**Slip Op. 06–128**

**MICHAEL SIMON DESIGN, INC., Plaintiff, v. UNITED STATES, Defendant.**

**Court No. 04–00537**
**Before: Judge Judith M. Barzilay**

## OPINION

[Upon classification of knitted cardigans, knitted blouses, and woven ladies shirts, summary judgment granted on certain items for the plaintiff and on certain items for the defendant.]

Dated: August 24, 2006

*Barnes, Richardson & Colburn* (*Alan Goggins*) for the plaintiff.

*Peter D. Keisler*, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Amy M. Rubin*); *Sheryl A. French*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of counsel, for the defendant.

**BARZILAY, JUDGE**: In this case, the plaintiff importer challenges a classification decision by the Bureau of Customs and Border Protection of the United States Department of Homeland Security ("Customs" or "Government") classifying certain articles of apparel as either "[s]weaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted" under heading 6110 or "women's or girls' blouses, shirts and shirt-blouses" under heading 6206 of the Harmonized Tariff Schedule of the United States 2003 ("HTSUS"), 19 U.S.C. § 1202. Compl. ¶¶ 6,8. Plaintiff contests Customs' position that heading 9505 excludes all utilitarian items in light of the recently amended Explanatory Notes to heading 9505, HTSUS, and claims that the items at issue should have been correctly classified under heading 9505 as festive articles. For the reasons discussed below, the court grants summary judgment for Plaintiff with respect to some items and summary judgment for Defendant with respect to others.

## BACKGROUND

Plaintiff Michael Simon Design, Inc. ("Michael Simon"), designs and imports knitwear into the United States for resale. In July 2003, Michael Simon imported apparel identified on commercial invoices as "knitted cardigans," "knitted blouses," and "woven ladies shirts." Joint Statement of Material Facts Not in Dispute ("JS") ¶¶ 4–5. The imported shipment contained sixteen different styles of sweaters. JS ¶ 6. Customs classified thirteen styles under subheading 6110.90.90, HTSUS, subject to a 6.0% *ad valorem* duty, and classified one style under subheading 6206.30.3040, HTSUS, subject to a 15.5% *ad valorem* duty. JS ¶¶ 11, 15, 24, 30, 38, 44, 49, 53, 54, 62, 66; *see* Protest, June 1, 2004. Two other styles were subject to *ad valorem* duties, but their classifications are not in dispute. JS ¶ 7.

Michael Simon filed a timely protest with Customs pursuant to 19 U.S.C. § 1514 to contest fourteen of the HTSUS classifications. JS ¶ 2. Specifically, Plaintiff maintained that the merchandise at issue should have been classified as "festive articles" under heading 9505, subject to duty-free treatment, and not under headings in Chapters 61 and 62 of the HTSUS. *See* Protest, June 1, 2004. Customs denied the protest providing the following short explanation: "Articles of fancy dress in HTSUS Chapt.s [sic] 61 & 62 are excluded from classification as festive, as per chapt. [sic] 95, note 1(e)." *See* Protest, June 1, 2004.

In May 2003, the World Customs Organization ("WCO"), in which the United States is a participating member, amended the Explanatory Note to heading 9505. *See Amendment of the Explanatory Note to Heading 95.05, Annex M/10*, May 31, 2003, http://hotdocs.usitc.gov/tata/ N_xxx/Ncxxx/NC0730B2%20Part%20II.pdf (last visited Aug. 23, 2006). The amended Explanatory Note to heading 9505, HTSUS, ("amended EN 95.05") explicitly excludes apparel from "festive articles."[1] *See Amendment of the Explanatory Note to Heading 95.05*. The amendments became effective on August 1, 2003, after the date of the merchandise's entry in this case. *See* World Customs Organization, International Convention on the Harmonized and Commodity Description and Coding System, art. 8, sec. 2, June 14, 1983, *available at* www.wcoomd.org/ie/EN/Topics_Issues/HarmonizedSystem/Hsconve2.pdf (last visited Aug. 23, 2006).

On this appeal, Michael Simon claims that all the apparel at issue should be classified as "festive articles" under HTSUS heading 9505. Pl.'s Br. 16–19. Plaintiff argues that the application of the amended EN 95.05 to exclude articles containing festive motifs from heading

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[1] In relevant parts, the amended EN 95.05 reads: "The heading also **excludes** articles that contain a festive design, decoration, emblem or motif and have a utilitarian function, e.g. tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen." *Amendment of the Explanatory Note to Heading 95.05*.

9505 would contravene a body of case law that explicitly includes "utilitarian" articles within the scope of "festive articles." Pl.'s Br. 24–26. Customs, on the other hand, argues that heading 9505 was never meant to encompass the apparel at issue, as illuminated by the amended EN 95.05. Def.'s Br. 5. Alternatively, Customs claims that if heading 9505 does encompass the apparel at issue, six of the sweaters fail to satisfy the test for "festive articles." Def.'s Br. 21.

Michael Simon timely filed suit in this Court pursuant to 19 U.S.C. § 1515(a) (2000) and 28 U.S.C. §§ 2632(b) and 2636(a) (2000). *See* JS ¶ 2. This Court has exclusive jurisdiction over this case pursuant to 28 U.S.C. § 1581(a); *see Park B. Smith v. United States*, 347 F.3d 922, 924 (Fed. Cir. 2003).

## SUMMARY JUDGMENT AND STANDARD OF REVIEW

In this case, both parties have filed for summary judgment. "The fact that both parties have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not proper if disputes remain as to material facts." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987) (citation omitted). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In classification cases, "summary judgment is appropriate when there is no genuine dispute as to . . . what the merchandise is . . . . or as to its use." *Ero Indus., Inc. v. United States*, 24 CIT 1175, 1179, 118 F. Supp. 2d. 1356, 1359–60 (2000).

"Determining whether merchandise comes within a particular tariff provision, as properly interpreted, is a question of fact." *Totes, Inc. v. United States*, 69 F.3d 495, 498 (Fed. Cir. 1995) (citation omitted). By statute, Customs' factual determination is presumed to be correct. *Id.* (citing 28 U.S.C. § 2639(a)(1) (1988)).[2] Consequently, "the party challenging the classification . . . bears the burden of proof." *Id.* (citations omitted); *see Avia Group Int'l, Inc. v. L.A. Gear Cal., Inc.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988) (holding that parties moving for summary judgment bear burden of demonstrating that there

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[2] This subsection provides:

> (a)(1) Except as provided in paragraph (2) of this subsection, in any civil action commenced in the Court of International Trade under section 515, 516, or 516A of the Tariff Act of 1930, the decision of the Secretary of the Treasury, the 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.

28 U.S.C. § 2639(a)(1).

are no genuine issues of material fact in dispute). The court's task is to " 'determine whether there are any factual disputes that are material to the resolution of the action.' " *Sea-Land Serv., Inc. v. United States*, 23 CIT 679, 684, 69 F. Supp. 2d 1371, 1375 (1999) (quoting *Phone-Mate, Inc., v. United States*, 12 CIT, 575, 577, 690 F. Supp. 1048, 1050 (1988)), *aff'd*, 239 F.3d 1366 (Fed. Cir. 2001).

The Court reviews classification cases *de novo* pursuant to 28 U.S.C. § 2640(a) (2000). *Filmtec Corp. v. United States*, 27 CIT ___ , ___ , 293 F. Supp. 2d 1364, 1367 (2003). The analysis of a Customs classification involves two steps: "first, [the court] construe[s] the relevant classification headings; and second, [it] determine[s] under which of the properly construed tariff terms the merchandise at issue falls." *Id.* (citations omitted) (second, third, & fourth brackets in original); *see Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423, 1425–26 (Fed. Cir. 1997). Thus, when there are no contested factual issues, the "propriety of the summary judgment turns on the proper construction of the HTSUS, which is a question of law" subject to *de novo* review. *Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1466 (Fed. Cir. 1998) (citation omitted).

Customs argues that its long-held position that heading 9505, HTSUS, excludes items whose primary function is utilitarian is entitled to deference in light of the amended EN 95.05. Def.'s Br. 16–17 (citing HQ 955239 (Feb. 28, 1994)). Indeed, agencies charged with applying a statute "necessarily make all sorts of interpretive choices, and . . . 'well-reasoned views of the agencies implementing a statute "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))). As the Supreme Court in *Skidmore* stated that:

> while not controlling upon the courts by reason of their authority, . . . . [t]he weight of [the agency rulings] . . . in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

*Skidmore*, 323 U.S. at 140. Based on this principle, the Federal Circuit and this Court have afforded *Skidmore* deference to Customs' position in classification cases where Customs has issued rulings. *See, e.g., Rubie's Costume Co. v. United States*, 337 F.3d 1350, 1354–55 (Fed. Cir. 2003) (affording *Skidmore* deference to Customs' ruling); *Hartog Foods Int'l., Inc. v. United States*, 291 F.3d 789, 791 (Fed. Cir. 2002) (extending no *Skidmore* deference to Customs' position "because Customs denied [the] protest without an official ruling"); *Dolly, Inc. v. United States*, 27 CIT ___ , ___ , 293 F. Supp. 2d.

1340, 1342 (2003) (same). *But see Structural Indus., Inc. v. United States*, 356 F.3d 1366, 1370 (Fed. Cir. 2004) (withholding *Skidmore* deference because Customs ruling was not made pursuant to "deliberative notice-and-comment" process and because Customs failed to follow consistent pattern of rulings). In addition, the Federal Circuit has afforded *Skidmore* deference to a Customs' position in a case where Customs "issued no formal decision when it classified [the subject] merchandise, and proffered no analysis until [the] litigation." *Park B. Smith*, 347 F.3d at 925.

## DISCUSSION

### 1. Rules for Classification of Goods

"The proper classification of merchandise entering the United States is directed by the General Rules of Interpretation ("GRIs") of the HTSUS and the Additional United States Rules of Interpretation." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998); *see Pillsbury Co. v. United States*, 431 F.3d 1377, 1379 (Fed. Cir. 2005); *Fujitsu Am., Inc. v. United States*, 422 F.3d 1364, 1366 (Fed. Cir. 2005). "The HTSUS scheme is organized by headings, each of which has one or more subheadings; the headings set forth general categories of merchandise, and the subheadings provide a more particularized segregation of the goods within each category." *Orlando Food*, 140 F.3d at 1439. Under GRI 1, "[a] classification analysis begins, as it must, with the language of the headings." *Id.* at 1440. In pertinent part, GRI 1 states that "classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1, HTSUS. In fact, "Section and Chapter Notes are not optional interpretive rules, but are statutory law, codified at 19 U.S.C. § 1202." *Park B. Smith*, 347 F.3d at 926 (citing *Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999)). The GRIs are applied in numerical order. *See ABB, Inc. v. United States*, 421 F.3d 1274, 1276 n.4 (Fed. Cir. 2005) (citing *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999)). Additionally, when imported items are "prima facie [sic] classifiable under more than one heading, the [HTSUS's] General Rules of Interpretation determine the outcome." *Russ Berrie & Co. v. United States*, 381 F.3d 1334, 1337 (Fed. Cir. 2004). Thus, the "proper scope of a classification in the HTSUS is an issue of statutory interpretation." *Bauerhin Techs. Ltd. P'ship v. United States*, 110 F.3d 774, 776 (Fed. Cir.1997).

"It is a general rule of statutory construction that where Congress has clearly stated its intent in the language of a statute, a court should not inquire further into the meaning of the statute." *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999) (citation omitted). If the "statutory language of [a] tariff classification is ambiguous," the court may use various "aids in construing the statute

and disclosing legislative intent." *Celestaire, Inc. v. United States*, 20 CIT 619, 623, 928 F.Supp. 1174, 1178 (1996) (citation omitted), *aff'd*, 120 F.3d 1232 (Fed. Cir. 1997). Such aids, for example, include "standard canons of statutory construction [or] legislative ratification of prior judicial construction." *Id.* (citations omitted). Additionally, the court may construe HTSUS terms "according to their common and commercial meaning" if such construction would not contravene legislative intent. *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1352 (Fed. Cir. 2000) (citation omitted).

Finally, "a court may refer to the Explanatory Notes of a tariff subheading, which do not constitute controlling legislative history but nonetheless are intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting subheadings." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (citation omitted); *see Motorola, Inc. v. United States*, 436 F.3d 1357, 1361 (Fed. Cir. 2006) (noting that ENs are "instructive, but not binding."); *ABB, Inc.*, 421 F.3d at 1277 (same); *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (same) (citing *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992)).

**2. Classification of the Merchandise in Question**

*A. Some Apparel at Issue Is* Prima Facie *Classifiable Under Heading 9505*

Heading 9505 covers "[f]estive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof." Heading 9505, HTSUS (2003). The Federal Circuit has interpreted the scope and meaning of heading 9505 in *Park B. Smith, Ltd. v. United States*, laying out a two-prong test for determining whether a particular article falls into the heading. 347 F.3d at 927. "[C]lassification as a 'festive article' under Chapter 95 requires that the article satisfy two criteria: (1) it must be closely associated with a festive occasion and (2) the article [be] used or displayed principally during that festive occasion." *Id.* (citing *Midwest*, 122 F.3d at 1429). Additionally, to quality as "festive articles," items must be " 'closely associated with a festive occasion' " to the degree that " 'the physical appearance of an article is so intrinsically linked to a festive occasion that its use during other time periods would be *aberrant*.' " *Id.* (quoting *Park B. Smith, Ltd. v. United States*, 25 CIT 506, 509 (2001) (not reported in F. Supp.)) (emphasis added). In general, the Federal Circuit has held that utilitarian items can be classified under the "festive articles" heading. *See Park B. Smith*, 347 F.3d at 928 (finding that heading 9505 includes utilitarian articles such as napkins, placemats, and rugs with Halloween and Christmas symbols on them); *Midwest*, 122 F.3d at 1429 (finding that prior edition of the Explanatory Notes did not exclude utilitarian items from falling within scope of "festive articles" under heading 9505, HTSUS).

Defendant argues that neither *Park B. Smith, Midwest*, nor other case law has declared "festive articles" an unambiguous term and that the court should therefore refer to the amended EN 95.05 to clarify any ambiguity. Def.'s Br. 10–11. While conceding that the Explanatory Notes are not legally binding on this court, Customs maintains that the sweaters at issue should be categorically excluded from heading 9505, HTSUS, because the amended EN 95.05 clarifies ambiguity by excluding "articles that contain a festive design, decoration, emblem or motif and have a utilitarian function, e.g. . . . apparel."[3] Def's Br. 5, 14. In addition, Customs seeks *Skidmore* deference for its position, claiming that it has "consistently interpreted the tariff term 'festive articles' as excluding utilitarian articles." Def.'s Br. 16–17 (citing *e.g.*, HQ 958405 (Nov. 7, 1996); HQ 955239 (Feb. 28, 1994)).

However, Customs' position in this case deserves no *Skidmore* deference. First, Customs denied Plaintiff's protest without an official ruling. *See* Pl.'s Mem. Opp'n Def.'s Cross-Mot. Summ. J. 7; Def.'s Reply 8. In addition, even if Customs claims that it held a consistent position with respect to the scope of heading 9505 in previous rulings, the Federal Circuit has rejected that position. Further, the Government has demonstrated an inconsistent position in this case. In the denial of protest, Customs did not state that the merchandise was excluded from heading 9505 because of the amended EN 95.05. *See* Protest, June 1, 2004. Indeed, the amendments were not yet in effect at that time. Instead, Customs denied Plaintiff's protest by stating that "articles of fancy dress in HTSUS chapt.s [sic] 61 & 62 are excluded from classification as festive, as per chapt. 95, Note 1(e). Original Customs decision reviewed & found to be correct." *Protest*, June 1, 2004. In its brief, however, the Government did not argue that the apparel in question was fancy dress. *See* Def.'s Br. 28. This inconsistency weighs against giving Customs deference in its interpretation of heading 9505. Thus, the court finds that Customs' position lacks the power to persuade.

The court's own analysis rejects the application of the amended EN 95.05 to the classification of merchandise in this case because the amended EN 95.05 contradicts the Federal Circuit's current interpretation of the scope of heading 9505. While the term "festive articles" may be ambiguous in some respects as Defendant argues, it is

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[3] It should be noted that Defendant claims that the application of the amended EN 95.05 presented a novel issue because "no court has yet considered or applied the *current version* of the ENs to Heading 9505." Def.'s Br. 13–14. However, the Government briefed this issue before the Federal Circuit in *Russ Berrie. See* Brief for Appellee, 2004 WL 3768255, at *26, Russ Berrie & Co. v. United States, 381 F.3d 1334 (Fed. Cir. 2004) (No. 04–1084); Brief for Appellant, 2004 WL 3768254, at *18–19, Russ Berrie & Co. v. United States, 381 F.3d 1334 (Fed. Cir. 2004) (No. 04–1084). The Federal Circuit resolved the matter by using the rule of specificity to hold that Halloween and Christmas earring sets were classifiable as imitation jewelry, rather than "festive articles." *Russ Berrie*, 381 F.3d at 1336–37.

not ambiguous with respect to encompassing utilitarian articles, since *Park B. Smith* and *Midwest* held, without qualification, that the term "festive articles" includes utilitarian articles. *See Park B. Smith*, 347 F.3d at 928; *Midwest*, 122 F.3d at 1429. Application of the amended EN 95.05 would categorically exclude items which have a "utilitarian function" from heading 9505, thereby precluding items such as earrings, table linens, mugs, and rugs from falling under that heading even though the Federal Circuit has ruled to the contrary. *See Park B. Smith*, 347 F.3d at 927–28; *Midwest*, 122 F.3d at 1429. Meanwhile, the Federal Circuit's current interpretation of the meaning of the term "festive articles" controls.[4] *See PAM, S.p.A. v. United States*, 28 CIT ___ , ___ , 347 F. Supp. 2d. 1362, 1370 (2004) ("This Court must apply the binding precedent of the Court of Appeals for the Federal Circuit.").

*1. Christmas and Halloween Motif Items Are* Prima Facie *Classifiable Under Heading 9505*

The court has examined images of the following sweaters and agrees with the parties that their motifs are festive in that they are closely associated with a festive occasion and would be principally displayed during those festive occasions:

> 1. Style Numbers E093309 and E093309W (W designates different size): sweater with beaded nativity scene identified as "Silent Night LS CD–RC," "Silent Night," "Womens Silent Night Cardigan," "Silent Night LS cardigan," or "Silent Card" on invoices and purchase orders. JS ¶ 14.
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> 2. Style Numbers E093100 and E093100W (W designates different size): sweater shell with beaded starry night scene named "Silent Night Shell RC," "Silent Night Shell," "Womens Silent Night Shell," or "Silent Shell" on invoices and purchase orders. JS ¶ 16.

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[4] Even though the Explanatory Notes are persuasive and not controlling, the court's task would be more difficult had the timing been different in this case as one of the Federal Circuit's key rulings cited to the previous edition of the Explanatory Notes in its analysis. *See Midwest*, 122 F.3d at 1429 (citing prior editions of the Explanatory Notes, which did not specifically exclude utilitarian items, to construe term "festive articles"). To use the Explanatory Notes to contradict or change the scope of a term already defined by legally binding sources amounts to legal error. *See Motorola, Inc.*, 436 F.3d at 1361 (stating that "[b]ecause the [trial] court used the Explanatory Note for guidance as to the meaning of a definitional term and did not treat the Explanatory Note as setting forth an additional definitional requirement, . . . the trial court did not commit legal error by referring to the Explanatory Note"); *Lonza, Inc., v. United States*, 46 F.3d 1098, 1109 n.29 (Fed. Cir. 1995) ("To the extent the definition . . . found in the *Explanatory Notes* conflicts with the court's determination, that definition is rejected.").

> 3. Style Number E093215: sweater with large beaded angel identified as "Angel LS P/O RC," "Angel," or Angel ls po" on invoices and purchase orders. JS ¶ 27.
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> 4. Style Number K083300: sweater with jack-o-lantern, bat, candy corn, and black cat motifs identified as "Halloween Party Sweater" or "Girl's Halloween Party Cardiga[n]" on invoices and purchase orders. JS ¶ 43.
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> 5. Style Number K083301: sweater with witch, devil, jack-o-lantern, candy corn, and spider web motifs identified as "Trick/ Treat CRD" or "Girl's Trick or Treat Cardigan" on invoices and purchase orders. JS ¶ 48.
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> 6. Style Number E093302: sweater with Christmas tree motif identified as"OH XMS TREE 3/4 CD–RC," "Oh Xmas Tree," or "Oh Xmas Tree crd" on invoices and purchase orders. JS ¶ 34.

The parties do not contest that these items satisfy the legal test for "festive articles" classification set forth in *Midwest* and *Park B. Smith*. Def.'s Br. 21–22; Pl.'s Br. 12. The articles of apparel with Christmas motifs are therefore *prima facie* classifiable under subheading 9505.10.5020, HTSUS, encompassing "[f]estive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Articles for Christmas festivities and parts and accessories thereof: . . . Other . . . Other . . . Other." Subheading 9505.10.5020, HTSUS. The Halloween motif articles of apparel are classifiable under subheading 9505.90.6000, covering "[f]estive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: . . . Other: . . . Other." Subheading 9505.90.6000, HTSUS. Defendant disputes the "'festive' nature" of six other items. Def.'s Br. 21.

*2. Spider Motif Sweater*

Defendant argues that style number E08325 (Women's Black Widow Sweater) is not a "festive article" because its design fails to meet the "festive article" test. *See* Def.'s Br. 21–22. Item number E08325 is a sweater available in black or "pearl." *See* JS Ex. 1. The sweater has web-like lacing around the sleeves and collar. The black version of the sweater has an image of a small white spider dangling down from the collar, while the "pearl" sweater has the same image in black and is identified as "BLACK WIDOW 3/4 SLV. PULLOVER" on marketing materials. *See* JS Ex. 1; JS ¶ 51.

Plaintiff offers examples where Customs has found spiders or spider webs to constitute "festive" motifs. *See* Pl.'s Br. 14–15; NY J84370 (May 7, 2003) (ruling that orange and black candle holder with spider motif falls under 9505); NY F83636 (Mar. 20, 2000) (ruling that plastic illuminated spider falls under 9505); NY 874361

(May 29, 1992) (ruling that kit with polyester spider web and plastic spiders falls under 9505). Further, Michael Petito, the founder and current President of Michael Simon Design, stated in his affidavit that item E08325 was marketed as part of a Halloween apparel collection and that he "would not expect the ultimate purchasers of this pullover to wear it at any other time of the year other than on or around Halloween." Petito Aff. ¶ 11.

Defendant counters that while a spider may be a Halloween symbol, a spider motif alone on an article does not "render[ ] that article *prima facie* classifiable as a 'festive article.'" Def.'s Br. 26. However, the Federal Circuit "ruled that articles with *symbolic* content associated with a particular recognized holiday, such as Christmas trees, Halloween jack-o-lanterns, or bunnies for Easter, are festive articles." *Park B. Smith*, 347 F.3d at 929 (emphasis added). Thus, the sweater at issue with distinctly recognizable Halloween symbols (spider and web) meets the "closely associated" requirement of the two-part test. *See id.* at 927. In addition, Plaintiff supplied sufficient evidence that the item at issue is sold exclusively during the festive occasion for Halloween and that it is used principally during Halloween. *See* Petito Aff. ¶ 11. Item number E08325 (Women's Black Widow Sweater) is therefore *prima facie* classifiable under subheading 9505.90.6000, HTSUS.

*3. Bat Motif Sweater*

Defendant claims that item E08320 (Women's Elvira Sweater) also fails to satisfy the "festive article" test. Item E08320 is a sweater that comes in "lake" (blue) or "pearl" colored backgrounds with black trim around the collar, sleeves, and bottom of the sweater and is identified as "ELVIRA L/S PULLOVER" on marketing materials. JS. Ex. 1; JS ¶ 65. A black bat embellishes the top of the sweater. Customs has recognized that, similar to spiders, bats are symbols associated with Halloween. *See, e.g.*, NY H89472 (Mar. 22, 2002) (ruling that candy bucket with bat motif falls under 9505); NY I88175 (Nov. 19, 2002) (ruling metal candle holders with bat motifs fall under 9505). Additionally, Mr. Petito stated that he did not expect purchasers of item E08320 to "wear it at any other time of the year other than on or around Halloween." Petito Aff. ¶ 13.

Customs argues that a bat motif alone is insufficient to place an item under heading 9505 because it is not intrinsically related to Halloween. *See* Def.'s Br. 21–22. However, as stated earlier, so long as an article carries symbolic content intrinsically related to a recognized holiday, the article is considered to be "closely associated" with that holiday. *See Park B. Smith*, 347 F.3d at 929 (emphasis added). Thus, an article with a distinctly recognizable and *prominent* Halloween symbol (bat) meets the "closely associated" requirement of the two-part test. *See id.* at 927. In addition, Plaintiffs supplied sufficient evidence that the item at issue is sold exclusively during the

festive occasion for Halloween and that it is used principally during Halloween. *See* Petito Aff. ¶ 13. Item number E08320 (Women's Elvira Sweater) is therefore *prima facie* classifiable under subheading 9505.90.6000, HTSUS.

*4. Ghost Motif Sweater*

Item E08321 is a black sweater with the image of a ghost emblazoned on the front with white sequins and identified as "CASPER L/S PULLOVER" on marketing materials. JS Ex. 1; JS ¶ 69. The ghost is shaped like a floating sheet with a face. JS Ex. 1. Defendant argues that item E08321 fails to satisfy the "festive article" test because while ghosts are associated with Halloween, their use as motifs is not restricted to the holiday. *See* Def.'s Br. 24. Plaintiff, though, cites multiple Customs rulings finding ghosts to be a Halloween motif. *See e.g.*, NY J80301 (Jan. 21, 2003) (ruling that metal lantern with ghost, jack-o-lantern, cat and bat motifs fall under HTSUS heading 9505); NY G89126 (May 8, 2001) (ruling that candle lampshade with ghost, cat, and jack-o-lantern motif falls under HTSUS heading 9505). Mr. Petito also states that he did not expect purchasers of item E08321 to "wear it at any other time of the year than on or around Halloween." Petito Aff. ¶ 14.

As with the bat and spider sweaters at issue, the court finds that the prominent ghost motif renders the sweater at issue a "festive" article. The Federal Circuit ruled that pins and earrings with symbols such as "[s]nowmen decorated with holly, *ghosts*, and witches' and monsters' heads are symbols that are closely associated with the Christmas and Halloween holidays and are used principally on those occasions" and therefore are *prima facie* classifiable under HTSUS heading 9505. *Russ Berrie*, 381 F.3d at 1336 (emphasis added). Even though many of the Customs rulings to which Plaintiff cites refer to articles depicting ghost motifs displayed with other Halloween motifs, such as cats, bats, and jack-o-lanterns, the ghost motif alone is also intrinsically linked to Halloween. *See, e.g.*, NY J80301; NY G89126. After viewing a picture of item E08321, considering Mr. Petito's affidavit, and applicable law, the court finds that item E08321 is *prima facie* classifiable under subheading 9505.90.6000, HTSUS.

*5. Black Cat Motifs Items*

Defendant argues that style numbers E08326, K083302, and FX83401 are not "festive articles" because the cat motifs do not satisfy the legal definition of "festive" as set forth by the courts. Def.'s Br. 21–22. E08326 is a sweater that comes in a "pearl" or "yam" colored background with black trim, featuring two black cats arching

their backs on the front[5] and identified as "CAT NIP 3/4 SLV. PULLOVER" on marketing materials. JS Ex. 1; JS ¶ 57. K083302 is a "lime green" sweater with pink cuffs and three black cats wearing pink collars identified as "CATWALK SWEATER" on marketing materials. JS Ex. 1; JS ¶ 59. FX83401 is a black shirt with four cats outlined in white identified as "Fraidy Cat Shirt" on marketing materials. JS Ex. 1; JS ¶ 61.

Plaintiff points out that Customs has found black cats to be a Halloween motif. Pl.'s Br. 15); *see also* NY J85257 (June 5, 2003) (ruling that battery operated, motion activated black cat that makes screeching noises classifiable under 9505); NY C84936 (Mar. 10, 1998) (ruling that wall hanging depicting black cat and jack-o-lantern classifiable under 9505). Additionally, Plaintiff submitted an affidavit from Mr. Petito stating that he would not expect a purchaser of item E08326, K083302, or FX83401 to wear the apparel "at any other time of the year than on or around Halloween." Petito Aff. ¶¶ 10, 12, 15, Nov. 21, 2005.

Customs reasons that while black cat motifs are "associated" with Halloween, they are not "*closely* associated *only* with Halloween," and use of those symbols at other times of the year would not be aberrant. Def.'s Br. 24. After examining pictures of the apparel in question, Mr. Petito's affidavit, and granting Customs the presumption of correctness in its factual determination of the apparel's classification pursuant to 28 U.S.C. § 2639(a)(1), the court finds that items E08326, K083302, and FX83401 are not *prima facie* classifiable under 9505. While black cats may be Halloween motifs, the particular images on the items at issue do not satisfy the first part of the *Midwest* test – i.e., they are not "closely associated with a festive occasion"– because they are not so *intrinsically* linked to Halloween that wearing those items at other times of the year would evoke thoughts of Halloween or seem aberrant. *See Park B. Smith*, 347 F.3d at 927 (citations omitted).

*B. The Apparel at Issue Are* Prima Facie *Classifiable Under Headings 6110 & 6206*

The parties do not contest that thirteen of the articles at issue are *prima facie* classifiable under headings 6110, HTSUS, and one article is *prima facie* classifiable under 6206, HTSUS. Heading 6110 covers "[s]weaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted." Heading 6110, HTSUS. Based on the relevant portions of the Joint Statement of Material Facts and the examination of the images of the apparel designated by the style numbers E093302, E093309, E093309W, E093100, E093100W,

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[5] While it can be a significant part of holiday motifs, both parties agree that the background color is irrelevant in this case. *See* Pl.'s Resp. Ct.'s Questions 6; Def.'s Resp. Ct.'s Questions 5.

E093215, E08325, E08326, E08320, E08321, K083300, K083301, and K083302, the court finds that these articles are each knitted or crocheted sweaters or pullovers. They are therefore *prima facie* classifiable under heading 6110, HTSUS. Heading 6206 covers "[w]omen's or girls' blouses, shirts and shirt-blouses." Heading 6206, HTSUS. Having examined a picture of item FX83401 and determined that it is a woman's shirt, the court concludes that it is *prima facie* classifiable under heading 6206, HTSUS.

*C. Apparel Items* Prima Facie *Classifiable Under Heading 9505 Are Festive Articles Because of Section Notes from Section XI.*

Having established that items E093302 (Oh Xmas Tree), E093309 (Womens Silent Night Cardigan), E093309W (Womens Silent Night Cardigan), E093100 (Womens Silent Night Shell), E093100W (Womens Silent Night Shell), E093215 (Angel), K083300 (Halloween Party Sweater), K083301 (Girl's Trick or Treat Cardigan), E08325 (Black Widow 3/4 Slv. Pullover), E08320 (Elvira L/S Pullover), and E08321 (Casper L/S Pullover) are *prima facie* classifiable as "festive articles" under heading 9505 and as sweaters under headings 6110 or 6206, the court next turns to the relevant Chapter and Section notes pursuant to GRI 1. Chapter notes for Chapter 95 list specific items which should be excluded from the Chapter's scope. In relevant part, Note 1 states that "chapter [95] does not cover: . . . (e) Sports clothing or fancy dress, of textiles, of chapter 61 or 62." Chapter Note 1(e) 9505, HTSUS. The court in *Rubie's Costume* defined "fancy dress" as "a costume (as for a masquerade or party) departing from [currently] conventional style and usu. representing a fictional or historical character, an animal, the fancy of the wearer, or a particular occupation." *Rubie's Costume Co.*, 337 F.3d at 1356–57 (quoting *Rubie's Costume Co. v. United States*, 26 CIT 209, 216, 196 F. Supp. 2d 1320, 1327 (2002) (citing *Webster's Third New International Dictionary* 822 (1986))). The court established that this "exclusion to Chapter 95, HTSUS, *encompasses* textile *costumes* that are classifiable as 'wearing apparel' under Chapter 61 or 62." *Id.* at 1357 (emphasis added).

While neither party contends that the apparel at issue fall under the Note 1(e) exception for "fancy dress," Pl.'s Br. 27, Def.'s Br. 28., Defendant does argue that although they "agree that the imported garments are not *expressly* excluded from the 'festive articles' provision by virtue of Note 1(e), the lack of any indication that Heading 9505 was intended to encompass normal articles of apparel should render such garments implicitly excluded." Def.'s Br. 29. However, "[a]bsent a clearer showing of *congressional* intent, we refuse to import *incidental* characteristics of the examples in the Explanatory Notes into the headings of the HTSUS." *Midwest*, 122 F.3d at 1428 (emphasis added). Therefore, the court will not apply unwritten and implicit assumptions derived from the Explanatory Notes to limit

the scope of heading 9505. After examining the images of all the apparel at issue, the court concludes that none of the items satisfies the definition of "fancy dress" set forth in *Rubie's Costume*. Therefore, the apparel items *prima facie* classifiable under heading 9505 are not excluded by Chapter 95 notes.

Furthermore, Section XI notes covering Chapters 61 and 62 constitute binding authority. *See Orlando Food*, 140 F.3d at 1439; *Park B. Smith*, 347 F.3d at 926; Section XI Notes, HTSUS. In relevant part, the notes state that Section XI does not include "articles of chapter 95." Section XI, Note 1(t), HTSUS. Thus, all items *prima facie* classifiable under heading 9505 are excluded by Note 1(t) from headings 6110 and 6206.

## CONCLUSION

In sum, Customs correctly classified item E08326 (CAT NIP 3/4 SLV. PULLOVER) under subheading 6110.90.9090, item K083302 (CATWALK SWEATER) under subheading 6110.90.9042, HTSUS, and item FX83401 (Fraidy Cat Shirt) under subheading 6206.30.3040, HTSUS. *See* 28 U.S.C. § 2639(a)(1). Further, items E093302 (Oh Xmas Tree), E093309 (Silent Night Cardigan), E093309W (Silent Night Cardigan), E093100 (Silent Night Shell), E093100W (Silent Night Shell), and E093215 (Angel) are classified under subheading 9505.10.5020, HTSUS; items K083300 (Halloween Party Sweater), K083301 (Girl's Trick or Treat Cardigan), E08325 (BLACK WIDOW 3/4 SLV. PULLOVER), E08320 (ELVIRA L/S PULLOVER), and E08321 (CASPER L/S PULLOVER) are classified under 9505.90.6000, HTSUS.

## Slip Op. 06–129

SHAKEPROOF ASSEMBLY COMPONENTS DIVISION OF ILLINOIS TOOL WORKS, INC., Plaintiff, v. UNITED STATES, Defendant, and HANG ZHOU SPRING WASHER CO., LTD., Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge
Court No. 05–00404

### *OPINION*

[Commerce's redetermination results sustained.]

Date: August 25, 2006

*McDermott Will & Emery LLP* (*David J. Levine* and *Raymond Paul Paretzky*) for Plaintiff Shakeproof Assembly Components Division of Illinois Tool Works, Inc.

*Peter D. Keisler*, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand*); *Ada Bosque*, Office of the Chief Counsel, U.S. Department of Commerce, for Defendant the United States.

*White & Case LLP* (*William J. Clinton, Adams C. Lee,* and *Emily Lawson*) for Defendant-Intervenor Hang Zhou Spring Washer Company, Ltd.

Goldberg, Senior Judge: In *Shakeproof Assembly Components Division of Illinois Tool Works, Inc. v. United States*, 29 CIT ____ , 412 F. Supp. 2d 1330 (2005) (**"*Shakeproof I*"**), familiarity with which is presumed, the Court granted a partial consent motion for voluntary remand of the final results of an administrative review of an antidumping duty order by the U.S. Department of Commerce (**"Commerce"**). Commerce's redetermination is now pending before the Court, which has jurisdiction pursuant to 28 U.S.C. § 1581(c).

## I. *BACKGROUND*

Shakeproof Assembly Components Division of Illinois Tool Works, Inc. (**"Plaintiff"**) commenced this action to contest one aspect of Commerce's antidumping duty calculations in *Certain Helical Spring Lock Washers from the People's Republic of China*, 70 Fed. Reg. 28274 (Dep't Commerce May 17, 2005) (final results of administrative review) (the **"Final Results"**). *Id.* at ____ , 412 F. Supp. 2d at 1332–33. In general terms, Plaintiff alleged that, in the *Final Results*, Commerce had employed without explanation a new and erroneous methodology to value a certain factor of production[1] involved in the making of helical spring lock washers (the **"subject imports"**) by Hang Zhou Spring Washer Co., Ltd. (**"Defendant-Intervenor"**) for sale into the United States during the period of review. *Id.* Following initiation of this action, Commerce moved the Court for a voluntary remand of the *Final Results* to justify the use of its methodology or, if that was not possible, to recalculate the antidumping duty based on a justifiable methodology. *Id.* at ____ , 412 F. Supp. 2d at 1333. The Court granted this motion. *Id.* at ____ , 412 F. Supp. 2d at 1339.

On remand, Commerce explored in greater detail the contested factor of production – so-called plating services – and the agency's corresponding valuation methodology. *See* Final Results of Redeter-

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[1] For imports from non-market economies like the People's Republic of China, Commerce may look to the cumulated value of the imports' factors of production to determine the imports' normal value. *See* 19 U.S.C. § 1677b(c) (1999). As the Court has previously noted:

> Normal value is a critical variable in antidumping calculations. It is intended to represent the price at which subject imports are first sold in their home market (or, where necessary, a comparable market). *See* 19 U.S.C. § 1677b(a)(1)(A)–(C) (1999). . . . Once calculated, the normal value of subject imports is compared with their export price (or, where necessary, their constructed export price) to determine if the subject imports are being sold at less than fair value (or dumped) in the United States. *Id.* § 1677b(a).

*Shakeproof I*, 29 CIT at ____ , 412 F. Supp. 2d at 1332 n1.

mination Pursuant to United States Court of International Trade Remand Order (Dep't Commerce June 19, 2006), *available at* http://www.ia.ita.doc.gov/ remands/05-163.pdf at 2 (**"*Remand Results*"**). As in the *Final Results* Commerce established that plating services involved the application of zinc plating or coating to the subject imports during the production process. *Id.* at 2–4. Commerce further established that, in valuing plating services in the *Final Results*, Commerce had employed a methodology which differed from the valuation methodology employed during the immediately preceding administrative review of the subject imports. *Id.* at 1. To resolve this discrepancy, Commerce solicited information from Plaintiff and Defendant-Intervenor regarding: the most appropriate way to value plating services; the industry standard, if any, for such valuation; and proposed surrogate values[2] to be used in valuing the plating services performed on the subject imports. *Id.* at 2.

In response, Plaintiff provided Commerce with letters from three industry experts stating that the standard industry practice was to provide a fixed price for plating services to be charged on the basis of the amount of lock washer to be coated, rather than on the basis of the amount of zinc coating used during the plating process (e.g., five rupees per each kilogram of lock washer coated, as opposed to five rupees per each kilogram of coating applied to the lock washers). *Id.* at 5. Plaintiff also provided a letter (with contact information) from Sudha Metal Finishers, an Indian company which supplied the price quote used as the surrogate value for plating services in the *Final Results*. *Id.* The letter stated that that price quote had been provided on a per kilogram of lock washers coated basis, not on a per kilogram of zinc coating used basis. *Id.* The letter further noted that the price quote used in the *Final Results* reflected Sudha Metal Finishers' prevailing rate for plating services during March 2003, within the period of review. *Id.* at 10. Plaintiff was unable to give additional details about the price quote, including the manner in which the quote was solicited, because the branch of Plaintiff's organization which had solicited the quote from Sudha Metal Finishers had ceased to operate in the region. *Id.* at 5.

For its part, Defendant-Intervenor responded by providing three plating services price quotes from Indian companies for the period between March and April 2004, after the period of review. *Id.* at 4. Defendant-Intervenor also provided the contact information for

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[2] In valuing factors of production for imports from non-market economies, Commerce is required to use, "to the extent possible, the prices or costs of factors of production in one or more market economy countries that are (A) at a level of economic development comparable to that of the non-market economy country, and (B) significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4) (1999). In other words, "the statutory provisions specifically authorize Commerce to use surrogate countries to estimate the value of the factors of production." *Shakeproof Assembly Components Div. of Ill. Tool Works v. United States*, 268 F.3d 1376, 1381 (Fed. Cir. 2001) (**"*Shakeproof 2001*"**).

these companies. *Id.* at 6. However, the manner in which the price quotes were solicited and the methodology by which the price quotes were to be applied (i.e., on a per kilogram of lock washer coated basis or a per kilogram of zinc coating used basis) were not expressly spelled out in Defendant-Intervenor's submission to Commerce. *Id.*

From the information provided, Commerce made several determinations which altered the calculations in the *Final Results.* First, recognizing that the price quote used in the *Final Results* had been applied on a per kilogram of zinc coating used basis, Commerce rejected this methodology for valuing plating services and instead adopted the methodology used in the immediately preceding review period. *Id.* at 6, 15. That is, Commerce determined that it was most appropriate to value plating services on a per kilogram of lock washer coated basis. *Id.* Both Plaintiff and Defendant-Intervenor supported this change in methodology in the *Remand Results.*

Second, Commerce evaluated the plating services valuation information placed on the record during both the original review and remand proceedings and determined that the price quote provided by Plaintiff and used in the *Final Results* was still the best surrogate value for plating services. *Id.* at 6, 14–15. That is, Commerce found the original price quote to be "the best available information" for valuing plating services, *id.* at 14, and thereby rejected the three additional price quotes supplied by Defendant-Intervenor during the remand proceedings. Commerce justified this evidentiary choice by noting that: (1) the appropriate methodological application and means of solicitation of Defendant-Intervenor's price quotes were not clear from the record evidence, *id.* at 5–6, 12–13; (2) the appropriate methodological application and means of solicitation of Plaintiff's quote were established by record evidence, *id.*, and (3) unlike Defendant-Intervenor's price quotes, Plaintiff's price quote was contemporaneous with the period of review, *id.* at 14. As a result, Commerce revised its calculations in the *Remand Results*, resulting in a change in the antidumping duty rate "from 0.00 percent to 19.48 percent" for Defendant-Intervenor. *Id.* at 15.

## II. *STANDARD OF REVIEW*

The Court must sustain any determination, finding, or conclusion made by Commerce in the *Remand Results* unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1999).

With respect to the substantial evidence requirement, the U.S. Supreme Court has defined this term to mean "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (*quoting Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (quotation mark omitted)).

With respect to the in accordance with law requirement, the Court must defer to an agency's reasonable construction of an ambiguous statute. *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1343 (Fed. Cir. 2004) (*citing Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)). Further, "the deference granted to the agency's interpretation of the statutes it administers extends to the methodology it applies to fulfill its statutory mandate." *GMN Georg Muller Nurnberg AG v. United States*, 15 CIT 174, 178, 763 F. Supp. 607, 611 (1991) (*citing, inter alia, Chevron*, 467 U.S. at 844–45; *Amer. Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986)).

## III. *DISCUSSION*

While Plaintiff is predictably pleased with the *Remand Results*, Defendant-Intervenor objects to Commerce's revised valuation of plating services. Specifically, Defendant-Intervenor takes issue with Commerce's exclusive reliance on Plaintiff's quote as a surrogate value for the plating services factor of production. Defendant-Intervenor's Comments on the Department of Commerce Remand Determination (**"Def.-Int.'s Br."** at 5–6. Defendant-Intervenor does not argue that the quote supplied by Plaintiff should not have been used. Rather, Defendant-Intervenor simply argues that its quotes also should have been included in Commerce's valuation of plating services because its quotes were: (1) intended to be applied on a per kilogram of lock washer coated basis, the methodology adopted by Commerce in the *Remand Results*, *id.* at 6–10; (2) as reliable and representative of the factor of production as Plaintiff's price quote used by Commerce in the *Remand Results*, *id.* at 15–17; and (3) no further outside the period of review than price quotes Commerce has used to value factors of production in previous reviews of the subject imports and other past investigations, *id.* at 17–20.

Even assuming *arguendo* that Defendant-Intervenor's has proven (contrary to Commerce's findings) that its price quotes (1) clearly employed the methodology adopted by Commerce in the *Remand Results* and (2) were as representative and reliable as the price quote used in the *Remand Results*, the Court concludes that Commerce's valuation of the plating services factor of production using the record evidence most contemporaneous with the period of review was reasonable. Accordingly, for the reasons that follow, the Court sustains the *Remand Results*.

### A. COMMERCE'S VALUATION OF PLATING SERVICES IN THE *REMAND RESULTS* IS IN ACCORDANCE WITH LAW.

First, Commerce has an established practice of favoring surrogate values which are contemporaneous with the period of investigation or review under consideration, and the Court finds this practice to be in accordance with law. To value a factor of production, Commerce must use the "best available information[.]" 19 U.S.C.

§ 1677b(c)(1)(B) (1999). Congress has left to Commerce's discretion exactly what constitutes such information. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377–78 (Fed. Cir. 1999). One of Commerce's established practices or methodologies for valuing factors of production is to utilize and rely on credible surrogate values which are contemporaneous with the period of investigation or review. *See* Import Administration Policy Bulletin No. 04.1, Non-Market Economy Surrogate Country Selection Process (2004), *available at* http://ia.ita.doc.gov/ policy/bull04-1.html ("In assessing data and data sources, it is the Department's stated practice to use investigation or review period-wide price averages, . . . [and] prices that are contemporaneous with the period of investigation or review. . . ."); *see also Shandong Huarong Gen. Corp. v. Unites States*, 25 CIT 834, 849, 159 F. Supp. 2d 714, 728 (2001) (noting that "Commerce's practice is to use surrogate value data that is contemporaneous with the period of review."). In other words, Commerce believes that, when available in a reliable form representative of the factor of production in question, valuation information contemporaneous with a period of investigation or review generally constitutes the best information. The reasonableness of this methodology is manifest: in an original investigation or administrative review, Commerce must establish the value of a factor of production for a specific time period in order to calculate the normal value of imports (and, in turn, their dumping margin) within that time period as accurately as possible. *See* 19 U.S.C. § 1677b(a)(1)(A) (1999) (instructing that normal value must be "the price . . . reasonably corresponding to the time of the sales used to determine the export price or constructed export price"). Commerce's reliance on valuation information from within that specific time period is clearly an appropriate means of fulfilling this statutory directive. Commerce properly employed this reasonable methodology here. *See Remand Results* at 14 (determining that "[Plaintiff's] price quote is the best available information because it is contemporaneous with this [period of review].").

Further, the Court rejects Defendant-Intervenor's contention that Commerce has varied this methodology across administrative reviews of the subject imports and other investigations without explanation or justification. Defendant-Intervenor observes that, in the immediately preceding administrative review of the subject imports, Commerce valued plating services using a price quote from outside the period of review. Def.-Int.'s Br. at 18–19. In addition, Defendant-Intervenor notes that Commerce has used post-review surrogate values in other investigations. *Id.* at 19 (*citing Folding Metal Tables and Chairs from the People's Republic of China*, 71 Fed. Reg. 2905 (Dep't Commerce Jan. 18, 2006) (final determination); *Certain Cut-to-Length Carbon Steel Plate from Romania*, 65 Fed. Reg. 54208 (Dep't Commerce Sept. 7, 2000) (preliminary determination)). Defendant-Intervenor argues that, if Commerce was previously will-

ing to consider surrogate values from outside the period of review, it was methodologically aberrant for Commerce to reject similar valuation information in the *Remand Results*. *Id.* Defendant-Intervenor contends that, under administrative law principles, Commerce was required to explain its departure from prior practice and the agency's failure to do so rendered the *Remand Results* not in accordance with law. *Id*.

In the Court's view, Defendant-Intervenor confuses the result for the method. Commerce applied the same methodology in its two most recent reviews of the subject imports; that is, for both reviews, the agency selected the most contemporaneous surrogate values available from the reliable record evidence to establish the value of plating services. The difference between the two reviews is not the result of a change in methodology by Commerce, but rather is attributable to inevitable variances in the composition of the two administrative records. It is not always possible for Commerce to obtain reliable surrogate values from within the specific period of investigation or review under consideration.[3] When this occurs, Commerce makes appropriate allowances and adjustments to available surrogate values in order to best approximate factor of production values during the period of investigation or review.[4] However, when the administrative record contains reliable surrogate values for a factor of production from both within and without the period of investigation or review, all other factors held equal, Commerce consistently selects the most contemporaneous information available to the agency.[5] That is what occurred here, rendering the methodology employed by Commerce in the *Remand Results* consistent with the agency's past practice.

In addition, the Court is not persuaded by the alternative methodology advocated by Defendant-Intervenor. Defendant-Intervenor suggests that, where the record contains surrogate values from

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[3] *See* Issues and Decision Memorandum for the Final Results of Folding Metal Tables and Chairs from the People's Republic of China, A–570–868 (Jan. 9, 2006), *available at* http://ia.ita.doc.gov/frn/summary/prc/E6-498-1.pdf at 35 ("While it would be ideal to have an international air freight price quote from the [period of review], this information is not publicly available and accessible to [Commerce].").

[4] *See Certain Cut-to-Length Carbon Steel Plate from Romania*, 65 Fed. Reg. at 54210 ("Where any of the factor values were from years other than [the period of review], we applied an inflator or deflator, as appropriate, based on the consumer price index so that all factor values would approximate [period of review] costs.").

[5] *See, e.g.*, Issues and Decision Memorandum for the 2003–2004 Antidumping Duty Administrative Review of Persulfates from the People's Republic of China, A–570–847 (Feb. 6, 2006) *available at* http://ia.ita.doc.gov/frn/summary/prc/E6-2088-1.pdf at 17–18 (disregarding one surrogate value and selecting another because the latter was "much more contemporaneous with the [period of review]"); Issues and Decision Memorandum for the Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China, A–570–831 (June 13, 2005) *available at* http://ia.ita.doc.gov/frn/summary/prc/E5-3048-1.pdf at 26 (employing same rationale for selection of surrogate value for factor of production).

within and without the period of review, Commerce should employ an averaging methodology, Def.-Int.'s Br. at 19–20, whereby the outlying surrogate values are presumably adjusted to reflect market conditions during the period of investigation or review and combined with surrogate values from within the period of investigation or review. While not an impossible methodology to employ, Defendant-Intervenor offers no compelling reason[6] for why such a constructed average would result in a more accurate valuation here than simply using information taken directly from the period of review. In any event, "Commerce need not prove that its methodology was the only way or even the best way to calculate surrogate values for factors of production, as long as it was a reasonable way." *Coal. for the Pres. of Am. Brake Drum and Rotor Aftermarket Mfrs. v. United States*, 23 CIT 88, 118, 44 F. Supp. 2d 229, 258 (1999). Defendant-Intervenor's alternative approach does little to call into question the reasonableness of Commerce's established methodology, which the Court finds to be in accordance with law.

### B. COMMERCE'S VALUATION OF PLATING SERVICES IN THE *REMAND RESULTS* IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Second, substantial evidence supports Commerce's choice of Plaintiff's price quote as a surrogate value for the plating services factor of production in the *Remand Results*. It is uncontested that the price quote used by Commerce was contemporaneous with the period of review and that the price quotes rejected by Commerce came from outside the period of review. In addition, the reliability and representativeness of the price quote used by Commerce are not seriously in dispute. *See supra* note 6. Even assuming that Defendant-Intervenor's price quotes were equal to Plaintiff's price quote in all other respects, the temporal difference between these two sets of reliable record evidence was a sufficient basis for Commerce's

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[6] Defendant-Intervenor suggests that because "[Plaintiff's] price quote may be tainted by the affiliation between [Plaintiff] and the Indian company soliciting the price quote," an average of a range of prices from within and without the period of review would result in a more accurate surrogate value for the plating services factor of production than reliance on only Plaintiff's potentially misleading price quote. Def.-Int.'s Br. at 19. However, Defendant-Intervenor points to no evidence indicating that Plaintiff's affiliate "manipulated the circumstance by which the price quote from [Sudha Metal Finishers] was solicited[.]" *Id.* at 13. It is also not facially apparent how Plaintiff's affiliation with the company *soliciting* the price quote would necessarily have an impact on the independent company *providing* the price quote. As such, the Court rejects Defendant-Intervenor's unsubstantiated criticism of the price quote used by Commerce in the *Remand Results*, as well as the corresponding justification for Defendant-Intervenor's proposed alternative methodology. *Cf.* USCIT R. 11(b) ("By presenting to the court . . . a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after any inquiry reasonable under the circumstances . . . *the allegations and other factual contentions have evidentiary support*. . . .") (emphasis added).

evidentiary choice.[7] Because Commerce selected the most contemporaneous surrogate value available from among the reliable and representative valuation information on the administrative record, the Court finds that Commerce's valuation of plating services in the *Remand Results* is supported by substantial evidence.

## IV. *CONCLUSION*

The Court concludes that Commerce's valuation of the plating services factor of production is both in accordance with law and supported by substantial evidence. The Court therefore sustains the *Remand Results*. Judgment shall be entered accordingly.

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[7] The Court notes that this case is readily distinguishable from *Yantai Oriental Juice Co. v. United States*, 26 CIT 605, 617 (2002), which found that contemporaneity is insufficient to justify Commerce's selection of a surrogate value under certain circumstances. In *Yantai*, a dispute existed as to whether Commerce's chosen surrogate value adequately represented or approximated the factor of production in question, and the court rejected contemporaneity as an adequate reason for overlooking these other potential deficiencies in Commerce's chosen surrogate value. *Id*. Here, because no dispute about the representativeness of Commerce's chosen surrogate value exists, Commerce may properly differentiate between two otherwise reliable and representative surrogate values on the basis of contemporaneity.