fixtures are not protected from dampness. (Trial Tr. 93, Oct. 17; Trial Tr. 1319, Oct. 27.)

#### (a) *SKU 240–210 (Pl. Ex. W–17)*

SKU 240–210 is an agreed upon representative SKU covering SKUs 240–216 and 280–746. (Joint Report 3.) SKU 240–210 is a “flush mounted, octagonal ceiling fixture, 11.5 inches across. The fixture has a curved, translucent, frosted glass bowl held by black

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<sup>55</sup>Mr. St. John noted that this fixture is known as a “black exterior car port light” (Trial Tr. 1056, Oct. 26) while Mr. Mintz offered “lantern” as the industry term (Trial Tr. 1316, Oct. 27). This Court uses Mr. Mintz’ terminology.

metal ribs extending from the mounting plate.” (Pl. Ex. W-17 at 1.) The metal is cast aluminum. (Trial Tr. 86, Oct. 17.) Plaintiff produced as evidence a physical sample (Pl. Ex. 198), photograph (Pl. Ex. 137), and SKU information packet (Pl. Ex. 17).

Mr. St. John explained that this fixture is “French style” in that it is a “companion to the typical French exterior lantern.” (Trial Tr. 87, Oct. 17.) Mr. St. John explained that this fixture would not be sold as an interior fixture because it has “a gothic feel to it.” (*Id.* at 94.) Mr. St. John offered that this fixture had “rubber gaskets around the top where it adheres to the ceiling and another gasket on the inside that further weatherproofs the glass so that moisture and water can’t get inside of it.” (*Id.* at 89.) Therefore, Mr. St. John insisted the most important component was the glass. (Pl. Ex. W-17 at 3.)

The glass has a visible surface area of 90.3 square inches, which constitutes forty-one percent of the whole, and weighs 28.2 ounces, which constitutes forty-nine percent of the total weight. (Pl. Ex. W-17 at 1.) The metal has a visible surface area of 129.9 square inches, which constitutes fifty-nine percent of the whole, and weighs 25.9 ounces, which constitutes forty-five percent of the total weight. (*Id.*) This Court finds that the metal has greater visible surface area than the glass, but the metal and glass are nearly equal in weight. This Court also considers the factor “material’s role in relation to the use of the good” as listed in the EN to GRI 3(b). While both the glass and metal “contribute[] to decorative appearance” and are “part of [the] structure,” the glass further functions to direct and diffuse light, to protect the lamp, to shield the lamp from view, and to protect the electrical components from dampness. (*Id.*) However, from a design perspective, Mr. Mintz maintained that the glass shade and metal framework work together for the “overall appearance and function of the fixture.” (Trial Tr. 358, Oct. 18.)

This Court finds that the glass component: consists of a translucent glass lens; comprises approximately two-fifths of the total visible surface area; weighs approximately one-half of the entirety of the fixture; directs and softens light through diffusion; protects the lamp; protects the electrical components from dampness; and contributes to the decorative appearance and structure. This Court finds that the metal component: consists of a backplate and cage of a black finish that constitutes the framework of the fixture; comprises approximately three-fifths of the total visible surface area; weighs approximately two-fifths of the entirety of the fixture; contributes to the decorative appearance and structure; houses the electrical components; mounts the fixture to the ceiling; protects the glass shade and lamp; establishes the fixture’s scale; defines this fixture from design and marketability standpoints; and distinguishes this fixture as a lantern. This Court finds the metal components are the most important for design and structure. Because this is an exterior fixture,

this Court finds the glass component the most important for function and use. Therefore, this Court finds that both the glass and metal are equally important.

Upon careful consideration of the totality of these various factors, this Court finds that both the glass and metal are equally important. Since both the glass and metal components merit equal consideration, this Court finds that application of GRI 3(c) is appropriate for this fixture. *See, e.g., Orlando*, 140 F.3d at 1442. The applicable classifications are subheadings 9405.10.60 and 9405.10.80. This Court notes that subheading 9405.10.80 occurs last in numerical order. Accordingly, this Court holds that representative SKU 240–210 and its agreed upon represented SKUs 240–216 and 280–746 properly fall under HTSUS subheading 9405.10.80 through application of GRI 3(c).

(b) *SKU 113–861 (Pl. Ex. W–4)*

SKU 113–861 and agreed upon representative SKU 280–746 are divisional SKUs. As discussed in the divisional SKU section above, this Court accepts Plaintiff’s submission that SKUs 113–861 and 280–746 are identical fixtures that received different SKU numbers when regional divisions placed orders. *See supra* § IV. Plaintiff produced as evidence a physical sample for SKU 280–746. (Pl. Ex. 204.) Because they are identical fixtures, this Court finds that SKUs 113–861 and 280–746 must have the same classification. Furthermore, SKU 280–746 is an agreed upon represented SKU covered by the classification of SKU 240–210 (Joint Report 3), which has already been decided (see *supra* IV.B.3.1). This Court classified SKUs 240–210 and agreed upon represented SKU 280–746 under HTSUS subheading 9405.10.80 through application of GRI 3(c). Accordingly, this Court holds that SKU 113–861 also falls under HTSUS subheading 9405.10.80 through application of GRI 3(c).

(c) *SKU 113–844 (Pl. Ex. W–3)*

SKU 113–844 is a “[f]lush mounted, square ceiling fixture consisting of translucent glass panes held by black metal ribs extending from the mounting plate, of similar finish.” (Pl. Ex. W–3 at 1.) Plaintiff produced as evidence a SKU information packet consisting of an adequate image of the fixture. (Pl. Ex. 3.) Mr. St. John advanced that SKU 113–844 is a one lamp version of SKU 113–861. (Trial Tr. 1057, 1061, Oct. 26.)

Upon examination of all the evidence, this Court finds that the SKUs 113–861 and 113–844 are substantially identical fixtures. This Court finds that one less lamp in an otherwise identical fixture does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 113–861 to SKU 113–844, this Court finds that both the glass and metal are equally important. Since both the glass and metal components merit equal consideration, this



Court finds that application of GRI 3(c) is appropriate for this fixture. *See, e.g., Orlando*, 140 F.3d at 1442. The applicable classifications are subheadings 9405.10.60 and 9405.10.80. This Court notes that subheading 9405.10.80 occurs last in numerical order. Accordingly, this Court holds that SKU 113-844 falls under HTSUS subheading 9405.10.80 through application of GRI 3(c).

(d) *SKU 280-706 (Pl. Ex. W-34)*

SKU 280-706 is a “[f]lush mounted, square ceiling fixture consisting of translucent glass panes held by white metal ribs extending from the mounting plate, of similar finish.” (Pl. Ex. W-34 at 1.) Plaintiff produced as evidence a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 34.) Mr. St. John and Mr. Mintz testified that SKUs 113-861 and 280-706 are identical except for the finish. (Trial Tr. 1058-59, Oct. 26; Trial Tr. 1317, Oct. 27.)

Upon examination of all the evidence, this Court finds SKUs 113-844 and 280-706 are substantially identical fixtures. This Court finds that a different finish on an otherwise identical fixture does not affect the essential character analysis. Therefore, adopting and applying the analysis of SKU 113-844 to SKU 280-706, this Court finds that both the glass and metal are equally important. Since both the glass and metal components merit equal consideration, this Court finds that application of GRI 3(c) is appropriate for this fixture. *See, e.g., Orlando*, 140 F.3d at 1442. The applicable classifications are subheadings 9405.10.60 and 9405.10.80. This Court notes that subheading 9405.10.80 occurs last in numerical order. Accordingly, this Court holds that SKU 280-706 falls under HTSUS subheading 9405.10.80 through application of GRI 3(c).

(e) *SKU 280-729 (Pl. Ex. W-35)*

SKU 280-729 is a “[f]lush mounted, square ceiling fixture consisting of translucent glass panes held by brass metal ribs extending from the mounting plate.” (Pl. Ex. W-35 at 1.) Plaintiff produced a SKU information packet consisting of a clear, color image of the fixture. (Pl. Ex. 35.) Both Mr. St. John and Mr. Mintz stated that SKU 280-729 is so similar to SKU 113-844 that their testimony is the same. (Pl. Ex. W-34 at 3.) Mr. Mintz testified that SKU 280-729 “appears to be substantially the same [as SKUs 113-861 and 280-706], although [SKU 280-729] appears to be in a polished brass finish.” (Trial Tr. 1317-18, Oct. 27.) Mr. St. John affirmed that SKUs 280-729 and 280-706 are similar fixtures but for the finish on the metal. (Trial Tr. 1062-63, Oct. 26.)

Upon consideration of all the evidence, this Court finds that SKUs 280-706 and 280-729 are substantially identical fixtures. As noted above, this Court finds that a different finish on an otherwise identical fixture does not affect the essential character analysis. Therefore,

adopting and applying the analysis of SKU 280–706 to SKU 280–729, this Court finds that both the glass and metal are equally important. Since both the glass and metal components merit equal consideration, this Court finds that application of GRI 3(c) is appropriate for this fixture. *See, e.g., Orlando*, 140 F.3d at 1442. The applicable classifications are subheadings 9405.10.60 and 9405.10.80. This Court notes that subheading 9405.10.80 occurs last in numerical order. Accordingly, this Court holds that SKU 280–729 falls under HTSUS subheading 9405.10.80 through application of GRI 3(c).

### CONCLUSION

In accordance with the foregoing findings of fact and conclusions of law, this Court concludes that the subject fixtures are classified under the proper HTSUS subheading as stated herein. In conclusion, the following chart<sup>56</sup> lists the SKU classifications in the order as discussed in the analyses:

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<sup>56</sup>This chart is provided for convenience only and does not represent a finding by the Court. The Court's written opinion is controlling.

	<b>9405.10.60</b> <b>7.6 % duty</b>	<b>9405.10.80</b> <b>3.9 % duty</b>		
SKUs classified by GRI 3(b) (essential character)	482-393	385-186	385-706	537-296
	379-609	384-894	385-740	561-748
	457-581	385-141	385-768	561-670
	231-088	385-236	385-771	561-682
	790-113	385-303	494-935	258-008
	690-003	385-205	494-949	356-093
	469-258	385-155	385-432	794-885
	469-528	104-305	385-429	441-371
	469-231	491-770	385-396	235-024
	143-553	104-306	369-692	258-628
	768-057	491-798	522-787	258-776
	774-235	491-803	828-726	259-225
	774-553	385-477	828-734	259-301
	235-256	385-544	361-570	232-963
	686-386	384-961	361-617	233-013
		491-784	361-620	233-174
		794-187	361-634	233-196
		385-463	361-651	630-304
		385-513	361-665	342-071
		385-334	586-307	342-103
		385-365	385-091	342-104
		385-446	385-057	280-740
		284-604	385-060	113-892
	385-589	385-074	113-908	
	385-608	385-088	113-925	
	385-625	385-124	113-942	
	385-673	746-871	252-552	
	385-690	492-742	252-550	
SKUs classified by GRI 3(c) (default provision)		629-590	246-641	240-210
		482-397	246-651	240-216
		487-110	246-674	280-746
		487-176	263-110	113-861
		487-209	263-107	113-844
		487-221	377-882	280-706
		246-610	240-238	280-729
SKUs subject to 28 U.S.C. § 2639(a)(1) (presumption of correctness stands)	385-219 384-930 385-012 692-320			

Accordingly, this Court directs Customs to reliquidate the relevant entries to this litigation consistent with this decision.

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**Slip Op. 06-50**

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

FORMER EMPLOYEES OF CTS COMMUNICATIONS COMPONENTS, INC.,  
Plaintiffs, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Court No. 05-00372

**JUDGMENT**

On February 28, 2005, a petition for trade adjustment assistance (“TAA”) and alternative trade adjustment assistance (“ATAA”) benefits was filed on behalf of the Former Employees of CTS Communications Components, Inc. (“Plaintiffs”). On April 15, 2005, Labor issued a negative determination regarding Plaintiffs eligibility for TAA and ATAA benefits. Plaintiffs filed a summons and complaint with the Court appearing *pro se* on May 7, 2005. On June 7, 2005, Labor dismissed a request for administrative reconsideration based upon a lack of substantial new information. On February 7, 2006, the Court granted the United States Department of Labor’s (“Labor’s”) consent motion for voluntary remand. On March 22, 2006, Labor filed its *Notice of Revised Determination on Remand* (“*Remand Determination*”), TA-W-56,674 (Dep’t Labor March 2006).

In its *Remand Determination*, Labor determined that Plaintiffs had been involved in the production of ceramic blocks/filters and sensors. Labor also found that an increase in “imports of ceramic sensors like or directly competitive with those produced by the subject firm contributed importantly to the total or partial separation of a significant number of workers at the subject facility.” *Remand Determination* at 3. Consequently, Labor determined that Plaintiffs are eligible to receive TAA or ATAA benefits. *See id.* at 4. On April 5, 2006, Plaintiffs filed comments stating that they are satisfied with the *Remand Determination* as filed.

Upon consideration of Labor’s *Remand Determination*, Plaintiff’s Comments, and other papers and proceedings filed herein; it is hereby

**ORDERED** that Labor’s decision to certify Plaintiffs to receive TAA and ATAA benefits is supported by substantial evidence and is otherwise in accordance with law; and it is further

**ORDERED** that Labor’s *Remand Determination* filed on March 22, 2006, is affirmed in its entirety; and it is further

**ORDERED** that this case is dismissed.

## Slip Op. 06-51

HABAS SINAI VE TIBBI GAZLAR ISTIHSAL ENDUSTRISI A.S., Plaintiff, v.  
UNITED STATES, Defendant.

Court No. 05-00613

[Out-of-time motion for leave to intervene in action challenging Final Results of administrative review of antidumping duty order granted.]

Dated: April 10, 2006

*Law Offices of David L. Simon (David L. Simon), for Plaintiff.*

*Peter D. Keisler, Assistant Attorney General; David M. Cohen, Director, Jeanne E. Davidson, Deputy Director, and Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (David S. Silverbrand); Ada L. Loo, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel; for Defendant.*

*Wiley Rein & Fielding LLP (Alan H. Price and John R. Shane), for Proposed Defendant-Intervenors.*

**OPINION**

RIDGWAY, Judge:

At issue in this action are the final results of the U.S. Department of Commerce's administrative review of the antidumping duty order covering certain steel concrete reinforcing bars ("rebar") from Turkey for the period April 1, 2003 through March 31, 2004. *See* Certain Steel Concrete Reinforcing Bars from Turkey: Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination to Revoke in Part, 70 Fed. Reg. 67,665 (Nov. 8, 2005) ("Final Results"). Plaintiff Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S., a Turkish producer of the subject merchandise, challenges the Final Results, asserting that Commerce erred in using annual cost (rather than quarterly cost) in calculating Habas' cost of production, and that Commerce erred in treating invoice dates (rather than contract dates) as Habas' dates of sale.

Now pending before the Court is the out-of-time Motion to Intervene As A Matter of Right filed by domestic producers and proposed Defendant-Intervenors Nucor Corporation, Gerdau AmeriSteel Corporation, and Commercial Metals Company ("Domestic Producers"). *See also* Domestic Producers' Motion for Leave to File Out of Time ("Dom. Prods. Brief"). The Government consents to the proposed intervention, but plaintiff Habas objects. *See* Plaintiff's Opposition to Motion of Nucor *et al.* For Leave to File Motion to Intervene Out of Time ("Habas Brief") at 4.

For the reasons set forth below, the Domestic Producers' motion to intervene is granted.

### I. Background

On November 8, 2005, Commerce published the Final Results of its administrative review of the antidumping duty order on steel concrete rebar from Turkey for the 2003–2004 period of review. *See* Final Results, 70 Fed. Reg. 67,665. Habas filed its Summons and Complaint challenging the Final Results a mere two days later, on November 10, 2006. Habas and the Government then negotiated and submitted a Proposed Briefing Schedule, which the Court adopted in its Scheduling Order entered on February 3, 2006.

The Domestic Producers' Motion to Intervene was filed on February 6, 2006 – nearly three full months after service of Habas' Complaint.<sup>1</sup> It is undisputed that the motion was filed late. It is also undisputed that the Domestic Producers otherwise satisfy all criteria for intervention as a matter of right in this action. *See generally* Dom. Prods. Motion to Intervene As A Matter of Right at 1; 19 U.S.C. § 1561a(d) (2000); 28 U.S.C. § 2631(j)(1)(B) (2000).

The Domestic Producers assert that their failure to timely intervene “is entirely due to inadvertence,” and should therefore be excused. *See* Dom. Prods. Brief at 2. According to the Domestic Producers:

[W]hile the records of the Domestic Producers' attorneys show that the summons and complaint were served, the summons and complaint were inadvertently left unentered into the pleading files and electronic document system of the attorneys' firm. Therefore, although the documents had been properly served, there was no indication of the documents' existence either in the hard copy pleading binder or electronic document system.

Dom. Prods. Brief at 2.<sup>2</sup>

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<sup>1</sup>Although the Domestic Producers' Motion to Intervene is dated February 2, 2006, the text of the motion recites events that occurred on February 6, 2006, and the motion was filed on the latter date. It is thus somewhat unclear precisely when the Domestic Producers became aware of this action and whether, in fact, they “fil[ed] their motion [to intervene] on the same day that they discovered their mistake,” as the text of their papers represents. *See* Dom. Prods. Brief at 4 n.1.

<sup>2</sup>No claim is made that it would be unfair to the Domestic Producers to penalize them for the acts or omissions of their counsel. Indeed, any such claim would be unlikely to succeed. Courts generally have shown little hesitation in visiting the sins of counsel on their clients. *See, e.g., Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 396–97 (1993). *Cf. Siam Food Prods. Public Co. v. United States*, 22 CIT 826, 829 n.3, 24 F. Supp. 2d 276, 279 n.3 (1998) (rejecting party's assertion that “court has generally granted untimely motions [to intervene] only to ensure that parties who had made timely decisions were not prejudiced” by actions of their counsel; citing, *inter alia*, *Unicorn Tales, Inc. v. Banerjee*, 138 F.3d 467, 470–71 (2d Cir. 1998)).



## II. Analysis

In a case such as this, a motion to intervene as a matter of right must be filed “no later than 30 days after the date of service of the complaint,” except where “good cause” is shown for delay. USCIT Rule 24(a). “Good cause” is defined as “mistake, inadvertence, surprise or excusable neglect.” *Id.*<sup>3</sup> The Domestic Producers here characterize their excuse as “inadvertence.” *See* Dom. Prods. Brief at 1–4.<sup>4</sup>

The relevant caselaw is not particularly robust. Indeed, as the Domestic Producers note, there are no cases interpreting “inadvertence” in the context of USCIT Rule 24(a). *See* Dom. Prods. Brief at 3 (acknowledging that “the court does not appear to have ever considered the definition of ‘inadvertence’ in the context of Rule 24”). *See generally* *Siam Food Prods. Public Co.*, 22 CIT 826, 24 F. Supp. 2d 276 (interpreting “excusable neglect” in context of Rule 24(a) and denying motion to intervene); *Co-Steel Raritan, Inc. v. U.S. Int’l Trade Comm’n*, 26 CIT 1131, 1132–34 (2002), *rev’d on other grounds*, 357 F.3d 1294 (2004) (denying motion to intervene, finding no “good

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<sup>3</sup>Delay also may be excused “under circumstances in which by due diligence a motion to intervene . . . could not have been made within the 30-day period.” USCIT Rule 24(a). No such circumstances are present here.

<sup>4</sup>The Domestic Producers seek to minimize their “inadvertence” by emphasizing the speed with which Habas filed this action. According to the Domestic Producers, Habas’ alacrity “considerably shortened the amount of time available to the Domestic Producers to become aware of the inadvertent failure to enter the summons and complaint into the pleading files and electronic case system, and thus be in a position to timely intervene in [this] action.” *See* Dom. Prods. Brief at 2. The Domestic Producers’ argument is ill-conceived, for at least two reasons.

First, as Habas explained when it commenced this action, it was compelled to move quickly “in light of the [Commerce] Department’s new policy of instructing U.S. Customs and Border Protection to liquidate . . . entries within fifteen days of publication” of the final results of a review. *See* Consent Motion for Preliminary Injunction Against Liquidation of Entries (Nov. 9, 2006) at 4. Habas noted:

Prior to Commerce’s . . . new policy, . . . aggrieved parties could file a complaint . . . within 30 days of Commerce’s final results, and thereafter move the Court for an injunction against liquidation, because Commerce routinely did not issue liquidation instructions until many months after the issuance of final results in a given review. However, because the entries may now be liquidated as soon as 15 days after the publication of Commerce’s final results, a party may be too late to protect its interests if it does not immediately request an injunction against liquidation. Habas therefore file[d] [its] motion for injunction simultaneously with the filing of its . . . summons and complaint. . . .

*Id.* at 4–5. Indeed, the Domestic Producers filed their own action challenging Commerce’s Final Results on November 14, 2005 – a mere four days after Habas filed this case. *See Nucor Corp. v. United States*, Court No. 05–00616 (filed Nov. 14, 2005). The Domestic Producers therefore should not be heard to argue that Habas moved with extraordinary speed.

Moreover, the Domestic Producers here missed the deadline for intervention not by a matter of days, but by a matter of months. The Domestic Producers’ motion would have been timely only if Habas had consumed virtually every day allowed under the statute for the filing of its Summons and Complaint – something that the Domestic Producers themselves did not do. For this reason, too, the Domestic Producers’ argument has a hollow ring.

cause”; no specific discussion of “mistake, inadvertence, surprise or excusable neglect”); *Geum Poong Corp. v. United States*, 26 CIT 908, 217 F. Supp. 2d 1342 (2002) (dissolving order granting out-of-time motion to intervene, finding no “good cause”; no specific discussion of “mistake, inadvertence, surprise or excusable neglect”); *see also Tung Fong Indus. Co. v. United States*, 29 CIT \_\_\_, \_\_\_, 366 F. Supp. 2d 1308, 1312 n.7 (2005) (finding no “surprise” to excuse out-of-time motion to intervene).<sup>5</sup>

The Domestic Producers point to a line of cases interpreting “inadvertence” in the context of “challenges to the liquidation of entries under the now repealed 19 U.S.C. § 1520(c)” – a statute that “permitted challenges to any liquidation premised upon or involving ‘a clerical error, mistake of fact, or *other inadvertence.*’” *See Dom. Prods. Brief* at 3–4 (emphasis added). But there is some danger in importing wholesale into Rule 24(a), from some entirely different context, a line of authority defining the term “inadvertence” (or, for that matter, “mistake,” “surprise,” or “excusable neglect”). That is not to say that caselaw from other contexts is of no utility in interpreting Rule 24(a), but only that such caselaw must be analyzed with great care — particularly where the other rule (or statute) does not include all four of Rule 24(a)’s terms (“mistake, inadvertence, surprise or excusable neglect”) but, rather, uses only one of the terms in isolation.<sup>6</sup>

<sup>5</sup>The 30-day time limit was added to Rule 24(a) in 1993, and is a provision unique to the Rules of the Court of International Trade. *See Siam Food Prods. Public Co.*, 22 CIT at 827, 24 F. Supp. 2d at 278 (comparing USCIT R. 24(a) with Fed.R.Civ.P. 24(a)). The 1993 amendment effectively supersedes much of the pre-1993 caselaw of the Court of International Trade and the Court of Appeals for the Federal Circuit analyzing out-of-time motions to intervene in actions brought under 28 U.S.C. § 1581(c). *See Siam Food Prods. Public Co.*, 22 CIT at 827–28, 24 F. Supp. 2d at 278–79; *Geum Poong Corp.*, 26 CIT at 909 n.4, 217 F. Supp. 2d at 1343 n.4.

<sup>6</sup>For example, *Siam Food Prods. Public Co.* took note that the Supreme Court’s opinion in *Pioneer Inv. Servs.* “acknowledged a standard for excusable neglect that includes consideration of prejudice,” and observed that the *Pioneer Inv. Servs.* analysis had been applied in *E.I. DuPont de Nemours & Co. v. United States*, 22 CIT 601, 603, 15 F. Supp. 2d 859, 861 (1998). *See Siam Food Prods. Public Co.*, 22 CIT at 828, 24 F. Supp. 2d at 279 (citing *Pioneer Inv. Servs.*, 507 U.S. at 395).

However, *E.I. DuPont* dealt with the interpretation of Rule 4(a)(5) of the Federal Rules of Appellate Procedure, which authorizes extensions of time for filing notices of appeal where “excusable neglect or good cause” is shown. *See E.I. DuPont*, 22 CIT at 602–03 & n.2, 15 F. Supp. 2d at 861 & n.2 (quoting F.R.App.P. 4(a)(5)). Thus, under the rule at issue in *E.I. DuPont*, “good cause” is a distinct ground for relief – parallel to, and entirely separate from, “excusable neglect.” In contrast, USCIT Rule 24(a) treats “excusable neglect” as one of four types of “good cause” (together with “mistake,” “inadvertence,” and “surprise”).

Similarly, in *Pioneer Inv. Servs.*, the Supreme Court was grappling with the meaning of “excusable neglect” in the context of a Federal Rule of Bankruptcy Procedure permitting late filing of proofs of claim where the failure to comply with the filing deadline was the result of “excusable neglect.” In the opening paragraph of its opinion, the Supreme Court framed the issue in that case as “whether an attorney’s *inadvertent* failure to file a proof of claim within the deadline set by the court can constitute ‘excusable neglect’ within the

In any event, there is no need here to expressly define “inadvertence,” or any of the other three types of “good cause” listed in Rule 24(a).<sup>7</sup> Habas does not argue that the specific facts set forth by the Domestic Producers cannot constitute “good cause” within the meaning of Rule 24(a).<sup>8</sup> Instead, Habas contends that it has suffered

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meaning of the [Bankruptcy] Rule.” 507 U.S. at 382–83 (emphases added). *See also id.* at 391 (noting that the Federal Rules of Civil Procedure use the phrase “excusable neglect” in several different contexts).

In short, *Pioneer Inv. Servs.* treats at least some “inadvertence” as a form of “excusable neglect,” in the context of an entirely different rule of procedure. Indeed, elsewhere in its opinion, the Supreme Court explains that – in the context of the Bankruptcy Rule there at issue – “excusable neglect” may embrace not only “inadvertence,” but also “mistake, or carelessness, as well as . . . intervening circumstances beyond the party’s control.” *Id.* at 388 (emphasis added).

In contrast, USCIT Rule 24(a) treats “inadvertence” as a separate ground for excuse – parallel to, and entirely distinct from, “excusable neglect” (as well as “mistake” and “surprise”). *See also* USCIT R. 60(b)(1) (permitting court to reopen judgments for reasons of “mistake, inadvertence, surprise, or excusable neglect” where motion is made within one year of judgment).

<sup>7</sup>As an alternative to “inadvertence,” the Domestic Producers contend that their circumstances also can be analyzed under the rubric of “excusable neglect.” *See* Dom. Prods. Brief at 4 n.1. However, no party suggests that the outcome here depends on whether the Domestic Producers’ conduct is characterized as “inadvertence” versus “excusable neglect.”

<sup>8</sup>The Domestic Producers’ claims that they were unaware of the existence of this action until early February are accepted at face value. They are nevertheless somewhat hard to swallow.

Specifically, “counsel for Habas conferred by telephone with counsel for Nucor in connection with Habas’ motion for [an] injunction” in the instant action on November 9, 2005, even before the action was filed with the court. *See* Habas Memorandum of Points and Authorities Concerning Letter of the Court of February 23, 2006 at 3–4 (*citing* Habas Consent Motion for Injunction Against Liquidation of Entries (Nov. 9, 2005) at 3). It is unclear what counsel for Nucor thought he was consenting to, if he had no knowledge of this case.

Of course, the Domestic Producers were also served with a written copy of Habas’ Consent Motion for Injunction Against Liquidation of Entries (Nov. 9, 2005) (as well as copies of the Summons and Complaint).

Moreover, this action is discussed in papers filed in the Domestic Producers’ own case – *Nucor Corp. v. United States*, Court No. 05–00616, in which the Domestic Producers challenge the same Final Results that Habas contests here. For example, the Response of Defendant-Intervenor ICDAS to Defendant’s Motion for Voluntary Remand (Dec. 12, 2005), filed in *Nucor*, states:

We note that the “date of sale” issue is now the subject of three CIT appeals that involve the Antidumping Order on rebar from Turkey. *See Colakoglu v. United States*, Court No. 04–00621 (filed Dec. 8, 2004); *Habas v. United States*, Court No. 05–00613 (filed Nov. 10, 2005); *Nucor Corp. v. United States*, Court No. 05–00616 (filed Nov. 14, 2005).

Response of Defendant-Intervenor ICDAS to Defendant’s Motion for Voluntary Remand at 2 (emphasis added). Similarly, the Commerce Department’s December 29, 2005 letter transmitting the Administrative Record in *Nucor* is captioned in two other cases as well – one of which is *Habas*, the case at bar. In addition, the case at bar was referenced in the Court’s December 30, 2005 opinion in *Nucor*, which denied the Domestic Producers’ application for a preliminary injunction as to entries outside the period of review. *See Nucor Corp. v. United States*, 29 CIT \_\_\_\_, \_\_\_\_, n.19, 412 F. Supp. 2d 1341, 1354 n.19 (2005) (discussing “*Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, Court No. 05–00613 (filed Nov. 10, 2005), which – like this case [*i.e.*, *Nucor*, Court No. 05–00616] – concerns the 2003–2004 review”). Finally, Defendant-Intervenor ICDAS’ Proposed Briefing Schedule –

prejudice as a result of the Domestic Producers' tardiness. According to Habas:

Nucor *et al.* have waited to file their motion to intervene until after the parties to this litigation, *i.e.*, Habas and the Government, agreed upon a schedule for these proceedings. Habas' position, during the discussion with the Government concerning the schedule, was predicated on the fact that the only parties to this litigation were Habas and the Government. If Nucor *et al.* are permitted to intervene at this late date, then Habas will be compelled to rebut the arguments of two defendants, the Government and now Nucor *et al.*, rather than just one, which changes considerably Habas' view of the amount of time it will need for its response brief.

Habas Brief at 1.

Habas properly does not argue that the mere addition of another opposing party, in and of itself, constitutes prejudice. The addition of another party to the case is the consequence of *any* intervention (whether late or not); and Rule 24(a) plainly contemplates that late intervention is permitted under certain circumstances. Thus, the mere fact of the addition of another party to a case (with the concomitant additional expense) can never constitute prejudice for purposes of analyzing an untimely motion to intervene.

The argument that Habas makes is slightly more nuanced. As set forth above, Habas claims that, in proposing the briefing schedule for this action, it assumed that its reply brief would be addressing only a single response brief (*i.e.*, that of the Government). Habas suggests that it would have sought more time for the filing of its reply if it were required to address *two* response briefs. *See* Habas Brief at 1.

Any such prejudice, however, can be readily remedied by according Habas an opportunity to propose an amended briefing schedule. Habas offers no reason why such an opportunity would not restore it to the position in which it would have been had the Domestic Producers timely sought to intervene.

Habas nevertheless maintains that "as a matter of equity Nucor *et al.* should not be allowed to take advantage of their own errors, whether negligent or inadvertent." Habas Brief at 1. Habas asserts that "[i]f Nucor wishes to make its views known to the Court, it may attempt to participate as *amicus*, but it should not be granted party

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filed in *Nucor* – refers to the case here at bar, and notes that it "relate[s] to the same administrative review." *See* Defendant-Intervenor ICDAS' Proposed Briefing Schedule (Feb. 3, 2006) at 2 n.1.

Either the Domestic Producers' claims of ignorance are disingenuous, or they failed to read even the papers filed in *their own* court case. In any event, whether or not the Domestic Producers in fact had actual knowledge of this action, it is abundantly clear that they should have known of it.

status at this time.” *Id.* at 2. In their initial brief, the Domestic Producers argued that *amicus* status is inadequate, emphasizing that “[a]micus cannot raise issues, but may only respond to issues raised by other parties” (and thus intimating that they believed that they *could* raise new issues of their own if granted status as an intervenor). *See* Dom. Prods. Brief at 3. However, it is clear beyond cavil that defendant-intervenors such as the Domestic Producers here must take a case as they find it. *See, e.g., Siam Food Prods. Public Co.*, 22 CIT at 830, 24 F. Supp. 2d at 280 (“Movants . . . are time barred from bringing their own case and thus even as intervenors before the CIT may not bring their own challenges to the Secretary’s determination. Their role will be in support of the defendant.”) (citations omitted).<sup>9</sup>

There are, nevertheless, other reasons why *amicus* status would not fully protect the Domestic Producers’ interests. As the Domestic Producers note, only intervention “would ensure that the Domestic Producers are granted access to the confidential record” in this case:

Plaintiff . . . has raised issues that involve confidential data submitted to the Department of Commerce pursuant to an administrative protective order. Full briefing of these issues would necessarily involve reference to such data. However, the Domestic Producers understand that they would not be entitled to view, or reference, confidential data as *amici*.

Domestic Producers Response to the Court’s Letter of February 23, 2006. Thus, as the Domestic Producers conclude, “only intervention would allow for the Domestic Producers’ interests to be fully represented in this litigation.” *Id.* Granting them *amicus* status simply

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<sup>9</sup> *See also Nakajima All Co. v. United States*, 2 CIT 170, 171–72 (1981) (“The intervenor cannot circumvent the explicit statutory time limitation for contesting an antidumping duty determination [*i.e.*, 19 U.S.C. § 1516a(a)(2)] by simply making a cross-claim when the time for commencing an action has expired.”); *Fuji Elec. Co. v. United States*, 7 CIT 247, 249, 595 F. Supp. 1152, 1154 (1984) (a party “appearing as intervenor, takes the action as it has been framed by the parties therein”); *Silver Reed America, Inc. v. United States*, 8 CIT 342, 349, 600 F. Supp. 2d 846, 851 (1984). *Cf. Torrington Co. v. United States*, 14 CIT 56, 59, 731 F. Supp. 1073, 1076 (1990) (rejecting intervenor’s claims as “clearly beyond the scope of the original litigation”); *National Assoc. of Mirror Mfrs. v. United States*, 11 CIT 648, 651, 670 F. Supp. 1013, 1015 (1987) (rejecting intervenor’s claims as “unduly enlarg[ing] the pleadings”). *Cf. Wire Rope Importers’ Assoc. v. United States*, 18 CIT 478, 479–80 (1994). *See generally* Habas Memorandum of Points and Authorities Concerning Letter of the Court of February 23, 2006; Defendant’s Response to the Court’s February 23, 2006 Letter.

Indeed, the Government emphasizes that, if Habas were to voluntarily dismiss its complaint in this action, any intervenors “could not maintain a claim.” *See* Defendant’s Response to the Court’s February 23, 2006 Letter at 2 (*citing Roberts v. Carrier Corp.*, 117 F.R.D. 426, 428 (N.D. Ind. 1987)).

In any event, the Domestic Producers now disclaim any interest in raising new issues in this action. *See* Domestic Producers Response to the Court’s Letter of February 23, 2006 at 1.

“[would] not totally alleviate th[e] prejudice” that they would suffer if their motion were denied. *See Siam Food Prods. Co.*, 22 CIT at 830, 24 F. Supp. 2d at 280.

### **III. Conclusion**

Habas' sole stated objection to the Domestic Producers' untimely intervention in this action is the prejudice that Habas claims it will suffer. But the potential prejudice to the Domestic Producers clearly outweighs the minimal prejudice that Habas alleges; and, in any event, the potential prejudice to Habas is readily cured by according Habas an opportunity to propose an amended scheduling order in this matter.

Accordingly, for all the reasons stated above, the Domestic Producers' out-of-time Motion to Intervene As A Matter of Right must be granted.