U.S. Customs and Border Protection

Slip Op. 10–122

THAI PLASTIC BAGS INDUSTRIES CO., LTD., et al. Plaintiffs, v. UNITED STATES, Defendant, and POLYETHYLENE RETAIL CARRIER BAG COMMITTEE, et al. Defendant-Intervenors.

Before: Pogue, Judge
Court No. 09–00537
Public Version

[Plaintiffs' motion for judgment upon the agency record DENIED.]

Dated: October 26, 2010

Hughes Hubbard & Reed LLP (*Kenneth J. Pierce*, *Robert L. LaFrankie*, and *Victor S. Mroczka*) for the Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Carrie A. Dunsmore*) for the Defendant.

King & Spalding, LLP (*Stephen A. Jones* and *Daniel L. Schneiderman*) for the Defendant-Intervenors.

OPINION AND ORDER

Pogue, Judge:

Introduction

In this action, producers/exporters Thai Plastic Bags Industries Co., Ltd., Apec Film Ltd., and Winner's Pack Co., Ltd. (collectively "TPBG" or Plaintiffs) challenge the cost calculation methodology used to determine their dumping margin in the final results of the U.S. Department of Commerce's ("Commerce" or "the Department") administrative review[1] of the antidumping duty ("AD") order on polyethylene retail carrier bags ("plastic bags") from Thailand.[2] Specifi-

[1] Original AD determinations are subject to Commerce's periodic review, including yearly reviews conducted upon request from interested parties. *See* Tariff Act of 1930, § 751, 19 U.S.C.§ 1675(a)(2006). Future references to the Tariff Act of 1930 will be to Title 19 of the United States Code, 2006 Edition.

[2] *See Polyethylene Retail Carrier Bags from Thailand*, 74 Fed. Reg. 65,751 (Dep't Commerce Dec. 11, 2009) (final results of AD administrative review) ("*Final Results*"), and accompanying Issues and Decision Memorandum, A-549–821, AR: 8/01/07 - 07/31/08 (Dec. 7, 2009), Admin. R. Pub. Doc. 100 ("*Decision Mem.*").

cally, in their current motion for judgment on the agency record, Plaintiffs object to Commerce's adjustment of Plaintiffs' submitted data — regarding the fixed overhead ("FOH"), variable overhead ("VOH"), and per-unit labor costs ("labor") of their goods — in Commerce's sales-below-cost test and calculation of constructed value ("CV").

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a).

Because Plaintiffs' main challenges here contradict their arguments as presented before the agency in the administrative review, and because other challenges were not presented to the agency at all, as is more fully explained below, the court denies Plaintiffs' motion.

Background

This action involves the fourth administrative review of the original 2004 AD investigation of the subject merchandise.[3] That original determination, *Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 34,122 (Dep't Commerce June 18, 2004) (notice of final determination at less than fair value), amended by, *Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 42,419 (Dep't Commerce July 15, 2004) (notice of amended final determination of sales at less than fair value), assessed an AD margin for Plaintiffs of 2.26 percent.[4] *Polyethylene Retail Carrier Bags From Thailand*, 69 Fed. Reg. 48,204, 48,205 (Dep't Commerce Aug. 9, 2004) (AD order).

I. Commerce's Review Determination

TPBG requested this fourth administrative review, on September 2, 2008, *see* Polyethylene Retail Carrier Bags from Thailand: Request for Administrative Review, A-549–821, POR: 8/1/07 — 7/31/08 (Sept. 2, 2008), Admin. R. Pub. Doc. 2, and Commerce then initiated the review. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 73 Fed. Reg. 56,795, 56,796 (Dep't Commerce Sept. 30, 2008). Commerce's preliminary determination followed, in August 2009. *Polyethylene Retail Carrier Bags from Thailand*, 74 Fed. Reg. 39,928 (Dep't Commerce Aug. 10, 2009) (preliminary results of antidumping duty administrative review) ("*Preliminary Results*").

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[3] As noted, the investigated or "subject" merchandise a tissue are plastic bags. These plastic bags are sometimes called grocery bags, merchandise bags, t-shirt sacks or checkout sacks, and are generally defined as non-sealable and with handles, along with specified thickness, length and depth ranges. TPBG produces all of these bags in Thailand, and the plastic bags are normally provided free of charge by retailers to customers in order to help them package their purchases. *Final Results* at 65,751.

[4] The dumping margin is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. §1677(35)(A).

In the Preliminary Results Memorandum, incorporated by reference in the Preliminary Results, Commerce matched U.S. models to foreign-market models in order to make the appropriate price of sales comparisons.[5] [6] In order to appropriately compare the matched sales, Commerce adjusted the FOH, VOH, and labor amounts, as they had been allocated in TPBG's submission,[7] to assure that the allocated costs were appropriate. As Commerce explained:

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[5] Unique models of subject merchandise and analogous foreign like products are assigned control numbers ("CONNUM"). *See* (Mem. in Supp. of Pls.' Mot. for Summ. J. on the Agency R.("Pls.' Br.") 5 n.2; Def.'s Opp. to Pls.' Mot. for J. Upon the Agency R. ("Gov't Response Br.") 3.) Foreign-market and exported CONNUMs are referred to as "CONNUMHs" and "CONNUMUs," respectively. *See* Request for Information, Polyethylene Retail Carrier Bags from Thailand, A-549–821, 8/1/2007 — 7/31/2008 (Nov.25, 2008), Admin R. Pub. Doc. 14 at B-5, C-5.

Commerce matched CONNUMUs to CONNUMHs "according to the following methodology, in descending order of preference":

1) We found the identical home-market model according to the abbreviated product code (CONNUMH). We made comparisons to weighted-average home-market prices that were based on all sales which passed the cost test of the identical products. . . .
2) If no identical match was found, we matched the similar merchandise on the basis of the comparison-model market which was closest in terms of the physical characteristics to the model sold in the United States. These characteristics are, in order from most important to least important for purposes of our selection, 1) quality, 2) bag type, 3) length, 4) width, 5) gusset, 6) thickness, 7) percentage of high-density polyethylene resin, 8) percentage of low-density polyethylene resin, 9) percentage of low linear-density polyethylene resin, 10) percentage of color concentrate, 11) percentage of ink coverage, 12) number of ink colors, and 13) number of sides printed. We made comparisons to weighted-average home-market prices that were based on all sales which passed the cost test of the most similar product. . . .
3) For those U.S. models for which no identical or similar match was found, the CV of the U.S. model was used as the basis for normal value.

Polyethylene Retail Carrier Bags from Thailand — Thai Plastic Bags Industries Group (TPBG), Preliminary Results Analysis Memorandum, A-549–821, AR 8/1/07 — 7/31/08 (Aug. 10, 2009), Admin. R. Conf. Doc. 29 ("*Preliminary Mem.*") at 2.

[6] In some cases, Commerce found "U.S. models for which no identical or similar [home market] match" existed on the record, *Preliminary Mem.* at 2, and "found that there were some models for which [Commerce] had to disregard sales below cost." *Id.* at 6. Thus, Commerce "calculated normal value based on CV when [it] did not find an identical or similar model in the home market or when the identical or similar model was disregarded as below cost." *Id.* Commerce moreover "calculated [CV] . . . [by] includ[ing] the cost of materials and fabrication, adjusted [to eliminate cost differences attributable to factors other than physical characteristics] . . . ." *Preliminary Results*, 74 Fed. Reg. at 39,932. There were [[

]] and, therefore, [[

]]. (Def.-Intervenors' Opp'n to Pls.' Mot. for J. Upon the Agency R. ("Def.-Interventors' Mem.") 5 n.4.)

[7] In its administrative review, Commerce served questionnaires on the Plaintiffs who, as "respondents," were required to respond with requested information.

TPBG's reported COP and CV data indicate considerable cost disparities among products with similar physical characteristics.[8] . . . TPBG explained that, because the Rayong facility is more efficient than the Sampran facility, the per-kg costs at the Rayong facility are lower than the costs at the Sampran facility. . . .TPBG explained that it produces more home-market products at the Sampran facility and more export products at the Rayong facility. . . . TPBG explained that priority is given to U.S. production runs over home-market production runs. Specifically, TPBG explained that U.S. production runs are run on a continuous basis whereas home-market production runs are often interrupted for priority export runs. TPBG explained that the stop and go for domestic production results in greater production inefficiencies.

[I]t is unreasonable to attribute the starts and stoppages, and associated inefficiencies, mainly to the home-market products. By TPBG's own admission, the cause of the stoppages is management's own internal decision concerning the export and home-market production runs and not due to production activities or requirements of the domestic product. Accordingly, we determine that the cost differences created by TPBG's methodology are not attributable to the physical differences between the home-market and U.S. products.

[19 C.F.R. § 351.411] states, "{t}he Secretary will not consider differences in [COP] when compared merchandise has identical physical characteristics." In [*Stainless Steel Bar from the United Kingdom*[9]] and accompanying Issues and Decision Memorandum at Comment 1, we reaffirmed our policy that we would determine whether cost differences may affect the accuracy of the margin calculation, when such cost differences are attributable to factors beyond physical characteristics (such as situations where the merchandise is produced at separate facilities or the cost differences are high even though the physical differences appear small). In such instances, we have adjusted costs

[8] For example, for CONNUM [[ ]] (U.S. product), TPBG reported an output of [[ ]], direct material costs of [[ ], direct labor costs of [[ ]], variable overhead of [[ ]], and fixed overhead of [[ ]. For CONNUM [[ ] (home market product) TPBG reported an output of [[ ]], direct material costs of [[ ]], direct labor costs of [[ ]], variable overhead of [[ ]], and fixed overhead of [[ ]].

[9] *Stainless Steel Bar from the United Kingdom*, 72 Fed. Reg. 43,598 (Dep't Commerce Aug. 6, 2007) (final results of AD administrative review).

> to address the distortion. *See, e.g.*, [*Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*[10]] at Comment 22; *Small Diameter Circular Seamless Carbon and Alloy Steel, Standard, Line and Pressure Pipe From Brazil*[11]] at Comment 2. [W]e [] adjusted the per-unit labor, VOH, and FOH costs of each product, by averaging most of these costs across all product lines, to eliminate the distortion caused by TPBG's allocation methodology.

Preliminary Mem. at 3–4 (citations omitted). *Accord Preliminary Results*, 74 Fed. Reg. at 39,932. The adjusted costs were then used in Commerce's computation of the cost of production ["COP"] and CV of those matched foreign models.

Relevant to the litigation here, TPBG then contested Commerce's preliminary determination, arguing that Commerce should use TPBG's reported costs, without Commerce's adjustments, because "[t]he TPBG cost methodology correctly allocates additional costs to those products which require additional time to process, with products which require less time to process having fewer costs allocated to those products." Thai Plastic Bags Group ("TPBG") Case Brief, A-549–821, ARP 8/1/2007 — 7/31/2008 (Sept. 9, 2009), Admin. R. Conf. Doc. 1489, ("Pls.' Case Br.") at 1. TPBG stated that it "based its reported costs on actual cost and production records maintained in the ordinary course of business." *Id.* at 2.[12] Importantly, TPBG also argued that if Commerce determined that it was necessary to adjust TPBG's cost allocation, the adjustment should be, contrary to the petitioners' position, applied to all costs used in the calculation.[13] Thai Plastic Bags Group ("TPBG") Rebuttal Brief, A-549–821, ARP 8/1/2007 — 7/31/2008 (Sept. 14, 2009), Admin. R. Conf. Doc. 1494,("Pls.' Rebuttal Br.") at 1. *See also id.* ("Either [Commerce]

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[10] *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan* 64 Fed. Reg. 24,329 (Dep't Commerce May 6, 1999) (notice of final determination of sales at less than fair value).

[11] *Small Diameter Circular Seamless Carbon and Alloy Steel, Standard, Line and Pressure Pipe From Brazil*, 60 Fed. Reg. 31,960 (Dep't Commerce June 19, 1995).

[12] TPBG points out that it "has been using the same cost accounting system and the same methodology in the U.S. antidumping proceedings involving [plastic bags] from Thailand since 2004." *Id.* at 1.

[13] TPBG specifically argued that the cost adjustment should not be limited to Commerce's DIFMER adjustment. *See infra* pp. 16–17.

should use the revised costs for ***all*** purposes in its calculations, or it should not revise the costs at all.") (emphasis in original).[14]

After considering TPBG's argument, Commerce concluded, in its Decision Memorandum, that "[b]ecause TPBG's reported conversion costs resulted in product-specific cost differences which were unrelated to differences in physical characteristics, [Commerce] could not use TPBG's reported costs . . . ." *Decision Mem.* at 3. Commerce stated:

> We disagree [with petitioners/Defendant-intervenors] . .. that we should use TPBG's reported costs for the purposes of the sales-below-cost test and the calculation of constructed value. Normally, the product costs a respondent reports should reflect cost differences attributable to the different physical characteristics we define to ensure that the product-specific costs we use for the below-cost test reflect the corresponding product's physical characteristics accurately without hiding extraneous factors that may affect differences in costs. In addition, [19 U.S.C. § 1677b(a)(6)(C)(ii)] requires that we account for and adjust for any differences attributable to physical differences between sub-

[14] TPBG argued:

> [*Stainless Steel Bar*, 72 Fed. Reg. 43598] states that [Commerce] has concerns when a respondent has provided cost data which might affect the accuracy of the results, such as 'when such cost differences are attributable to factors beyond physical characteristics (such as situations where the merchandise is produced at separate facilities or the cost differences are high even though the physical differences appear small). . .. *Stainless Steel Bar* expresses [Commerce's] concerns in such situations that relate to all aspects of [Commerce's] calculations, not just the [DIFMER] calculation. . . . In fact, [Commerce's] primary concern in *Stainless Steel Bar* related to how that respondent's use of job-order costs for each CONNUM could distort the sales below cost test[.] . . . Thus, [Commerce] was primarily concerned with the potential effects on the sales below cost test. [Commerce] went on to stress that distortions in cost arising from timing and other non-physical characteristic factors could affect the sales below cost test[.] . . . In other words, [Commerce] was concerned that the cost distortions could be used to manipulate the margin through the sales below cost test. [Commerce] went onto state that such distortions could also affect the [DIFMER] adjustments, but it is apparent that the sales below cost test [and by extension the calculation of CV] remains the primary concern[.] . . . Adjusting the reported costs only for purposes of the [DIFMER] adjustment merely replaces one set of purported distortions with another set of distortions. In other words, if [Commerce] is to achieve its goal of calculating an accurate dumping margin, then any adjustment to the costs must be applied consistently throughout the calculation . . . . [I]f [Commerce] insists on revising [labor, VOH, and FOH], then [Commerce's] objective of ensuring an accurate dumping calculation with respect to all parts of that calculation mandates that [Commerce] should apply those revisions throughout the entire calculation. [Commerce] thus should follow the *Stainless Steel Bar* reasoning and continue to apply the cost revisions for all purposes, for the [DIFMER] adjustments, the sales below cost test[,] and the calculation of [CV].

Id. at 2–4, 6 (citations and footnote omitted). The reader will note that this position is *directly* contrary to TPBG's current position before the court. *See infra*.

> ject merchandise and foreign like product if similar products are compared. For this purpose, [19 C.F.R. §351.411(b)] directs us to consider differences in variable costs associated with the physical differences in the merchandise, i.e., the difference-in-merchandise adjustment. Normally, we use a respondent's product-specific costs (that reflect cost differences attributable to our defined physical characteristics as described above) for the below-cost test. *See* [19 U.S.C.§ 1677b(b)(1)] . Similarly, the product-specific costs should incorporate differences in variable costs associated with the physical differences in the merchandise in accordance with [19 C.F.R. § 351.411(b)] and be used for the difference-in-merchandise adjustment. In contrast, where a respondent's reporting methodology results in cost differences extraneous to our identified physical characteristics, we may not rely on a respondent's reported methodology. . . .
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> In the less-than-fair-value investigation of PRCBs from Malaysia, we calculated different costs of production to use for the below-cost test and the difference-in-merchandise adjustment. *See* Malaysia PRCBLTFV and accompanying I&D Memo at Comment 5. We do not consider our decision in that investigation to be consistent with our normal practice of calculating a single cost of production for both the sales-below-cost test and the difference-in-merchandise adjustment, even in cases in which we revised material costs to neutralize the cost differences resulting from extraneous factors other than differences in the physical characteristics. See, e.g., [*Stainless Steel Bar from the United Kingdom*, 72 Fed. Reg. 43,598 (Dep't Commerce Aug. 6, 2007) (final results of AD administrative review) ("UK SSB"), and accompanying I&D Memo at Comment 1].

Decision Mem. at 3–4 (footnote omitted).

Finally, Commerce reasoned that "although TPBG might have used its actual [period of review ("POR")] and production records that it maintains in its normal course of business as a basis for allocating its conversion costs, TPBG has acknowledged that its allocation methodology, which was developed for dumping purposes, is a departure from its normal cost-accounting system." *Id.* at 4–5. Thus, Commerce concluded, "[Commerce's] adjustment does not represent a departure from TPBG's normal books and records." *Id.* at 5.

As a consequence of its determinations, Commerce assessed an AD margin of 21.99 percent for TPBG for the fourth administrative review. *Final Results*, 74 Fed. Reg. at 65,752.

II. Legal Framework

In calculating the normal value of subject merchandise originating from a market economy country, such as Thailand, Commerce must follow the rules laid out in 19 U.S.C. § 1677b(a)-(b), (d)-(f).[15] Pursuant to this statutory instruction, Commerce must first attempt to determine a "price" to use as a normal value, more specifically, "the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade, and, to the extent practicable, at the same level of trade as the export price or constructed export price." *Id.* § 1677b(a)(1)(B). As indicated above, in order to ascertain this "price," Commerce tries to match the subject merchandise to "foreign like product[s]."[16]

A. Sales Below Cost

In its calculation of the price of the foreign like product, Commerce will discard certain of a respondent's reported sales. Relevant to this matter, if Commerce determines that sales of the foreign like product "were made at less than cost of production,"[17] it will disregard these sales. *Id.* § 1677b(b)(1).[18] As noted above, in certain circumstances, Commerce will not use the price of the foreign like product and will, instead, calculate a CV to input as the normal value. For example, after Commerce disregards respondent's sales as less than the COP,

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[15] *See also id.* § 1677b(a) ("In determining under this subtitle whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value.").

[16] Foreign like products are defined in 19 U.S.C. § 1677(16). Of note, subsections (B) and (C) of 19 U.S.C. § 1677(16), which are referenced in section 1677b(a)(6)(C)(ii), refer to foreign like products that are not identical to subject merchandise.

[17] COP, for purposes of section 1677b, equals the sum of:

> (A) the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business;
>
> (B) an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question; *and*
>
> (C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the foreign like product in condition packed ready for shipment. . . .

Id. § 1677b(b)(3) (emphasis added).

[18] These sales are only disregarded if they "have been made within an extended period of time in substantial quantities" and "were not at prices which permit recovery of all costs within a reasonable period of time[.]" *Id.* § 1677b(b)(1)(A)-(B). Such requirements are not at issue here.

if no foreign like product sales remain, "normal value shall be based on the [CV] of the merchandise." *Id.* § 1677b(b)(1).[19]

According to statute and regulations, Commerce uses the same method to calculate "costs" for both COP and CV. Commerce also uses the respondent's records, provided that these records meet certain requirements.[20]

Commerce must attempt to calculate COP and CV as accurately as possible and, to this end, Commerce is authorized to make adjustments to cost allocations. Commerce's regulations instruct that "[i]n determining the appropriate method for allocating costs among products, [Commerce] may take into account production quantities, relative sales values, and other quantitative and qualitative factors associated with the manufacture and sale of the subject merchandise and foreign like product." 19 C.F.R. § 351.407(c). *Accord* AD Manual 71 ("We review various qualitative and quantitative factors to determine whether a *representative* measure of the materials, *labor, overhead* and other costs have been allocated to the foreign like product.

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[19] CV amounts to the sum of:

(1) the cost of materials and fabrication or other processing of any kind employed in producing the merchandise[] . . . ["COM"];

(2) (A) the actual amounts . . . for selling, general, and administrative expenses. . . ; *and*

(3) the cost of all containers and coverings . . . and all other expenses incidental to . . . shipment to the United States. . . .

Id. § 1677b(e) (emphasis added).

[20] Costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles ["GAAP"] of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise. [Commerce] shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer on a timely basis, if such allocations have been historically used by the exporter or producer []. . .

Id. § 1677b(f)(1)(A). *Accord* AD Manual 70. *See also* Statement of Administrative Action, H.R. Rep. No. 103–316, at 834–35 (1994) ("SAA"), reprinted in 1994 U.S.C.C.A.N. 4171–72, ("The exporter or producer will be expected to demonstrate that it has historically utilized [its reported] allocations . . . . In determining whether to accept the cost allocation methods proposed by a specific producer, . . . Commerce will [] consider whether the producer historically used its submitted cost allocation methods to compute the cost of the subject merchandise prior to the investigation or review and in the normal course of its business operation.").

The SAA "represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of U.S. international obligations and domestic law. . .. [S]ince this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority. . . . [T]he Statement describes the administrative action proposed to implement the particular agreement, explaining how the proposed action changes existing administrative practice and stating why the changes are required or appropriate to implement the agreement." SAA at 656, reprinted in 1994 U.S.C.C.A.N. at 4040.

We should specifically review the *allocation methods* (e.g., production quantities and relative sales values) to determine whether an appropriate portion of common costs have been allocated to the product.") (emphasis added). *See also* SAA at 834–35, reprinted in 1994 U.S.C. C.A.N. at 4172. Specifically, if Commerce "determines that costs [as submitted by a respondent . . . have been shifted away from production of the subject merchandise, or the foreign like product," then "[Commerce] will adjust costs appropriately, to ensure they are not artificially reduced." SAA at 835, reprinted in 1994 U.S.C.C.A.N. at 4172.

B. DIFMER Adjustment to Price

Once Commerce computes price or CV, Commerce must then make certain "adjustments" pursuant to statute. 19 U.S.C. § 1677b(a)(6), (8). Relevant here, the "price" "shall be":

> increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and the price . . . that is established to the satisfaction of the administering authority to be wholly or partly due to— . . . .
>
> (ii) the fact that [nonidentical] merchandise . . . is used in determining normal value[] . . . .

19 U.S.C. § 1677b(a)(6)(C). Commerce's regulations implementing Section 1677b(a)(6)(C), provide for this "DIFMER" adjustment.[21] [22]

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[21] DIFMER adjustment refers to Commerce's "difference in physical characteristics" or "difference-in-merchandise" adjustment or "allowance":

> (a) Introduction. In comparing United States sales with foreign market sales, [Commerce] may determine that the merchandise sold in the United States does not have the same physical characteristics as the merchandise sold in the foreign market, and that the difference has an effect on prices. In calculating normal value, [Commerce] will make a reasonable allowance for such differences. (See section 773(a)(6)(C)(ii) of the Act.)
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> (b) Reasonable allowance. In deciding what is a reasonable allowance for differences in physical characteristics, [Commerce] will consider only differences in variable costs associated with the physical differences. . . . [Commerce] will not consider differences in cost of production when compared merchandise has identical physical characteristics.

19 C.F.R. § 351.411(b); *see also* AD Manual at 5 ("The statutory preference is to compare the subject merchandise sold in the United States to identical articles some in the [foreign] market.

When this is not possible, [Commerce] will compare merchandise which is physically similar to the articles sold in the United States and adjust for any physical differences in the merchandise ([DIFMER]) being compared that affect the price of the merchandise . . . .").

[22] Commerce calculates the DIFMER adjustment by calculating "the variable manufacturing cost incurred in producing the differences in physical characteristics." AD Manual 49. The calculation "is based on actual physical differences in the products, and is calculated on the basis of direct manufacturing costs." *Id.* at 49–50 "Direct" manufacturing costs utilized

Adjustments are not made for DIFMERs "based on . . . the fact that the domestic and exported products are produced in different facilities with differing production efficiencies." AD manual 50; SAA at 828, reprinted in 1994 U.S.C.C.A.N. at 4167.[23]

III. TPBG's Challenge

In their brief before the court, Plaintiffs argue that:

(1) Substantial Evidence Does Not Support Commerce's Factual Finding that Physically Similar Products Have Significant Cost Differences

(2) Substantial Evidence Does Not Support Commerce's Determination that Plaintiffs' Costs Are Unreasonable or Otherwise Distorted

(3) Commerce Wrongly Concluded that Plaintiffs' Cost Differences Are Not Attributable to the Physical Differences of the Merchandise

(4) The Difference-In-Merchandise Adjustment Standard Should Not Be Used for the Purposes of the Sales-Below-Cost and Constructed Value Calculations

(5) Commerce's Reliance on Previous Administrative Determinations — to Support its Rejection of Plaintiffs' Reported Costs Not Attributable to Physical Differences of the Merchandise — is Misplaced

Standard of Review

Applying the familiar standard for reviewing Commerce's decision, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). *See also United States v. Eurodif S.A.*, __ U.S. __, 129 S. Ct. 878, 886 (2009).

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by Commerce in the DIFMER analysis "include[s] the cost of materials, labor and variable factory overhead," *id.* at 50, but does *not* include fixed costs, *see* 19 C.F.R. § 351.410(b). If the DIFMER adjustment for the foreign like product exceeds 20 percent of the total COP of the subject merchandise, Commerce will not use that foreign like product. AD Manual at 7. When Commerce "determine[s] that the [DIFMER] adjustment is too great, [Commerce] select[s] a different product as most similar or, if there is no similar match, use[s] [CV] for the [normal value." *Id.*

[23] Moreover, because CV is based on COM of the subject merchandise, no DIFMER adjustment is made to CV. *Id.* at 58.

Analysis

Essentially, Plaintiffs challenge two aspects of Commerce's final determination. First, TPBG contends that Commerce improperly applied the "physical differences" test, associated with the DIFMER adjustment, to the sales-below-cost test and the constructed value calculation.[24] Second, TPBG asserts that, assuming Commerce's use to adjust TPBG's submitted numbers with substantial evidence.[25]

The court will address each of Plaintiffs' challenges in turn.

A. Legality of Commerce's Adjustment Pursuant to its "Physical Characteristics" Test

Plaintiffs' argument on this issue is barred by judicial estoppel. "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). *See also Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1353–54 (Fed. Cir. 2010); *Scarano v. Cent. R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953).[26]

The Federal Circuit has made it clear that "[j]udicial estoppel applies just as much when one of the tribunals is an administrative agency as it does when both tribunals are courts." *Trs. in Bankr. of N.*

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[24] This is the gravamen of Plaintiff's fourth and fifth arguments to the court, that:

(4) The Difference-In-Merchandise Adjustment Standard Should Not Be Used for the Purposes of the Sales-Below-Cost and Constructed Value Calculations [and that]

(5) Commerce's Reliance on Previous Administrative Determinations — to Support its Rejection of Plaintiffs' Reported Costs Not Attributable to Physical Differences of the Merchandise — is Misplaced

[25] This is the gravamen of Plaintiff's second argument to the court, that:

(2) Substantial Evidence Does Not Support Commerce's Determination that Plaintiffs' Costs Are Unreasonable or Otherwise Distorted

[26] Judicial estoppel is "is an equitable doctrine invoked by a court at its discretion[.]" *New Hampshire*, 532 U.S. at 750 (citation and quotation marks omitted). This doctrine can be applied to questions of law. *Transclean Corp. v. Jiffy Lube Int'l, Inc.*, 474 F.3d 1298 (Fed. Cir. 2007). Although neither party has raised this issue before the court, "the doctrine can be raised by courts *sua sponte* because judicial estoppel concerns the integrity of the judicial system independent of the interests of the parties." *In re Airadigm Communc'ns, Inc.*, 616 F.3d 642,661, Nos. 08–3585, 08–3587, 08–3588, 08–3590, 2010 WL 3024876, at *17 n.14 (7th Cir. Aug. 4, 2010) (citing *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 530 (5th Cir. 2000) ("[B]ecause that doctrine protects the judicial system, [the court] can apply it *sua sponte* in certain instances.") (citations omitted)). *Sua sponte* application of judicial estoppel is "especially" warranted in "egregious case[s] wherein a party has successfully asserted a directly contrary position." *Beall v. United States*, 467 F.3d 864, 870 (5th Cir. 2006).

Am. Rubber Thread Co., 593 F.3d at 1353–54 (citing *Lampi Corp. v. Am. Power Prods., Inc.*, 228 F.3d 1365, 1377 (Fed. Cir. 2000) ("The [judicial estoppel] doctrine also applies to administrative proceedings in which a party obtains a favorable order by making an argument that it seeks to repudiate in a subsequent judicial proceeding.")) ("Turning to the remaining issue, we find that NART is precluded by the doctrine of judicial estoppel from arguing in the CIT in favor of a revocation date of October 1, 1995, given its earlier successful argument to Commerce that a revocation date of October 1, 1995, was inappropriate."). Thus, judicial estoppel applies here, where the court is reviewing an agency decision rather than a decision of a lower court.

Three non-exclusive factors frame the application of judicial estoppel. *New Hampshire*, 532 U.S. at 750–51. First, "a party's later position must be clearly inconsistent with its earlier position." *Id.* at 750 (citations and quotation marks omitted). Second, the court considers whether a party has "succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled[.]" *Id.* (citations and quotation marks omitted). Third, the court considers "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750–51 (citations omitted). *See also Scarano v. Cent. R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953) ("A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate.").

Application of the Supreme Court's three factors weighs in favor of applying judicial estoppel in this case. First, TPBG's position before this court is "directly" and "clearly" contrary to its position before Commerce during the administrative review. Below, Plaintiffs argued that the same concerns — the need for cost differences to be based upon physical differences — underlie the DIFMER, the sales below cost, and the CV calculations. Pls.'s Rebuttal Br. at 1–4, 6. This argument was made directly in response to the petitioners' request that Commerce use TPBG's reported costs for COP and CV, while

using adjusted costs for DIFMER. *Decision Mem.* at 3. Currently, before the court, Plaintiffs argue that Commerce improperly "applied the wrong legal standard in making [its] decision [that TPBG's costs were 'distorted' for purposes of the sales below cost test and CV] (*i.e.*, Commerce applied the DIFMER 'physical differences' test)." (Mem. in Supp. Of Pls.' Mot. for J. on the Agency R. ("Pls.' Mem.") at 2.) But before the agency, Plaintiffs claimed that if the agency revised costs for DIFMER purposes, it must do so for all purposes, including COP and CV. Basically, before the court, TPBG argues that Commerce cannot take physical differences into account when determining whether to accept reported costs for the purposes of COP and CV, and may only address those physical differences in the DIFMER adjustment; at the same time, TPBG argued before Commerce that when calculating COP, CV, and DIFMER, Commerce should use the same costs adjusted to reflect cost differences attributable to physical differences in the merchandise.[27] Thus, in the administrative proceeding, Plaintiffs argued for the same across the board adjustments to costs for each purpose; here Plaintiffs argue against such adjustments. These two positions are not reconcilable.

Second, Plaintiffs succeeded in its argument before Commerce. *See Decision Mem.* at 3–4 ("We disagree with petitioners' argument, however, that we should use TPBG's reported costs for the purposes of the sales-below-cost test and the calculation of constructed value. . . . Therefore, for the final results, to limit the distortive effect of cost differences that are unrelated to differences in physical characteristics, we have continued to . . . use the adjusted cost for the sales-below-cost test, the [DIFMER] adjustment, and constructed-value calculations."). *Id.* at 3–4.

Third, TPBG would "derive an unfair advantage or impose an unfair detriment" on the government if allowed to switch their position on this issue here. For these reasons, Plaintiffs claim on this issue is barred.[28]

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[27] In its memorandum before the court, TPBG states that "Commerce properly used one set of costs for [DIFMER, CV, and COP for sales below cost], but it improperly 'adjusted' them before doing so." (Pls.' Mem. at 2.) This argument does not make sense. TPBG is not challenging Commerce's adjustment of costs for purposes of calculating the DIFMER adjustment

[28] The court also notes that TPBG would be unlikely to prevail on the merits of this issue. In its determination, Commerce decided to revise TPBG's cost allocations (regarding direct labor, variable overhead and fixed overhead costs) to eliminate a "distortion" based on factors not attributable to physical characteristics. 74 Fed. Reg. 39, 931. As noted, Commerce reallocated TPBG's costs for the sales-below-cost test, the constructed-value calculations and the difference-in merchandise adjustment. *Id.* The governments' legal determination to apply its adjustment for all three purposes was reasonable because the calculation

B. Evidence Supporting Commerce's Rejection of Plaintiffs' Reported Costs Pursuant to 19 U.S.C. § 1677b(f)(1)(A)

TPBG argued below that Commerce should use TPBG's reported costs because (1) TPBG has been using the same cost system from Thailand since 2004 and even the European Commission has verified the costs, and (2) "TPBG based its reported costs on actual cost and production records maintained in the ordinary course of business," i.e., TPBG's reported cost methodology "correctly allocates additional costs to those products which require additional time to process, with products which require less time to process having fewer costs allocated to those products." Pls.' Case Br. at 1–2.

But Commerce rejected, in part,[29] TPBG's reported cost allocations, as the record indicated that "TPBG has acknowledged that its allocation methodology, which was developed for dumping purposes, is a departure from its normal cost-accounting system." *Decision Memo* at 4–5. In addition, "TPBG's reported conversion costs resulted in product-specific cost differences which were unrelated to differences in physical characteristics," *id.* at 3, but rather were based, by TPBG's admission, on management's internal decision "concerning the export and home-market production runs and not due to production activities or requirements of the domestic product." *Preliminary Mem.* at 4. Absent proof of physical differences, Commerce was compensating for a price distortion through a reallocation of costs to more accurately describe the cost structure. These conclusions follow from a reasonable reading of the record and are therefore supported by substantial evidence. *See Nippon Steel Corp. v. United States*, 458 F. 3d 1345, 1350–51 (Fed. Cir. 2006).

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of costs "reasonably reflect[ed]" the associated costs of production and sales. *See* 19 U.S.C. §1677b(f)(1)(A). As the SAA explains, Commerce must use a methodology that reasonably captures all of the costs incurred in manufacturing and selling the product at issue. SAA at 835. Further, "if Commerce determines that costs, including financing costs, have been shifted away from the production of the subject merchandise, or the foreign like product, it will adjust costs appropriately, to ensure they are not artificially reduced. *Id. See NTN Bearing Corp. of America v. U.S.*, 368 F.3d 1369, 1374 (Fed. Cir., 2004) ("Commerce noted that it 'does not rely on a respondent's reported costs solely for the calculation of COP and CV,' Final Results, 63 Fed. Reg. at 2574, and concluded that it would be distortive to adjust those costs only for those calculations, but not for others in which they were used. *Id.* ('[I]f we determine a component of a respondent's COP and CV is distortive for one aspect of our analysis, it is reasonable to make the same determination with respect to those other aspects of our margin calculations where we relied on the identical cost data.'). We concur with Commerce's analysis and hold that it did not err in interpreting these provisions to permit it to employ affiliated supplier cost data to calculate cost deviations to limit the definition of similar merchandise, the difmer adjustment, and inventory carrying costs.").

[29] As noted, Commerce adjusted only Plaintiffs' FOH, VOH and labor costs. Commerce did not adjust Plaintiffs' input costs.

C. TPBG's Remaining Arguments

The remaining arguments in Plaintiffs' brief before the court include: (1) "substantial evidence does not support Commerce's factual finding that physically similar products have significant cost differences," Pls.' Br. at 12–16, and (3) "Commerce wrongly concluded that Plaintiffs' cost differences are not attributable to the physical differences of the merchandise." *id.* at 20–23. The government argues, and the court agrees, that, because Plaintiffs did not make these arguments in their case briefs before Commerce, the arguments are not appropriately reviewed here because of the preference for administrative exhaustion.

The relevant statute reflects this preference. In civil actions challenging AD determinations, "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952).

Exhaustion is "generally appropriate in the antidumping context because it allows the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review-advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Carpenter Tech. Corp. v. United States*, 30 CIT 1595, 1597, 464 F. Supp. 2d 1347, 1349 (2006).

Generally, parties are "procedurally required to raise the[ir] issue before Commerce at the time Commerce [is] addressing the issue." *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010) (citing *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008)). If Respondents "believed that the . . . issue was relevant to the Final Results" following the adverse decision by Commerce in the Preliminary Results, they "needed to include that issue in [their] case brief, as required by the regulation." *Dorbest Ltd. v. United States*, __ CIT __, __, 547 F. Supp. 2d 1321, 1344 (2008) (quoting *Carpenter Tech. Corp.*, 30 CIT at 1598, 464 F. Supp. 2d at 1349), *rev'd in part on other grounds*, 604 F.3d 1363. As a result of not raising these issues in their case brief, Plaintiffs "deprived the agency of the opportunity to consider these arguments in the first instance." *Carpenter Tech.*, 30 CIT at __, 464 F. Supp. 2d at 1349. Thus, because Plaintiffs have not preserved these issues, the court will not review them here.

IV. Conclusion

For the foregoing reasons, the court ORDERS that Plaintiffs' motion for judgment upon the agency record is denied.

Accordingly, judgment will be entered for the Defendant. *See USCIT Rule* 56.2(b).

Dated: October 26, 2010
New York, New York

/s/ Donald C. Pogue
DONALD C. POGUE, JUDGE

Slip Op. 10–123

TRUMPF MEDICAL SYSTEMS, INC. Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 07–00316

[Plaintiff's motion for summary judgment in tariff classification matter granted in part; defendant's cross motion denied.]

Dated: October 27, 2010

Simons & Wiskin (*Philip Yale Simons* and *Jerry P. Wiskin*) for the Plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, U.S. Department of Justice (*Mikki Cottet*) for the Defendants.

OPINION AND ORDER

Pogue, Judge:

Introduction

This case concerns the proper tariff classification of certain surgical light systems imported into the United States by Trumpf Medical Systems, Inc. ("Trumpf" or "Plaintiff"). U.S. Customs and Border Protection ("Customs") liquidated Trumpf's merchandise as lamps or light fittings under various Subheadings of Heading 9405 of the Harmonized Tariff Schedule of the United States ("HTSUS").[1] Trumpf argues that its merchandise is properly classified as surgical

[1] The government points to Subheading 9405.10.6020:

> 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:
>
> 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.[]

instruments or appliances under HTSUS Heading 9018.[2] Plaintiff and the United States ("Defendant" or the "Government") both move for summary judgment.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a).

Because the common meaning of the terms of Heading 9018 does not support the government's narrow interpretation of the Heading's scope, the court grants, in part, the Plaintiff's motion.

Background

I. Undisputed Facts

Certain relevant facts are undisputed.

A. Surgical Lights

Plaintiff's undisputed evidence identifies six characteristics particular to surgical lights — High Illumination/Brightness, Color Rendition of Tissue, Light Field Diameter, Shadow Reduction, Limited Heat/Irradiance and Depth of Illumination — and a category of factors related to their purchase and sale.[3]

B. Trumpf's Surgical Lights

The parties also agree to certain background facts related to the surgical light systems that Trumpf imported into the United States. Specifically, between November 2003 and July 2005 Trumpf imported

Items falling under this Subheading are charged an ad valorem duty of 7.6 percent. Provisions like Heading 9405.10.6020 are referred to as basket or residual provisions. *See E.M. Indus., Inc. v. United States*, 22 CIT 156, 165, 195 F.Supp. 2d 1473, 1480(1998). "'Classification of imported merchandise in a basket provision, however, is appropriate only when there is no tariff category that covers the merchandise more specifically.'" *Chevron Chem. Co. v. United States*, 23 CIT 500, 506, 59 F.Supp. 2d 1361,1368 (1999).

[2] Specifically, Plaintiff argues that its merchandise falls under HTSUS Subheading 9018.90.60:

> Instruments and appliances used in medical, surgical, dental or veterinary sciences . . . parts and accessories thereof:
>
> Other instruments and appliances and parts and accessories thereof:
>
> Other:
>
> Electro-medical instruments and appliances and parts and accessories thereof:
>
> Electro-surgical instruments and appliances, . . . ; all the foregoing and parts and accessories thereof.
>
> Items falling under this Subheading enter duty-free

[3] These characteristics and categories are further detailed in *Appendix A*.

its "Helion" and "Xenion" surgical light systems.[4] (Pl.'s Stmt. of Uncontested Material Facts ("Pl.'s Stmt.") ¶ 4 (citing McArver Aff. ¶ 3).)[5]

These surgical light systems "consist of a surgical light and a ceiling mounted moveable arm to which the surgical light is attached." (Compl. ¶ 6.) The movable arm allows "the surgeon to position the surgical lamp in the most favorable position during surgery." (*Id.*)

Among other various parts, the system includes:

- a surgical light or lights with a support boom and cardanic joint[6] (Ex. C to McArver Aff.)
- ceiling mounts (Ex. C to McArver Aff.; McArver Aff. ¶ 4)
- a central axis with (1) extension arms, (2) suspension arms, or (3) tracking arms (Ex. C to McArver Aff. *See also* McArver Aff. ¶ 5)[7]
- spring (or "sprung") arms (McArver Aff. ¶ 5; Helion Surgical Light User Manual ("Helion"), Ex. B to McArver Aff., 12; Xenion, Ex. B to McArver Aff., 12; Ex. C to McArver Aff.)
- transformer(s) (McArver Aff. ¶ 6)[8]
- a control panel (Helion, Ex. B to McArver Aff., 12; Xenion, Ex. B to McArver Aff., 12; McArver Aff. ¶ 5,) and
- for Helion lights, a switch box (McArver Aff. ¶ 9; Helion, Ex. B to McArver Aff., 12.)

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[4] Trumpf uses different light bulbs to provide specific levels of illumination while limiting heat emission. Instead of using the traditional incandescent light bulb, the surgical light systems either use halogen gas — the Helion model — or xenon gas — the Xenion model. (McArver Aff. ¶ 3.) According to Trumpf, its Xenion lights have many advantages over halogen. Xenion lights "provide brighter illumination tha[n] halogen lights, are more cost efficient and tend to last longer[,]" (*id.*) and emit less heat. (Xenion Surgical Light User Manual ("Xenion"), Ex. B to McArver Aff., 13.)

"Halogen" is "[a]ny of a group of five chemically related nonmetallic elements including flourine, chlorine, bromine, iodine, and astatine." *Webster's II New Riverside University Dictionary* 560 (1988). A halogen is "electronegative," that is, it has a "negative electric charge." *Academic Press Dictionary of Science and Technology* 728, 983 (1992). "Xenon" is "noble," that is, inert, gas. *See id.* 1471, 2384.

[5] The parties appear to agree that the following entries are composed of Trumpf's light systems: 233–3171894–2, 233–319579–6,233–3317878–0, 233–3373454–1, 233–3366253–6, 233–3366242–9, 2335540047–6, 233–5480395–1, 233–5480419–9.

[6] The court understands this to be a fixed point joint around which shafts/arms rotate.

[7] The number of extension or suspension arms depends upon the number of surgical lights and/or flat panel displays included in the system, as there is one suspension or extension arms per surgical light or flat panel display. (McArver Aff. ¶ 8.)

[8] The system requires one transformer per surgical light. (McArver Aff. ¶ 6.)

Some of the systems also include accessories such as cameras, flat panel screens, and various electrical and electronic components.[9] (Compl. ¶ 6.) Trumpf imports the surgical light systems in an unassembled condition. (*Id.* ¶ 7; McArver Aff. ¶ 10.) However, the systems themselves are complete, that is, they need no additional parts in order to function. (Compl. ¶ 7; McArver Aff. ¶ 10.) Indeed, the customer assembles the system

> by simply screwing the surgical lights to the suspension arms, screwing the suspension arms to the extension arms and attaching the unit to the ceiling of an operating room with a mounting bracket which is welded to the top of the central axis.

(Pl.'s Stmt. ¶ 8. *See also* McArver Aff. ¶ 10.)

Trumpf normally manufactures these systems in accordance with its customers' specifications.[10] (Pl.'s Stmt. ¶ 9; McArver Aff. ¶ 7.) Moreover, Trumpf's surgical lights "are specially manufactured to have specific properties to provide the surgeon and the operating team with optimal illumination in an operating theater[,]" that is, "to provide a certain light intensity, low heat generation, control of shadows and depth of focus."[11] (Pl.'s Stmt. ¶ 15 (citing McArver Aff. ¶ 15; Moore Aff. ¶ 11; Stauffer Aff. ¶ 10; Grattan Aff. ¶ 10).) Regarding the trueness of light color, Trumpf claims to approximate "daylight on a bright day" by using a color temperature of 4300 K (Ex. A to McArver Aff. 5; Helion, Ex. B to McArver Aff., 27; Xenion, Ex. B to McArver Aff., 25,) and a CRI of 93. (Helion, Ex. B to McArver Aff., 27; Xenion, Ex. B to McArver Aff., 25.) Moreover, users can adjust the luminous intensity, diameter of luminous field, and position of luminous field. (Helion, Ex. B to McArver Aff., 18 20; Xenion, Ex. B to McArver Aff., 17.) Finally, the lights are equipped with a sterile handle.[12] (Ex. A to McArver Aff. 5, 7; Helion, Ex. B to McArver Aff., 24; Xenion, Ex. B to McArver Aff., 18, 22–23.)

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[9] Specific options available to customers include laser guided focusing, which "simplifies the precise positioning of the luminous field on very small areas" (Helion, Ex. B to McArver Aff., 15; Xenion, Ex. B to McArver Aff., 14,) fittings for MedTV camera systems (Helion, Ex. B to McArver Aff., 15; Xenion, Ex. B to McArver Aff., 15,) external brightness controllers (Helion, Ex. B to McArver Aff., 15,) and anti-drift systems. (*Id.*)

[10] Once the axis of the light is manufactured with the chosen number of arms to accommodate the requested number of lights, cameras, and flat panel displays, extra arms cannot be added, even at time of assembly. (McArver Aff. ¶¶ 7–8, 11.) Moreover, arms wired for surgical lights cannot be used as arms for cameras or flat panel displays and vice versa. (McArver Aff. ¶ 8.) Therefore, if a customer cancels its order, Trumpf cannot easily resell its surgical lights. (McArver Aff. ¶ 12.)

[11] Customers can also select light type, size, control type (electronic or mechanical), camera and/or flat panel display, axis type, and arm types. (McArver Aff. ¶ 7.)

[12] This handle is detachable in order to allow for cleaning and disinfection. (Helion, Ex. B to McArver Aff., 24; Xenion, Ex. B to McArver Aff., 18, 22–23.)

Trumpf sells its products only to hospitals and physicians and only "for use in office surgical suites and clinics." (McArver Aff. ¶ 13. *See also* Grattan Aff. ¶ 4; Moore Aff. ¶ 3; Stauffer Aff. ¶ 3; Burgess Aff. ¶ 3.) Neither Trumpf nor its competitors sell their lights to distributors or other sellers of home or commercial lights.[13] (McArver Aff. ¶ 13.) Purchasing agents with which Trumpf's sales staff interact "do not purchase lamps or lighting fittings which provide illumination in an office setting." (Grattan Aff. ¶ 9; Moore Aff. ¶ 8; Stauffer Aff. ¶ 8. *See also* Burgess Aff. ¶ 8.) Trumpf and its competitors similarly do not describe their surgical lights as "lamps" or "lighting fittings." (Burgess Aff. ¶¶ 5, 6. *See also* Grattan Aff. ¶ 7; Moore Aff. ¶¶ 5, 6; Stauffer Aff. ¶ 6.) Trumpf's competitors consist of other manufacturers and sellers of surgical light systems; Trumpf does not compete with manufacturers, sellers, or wholesalers "of lamps and lighting fittings used in a house or office building." (Burgess Aff. ¶ 6. *See also* Grattan Aff. ¶ 8; Moore Aff. ¶ 7; Stauffer Aff. ¶ 7.)

Trumpf has obtained approval for U.S. sale of its surgical light systems from the U.S. Food and Drug Administration ("FDA"), and Trumpf's surgical lights meet the requirements of the Medical Device Directive. (Burgess Aff. ¶ 4; Grattan Aff. ¶ 5; Moore Aff. ¶ 4; Stauffer Aff. ¶ 4. *See also* Helion, Ex. B to McArver Aff., 8; Xenion, Ex. B to McArver Aff., 8.)[14]

II. Disputed Facts

Although both parties claim there are no material facts at issue, they present differing descriptions of the use of Trumpf's merchandise and of the composition of some specific entries at issue.

A. Use of Surgical Lights

Trumpf states that its surgical light systems "are used for intraoperative diagnostic purposes as well as providing proper illumina-

[13] The "normal" or "standard" practice in the industry to sell surgical lights is as follows. (Burgess Aff. ¶ 9; Grattan Aff. ¶ 11; Moore Aff. ¶ 9.) The sales consultant meets with the hospital purchasing agent, the operating room business manager, and the operating room manager. (*Id. See also* Grattan Aff. ¶¶ 10,11; Moore Aff. ¶ 10; Stauffer Aff. ¶ 9.) These hospital personnel discuss with the surgeons the preferred surgical light specifications. (Burgess Aff. ¶ 9. *See also* Grattan Aff. ¶ 11; Moore Aff. ¶ 10; Stauffer Aff. ¶ 9.) After receiving reports from hospital personnel as to these specifications, Trumpf installs in the operating suite a demonstration surgical light and surgeons, for two weeks, use the lights in actual surgical procedures. (Burgess Aff. ¶ 9. *See also* Grattan Aff. ¶¶ 10, 11; Moore Aff. ¶10; Stauffer Aff. ¶ 9.) If the surgeons consider the light satisfactory, the hospital personnel place an order with Trumpf and Trumpf will install a completely new light system. (Burgess Aff. ¶ 9. *See also* Grattan Aff. ¶¶ 10, 11; Moore Aff. ¶ 10;

[14] It does not appear that traditional lamps used in homes or office settings require FDA approval. (Moore Aff. ¶ 4.)

tion for a surgical procedure." (Blessing Aff. ¶ 4; Cobbs Aff. ¶ 4. *See also* Helion, Ex. B to McArver Aff., 8; Xenion, Ex. B to McArver Aff., 8 (The lights are "intended for local illumination of the part of the patient being examined or operated upon in a hospital or in a doctor's surgery.").) The subject lights "allow proper visualization intraoperatively of anatomic structures such as nerves, arteries, veins, intestines, and other glandular structures in order that vital structures are not unintentionally injured." (Blessing Aff. ¶ 4. *See also* Cobbs Aff. ¶ 4.)

The above-described use, Trumpf states, is the lights' *only* use. (Grattan Aff. ¶ 13 surgical light systems "are only used to illuminate a portion of a patient's body during surgery or for diagnostic purposes... I have never seen or heard of [] surgical light systems being used for another non-surgical related purpose"). *Accord* Stauffer Aff. ¶ 11.) Manuals for Helion and Xenion lights specifically state that the surgical lamps "may only be operated by surgeons, doctors or specially[-]trained personnel" and "[a]ny other use of the surgical light [besides the medical uses listed in the manual] is regarded as improper use." (Helion, Ex. B to McArver Aff., 8; Xenion, Ex. B to McArver Aff., 8.) Moreover, health professionals consider Trumpf's surgical lights as "surgical appliance[s] or instrument[s]" and not as lamps or lighting fittings. (*See* Burgess Aff. ¶ 5; Grattan Aff. ¶ 6; Moore Aff. ¶ 5; Stauffer Aff. ¶ 5. *See also* Blessing Aff. ¶ 5 ("I consider a surgical light as a diagnostic instrument or appliance."). *Accord* Cobbs Aff. ¶ 5.) Trumpf insists that a "standard lamp or lighting fixture," such as those "used in an office setting or a house," are not used for illumination during a surgical procedure. (*See* Blessing Aff. ¶ 7; Cobbs Aff. ¶ 6.)

The government does not agree that Trumpf's lights are specifically designed for diagnostic purposes. *See* HQ967747 (Mar. 21, 2006). Instead, the government describes Trumpf's lights as specialized spotlights. *See id.* (citing HQ 967159 (Nov. 17, 2004)). The government presents evidence that a surgical lighthead from another company, STERIS Corp. ("STERIS"),[15] has been used in art conservation

[15] STERIS manufactures surgical lights. Its lights are called Harmony Surgical Lighting and Visualization System ("HSLVS").

The government classifies STERIS's lights under HTSUS 9405. *See* HQ 967159 (Nov. 17, 2004). STERIS light include "1) a central axis, composed of carbon steel, that allows the lights and apparatus to move in circular motion around the patient to assist the surgeon during the surgical process. 2) the spring loaded arms, composed of carbon steel, that extend from the central axis and allow for either the lights or equipment to be mounted. 3) flat panel monitor adapters, composed of carbon steel, that connect with a spring load arm to mount a flat LCD monitor to the lighting system. 4) ceiling sets that allow for the lighting system to be mounted into the ceiling and consist of mounting components (nuts, bolts and

laboratories. (*See* Rosenfeld Decl. ¶8 ("[T]he type of illumination provided by the STERIS lighthead is also desirable in the art conservation environment.").) According to the government, the qualities of a STERIS lamp that provide illumination "that does not distort color and high intensity without heat, are also properties of lamps used in museum and art exhibition environments." (*Id.* at ¶9.) "[T]he ability to increase and decrease the pattern size of illumination is a feature found in spotlights, including theater spotlights and display spotlights used in museum and retail stores." (*Id.* at ¶4).

Trumpf does not contest the qualities of a STERIS light or a spotlight, but asserts that these qualities are not necessarily those of a surgical light. Trumpf does not offer specific evidence to this effect but nonetheless asserts that a STERIS light is not mentioned as a surgical light in the affidavit, essentially relying on the lack of the word "surgical light". (Pl.'s Resp. to Def.'s Additional Stmt. of Material Facts to which No Genuine Issue Exists ¶8.) Trumpf also notes that their light systems are not comparable to STERIS lamp heads in that Trumpf's surgical light systems are only used in a surgical setting. *See* Pl.'s Resp. to Questions at 3.

B. Unassembled Surgical Light System

Trumpf describes some of the entries at issue as parts of its surgical light systems. These entries are listed in *Appendix B*.[16]

The parties agree that the imports in these entries *can* be used as part of surgical light systems.[17] Moreover, there appears to be no dispute as to the actual contents of the entries. However, the parties *do* dispute whether the entries were entered as "'complete,' 'unassembled'" surgical light systems or discrete items also entered for

clamp rings) to attach to the ceiling; a carbon steel suspension tube to which the lighting assembly is attached and which houses the system cables and wires; and a plastic ceiling hood or cover. 5) lighting heads of carbon steel that provide the essential lighting function of the HSLVS." *Id.*

[16] Trumpf has dropped its claims regarding Entry No. 2333185814–4. (*See* Pl.'s Resp. to Def.'s Additional Stmt. of Material Fact as to which no Genuine Issue Exists ¶2.)

[17] Trumpf surgical light system components may include: ceiling mounts, an axis to attach suspension arms which rotates on a horizontal axis, the suspension arms, spring arms which move on a vertical axis and attach to the suspension arms, mounts for attaching a camera, mounts for attaching a flat panel monitor, aflat panel monitor(s). (*See* Ex. C to McArver Aff., 2.) These components in various configurations and including some or all of the aforementioned parts are for the purposes of litigation referred to as "pendants" by the parties. Trumpf surgical light systems also may included: surgical lights with a support boom and a universal joint for rotating on both a horizontal and vertical axis. (*See* Ex. C to McArver Aff., 2.) Depending on the configuration: transformers, a control panel, and switch boxes may also be necessary for the surgical light system. (McArver Aff. ¶9.) The actual surgical lights which are part of the system consist of the light source (incandescent quartz bulb containing xenon or halogen gas) and the housing. (McArver Aff. ¶¶ 3, 6.)

other potential uses. The government argues that Trumpf has not presented evidence that the individual components are parts of surgical light systems, (*see* Def.'s Resp. to Pl.'s Stmt. of Material Fact Not in Dispute ¶4; Def.'s Additional Stmt. of Material Fact ¶3–4 (claiming certain entries are not in fact complete "surgical light systems.")), noting that neither the entry papers nor the commercial invoices make reference to surgical light systems. (*See* Def's Mem. in Opp'n to Pl.'s Mot. for Summ. J and in Supp. of Def's Cross-mot. for Summ. J. 24. *See also, e.g.*, Def.'s Resp. to Pl.'s Stmt. of Material Facts not in Dispute ¶4.) Trumpf avers that the entries listed in *Appendix A* contained components of their surgical light systems.

III. The Instant Litigation

Trumpf timely protested Customs' classification of the merchandise at issue, and Customs denied in part and granted in part these protests. *See* HQ 967747 (Mar. 21, 2006). Having paid all liquidated duties, Trumpf subsequently commenced this action on August 28, 2007.

Customs liquidated the merchandise under two types of headings. *See* HQ 967747 (Mar. 21, 2006). First, Customs liquidated certain of Trumpf's entries under HTSUS 9033.0033,[18] as parts and accessories of "ceiling mounted equipment platforms know as 'booms' or 'orbiters' which are intended to be used in hospital operating and recovery rooms, and intensive care environments." (*Id.*) However, after protest by Trumpf, Customs reconsidered and entered these items under HTSUS 9402.90.00.20 as "medical furniture."[19] (*Id.*) Articles imported under Heading 9402.90.00.20 are duty free and, as a result, Trumpf does not contest this classification.

Second, HQ 967747 classified the surgical lamps under heading 9405.10.6020 as opposed to Heading 9018.90.60. In making this determination, Customs relied heavily on an earlier ruling, HQ 967159, which addressed the classification of HSLVS lights, like the STERIS lights, i.e., "overhead light used in surgical suites by surgeons." HQ 967159 (Nov. 17, 2004). Using identical language as in HQ 967159, Customs in HQ 9967747 determined that the lights in contention here were better classified under 9405 rather than 9018. Customs stated that:

> Lamps which 'are specially designed for diagnostic, probing irradiation etc. purposes' are included in Heading 9018, HTSUS.

[18] "Parts and accessories (not specified or included else wherein this chapter) for machines, appliances, instruments or apparatus of chapter 90."

[19] These items were ceiling mounted booms and orbiters which move on gas or electric power. The booms are set up to hold shelving and receptacles "designed to accept and hold monitoring devices." *See* HQ 967747 (Mar. 21, 2006).

> However the instant HSLVS parts cannot be said to have been designed for a lamp used in probing or irradiation. Lamps so designed are those that are part of an instrument which probes the body, such as an endoscope, which enables the clinician to *see* the internal organ and take a cell sample so as to diagnose a disease. Lamps used for irradiation are those which employ radiation to reveal, most commonly, skin diseases.

See HQ 967747.

Before Customs, Trumpf argued that its lights are used for diagnostic purposes, namely that these lights have "certain temperature and lighting features which will not harm the patient during a surgical procedure . . . [and] attachment of visualization equipment during certain surgical procedures and a handle to position it during surgery." *Id.* ;(*see also* Blessing Aff. ¶4.) The government did not find Trumpf's argument persuasive, stating:

> Precision overhead room lighting is necessary for the surgeon to do his or her job. But the instant merchandise is not used in direct contact or even in close proximity with the patient for the sole benefit of diagnosis of disease. While it is specialized lighting to be sure, it is more akin to the explicitly excluded spotlight of heading 9405, HTSUS, than it is to the included lamps attached to endoscopes and the like, that are used in intimate contact with the patient.

HQ 967747. In response to Customs' ruling, Trumpf brought the instant action, contending that the surgical lights described are better classified to under HTSUS 9018 rather than 9405.

Standard of Review

The court's review of Customs classification is twofold. "The proper scope and meaning of a tariff classification term is a question of law[,]... determining whether the goods at issue fall within a particular tariff term as properly construed is a question of fact." *Franklin v. United States*, 289 F.3d 753, 757 (Fed. Cir. 2002) (citations omitted).

In classification cases, genuine issues of material fact only arise when there is a dispute over the use, characteristics, or properties of the merchandise being classified, *see Brother Int'l Corp. v. United States*, 26 CIT 867, 869, 248 F.Supp.2d 1224, 1226 (2002), or where commercial meaning is in question. *See Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1048 (Fed. Cir. 2001). This follows from the familiar summary judgment standard: summary judgment is appropriate "if the pleadings, discovery and disclosure materials on

file, and any affidavits show that there is *no genuine issue* as to *any material fact* and that the movant is entitled to judgement as a matter of law." USCIT R. 56(c) (emphasis added). Material issues only arise concerning "facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

On questions of law, a customs' classification is subject to *de novo* review as to the meaning of the tariff provision, pursuant to 28 U.S.C. § 2640, but may be accorded a "respect proportional to its 'power to persuade.'" *United States v. Mead Corp*., 533 U.S. 218, 220 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

In interpreting and applying the HTSUS, the court looks to the General Rules of Interpretation ("GRI"), as well as the Additional United States Rules of Interpretation ("ARI"). *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed Cir. 1998); *Faus Group Inc. V. United States*, 28 CIT 1879, 358 F.Supp 2d. 1244, 1250 (2004). GRI (1) states that

> [F]or legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.

GRI (1) is "intended to make it quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification." 1 World Customs Org., Harmonized Commodity Description & Coding Sys., Explanatory Notes 1 (3 ed. 2002) ("Explanatory Notes").[20] Thus, interpretation of tariff headings, and the court's analysis, originate in the language of the Headings, Subheadings, Section Notes and Chapter Notes of the relevant parts of the HTSUS, in this case, Chapters 90, and 94.[21]

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[20] The Explanatory Notes are not "controlling legislative history but nonetheless are intended to clarify the scope of [the] HTSUS [] and to offer guidance" in the court's interpretation. *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994).

[21] Relevant to the entries in *Appendix A*, GRI (2) states that an article may be entered in an unfinished state and still fall under a particular heading. However, that article must have the same "essential character" as the finished article. GRI (3) Explanatory Note VIII provides: "The factor which determines essential character will vary as between different kinds 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."

Analysis

As noted above, the government contends that the Trumpf lighting systems are to be classified under Heading 9405. ("Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included."). But the Explanatory Notes to chapter 94, subpart (II)(l) specifically exclude from Heading 9405 "[m]edical diagnostic, probing, irradiation, etc., lamps (Heading 90.18)." *Id.* 9405 (II)(l). Thus, if Trumpf's merchandise is properly classified under Heading 9018, it cannot be classified under Heading 9405. Therefore, the court will first consider the language of Heading 9018, and the Chapter Notes thereto, to determine their application here.[22]

I. HTSUS Heading 9018[23] [24]

A. Merchandise Included in Heading 9018[25]

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[22] The court notes that Heading 9018 is a "use" provision. *See* ARI 1(" In the absence of special language or context which otherwise requires—
(a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use . . .")

[23] Heading 9018 falls under Chapter 90: "optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof."

[24] The court notes that the language of the HTSUS for all relevant years remains unchanged.

[25] Merchandise under Chapter 90 also includes "parts and accessories" of such "instruments and apparatus"; Chapter Note 2 instructs that "parts and accessories for machines, apparatus, instruments or articles of [Chapter 90] are to be classified according to the following rules":

(a) Parts and accessories which are goods included in any of the headings of [Chapter 90] or of [C]hapter 84[] [or] 85 (other than headings 8485, 8548 or 9033) are in all cases to be classified in their respective headings;
(b) Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading (including a machine, instrument or apparatus of heading 9010, 9103 or 9103) are to be classified with the machines, instruments or apparatus of that kind;
(c) All other parts and accessories are to be classified in heading 9033.

Moreover, components of a machine that work together to perform a certain function are classified in the heading appropriate to that function. *See* Chapter Note 3 (Incorporating by reference Section XVI Note 4 ("Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by . . . by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in [Chapter 90], then the whole falls to be classified in the heading appropriate to that function."). *See also* Explanatory Notes Heading 9018 ("Subject to the provisions of Notes 1 and 2 to [Chapter 90], parts and accessories of apparatus or appliances of this heading remain classified here.").

1. "Appliance" or "instrument"

The Chapter Notes to Heading 9018 do not define "appliance" or "instrument," though dictionaries use these terms somewhat interchangeably. These dictionary definitions indicate that an "appliance" constitutes a "device, [[26]] apparatus [[27]], or instrument for performing or facilitating the performance of a particular function." *Dorland's Illustrated Medical Dictionary* 116 (27th ed. 1988). *See also* 1 *Oxford English Dictionary* 575 ("[A] thing applied as a means to an end" or an "apparatus"); *Academic Press Dictionary of Science and Techonology* 140 ("[I]n general, any tool or machine that is used to carry out a specific task or produce a desired result."). Similarly, an "instrument" is "any tool, appliance, or apparatus." *Dorland's Illustrated Medical Dictionary* 842. *See also* 7 *Oxford English Dictionary* 1050 ("a tool[] or implement"[28]*);* Webster's Third New International Dictionary 1172 (2002) (A "utensil"[29] or a surgical "implement"); *Academic Press Dictionary of Science and Technology* 1117 ("[A] mechanical tool or device, especially one designed for precise operations"); *Webster's II New Riverside University Dictionary* 633 ("A means by which something is accomplished"). These definitions are broad in nature. An appliance, device or machine, need only accomplish one "simple task" or serve a "particular function" in providing "useful work."[30]

Trumpf's light systems qualify under the broad common meaning of these terms because the light systems perform a specific task.

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[26] A "device" is "[s]omething constructed or devised for a particular purpose, [especially] a machine used to perform one or more relatively simple tasks." *Webster's II New Riverside University Dictionary* 370 (1988).

A "machine" is "a device or system along with its source of power and auxiliary equipment" or, more broadly, "[a] system, [usually] of rigid bodies, constructed and connected to change, transmit, and direct applied forces in a predetermined way to accomplish a particular objective, as performance of useful work." *Id.* 712. *See also Academic Press Dictionary of Science and Technology* 1289 (a machine is "any device that transmits or modifies energy... [or is] an assembly of interrelated parts, each with a definite motion and separate function; used to perform a specific task.")

[27] An "apparatus" is a "machine" or "group of machines used together or in succession to accomplish a task." *Webster's II New Riverside University Dictionary* 118.

[28] The term "implement" includes "tool[s], utensil[s], or instrument[s] for doing a task." *Webster's II New Riverside University Dictionary* 614.

[29] A "utensil" is "[a]ny useful tool . . . ." *Webster's II New Riverside University Dictionary* 1272.

[30] Further, in our case law, "there is no 'judicial determination' of what a machine is. It remains simply a question of common meaning . . . ." *Victoria Distributors, Inc. v. United States* 56 Cust. Ct. 284, 288, 1966 WL 9504 (1966).

2. Professional Use

The Explanatory Notes instruct that Heading 9018 covers a "wide range of instruments and appliances *which in [the] vast majority of cases are used only in professional practice*." Explanatory Notes 9018 (emphasis added). For example, the Heading includes articles used by doctors, surgeons, and dentists "either to make a diagnosis, to prevent or treat an illness or to operate." *Id.*[31] As stated above, Trumpf claims that its surgical light systems have but "one commercial use and that is assisting surgeons during an operation in an operating theater." (Compl. ¶ 8).

Arguing to the contrary, the government states that STERIS lightheads, though another brand of surgical lightheads, are used in art conservatories. Through the affidavit of a lighting designer, the government claims that the use of a STERIS lighthead in an art conservatory confirms that these types of light systems are used in forums outside of the medical industry. *See* Rosenfeld Decl.

To the court, however, even assuming that a lighthead similar to Trumpf's has another potential use, the Explanatory Notes for Heading 9018 provide some flexibility. The phrase "in the vast majority of cases" indicates an understanding that a single example of an appliance used outside of the medical profession does not preclude coverage under this heading.

While the parties do not agree that Trumpf's surgical light systems are used solely for medical and surgical purposes, all of the evidence submitted indicates that the light systems' design is still "clearly identifiable" as for medical use; moreover, there is no dispute that these lights are commonly seen only in the medical setting. *See* Pl.'s Resp. To Questions Exhibit A. Accordingly, the court cannot conclude that the government has raised a material issue of fact on the issue of professional use.

3. "Diagnostic"

Of particular significance here, the Explanatory Notes state that Heading 9018 includes "[l]amps which are *specially designed for diagnostic, probing, irradiation etc. purposes*." *Id.* (I)(R) (emphasis added).[32] The parties dispute the meaning of the term "diagnostic,"

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[31] Heading 9018 will also cover a number of medical tools, such as "hammers, mallets, saws . . . or articles of cutlery (scissors, knives, shears etc.) . . . only when they are clearly identifiable as being for medical or surgical." *Id.*

[32] Torches such as those in the shape of a pen are **excluded** (heading 85.13) as are other lamps which are not clearly identifiable as being for medical or surgical use (heading 94.05).*Id.* (I)(R)

and whether the illumination[33] that Trumpf's surgical light systems provide constitutes a "diagnostic purpose."

Unsurprisingly, "diagnostic" denotes "relating to or based on a diagnosis." *Academic Press Dictionary of Science and Technology* 625. "Diagnosis" specifically means "the identification of a disease or condition on the basis of its signs and symptoms." *Id.* In medical terms, "diagnostic" "pertain[s] to or subserv[es] diagnosis; [or is] distinctive of or serving as a criterion of a disease, as signs and symptoms." *Dorland's Illustrated Medical Dictionary* 461. Thus, a light system that is configured in such a way as to assist a health professional to detect the "signs and symptoms" of a condition or disease has a diagnostic use.

In its classification ruling, Customs stated that because Trumpf's surgical lights do not come in "direct contact... or [] close proximity with the patient for the sole benefit of diagnosis of disease" HQ 967747 (Mar. 21, 2006), they cannot be defined as a diagnostic tool. Trumpf claims that this idea of proximity is not necessary to assist a physician in diagnosis. In addition, Trumpf claims that the lights are within "several feet" of the patient during operations and are thus in close proximity to the patient. Trumpf further claims that surgery is often required for diagnosis, and that the surgical lights assist in examination, probing and observation of a patient. (Pl.'s Mem. At 22–23).

The notion of spacial proximity is not included in the definition of "diagnostic," the meaning of which turns upon the role the instrument plays in assisting a physician to identify and determine diseases and conditions. Surgical lighting is, of course, not the only factor in diagnosis. When a variety of diagnostic tools are required, lighting may not even be the main tool used in a diagnosis. However, a surgical light does assist in diagnosis by providing proper and specific illumination, without which operations and exploration into a patient's condition would be extremely difficult.

Rules of statutory interpretation support this view. Specifically, under the rule of *noscitur a sociis*, if the language of a statute is ambiguous, "the meaning of an unclear word or phrase should be determined by the words immediately surrounding it." *Black's Law Dictionary* (9th ed. 2009) 1160–61; *See also X-Acto Crescent Products Co., Inc. v. United States* 27 Cust. Ct. 190, 190191, Not Reported in F.Supp., WL 6228 (1951). Therefore, the meanings of the words "prob-

[33] Both parties agree that Trump's surgical lights provide illumination (*See* Def.'s Resp. to Pl.'s Stmt. of Material Facts not in Dispute ¶10; Def.'s Resp. to Questions at 4; Pl.'s Mem. at 10; Cobbs ¶ 4; Blessing ¶ 4; 21 C.F.R. § 878.4580 (citing the Food and Drug Administration ("FDA")).

ing" and "irradiation" should shed light upon the meaning of "diagnostic," and provide clues about what may be included in the "etc." in this list.

"Probing" is "exploring or searching with the aid of a probe." *Webster's II New Riverside University Dictionary* 937; medically, a probe is a "slender, flexible instrument designed for introduction into a wound, cavity or sinus tract for purposes of exploration." *Dorland's Illustrated Medical Dictionary* 1355. Further, to "irradiate" is "[t]o send forth in a way analogous to the emission of light." *Webster's II New Riverside University Dictionary* 644. In medical terms, "irradiation" is "treatment by photons, electrons, neutrons, or other ionizing radiations...the application of rays, such as ultraviolet rays, to a substance to increase its vitamin efficiency" *Dorland's Illustrated Medical Dictionary* 856.

It follows that the act of irradiation is similar to illumination in that, in both cases, rays are emitted. Even though irradiation provides treatment for a patient, proper illumination assists a doctor to explore a field (similar to a probe), in order to diagnose a disease or condition. Thus, in context, the term diagnostic is broad enough to include Trumpf's surgical lighting systems.

Because the Defendant presents no evidence to dispute Trumpf's evidence that its surgical light's "chief use" is "as an aid to physicians in identifying a disease or illness from its signs and symptoms" *Instrumentation Associates, Inc. v. United States* 58 Cust.Ct. 471, 479, 269 F.Supp. 777, 783 (Cust.Ct. 1967), the light systems can be considered a diagnostic tool.

Conclusion

For the foregoing reasons, the court concludes that Plaintiff's entries of complete surgical light systems are correctly classified under HTSUS 9018.90.60 and not under Heading 9405.10.6020, as classified by Customs. The parties are directed to review the descriptions and components of the entries identified in *Appendix B* and to determine how these entries should be classified consistent with this Opinion. A draft judgment shall be submitted by November 29, 2010, provided that if the parties cannot agree to the terms of said judgment, they shall submit statements of their positions with regard to all of the entries at issue.

It is **SO ORDERED**

Dated: October 27, 2010
New York, New York

/s/ Donald C. Pogue
DONALD C. POGUE, JUDGE

APPENDIX A

Characteristics of surgical light systems:

1. High Illumination/Brightness

Illumination is "the act of adding light to a surface" (Ex. B to Pl.'s Mot. Summ. J. 6) and is measured, internationally, in "lux."[34] (*Id.*) Industry standards[35] dictate that surgical lights should produce a minimum illuminance of 100,000 lux or 100 klux. (Ex. A to Pl.'s Mot. Summ. J. 2. *Accord* Ex. B to Pl.'s Mot. Summ. J. 6.) Peak central illuminance should not exceed 160 klux, as this light level will cause glare and increase irradiation. (Ex. A to Pl.'s Mot. Summ. J. 8. *Accord* Ex. B to Pl.'s Mot. Summ. J. 12.) Illumination from a surgical light must be consistent (Ex. B to Pl.'s Mot. Summ. J. 10,) intense, and uniform. (Ex. A to Pl.'s Mot. Summ. J. 2.)

2. Color Rendition of Tissue

A surgical light must carefully calibrate the color of the emitted light such that surgeons are able to view, in true color, tissue, organs, and skin. The emitted light must be as close to white as possible, mimicking that of noon sunlight. (Ex. B to Pl.'s Mot. Summ. J. 7. *See also* Ex. A to Pl.'s Mot. Summ. J. 2.) One way of ensuring faithful color is to manipulate color temperature.[36] Color temperature is measured in degrees of Kelvin. (Ex. B to Pl.'s Mot. Summ. J. 7.) According to industry standards, color temperature should range from 3500 to 6700 Kelvin; surgeons prefer a color temperature of approximately 4500 Kelvin. (*Id.*)

Another measure of true color uses the Color Rendering Index ("CRI"). (Ex. A to Pl.'s Mot. Summ. J. 7.) The CRI "measures the effect of the light on the color appearance of the objects being seen." (Ex. B to Pl.'s Mot. Summ. J. 9.) CRI values anywhere from 85% to 100% are acceptable. (Ex. A to Pl.'s Mot. Summ. J. 7.) A surgical light rating of 94% is considered "good." (Ex. B to Pl.'s Mot. Summ. J. 9.) As a comparison, florescent lights have a CRI of around 70%. (Ex. A to Pl.'s Mot. Summ. J. 7.)

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[34] One lux is "equal to the illumination of a surface all of which is one metre from a uniform point source of light of unit intensity . . . ." 9 *Oxford English Dictionary* (2nd 1989) 127.

[35] Industry standards come from Illuminating Engineering Society and the International Electro technical Commission. (Ex. Bto Pl.'s Mot. Summ. J. 11–12.) The U.S. Food and Drug Administration ("FDA") mandates that companies must follow either of these guidelines. (*Id.* 11.)

[36] If the color temperature is too low, emitted light appears pink or red, whereas if the color temperature is too high, emitted light appears blue. (Ex. A to Pl.'s Mot. Summ. J. 2; Ex.B to Pl.'s Mot. Summ. J. 7.) The surgical light color temperature should fall between these two hues. (Ex. A to Pl.'s Mot. Summ. J. 2; Ex. B to Pl.'s Mot. Summ. J. 7.)

3. Light Field Diameter

The light pattern[37] diameter of the light field is also important; if the diameter is too large, glare can be a problem, but, if a surgeon needs diffuse light, a small diameter can also pose problems. (*Id.* 3.) The light field must be large enough to illuminate the particular surgery involved. (*See id.* 7.) Given the diversity of types of surgeries, surgical lights should allow for adjustment of the light pattern size. (*Id.* 3.) In any event, industry standards dictate that the light pattern diameter should not be smaller than eight inches. (Ex. B to Pl.'s Mot. Summ. J. 13.)

4. Shadow Reduction

In order to ensure optimal illumination of the surgical site, the light must minimize contrast shadows.[38] (Ex. A to Pl.'s Mot. Summ. J. 2.) The light, therefore, must have the ability to beam light around obstacles located between the light and the wound. (Ex. B to Pl.'s Mot. Summ. J. 9.) The light's design can involve lighthead diameter,[39] the number of lighthead lamps, the type of lens, or the type of refraction system. (*Id.*)

5. Limited Heat/Irradiance

While providing for optimal lighting, a surgical light must nonetheless limit its radiated energy, or its irradiance. (*Id.* 8; Ex. A to Pl.'s Mot. Summ. J. 7.) This is because heat will both dessicate tissue and make the surgical team uncomfortable. (Ex. A to Pl.'s Mot. Summ. J. 2–3.) Unfortunately, irradiance increases with increased illumination. (*See* Ex. B to Pl.'s Mot. Summ. J. 8.) For this reason, many surgical lights attempt to limit heat emission by using light filters, lenses, reflectors, reflector coatings, and sealed light designs (*id.* 11,) and/or by designing the light in such a way that it releases the heat behind the lighthead, (*id.* 8–9.)

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[37] The light pattern is "an area in which the level of illumination tapers from the center to the periphery so that illumination at the edge is no less than 20% of that at the center." (Ex. B to Pl.'s Mot. Summ. J. 13.)

[38] Contrast shadows "result from obstructions cast by hands or instruments" whereas contour shadows "help the surgeon differentiate between fine tissue striations and vasculature." (Ex. A to Pl.'s Mot. Summ. J. 2.) Thus, a good surgical light must limit contrast shadows but maintain contour shadows. (*Id.*)

[39] The larger the lighthead diameter, the better the shadow control.

6. Depth of Illumination[40]

A surgical light must provide sufficient depth of field, that is, sufficient range of illumination in order to reach tissue on surgery tables located a certain distance away from the light. (Ex. A to Pl.'s Mot. Summ. J. 8. *See also* Ex. B to Pl.'s Mot. Summ. J. 9 ("depth of field . . . indicates the length of the range within the focused, usable light that is projected").) Depth of field is measured as "the depth below the one-metre level reference point at which the central illumination falls to 20% of its initial value." (Ex. A to Pl.'s Mot. Summ. J. 8.) Ideally, the light should be positioned such that the surgical site is within the light's focal length, that is, positioned so that "the area where the [light] pattern is at its brightest and most focused" shines on the surgical cavity. (Ex. B to Pl.'s Mot. Summ. J. 9.)

7. Other Factors

Other factors hospitals consider when purchasing surgical lamps include: abilities to "transfer video signal and power to multiple flat panel monitors," "incorporate video camera systems," and "integrate into endoscopic automation systems"; conventional illumination of the operating room; "flexibility" and "maneuverability"; stability — that is, the light will not drift away; sterile control; and ease of cleaning. (*Id.* 9–10.)

[40] In the literature before the court regarding surgical lights, depth of illumination is sometimes also referred to as depth of field, focal length, or depth of focus. (Ex. B to Pl.'s Mot. Summ. J. 9; McArver Aff. ¶ 15.)

APPENDIX B

1. Entry No. 233–3416935–8

Trumpf describes this entry as containing "70 examination lights, Helion ® S light[s] specially configured to mount on TRUMPF's critical care nursing booms." (McArver Aff. Dated June 2, 2010 ¶3.)[41] Trumpf further contends that these are "examination lights" used for "medical diagnostic uses." Pl.'s Resp. to Questions at 4). Defendant contests that these lights are imported for use with the booms, not the surgical light systems, and that Plaintiff should not now be able to bring an action for lights not part of the surgical light systems at issue. Def.'s Resp. to Questions at 7.

2. Entry No. 233–3302102–2

Trumpf's evidence states that "Entry [No.] []233–3302102–2 contain[ed] seven flat panel display mounts on separate pendants." (McAver Aff. Dated June 2, 2010 ¶3-f.) The commercial invoice number for this entry provides an identical description. (*Id.* ¶2–3 (Invoice, Ex. F to McArver Aff. Dated June 2, 2010, 28.))[42] The government asserts that this entry simply contained pendants and flat panel mounts. (Def.'s Resp. to Pl.'s Stmt. of Material Facts not in Dispute ¶4.) According to the government, "pendants" are suspension systems which are suspended from the ceiling with display monitors and no lights[.]" (*See id.*)

3. Entry No. 233–3257991–3

Trumpf describes the contents of Entry No. 233–3257991–3 as; "three flat panel display mounts on separate pendants" or three systems of Helion® L+/L lights with flat panel mounts. (McArver Aff. Dated June 2, 2010 ¶3-d.) The government argues that these entries simply contained pendants with flat panel display mounts and "several numerous articles not identified as being components of complete unassembled surgical lights." (Def's Resp. to Pl's Stmt. of Material Facts not in Dispute ¶4.)[43]

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[41] The government asserts that this entry simply included light bulbs. (*See* Def.'s Resp. to Pl.'s Stmt. of Material Facts not in Dispute ¶4.)

[42] *See also* McAver Aff. Dated June 2, 2010 ¶2 ("There are no price lists which identify the components contained in each of TRUMPF's surgical light products contained in these entries.").) The court interprets Trumpf to claim that all products mentioned in the affidavit are part of surgical light systems and therefore do not have their own price lists as separate parts.

[43] The invoices also appear to suggest a difference in size and a difference between flat panel display mounts and flat panel displays.

4. Entry No. 233–5554827–4

The government asserts that Entry No. 233–5554827–4 contained flat panel mounts with separate pendant systems that are suspended from the ceiling, with neither lights nor display monitors. (Def's Resp. to Pl's Stmt. of Material Facts not in Dispute ¶4.) The government claims that these articles are not part of Trumpf's surgical lighting system. (Def's Resp. to Questions at 7). Trumpf states that this entry contains "six surgical light systems and six flat panel display mounts on separate pendants" (Pl.'s Resp. to Questions at 4), as well as "six flat panel mounts on separate pendants." (*Id.* at 5.) The entry also includes eighteen transformers for use with Xenion® L/L lights.

5. Entry No. 233–3302107–1

Plaintiff claims that Entry No. 233–3302–107–1 contained two Helion® systems and two flat panel display mounts. (McArver Aff. Dated June 2, 2010 ¶3-e.) According to Trumpf, the systems consisted of pendants and surgical lights in two configurations. (*Id.*) One configuration is a Helion® L+ "with a flat panel display and including the transformer boxes and control units." (*Id.*) The other is a "Helion® M+ light system with a flat panel display and including the transformer boxes and control units." (*Id.*) The entry also included "two flat panel display mounts on separate pendants." (*Id.*)

6. Entry No. 233–3247748–0

Plaintiffs cite invoices indicating that this entry contained "12 individual systems with Xenion® L/L lights, handles, identified as 'side rails,' wall controls and transformers." (*Id.* ¶3-g.) The pendants and the surgical lights were also included. (*Id.*) "In addition, this entry also contain[ed] 12 flat panel display mounts on separate pendants, which are identified on the commercial invoice." (*Id.*)

7. Entry No. 233–3317874–9

Entry No. 233–3317874–9 "contain[ed] eight systems with Helion® L+ lights, their transformers and controls." (*Id.* at ¶3-h.) The systems included the pendants and the lights. (*Id.*) The entry, moreover, "contain[ed] eight flat panel display mounts on separate pendants." (*Id.*) The government claims that this entry contained no lights (Def's Resp. to Questions at 7). Trumpf contends "that these components constitute surgical light systems." (Pl.'s Resp. to Questions at 6).

8. Entry No. 233–5510440–9

Trumpf asserts that Entry No. 233–5510440–9 consisted of pendants, surgical lights, and a "flat panel mount on a separate pen-

dant." (McArver Aff Dated June 2, 2010 ¶3-c.) Specifically, the imported systems in this entry contained "two Xenion lights: Xenion® L/ Xenion® M+." (*Id.*) This entry also included transformers used with the Xenion® L/ Xenion® M+ light systems. (*Id.*) The government again contends that this entry "contain[ed] several [] articles not identified as being the components of the complete unassembled surgical lights system contained in the entry." (Def's Resp. to Pl.'s Statement of Material Fact Not in Dispute ¶4.)

ERRATA

Slip Op. 10–123, issued October 27, 2010
Trumpf Medical Systems, Inc. v. United States

Footnote 33, page 23 — "Trump's" should be "Trumpf's"

Slip Op. 10–124

UNITED STATES, Plaintiff, v. CALLANISH LTD., Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 03–00658

[Denying plaintiff's application for a judgment by default against defendant in the amount of $17,734,926]

Dated: November 2, 2010

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Domenique Kirchner*); *Kevin B. Marsh*, Bureau of Customs and Border Protection, of counsel, for plaintiff.

OPINION AND ORDER

Stanceu, Judge:

I. Introduction

Following the court's opinion and order in *United States v. Scotia Pharmaceuticals Ltd.*, 33 CIT __, Slip Op. 09–49 (May 20, 2009), plaintiff filed an amended complaint to recover a civil penalty under Section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (1988) ("Section 592") against defendant Callanish Ltd. ("Callanish") in the amount of $17,734,926. Am. Compl. ¶¶ 91–93. Plaintiff's claim arises out of fifty-two consumption entries of merchandise, made between September 1, 1988 and March 24, 1992, that plaintiff alleges to have been capsules of "evening primrose oil" ("EPO"), a substance used as a food additive that could not be imported lawfully at the time of the entries at issue. *Id.* ¶¶ 11–12, 91–93. After defendant failed to appear by licensed counsel and failed to plead or otherwise defend itself within twenty days of being served with the summons and the amended complaint, the Clerk of this Court, pursuant to USCIT Rules 12 and 55, entered Callanish's default. Entry of Default 1.

On May 19, 2010, plaintiff applied for a judgment by default against Callanish in the amount of $17,734,926 pursuant to USCIT Rule 55(b). Pl.'s Req. for Default J. as to Callanish Ltd. 1–2 ("Pl.'s Req. for Default J."). Upon review of the amended complaint and plaintiff's application, the court holds that plaintiff has not established its entitlement to the default judgment it seeks against Callanish because plaintiff has failed to set forth as a well-pled fact the domestic value of the merchandise plaintiff alleges to have been imported fraudulently. The court, therefore, will deny without prejudice plaintiff's application for a default judgment.

II. Background

A. Alleged Fraudulent Scheme to Unlawfully Import Evening Primrose Oil

The amended complaint alleges that beginning on February 12, 1985, the Food and Drug Administration ("FDA") issued a series of import alerts announcing that evening primrose oil could not be sold lawfully in the United States without FDA approval, that this substance did not have FDA approval, and that all import shipments of EPO offered for entry into the United States were to be detained by Customs and Border Protection ("Customs") and naming Efamol Research, Inc. as a seller of EPO. Am. Compl. ¶ 5; Pl.'s Req. for Default J. 5; Admin. R. Doc. Nos. 70–75.

The amended complaint further alleges that during the period from September 1, 1988 to March 24, 1992, Callanish introduced, or aided and abetted another to enter or introduce, into the United States merchandise consisting of capsules of EPO under cover of fifty-two consumption entries filed at various ports of entry throughout the United States by means of material and false acts, statements and/or material omissions, in violation of Section 592. Am. Compl. ¶¶ 11–12, 91–93; Admin. R. Doc. Nos. 1–12 (Declaration of Timothy F. Quinn, Special Agent, U.S. Immigration and Customs Enforcement).

Plaintiff identifies several main participants in the alleged fraudulent scheme: (1) Murdock Healthcare, "the real buyer and importer" (a U.S. company doing business under several names such as Health Products International ("HPI"));[1] (2) Chester Lockard, the "straw buyer and importer of record" in the United States who served as president of the two U.S. companies, Pine Lawn Farms, Inc., and Genesis II of Mid-America, that paid the duties and fees for EPO shipments and then billed HPI for the shipments, plus commission;[2] and (3) three subsidiaries of Scotia Pharmaceuticals Ltd. ("Scotia Pharmaceuticals"), a British company: Efamol Ltd. (the British distributor of EPO), Efamol Research, Inc., the successor of which is Quantanova, Canada, Ltd. ("Quantanova"), and defendant Callanish, a British corporation with a business address at Breasclete, Isle of

[1] As a consequence of Health Products International's ("HPI") participation in the fraudulent scheme at issue in this action, HPI and its general counsel, Loren Israelson, pleaded guilty in the Eastern District of Missouri in 1996 to violations of 18 U.S.C. § 542 (2006) (entry of goods (EPO) by means of false statements). Am. Compl. ¶ 14. HPI employee David Anderson pleaded guilty to a violation of 19 U.S.C. § 1304 (concealing information regarding the marking of imported goods). *Id*.

[2] As a consequence of his participation in the fraudulent scheme at issue in this action, Chester Lockard, president of Pine Lawn Farms, Inc., pleaded guilty to a violation of 18 U.S.C. § 542 for fraudulently importing EPO. Am. Compl. ¶ 14.

Lewis, Scotland, United Kingdom, that manufactured and shipped the EPO to the United States. Am. Compl. ¶¶ 6–10; Pl.'s Req. for Default J. 3–4.

Specifically, plaintiff alleges that Callanish, as the party responsible for shipping each of the fifty-two entries of EPO to the United States, performed the following acts in furtherance of the fraudulent scheme: (1) "Callanish followed HPI's instructions to ship the EPO . . . and not to list or describe the merchandise as EPO;" (2) "Callanish provided false invoices to HPI showing the buyer as Pine Lawn Farms rather than HPI;" and (3) "Callanish, together with Scotia Pharmaceuticals Ltd[.], and Quantanova, Canada, Ltd., used different invoices for the same shipment, an invoice accurately identifying the merchandise as EPO was sent to HPI, and a second invoice was sent to Mr. Lockard's companies, Pine Lawn Farms or Genesis II, which disguised the EPO in the shipments." Am. Compl. ¶ 16. Plaintiff claims that the documents submitted to Customs for the fifty-two consumption entries of EPO "contained materially false statements," Am. Compl. ¶¶ 19–22, and that "Callanish shipped the EPO with knowledge that the importation of the EPO into the United States was illegal and that the EPO would be entered under cover of false documents," Am. Compl. ¶ 24.

B. Procedural History

The procedural background of this litigation is presented in the court's opinion and order in *United States v. Scotia Pharmaceuticals Ltd.*, 33 CIT __, __, Slip Op. 09–49, at 4–6, and is further supplemented herein.

On May 20, 2009, the court held that plaintiff had not established its entitlement to the judgment by default that it then sought against defendant Callanish for a civil penalty under 19 U.S.C. § 1592. *United States v. Scotia Pharmaceuticals Ltd.*, 33 CIT at __, Slip Op. 09–49, at 13–14. The court denied plaintiff's application for default but also allowed plaintiff the opportunity to amend its complaint. *Id.* at __, Slip Op. 09–49, at 14. Because plaintiff had not effected service upon defendants Scotia Pharmaceuticals and Quantanova, the court granted plaintiff's request to dismiss the action as to those defendants. *Id*.

On July 31, 2009, plaintiff filed its amended complaint. Am. Compl. On May 17, 2010, after plaintiff successfully effected service of process upon Callanish, defendant again failed to appear by licensed counsel and failed to plead or otherwise defend itself within twenty days of being served with the summons and amended complaint, and

the Clerk of this Court, pursuant to USCIT Rules 12 and 55, entered Callanish's default. Pl.'s Req. for Default J. 1; Entry of Default 1.

On May 19, 2010, plaintiff applied for a judgment by default against Callanish pursuant to USCIT Rule 55(b). Pl.'s Req. for Default J. 1. Plaintiff seeks a penalty equal to what it alleges to be the domestic value of the EPO entered on the fifty-two entries, $17,734,926. *Id.* 2.

III. Discussion

Because defendant Callanish has been found to be in default, the court accepts as true all well-pled facts in the complaint. *See Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981). An entry of default, however, is not sufficient to entitle plaintiff to the relief it seeks. *See Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) ("[A] defendant's default does not in itself warrant the court in entering a default judgment."). Even after an entry of default, "it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law." 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2688, at 63 (3d ed. 1998); *see also Nishimatsu Constr. Co.*, 515 F.2d at 1206–08 (vacating district court's entry of default judgment because the pleadings were insufficient to support the judgment). "There must be a sufficient basis in the pleadings for the judgment entered." *Nishimatsu Constr. Co.*, 515 F.2d at 1206. Accordingly, the court must decide whether the well-pled facts in plaintiff's complaint, and deemed to be admitted by Callanish as a result of the entry of default, are sufficient to establish liability for a violation of Section 592(a) that is grounded in fraud and sufficient to establish the amount of the civil penalty sought by plaintiff.

Under Section 592(a)(1)(A), it is unlawful for any person to enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of material and false documents, statements, or acts or material omissions, whether by fraud, gross negligence, or negligence. 19 U.S.C. § 1592(a)(1)(A)(i)-(ii). The statute also prohibits the aiding and abetting of another to commit a violation of Section 592(a)(1)(A). *Id.* § 1592(a)(1)(B). In an action brought to recover a civil penalty under Section 592, the amount of the penalty is determined by the court *de novo*. *Id.* § 1592(e). The statute provides that a violation of Section 592(a) based on fraud "is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise." *Id.* § 1592(c)(1). Therefore, the domestic

value of the merchandise is a fact essential to the court's *de novo* determination of the amount of any penalty. Plaintiff, therefore, must allege the domestic value of the merchandise as a well-pled fact in order to obtain a default judgment in this case.

The amended complaint seeks a penalty of $17,734,926, which plaintiff alleges to be the domestic value of the fifty-two consumption entries of EPO that it alleges to have been fraudulently imported in violation of the statute. Am. Compl. ¶ 93. The complaint lacks any well-pled fact concerning the domestic value of the merchandise or how that value was determined. Plaintiff provides only the conclusory statement of the domestic value of the imported EPO.[3] The mere allegation of an amount offered as the "domestic value," absent anything more, does not constitute a well-pled fact. *See Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008) (defining well-pled facts as those that are "plausible, nonconclusory, and *non-speculative*" (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007) (emphasis added))). Absent such a well-pled fact, the court is unable to enter a judgment by default in this case, and plaintiff's application must be denied. The court will allow plaintiff the opportunity to move for leave to amend its complaint.

IV. Conclusion and Order

From its review of the amended complaint and of plaintiff's application for judgment by default, the court concludes that plaintiff has not established its entitlement to a judgment by default against defendant Callanish for a civil penalty under 19 U.S.C. § 1592. Upon consideration of all papers and proceedings herein, it is hereby

ORDERED that plaintiff's application for judgment by default against defendant Callanish be, and hereby is, DENIED without prejudice; and it is further

ORDERED that unless plaintiff moves within sixty (60) days of the date of this Opinion and Order for leave to file an amended complaint, plaintiff, upon entry of a further order, shall be required to show cause why a judgment should not be entered dismissing this action.

Dated: November 2, 2010
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE

[3] From exhibits to plaintiff's application for judgment by default, it appears that the amount of the "domestic value" was derived by doubling the amounts for entered value as set forth on entry summaries for the importations that are the subject of this action. *See* Admin. R. Doc. Nos. 165–531.