

# U.S. Customs and Border Protection

Slip Op. 12–124

WELCOM PRODUCTS, INC., Plaintiff, v. UNITED STATES, Defendant, and  
GLEASON INDUSTRIAL PRODUCTS, INC., AND PRECISION PRODUCTS, INC.  
Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge  
Court No. 11–00370

[Granting plaintiff’s motion for judgment requesting remand to the Department of Commerce for further explanation of the rationale for its finding that one model of hand truck was within the scope of the antidumping order. Defendant-intervenor’s cross-motion for judgment denied.]

Dated: September 27, 2012

*J. Kevin Horgan, Judith L. Holdsworth and Gregory S. Menegaz, of deKieffer & Horgan PLLC, Washington, D.C., for plaintiff.*

*Joshua E. Kurland, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., for defendant. With her on the brief were Stewart F. Delery, Acting Assistant Attorney General, Jeanne E. Davidson, Director, and Claudia Burke, Assistant Director. Of counsel on the brief was Nathaniel J. Halvorson, Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce.*

*Matthew P. Jaffe, Neville Peterson LLP, Washington, D.C., for defendant-intervenors.*

## **Musgrave, Senior Judge:**

In this case, the U.S. Department of Commerce, International Trade Administration (“Commerce”) found that one model of hand truck was within the scope of an antidumping order while two others were not. Plaintiff claims that Commerce erred in finding the one model within scope because it previously found that similar models were outside the scope of the order, while defendant-intervenors claim that Commerce erred by finding the two other models outside scope. The government defends Commerce’s actions on both counts. For the reasons explained below, plaintiff’s request for remand is granted, and defendant-intervenor’s request for reversal of the scope findings is denied.

### ***I. Facts***

In 2004, Commerce entered an antidumping duty order on certain varieties of hand trucks manufactured in China. *See Notice of Final Determination of Sales at Less Than Fair Value: Hand Trucks and Certain Parts Thereof from the People's Republic of China*, 69 Fed. Reg. 60,980 (Dep't Commerce, Oct. 14, 2004). The antidumping order's scope includes a "utility cart exclusion" which provides in relevant part as follows:

Excluded from the scope are small two-wheel or four-wheel utility carts specifically designed for carrying loads like personal bags or luggage in which the frame is made from telescoping tubular material measuring less than 5/8 inch in diameter. . . .

*Notice of Antidumping Duty Order: Hand Trucks and Certain Parts Thereof From the People's Republic of China*, 69 Fed. Reg. 70,122 (Dec. 2, 2004) ("Order").

Commerce analyzed the utility cart exclusion in a scope ruling involving plaintiff WelCom Products, Inc.'s ("WelCom") 2004 Magna Cart model at the time of the original antidumping investigation that gave rise to the antidumping order. *See Memo from Analysts to Jeffrey A. May, Scope Exclusion/Clarification Requests* (Sept. 3, 2004) (P.D. 2 at Ex. 2) ("2004 Magna Cart Ruling"). In the 2004 Magna Cart Ruling, Commerce concluded that a telescoping center tube attached between a cross member and the toe plate was part of the cart's frame and that the utility cart exclusion applied because that tube measured less than 5/8" in diameter. 2004 Magna Cart Ruling at 15. Commerce stated that "[s]ince the scope exclusion does not specify that the frame be exclusively constructed of telescoping tubular material less than 5/8" in diameter, or further define which parts of the frame must telescope, a reasonable interpretation of the scope exclusion language is that the primary focus should be on the diameter of the tubular material comprising the telescoping section(s) of the frame." *Id.* at 16.

Commerce construed this interpretation of the utility cart exclusion in a 2008 scope ruling concerning WelCom's MCX model hand truck. *See Memo from Katharine G. Huang to Stephen J. Claeys, Request by WelCom Products (MCX Magna Cart) (May 12, 2008) Ex. 3 to WelCom Scope Request ("MCX Ruling")*. Unlike the 2004 model, the MCX model lacked the center telescoping tube and featured telescoping side rails comprised of three segments, only one of which measured less than 5/8" in diameter. The MCX Ruling stated that "[c]onsistent with the 2004 Magna Cart Scope Ruling . . . since both telescoping sections are integral components of the frame, and we have deter-

mined that the frame does not have to be exclusively constructed of telescoping material less than 5/8 inch in diameter, it is reasonable to focus our analysis on whether either telescoping section of the frame is less than 5/8 inch in diameter.” MCX Ruling at 15. Because one section of the telescoping frame was less than 5/8” in diameter, the MCX was determined to be outside the scope of the Order. *Id.* Other scope rulings affirmed this result. *See* Ex. 6 to WelCom Scope Request at 6 (June 10, 2009 Safco Scope Ruling) and Ex. 7 to WelCom Scope Request at 5–6 (Mar. 26, 2010 Packard Scope Ruling).

On October 12, 2010, WelCom asked Commerce to determine whether three of its Magna Cart hand trucks (models MC2, MCI and MCK) were within the scope of the Order. WelCom Request for Scope Clarification (Oct. 8, 2010). Commerce preliminarily concluded that the MCK, MC2 and MCI did not qualify for the utility scope exclusion on May 9, 2011. *Hand Trucks and Certain Parts Thereof from the People’s Republic of China (PRC): Preliminary Scope Ruling – WelCom Products* (May 9, 2011) (“Preliminary Scope Ruling”). In the Preliminary Scope Ruling, Commerce reversed the earlier rulings’ interpretations of the utility cart scope exclusion. The MC2 and MCI models, which resembled the cart in the 2004 Magna Cart Ruling, were preliminarily found within scope because Commerce decided the single vertical telescoping tube was not part of the frame. Preliminary Scope Ruling at 7. The MCK model, which resembled the MCX model and the other models ruled outside scope in 2008, was deemed in scope because its telescoping frame rails were not entirely less than 5/8” in diameter. *Id.*

After considering comments by the parties, Commerce ultimately found the MC2 and MCI models were outside the scope of the Order and the MCK model was within its scope. *See Hand Trucks and Certain Parts Thereof from the People’s Republic of China (PRC): Final Scope Ruling – WelCom Products (MC2 Magna Cart, MCI Magna Cart, and MCK Magna Cart)*, Memorandum from Steve Bezirgianian, International Trade Analyst to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations (Sept. 6, 2011) (“Final Scope Ruling”). Commerce reversed its preliminary finding on the MC2 and MCI models in deference to the 2004 Magna Cart Ruling’s finding that the center telescoping arm was part of the frame.

The MCK model, although similar to a model found outside scope in the three later rulings, was found in scope in the Final Scope Ruling because the telescoping portion of the frame was not entirely less than 5/8” in diameter. The earlier rulings were found to have “improperly expanded” the 2004 Magna Cart Ruling’s interpretation of

the scope language. Final Scope Ruling at 17. Commerce determined that in order to fit within the exclusion, the entire telescoping portion of the frame must be less than 5/8" in diameter. *Id.* at 16. The MCK model was in scope because two sections of the telescoping frame were more than 5/8" in diameter.

Plaintiff WelCom challenges the Final Scope Ruling's determination that the MCK model is in scope; defendant-intervenors Gleason Indus. Prod., Inc. and Precision Prod., Inc. ("Gleason") challenge the determination that the MC2 and MCI models are outside the scope of the Order. All three models at issue here are two-wheel utility carts which but for the utility cart exclusion would fall within the scope of the Order.

## ***II. Arguments Presented***

WelCom argues the utility cart exclusion does not "require" that all telescoping portions of the frame be less than 5/8" in diameter. Plaintiff's Memorandum in Support of its Motion for Judgment on the Agency Record ("Pl. Memo"), at 15. Commerce erred by not following the MCX ruling and its progeny because the MCK model is indistinguishable in construction and features with the MCX and Safco/Packard models involved in the earlier rulings. Pl. Memo at 20. WelCom argues that the case should be decided according to the factors set forth in 19 C.F.R. § 351.225(k)(1). Pl. Memo at 16, citing *Duferco Steel Inc. v. United States*, 296 F.3d 1087 (Fed. Cir. 2002) and *Arcelormittal Stainless Belg. N.V. v. United States*, 2011 Ct. Intl. Trade LEXIS 82, Slip Op. 11-82, at \*6-7 (CIT, July 12, 2011) (construing *Duferco*).

WelCom argues Commerce incorrectly construed the 2004 Magna Cart Ruling because that ruling provides that the entire telescoping portion of the frame need not be less than 5/8" in diameter. Pl. Memo at 8, 21. Commerce overturned findings made in its earlier MCX line of rulings without providing adequate reasoning for its reversal of its position. *Id.* WelCom also argues Commerce failed to address its argument that the 2004 Magna Cart was not reflected in the ITC's injury analysis. *Id.* at 26-27. In addition, WelCom argues, the MCK model should be outside the scope because there are no similar hand trucks being made in the U.S. Pl. Memo at 17, 31. The matter should be remanded to Commerce for an explanation of why it found the lack of U.S. production of similar merchandise "irrelevant". *Id.* at 27, quoting Final Scope Ruling at 18.

Gleason argues that Commerce erred by finding the MC2 and MCI models were outside scope in the Final Scope Ruling. Memorandum of

Points and Authorities in Support of Gleason's Motion for Judgment on the Agency Record ("Gleason Memo") at 8. Commerce erred by relying on the 2004 Magna Cart scope ruling. *Id.* According to Gleason, Commerce's decision is unsupported by substantial evidence because the telescoping portions of the carts are not part of the frame, the carts are not small, and they are not designed to carry small loads such as luggage. Gleason Memo at 17–20.

The government argues that Commerce's decisions on both scope issues are supported by substantial evidence. Defendant's Memorandum in Opposition to Plaintiffs' Rule 56.2 Motions for Judgment Upon the Agency Record ("Deft. Memo") at 11. Commerce reasonably determined that the utility cart exclusion for small carts featuring telescoping tubular materials measuring less than 5/8" in diameter does not require the entire hand truck frame to be made of telescoping tubular material, but it does require the entire telescoping section of the frame to measure less than 5/8" in diameter. *Id.* at 9. The utility cart language is ambiguous and thus required interpretation by Commerce. *Id.* at 14. Commerce correctly gave weight to the 2004 Magna Cart Ruling in deciding that the MCI and MC2 models were outside scope. *Id.* at 16. The government argues that Commerce likewise was correct to reverse its earlier finding that only part of the telescoping portion of the frame needed to have a diameter of less than 5/8" because that reversal flowed directly from the language of the 2004 Magna Cart ruling. *Id.* at 25.

### ***III. Standard of Review***

This 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). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Commerce's findings must be "reached by 'reasoned decisionmaking,' including an examination of the relevant data and a reasoned explanation supported by a stated connection between the facts found and the choice made." See *Husteel Co. v. United States*, 31 CIT \_\_, , 491 F. Supp. 2d 1283, 1291 (2007) (citing *Elec. Consumers Res. Council v. Fed. Energy Regulatory Comm'n*, 747 F.2d 1511, 1513 (D.C. Cir. 1984)). "In order to effectuate review of the reasonableness of agency action, '[c]ourts look for a reasoned analysis or explanation for an agency's decision as a way to determine whether a particular decision is arbitrary, capricious, or an abuse of discretion.'" *U.S. Steel Corp. v. United States*, 621

F.3d 1351, 1357 (Fed. Cir. 2010), quoting *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998). An abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represent an unreasonable judgment in weighing relevant factors. *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005).

“An agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.” *SKF USA, Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (quoting *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996)). If the Department provides “no reasonable explanation” for changing a practice that it has “consistently followed,” such a change is an unacceptable agency practice. See *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003).

#### IV. Analysis

In analyzing the issues here, Commerce properly began by examining the language of the Order at issue. The “predicate for the interpretive process is language in the order that is subject to interpretation.” *Duferco Steel Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002). The Order states that “small two-wheel or four-wheel utility carts specifically designed for carrying loads like personal bags or luggage in which the frame is made from telescoping tubular material measuring less than 5/8 inch in diameter” are excluded from the scope of the Order. Although the parties disagree whether this language is subject to interpretation, the court agrees with the government that it is ambiguous. Because the terms of the Order alone were not dispositive, Commerce determined whether it could make a ruling based upon the request for a scope ruling and the factors listed in § 351.225(k)(1). See *Sango Int’l, L.P. v. United States*, 484 F.3d 1371 (Fed. Cir. 2007). Accordingly, Commerce considered “[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [International Trade] Commission.” 19 C.F.R. § 351.225(k)(1). Most important among this evidence are Commerce’s earlier rulings. In the 2004 Magna Cart Ruling, Commerce held that “[s]ince the scope exclusion does not specify that the frame be exclusively constructed of telescoping tubular material less than 5/8” in diameter, or further define which parts of the frame must telescope, a reasonable interpretation of the scope exclusion language is that the primary focus should be on the diameter of the tubular material comprising the telescoping section(s) of the frame.” 2004 Magna Cart



Ruling at 16. In the MCX Ruling, Commerce determined that “the frame does not have to be exclusively constructed of telescoping material less than 5/8 inch in diameter. . . .” MCX Ruling at 15.

### **A. Commerce Properly Determined that the MC2 and MCI Carts were Outside Scope**

The court first addresses Gleason’s argument that the MC2 and MCI carts should have been found within scope. In the Final Scope Ruling, Commerce applied the rationale of the 2004 Magna Cart Ruling to the MC2 and MCI carts pursuant to 19 C.F.R. § 351.225(k)(1). Commerce concluded that the MC2 and MCI carts were outside scope because “these carts have a portion of the frame comprised of telescoping tubular material that measures less than 5/8 inches in diameter at all points, are small in size, and are designed for carrying small loads such as personal bags or luggage.” Final Scope Ruling at 15. In making this determination, Commerce considered the description of the merchandise from the Order. Commerce also followed the interpretation of the scope language from the 2004 Magna Cart Ruling, which held a similar cart was small and suitable for use in carrying luggage. Commerce held in the Final Scope Ruling that the MC2 and MCI carts were very close in construction and features to the 2004 Magna Cart. *Id.* Although the court disagrees with Commerce’s determination within the Final Scope Ruling that the telescoping portion of the frame must at all points be less than 5/8” (explained *infra*), and is sympathetic to Gleason’s argument that the telescoping portion of the MC2 and MCI models is not part of the frame, Commerce’s reasoning (apart from the “at all points” decision) and methodology comply with the substantial evidence standard. For these reasons, Gleason’s arguments to the contrary are unavailing and the court finds that the portion of the Final Scope Ruling regarding the MC2 and MCI models is supported by substantial evidence. As a result, Gleason’s motion is denied.

### **B. Commerce Improperly Determined that the MCK Carts were Within Scope**

The same analysis does not apply to Commerce’s determination that the MCK model falls within the scope of the Order. In the Final Scope Ruling, Commerce reinterpreted the scope language as well as its prior rulings to require that the entire telescoping portion of a hand truck frame be less than 5/8” in diameter. Commerce used this “at all points” requirement to distinguish the 2004 Magna Cart Ruling from the later rulings which found carts similar to the MCK model outside scope. Final Scope Ruling at 16–17. The court disagrees that this interpretation naturally flows from the language of

the Order or the 2004 Magna Cart Ruling and finds that Commerce's explanation for the reversal of position is unreasonable.

The court finds instructive our appellate court's recent decision in *ArcelorMittal Stainless Belgium N.V. v. United States*, \_\_\_ F.3d \_\_\_, 2012 WL 3871378, (Fed. Cir., September 7, 2012) (No. 2011-1578), which reversed this court's finding that Commerce correctly found that steel plate with a nominal thickness equal to or exceeding 4.75 mm (but with a smaller actual thickness) was within the scope of an order applicable to plate that was 4.75 mm or greater. The appellate court scolded "Commerce's apparently shifting views regarding the scope of the antidumping order" and the "manifest injustice of enlarging the scope of the proceeding in [an] off-handed manner." *ArcelorMittal*, 2012 WL, at \*7. The court believes a similar analysis applies in this case.

The Final Scope Ruling overturns the findings of the MCX and later scope rulings without providing an adequate rationale for the change. *SKF USA, Inc. v. United States*, 263 F.3d at 1382. For example, in explaining the reversal of position from the MCX Ruling, Commerce cited the 2004 Magna Cart Ruling's focus on "the diameter of the tubular material comprising the telescoping *section(s)* of the frame." Final Scope Ruling at 16 (emphasis added). "[The 2004 Magna Cart] ruling specifies 'section(s)' as singular and plural, as a hand-propelled barrow may have one or more than one telescoping section. The Department interprets this to mean that all of the telescoping tubular parts of the frame must be less than 5/8 inches in diameter . . ." Final Scope Ruling at 16-17.

The court finds this rationale unsupported by substantial evidence because the use of both plural and singular in the 2004 Magna Cart Ruling necessarily means that the exclusion language applies equally to multiple and single telescoping sections that are less than 5/8" in diameter. Because telescoping necessarily involves at least two sections which telescope one into another, it is not possible to have a telescoping frame with only one telescoping section. Thus, Commerce's use of "section(s)" in the 2004 Magna Cart Ruling implies that only one of the telescoping sections can be less than 5/8" in diameter and still qualify for the utility cart exclusion.<sup>1</sup>

The interpretation of the scope language in the later rulings may not be reversed absent a reasoned basis for the change. Commerce's explanation for overruling the later rulings' findings that not all of

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<sup>1</sup> The use of the term "section" to apply to the individual pieces of telescoping frame portion is supported by the Final Scope Ruling's text. Commerce finds there that the 2004 Magna Cart's single telescoping leg is composed of several sections when it mentions that "[t]he telescoping *sections* of the 2004 Magna Cart consisted of tubular material of 1/2 inch and 1/4 inch diameter. . . ." Final Scope Ruling at 17 (emphasis added).



the telescoping material need be less than 5/8" in diameter is invalid. The distinction made by Commerce is unsupported by the language of the Order, or the other items that Commerce is bound to consider pursuant to *Duferco* and 19 C.F.R. § 351.225(k)(1). The court finds Commerce's explanation for reversing its earlier rulings is insufficient given its imposition of a new requirement for the utility cart exclusion, and that the decision taken is therefore arbitrary and capricious. *Husteel Co. v. United States*, 31 CIT 740, 753, 491 F. Supp. 2d 1283, 1291 (2007); *SKF USA, Inc. v. United States*, 263 F.3d at 1382.

Commerce also failed to adequately address Welcom's allegation that carts with telescoping frames consisting entirely of sections less than 5/8" in diameter would be impractical and unusable. WelCom Reply Brief at 8. Commerce cites to the examples of the MC2 and MCI carts as proof that such carts exist. Final Scope Ruling at 18. But Commerce fails to cite any other record information that addresses WelCom's credible argument that carts made of telescoping material entirely less than 5/8" in diameter do not exist in the market and are impractical.

WelCom argues that the Final Scope Ruling gives short shrift to its arguments that the MCK model should be excluded from the scope because the ITC found no material injury with regard to small foldable hand trucks. Pl. Memo at 26–28. In the Final Scope Ruling, Commerce noted that the ITC considers "domestic like product", which may have included the small foldable hand trucks imported by WelCom. "U.S. products resembling the Magna Cart *could have been* considered in the injury analysis."<sup>2</sup> Commerce is bound when making scope determinations to consider "the determinations of the . . . [International Trade] Commission." 19 C.F.R. § 351.225(k)(1). The court finds the reasoning used to deny WelCom's claims that the MCK model was not a like product with the hand trucks considered by the ITC in its injury determination is speculative and unsupported by substantial evidence. The court is concerned that Commerce has expanded the requirements for the utility cart exclusion where evidence exists that the ITC did not consider similar products in its investigation.<sup>3</sup>

<sup>2</sup> Final Scope Ruling at 15 (emphasis added).

<sup>3</sup> For example, WelCom points out that ITC investigated products rated for carrying between 300 to 1,200 lbs., whereas the products involved here are rated to carry no more than 150 lbs. Pl. Memo at 27, citing ITC Publ. 3737 at V-3; *see also Wheatland Tube Company v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998) (expansion of scope to cover line pipe improper where product was not considered by ITC); *cf. A.L. Patterson, Inc. v. United States*, \_\_\_ CIT \_\_\_, 2012 WL 3538722, CIT August 6, 2012, Slip Op. 12–103 at

### ***V. Conclusion***

Because Commerce adequately explained its rationale for following the 2004 Magna Cart Ruling, its determination that the MC2 and MCI hand trucks are outside the scope of the Order is supported by substantial evidence. The court finds Commerce's rationale for reversing its determination in the 2008 MCX Ruling is unsupported by substantial evidence because those reasons are not supported by the language cited. Commerce may not overturn the interpretations in the prior MCX and Safco rulings to exclude the MCK Magna Cart from the scope of the Order without a well-reasoned rationale that is in accord with the complete record in this case. The court also orders Commerce to reconsider its conclusion that the entire telescoping portion of the frame must be less than 5/8" in diameter, and to consider the record developed in the ITC injury determination. The court instructs Commerce to find whether ITC considered hand trucks similar to the Magna Cart models here were made in the U.S., or were covered by the injury determination.

SO ORDERED.

Dated: September 27, 2012  
New York, New York

*/s/ R. Kenton Musgrave*  
R. KENTON MUSGRAVE,  
*Senior Judge*



Slip Op. 12–125

WILTON INDUSTRIES, INC., Plaintiff, v. UNITED STATES, Defendant.

**Before: Gregory W. Carman, Judge**  
Court No. 10–00066

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

Dated: September 27, 2012

*Maria E. Celis, John M. Peterson, and Richard F. O'Neill, Neville Peterson LLP, of New York, NY, for Plaintiff.*

*Beverly A. Farrell, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for Defendant. On the briefs were Tony West, Assistant Attorney General, Barbara S. Williams, Attorney in Charge,*

\*14–15 (“Commerce cannot include in the final order merchandise for which there was no investigation and for which there was no determination of sales at LTFV or determination of injury.”)

International Trade Field Office, United States Department of Justice, and *Yelena Slepak*, Of Counsel, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection.

## OPINION

### **Carman, Judge:**

This matter is before the Court on a Motion for Summary Judgment by Plaintiff Wilton Industries, Inc. (“Plaintiff” or “Wilton”) and a Cross Motion for Summary Judgment by Defendant United States (“Defendant” or “Customs”). The parties dispute the correct tariff classification of decorative punches, imported by Plaintiff. For the reasons set forth below, Plaintiff’s motion is denied, and Defendant’s cross motion is granted.

### **Factual Background**

Plaintiff is an importer of the subject merchandise, decorative punches from Taiwan. Pl.’s Statement of Material Facts as to Which No Genuine Issue Exists (“Pl.’s Facts”) ¶¶ 1–3; Def.’s Resp. to Pl.’s Statement of Material Facts as to Which No Genuine Issue Exists (“Def.’s Resp. Facts”) ¶ 1; Def.’s Statement of Material Facts as to Which No Genuine Issue Exists (“Def.’s Facts”) ¶ 5; Pl.’s Resp to Def.’s Statement of Material Facts as to Which No Genuine Issue Exists (“Pl.’s Resp. Facts”) ¶ 5. The subject merchandise was imported into the Port of Los Angeles, California, between July 7 and October 25, 2008. Pl.’s Facts ¶3; Def.’s Resp. Facts ¶3; Def.’s Facts ¶4; Pl.’s Resp. Facts ¶4.

The parties do not dispute the nature and identity of the imported articles, which are all the brand “Stampin’ Up!” punches that cut shapes or designs out of or in paper and that come in a variety of shapes and sizes. Def.’s Facts ¶ 5; Pl.’s Resp. Facts ¶ 5; Def.’s Mem. of Law in Opp’n to Pl.’s Mot. for Summ. J. and in Supp. of Def.’s Cross-Mot. for Summ. J. (“Def.’s Cross Mot.”) at 3. Each of the punches is capable of making a hole of an intended shape or trimming the edge or corner of the paper with a decorative design. Pl.’s Facts ¶ 2; Def.’s Resp. Facts ¶ 2. Subject punches are used in scrap booking and craft projects involving the creation or decoration of invitations, cards, and other decorative items. Pl.’s Facts ¶ 1; Def.’s Resp. Facts ¶ 1. There are twelve entries that encompass thirty-nine models of punches at issue in this case. Def.’s Cross Mot., Attach. A.

After filing this action, Plaintiff provided Customs twenty representative samples of punches, referred to as “Twenty Punches” by the parties, to reconsider the classification of the subject merchandise. Def.’s Cross Mot. at 2. These Twenty Punches, however, are not the

imported articles in this case. Def.'s Facts at ¶¶ 6–7; Decl. of Kathy Campanelli, National Import Specialist, Customs (“NIS Decl.”) at ¶ 5. Nevertheless, Customs used the Twenty Punches and compared them with images of the imported articles to determination classification. NIS Decl. at ¶ 11; Def.'s Cross Mot. at 11–12. Customs agreed to classify twenty-three models of the punches under Plaintiff's proposed classification of Subheading 8441.10.00, HTSUS, which is duty free,<sup>1</sup> “in an effort to resolve this action.” Def.'s Supplemental Mem. of Law in Further Supp. of Def.'s Cross-Mot. for Summ. J. (“Def.'s Suppl. Br.”) at 2. For the remaining sixteen punches, however, Customs maintained that the proper classification is under Subheading 8203.40.60, HTSUS, with 3.3% duty margin<sup>2</sup> because these remaining punches “are intended for use when held in the hand.” Def.'s Cross Mot. at 3.

Because it was unclear exactly how many of the subject punches were actually in dispute and how the parties came to agreement for those not in dispute, the Court requested an in-person conference, held on July 19, 2012, to clarify the subject merchandise in this case. The Court also requested that the parties file physical samples of all the subject merchandise. In response, the parties explained that there are thirty-nine punches at issue but that there are only sixteen punches in dispute for the Court to decide.<sup>3</sup> Plaintiff stated that Defendant requested physical “samples or items similar to the merchandise” for only nine of the subject punches. Resp. Letter to Ct. from Pl., ECF No. 46. Plaintiff managed to produce thirty-seven of the thirty-nine subject punches,<sup>4</sup> despite the fact that many of the models

<sup>1</sup> Subheading 8441.10.00, HTSUS, provides:

8441	Other machinery for making up paper pulp, paper or paper-board, including cutting machines of all kinds, and parts thereof:
8441.10.00	Cutting machines

<sup>2</sup> Subheading 8203.40.60, HTSUS, provides:

8203	Files, rasps, pliers (including cutting pliers), pincers, tweezers, metal cutting shears, pipe cutters, bolt cutters, perforating punches and similar handtools, and base metal parts thereof.
...	
8203.40.60	Other (including parts).

<sup>3</sup> The parties jointly submitted a stipulation to the agreed upon classification for the twenty-three punches not in dispute. Stipulation, ECF No. 62.

<sup>4</sup> Plaintiff submitted a table of the subject merchandise and attached a sample number to each of the thirty-nine punches at issue for ease of reference. Pl.'s Letter Explaining Sample Numbers and Designations, ECF No. 54. In this table, Plaintiff acknowledged that four of the punches in dispute (#23, #24, #36, and #37) that were provided to the Court are “not the

have been discontinued. The two missing punches are one corner punch (#11) that is in dispute and one large punch that is not in dispute (#16). Plaintiff provided images and a narrative description for the missing punches which the Court deems sufficient to determination classification. The parties broke down the subject punches according to size: small, medium and large.<sup>5</sup> The following table provides the breakdown of the different sizes of punches plus the two that do not fit into the size breakdown, a corner punch and a scallop-edged punch:

	Small	Medium	Large	Other
<b>Total Punches</b>	8	6	23	1 corner 1 scallop-edged
<b>In Dispute</b>	8	6	1	1 corner
<b>Not in Dispute</b>	--	--	22	1 scallop-edged

The parties have also jointly submitted a narrative description of each of the subject punches, along with component and base plate breakdowns, as requested by the Court. Parties Joint Submission of Spreadsheets of Disputed and Non-Disputed Paper Punches, ECF Nos. 62–1, 62–2. For all the subject punches, regardless of size or shape, the component breakdown is essentially the same: the die components comprise approximately 75% of the total weight of each subject punch, while the housing, bottom, handle and springs comprise the balance of the weight. Because the weight and materials ratio are substantially similar for all the punches, the Court analyzes the various punches as one subject merchandise.

### **Jurisdiction and Standard of Review**

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2006). Summary judgment is appropriate when the record shows that “there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” USCIT R. 56(c).

actual article but substantially similar.” Parties Joint Submission of Spreadsheets of Disputed Paper Punches, ECF No. 62–1. The differences are as follows: #23 is missing the “Stampin’ up” logo; #24 is the European version; #36 is gray instead of black and is missing the “Stampin’ up” logo; and #37 is made for the retailer and not retained in Wilton’s system. Pl.’s Letter Explaining Sample Numbers and Designations, ECF No. 54. Defendant has not disputed the similarity of the provided punches and therefore the Court accepts the substantially similar punches as subject punches.

<sup>5</sup> Two of the punches do not fit into the size breakdown: #31 (not in dispute) and #11 (in dispute and not provided to the Court). Parties Joint Submission of Spreadsheets of Disputed and Non-Disputed Paper Punches, ECF Nos. 62–1, 62–2.

Although Customs usually enjoys a statutory presumption of correctness in its classification decisions, this does not apply to pure issues of law in a summary judgment motion before this Court. *Universal Elec. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). This Court “does not defer to Customs’ decisions because it has been tasked by Congress to conduct a *de novo* review, and to determine the correct classification based on the record made before it.” *Universal Elec.*, 112 F.3d at 493; see 28 U.S.C. § 2640(a). Ultimately, this Court’s “duty is to find the *correct* result, by whatever procedure is best suited to the case at hand.” *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) (emphasis in original).

Resolution of a disputed classification entails a two-step process: (1) ascertaining the proper meaning of specific terms in the relevant tariff provisions; and (2) determining whether the merchandise at issue comes within the description of such terms as properly construed. *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999). When “the nature of the merchandise is undisputed, . . . the classification issue collapses entirely into a question of law.” *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006) (citations omitted).

## Discussion

The Court acknowledges the parties’ good faith attempt to come to agreement regarding the classification of the subject merchandise. However, under *Jarvis Clark*, *supra*, the Court is charged with the duty to find the correct classification for all the entries in the case. Therefore, the Court looks at all of the subject merchandise before it, including the punches that the parties present as not in dispute.<sup>6</sup>

### I. Proposed Classifications

Plaintiff contended that Customs “has repeatedly misclassified its paper punching product as a matter of law. [Plaintiff] submits that the punches are properly classified as ‘cutting machines’ under HTS 8441.10.00 and entitled to receive [sic] duty-free treatment.” Pl.’s Mem. of Points and Authorities in Supp. of Pl.’s Mot. for Summ. J. (Pl.’s Mot.) at 2. Plaintiff asserted that the subject punches are machines because “they transfer energy from the user to the device wherein a set of dies forms a cutting edge.” *Id.* at 12. In support of its contention that subject punches are machines, Plaintiff submitted

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<sup>6</sup> The Court commends the parties’ good faith attempt to come to an agreement, and reluctantly disregards the stipulation of agreed classification for twenty-three of the subject punches. Defendant explained that it merely agreed to Plaintiff’s classification “in an effort to resolve this action,” not because Customs believes that is the correct classification. Def.’s Suppl. Br. at 2.



the testimony of mechanical engineer, Dr. P.R. Frise, as an expert. *Id.* at 12; Affirm. of Dr. Peter R. Frise; Ex. A-D to Pl.’s Mot. After reviewing the Twenty Punches provided by Plaintiff, Dr. Frise advised that those punches are indeed machines because they “utilize a lever, an inclined plane, and an axle to transmit forces and perform work.” *Id.* at 12. However, Plaintiff’s proffered testimony from its expert is inapposite for two reasons: (1) Dr. Frise advised on punches that are not at issue in this case, Def.’s Facts ¶ 6; and (2) Defendant conceded that based on its common meaning, a punch itself is a machine,” Def.’s Cross Mot. at 4. Further, Defendant stated that the “articles of [its proposed] Heading 8203” are “also machines, if only simple machines.” Def.’s Reply Mem. of Law in Opp’n to Pl.’s Mot. for Summ. J. and in Further Supp. of Def.’s Cross-Mot. for Summ. J. (“Def.’s Opp’n”) at 6.

Defendant contended, however, that the subject punches “are properly classifiable in subheading 8203.40.60 because they are described *eo nomine*<sup>7</sup> by this subheading and are excluded by Exclusionary Note 1(k) to Section XVI<sup>8</sup> from classification in subheading 8441.10.00.” Def.’s Cross Mot. at 8.

## II. GRI Analysis

Classification of merchandise is governed by the General Rules of Interpretation (“GRIs”). *Avenues in Leather, Inc. v. United States*, 423 F.3d 1326, 1333 (Fed. Cir. 2005). The GRIs direct “the proper classification of all merchandise and are applied in numerical order.” *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). The Court may not consult any subsequent GRI unless the proper classification cannot be determined by reference to GRI 1. *Mita Copystar Am. v. United States*, 160 F. 3d 710, 712 (Fed. Cir. 1998). According to GRI 1, “classification shall be determined according to the terms of the headings and any relative section or chapter notes[.]” Parties agree that the classification determination may be made under GRI 1, but each party submits a different heading as the correct classification.

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<sup>7</sup> *Eo nomine* means an item is “identified by name.” *Len-Ron Mfg. Co., Inc. v. United States*, 334 F.3d 1304, 1308 (Fed. Cir. 2003).

<sup>8</sup> Exclusionary Note 1(k) to Section XVI, which includes Chapter 84, instructs, in relevant part:

### Notes

1. This section does not cover:

...

(k) Articles of chapter 82 or 83.

Defendant asserted that the “proper classification of the ‘punches’ may be determined through Rule 1” of the GRI. Def.’s Opp’n at 2. Upon entry, Customs classified the subject punches under Heading 8203, HTSUS. Customs claimed the subject merchandise falls squarely under “perforating punches” which is an enumerated article under Heading 8203, HTSUS. The terms perforating and punch are not explicitly defined within the HTSUS, and in such circumstances, “[t]ariff terms are construed in accordance with their common or popular meaning.” *Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (1995). The Court

may rely upon its own understanding of terms used, and may consult standard lexicographic and scientific authorities to determine the common meaning of a tariff term.

*Mita Copystar Am. v. United States*, 21 F.3d 1079, 82 (Fed. Cir. 1994)).

Accordingly, the Court consulted Webster’s Dictionary for the common meanings of the terms “perforating” and “punch.” The first definition for “perforate” in Webster’s Dictionary is “to make a hole through: pierce, puncture.” *Webster’s Third New International Dictionary* 1678 (1981). The relevant definition for “punch” as a noun is “1.b: a device or machine for performing the operations of a hand punch: . . . (1): a hand-operated device for cutting holes or notches in paper or cardboard.” *Id.* 1678. Read together, the common meaning for perforating punch is a hand-operated device for cutting or making holes in or through paper or cardboard. The Court finds that the subject punches fall squarely under this common definition of perforating punch.

Hence, the Court agrees with Customs that the subject merchandise is described by the exemplar “perforating punches” listed *eo nomine* under Heading 8203, HTSUS.<sup>9</sup> This Court must “consider a HTSUS heading or subheading an *eo nomine* provision when it describes an article by a specific name.” *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011) (citation omitted). The Court notes that the exemplar “perforating punches” is coupled with the exemplar “similar handtools,” separated from the other

<sup>9</sup> Plaintiff conceded that HTSUS Heading 8203 “covers a wide range of tools” but then asserted that this heading “contains no language specifically, or even remotely, describing the merchandise at issue . . . . Not only are paper punches entirely different from files, rasps, pliers, and the other exemplars in this subheading, they also perform entirely different functions.” Pl.’s Mot. at 14. Plaintiff’s assertion is specious. HTSUS Heading 8203 does indeed cover a wide range of tools, all with different functions, with the common thread of these tools is that they are all worked by the hand. This common thread applies to the subject punches. Also, Plaintiff selectively quotes the tariff, leaving out the phrase “perforating punches,” which undermines Plaintiff’s assertion that Heading 8203 contains “no language” describing the subject merchandise at issue.

articles by commas, which indicates that handtools modify punches. Customs argued that this construction means that “classification in Heading 8203 is limited to those punches that are designed to operate best when used in a handheld fashion.” Def.’s Opp’n at 7. But Plaintiff countered that the punches are “not specifically intended or designed to be used as a handtool.” Pl.’s Opp’n at 13.

Upon review of the term “handtool” in Webster’s Dictionary, one is directed to the first definition under “tool,” which reads: “1 a : an instrument . . . used or worked by hand.” *Webster’s Third New International Dictionary* 1028, 2408. The Court applies this definition and finds that handtools do not have to be intended or designed to be operated wholly in the hand, but rather they need only be worked by hand. Therefore, the Court rejects Customs’ “operates best test”<sup>10</sup> because applying the common meaning of the term handtool does not require that a tool or machine be operated wholly in the hand. The subject punches—whether they are used in the hand, as Defendant asserts, or whether they are used against a flat surface, as Plaintiff asserts—need to be operated with at least one hand, if not two hands, so they are handtools according to the common meaning of the term. The Court finds that subject punches *prima facie* fall under Heading 8203 as a perforating punch.

Next the Court considers Plaintiff’s proposed HTSUS Heading 8441, which provides for “[o]ther machinery for making up paper pulp, paper or paperboard, including cutting machines of all kinds.” Plaintiff asserted that the subject punches are cutting machines. Customs conceded that the subject punches are simple machines but postulated that “the simplicity of the features and the purpose for [the subject punches’] use simply do not rise to the dignity of a machine contemplated by Heading 8441.” Def.’s Suppl. Br. at 7. Customs purported that the machine contemplated by Heading 8441 applies only to “more complex” machines, not “simple machines” such as the subject punches. *Id.* at 3. The Court notes that Heading 8441 does not contemplate such a distinction between simple and non-simple machines.

Plaintiff claimed Heading 8441, HTSUS, as the correct classification based upon the description “cutting machines of all kinds.” However, Plaintiff again selectively quotes the tariff, leaving out the key language “other machinery for making up paper pulp, paper or pa-

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<sup>10</sup> Customs apparently used two different tests to determine the classification of the subject punches: “designed to be hand-held when using them” and “operated better when . . . placed on a desk or table.” Def.’s Cross Mot. at 11–12. Confusion surrounds these tests, and in any case, the GRIs do not contemplate using such tests to determine classification. Furthermore, Customs apparently conducted these tests on only nine of the actual physical samples. Given these facts, the Court determines classification without regard to these Customs tests.

perboard, including . . . .” Reviewing and parsing this heading in its entirety, the Court finds that subject merchandise cannot fall under Heading 8441, HTSUS, unless it is a cutting machine “for making up paper pulp, paper or paperboard.” Upon a plain reading of the language in the heading, the phrase “including cutting machines of all kinds” is subordinate to all that comes before the word “including.” This is the only grammatically correct construal of a phrase that is set apart by commas and begins with the word “including.” See, e.g., *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363 (Fed. Cir. 1998) (discussing the canon of construction *expressio unius est exclusio alterius*—“the expression of one is the exclusion of others”—when a phrase starts with the word “including”). Heading 8441 is not a cutting machine provision; it is a paper production machine provision, specifically “for making up paper pulp, paper or paperboard.” While paper production machines may be cutting machines, not all cutting machines are paper production machines. Such is the instant case: while subject punches may be described as cutting machines, they are not paper production machines. The Court finds that subject punches do not fall under Heading 8441, because they are not cutting machines for making up paper pulp, paper or paperboard.

Plaintiff asserted the opposite argument to that of Customs; Heading 8203 is not applicable because perforating punches in this tariff heading are meant for industrial uses. In support of its claim, Plaintiff provided an industrial definition of the term perforating punch. Pl.’s Supplemental Mem. of Points and Authorities in Supp. of Pl.’s Mot. for Summ. J. (“Pl.’s Suppl. Br.”) at 6–10. The Court reiterates that headings are afforded their common meaning, not a meaning that is a term of art particular to an industry. Therefore, the Court finds Plaintiff’s offering of an industrial definition of perforating punch unavailing.

Assuming *arguendo* that the subject punches *prima facie* fell within Heading 8441 based upon the cutting machine language, Section Note 1(k) would still exclude consideration of this heading. Along with the terms of the headings, “any relevant section or chapter notes” must be considered because chapter and section notes “are not optional interpretative rules, but are statutory law, codified at 19 U.S.C. § 1202.” *Avenues in Leather*, 423 F.3d at 1333 (quotation omitted). The Section Notes for Section XVI of the HTSUS, which includes Chapter 84, specifically excludes “[a]rticles of chapter 82 and 83” from classification under Section XVI. Section Note 1(k) to Section XVI. Customs argued that the proper reading of Section XVI, Note 1(k) excludes classification in Heading 8441. Def.’s Cross Mot. at

12. The Court agrees. Applying the *Avenues in Leather* analysis regarding exclusionary notes, if the decorative punches are classifiable under chapter 82, then they cannot be classified under chapter 84. See *Avenues in Leather*, 423 F.3d at 1333–34; see also *Container Store v. United States*, 35 CIT \_\_, 800 F. Supp. 2d 1329, 1335 (2011) (applying the *Avenues in Leather* analysis for exclusionary notes under Section XV).<sup>11</sup> Therefore, even if the subject punches would have been *prima facie* classifiable as cutting machines under Heading 8441, Section Note 1(k) would have applied and Chapter 84 would be excluded from consideration.

The Court finally examines the applicable heading for the proper subheading. Upon review of the subheadings under Heading 8203, the Court finds that the proper subheading is the basket provision of “[o]ther.” Therefore, the Court holds the correct tariff classification for the subject punches is 8203.40.60, HTSUS.

### Conclusion

Because there is no dispute between the parties as to the nature of the merchandise involved in this case, and the only issues to be resolved are legal, the case is ripe for disposal at the summary judgment stage. See, e.g., *Value Vinyls, Inc. v. United States*, 31 CIT 173, 175, 2007 WL 273839 at \*2 (2007) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–49 (1986).)

Because this Court affirms Defendant’s preferred tariff classification of 8203.40.60, HTSUS, Plaintiff’s Motion for Summary Judgment is denied and Defendant’s Cross Motion for Summary Judgment is granted. Judgment will enter accordingly.

Dated: September 27, 2012

New York, New York

/s/ Gregory W. Carman

GREGORY W. CARMAN,  
Judge

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<sup>11</sup> The Court combed the HTSUS for other possible headings for the decorative punches but did not find a heading more descriptive. The Court also reviewed Customs Ruling Letters and discovered that Customs had previously classified similar decorative punches under various tariffs. The Court considered these classifications but decided that Subheading 8203.40.60, HTSUS, is the correct classification.

## Slip Op. 12–126

PRP TRADING CORP., Plaintiff, v. UNITED STATES, Defendant.

**Before: Gregory W. Carman, Judge  
Court No. 12–00103***[Court lacks jurisdiction; case will be dismissed absent request for transfer.]*

Dated: October 2, 2012

*Peter S. Herrick* of Miami, Florida, for plaintiff.*Justin R. Miller*, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Barbara S. Williams*, Attorney-in-Charge. Of counsel on the brief was *Yelena Slepak*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.**OPINION & ORDER****Carman, Judge:**

Before the Court is Defendant United States’ (“Defendant” or “Customs”) motion to dismiss under USCIT Rule 12(b)(1) for lack of subject matter jurisdiction and under USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. Plaintiff PRP Trading Corporation (“Plaintiff” or “PRP Trading”) brought this case, pursuant to 28 U.S.C. § 1581(a) (2006), challenging the allegedly improper exclusion of five entries of aluminum extrusions from Malaysia into the United States. Defendant asserted that the action is subject to dismissal because the case involves seized goods and subject matter jurisdiction lies in a federal district court.

For the reasons set forth below, the Court finds that this is a seizure case and grants Defendant’s motion to dismiss for lack of subject matter jurisdiction. Absent a request demonstrating why the interest of justice requires transfer of this case to another judicial forum by October 9, 2012, the case shall be dismissed by the Clerk of the Court on October 10, 2012.

**Factual Background**

At issue is the seizure of five entries of aluminum extrusions claimed to be imported from Malaysia into the port of San Juan, Puerto Rico, in December 2011 and January 2012. Compl. ¶¶ 1, 8, 13, 18, 23, 28. Upon arrival at the port, Customs detained the merchandise on suspicion that the country of origin marking of the merchandise was false. Def.’s Mem. in Supp. of Its Mot. to Dismiss (“Def.’s



Mot.”) at 2. Customs issued notices of detention to PRP Trading. *Id.*, Ex. 1. Plaintiff presented the merchandise to Customs for examination, and thus started the thirty day clock for Customs to decide upon the admissibility of the merchandise. Def.’s Reply Mem. in Supp. of Its Mot. to Dismiss (“Def.’s Reply”) at 2. After examination, Customs decided to seize all the merchandise. Def.’s Mot. at 5. On February 7, 2012, Customs seized all five entries, and on March 23, 2012, issued notices of seizure to PRP Trading. *Id.*, Ex. 2. Because the merchandise was seized, Defendant asserted that jurisdiction lies in a federal district court pursuant to 28 U.S.C. § 1356 (2006).

Plaintiff countered that this Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1581(a) because the entries at issue were deemed excluded or should have been deemed excluded. Pl.’s Mem. in Supp. of Its Opp’n to Def.’s Mot. to Dismiss for Lack of Subject Matter Juris. or in the Alternative for Failure to State A Claim (“Pl.’s Opp’n”) at 3–4, 6. Plaintiff focused its argument on the deemed exclusion part of the process. If Customs does not actively issue an admissibility decision within thirty days of the importer’s presentation of the merchandise, then “Customs’ inaction is treated as a decision to exclude the merchandise for purposes of filing an administrative protest under 19 U.S.C. § 1514(a)(4),” which is referred to as a “deemed exclusion.” Def.’s Reply at 2 (citing 19 U.S.C. § 1499(c)(5)(A)(2006)<sup>1</sup>). Two of Plaintiff’s five entries were deemed excluded—D05–0125496–1 and D05–0125498–7—because Customs did not act upon them within the requisite thirty days from the date the merchandise was presented for examination. Pl.’s Opp’n at 4–5. Plaintiff alleged that it was prejudiced in claiming jurisdiction for the remaining three entries—D05–012550–5, D05–0125451–6, D05–0125723–8—for which deemed exclusion should have occurred but for Customs’ delay in examining the merchandise. *Id.* at 6. Therefore, relying on the legal construct of deemed exclusion, Plaintiff argued that the Court has exclusive jurisdiction under 28 U.S.C. § 1581(a), which confers “exclusive jurisdiction of any civil action commenced to contest the denial of a protest,” for all five of its entries. *Id.*

Defendant conceded that two of the entries—D05–0125496–1 and D05–0125498–7—became deemed excluded. Def.’s Reply at 4. Defendant explained that the other three entries—D05–012550–5, D05–0125451–6, D05–0125723–8—were seized within thirty days, which means that Commerce made an active decision about admissibility, and thus these entries were not deemed excluded. “Because

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<sup>1</sup> Under 19 U.S.C. § 1499(c)(5)(A), when Customs fails to make a final determination with respect to the admissibility of detained merchandise within thirty days after the merchandise has been presented for Customs examination, it is tantamount to a decision of inadmissibility and referred to as “deemed exclusion.”

no deemed exclusion occurred, there is no protestable event, and there is no basis for § 1581(a) jurisdiction.” Def.’s Reply at 2. Defendant elucidated, however, that deemed exclusion is not the decisive factor in this case; seizure is the decisive factor. Deemed exclusion does not affect or preclude dismissal of the instant case “[b]ecause Customs seized the merchandise prior to the commencement of the Court action.” Def.’s Reply at 4. Defendant distinguished these facts—where seizure occurred on February 7, 2012, before commencement of this action on April 12, 2012—from the case on which Plaintiff relies to claim jurisdiction—where seizure occurred after commencement of that action—noting “[t]his timing forms the critical distinction.” Def.’s Reply at 7; see *CBB Group, Inc. v. United States*, 35 CIT \_\_\_, 783 F. Supp. 2d 1248 (2011) (holding that the court has subject matter jurisdiction to adjudicate importer’s protest of a deemed exclusion of merchandise where seizure occurred *after* the commencement of an action) (emphasis added). Defendant moves for dismissal of this action. Def.’s Mot. at 8–12.

### Discussion

While this Court has exclusive jurisdiction of any civil action commenced to contest the denial of a protest pursuant to 28 U.S.C. § 1581(a), this is a court of limited jurisdiction. The Court considered Plaintiff’s argument regarding deemed exclusion. However, this is a seizure case at its heart. Upon review of the relevant statutes, the Court agrees with Defendant that the fact of seizure trumps the fact of deemed exclusion. Further, the timing of the seizure, before commencement of Plaintiff’s action, makes the jurisdictional analysis of *CBB Group* inapposite to this case. Because the merchandise was seized, the Court looks at the jurisdictional statute for seizure found under 28 U.S.C. § 1356, which provides that

[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

This statute cross references 28 U.S.C. § 1582, which provides that

[t]he Court of International Trade shall have exclusive jurisdiction of any civil action which arises of out of an import action and which is commenced by the United States—

(1) to recover a civil penalty under section 592, 593(A), 641(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930;

- (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or
- (3) to recover customs duties.

For this court's exclusive jurisdiction to attach pursuant to 28 U.S.C. § 1582, the case must be brought by the United States, which does not apply to the instant case. Accordingly, Plaintiff must obtain relief by commencing an action in the district court pursuant to 28 U.S.C. § 1356. The Court holds that it lacks subject matter jurisdiction to hear this case.

Upon deciding that the Court lacks jurisdiction, the final question is what the Court should do with the case. The possibilities are to grant Defendant's motion and dismiss the case, or to transfer the case to district court. The Court has a statutory duty to transfer a case to cure a want of jurisdiction, if it is in the interest of justice:

[w]henever a civil action is filed in a court . . . , including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed.

28 U.S.C. § 1631. The Court notes that Plaintiff has not requested a transfer in its papers. To provide full opportunity to be heard on this issue, either party may file, by October 9, 2012, a letter demonstrating if the interest of justice requires transfer of this case to another judicial forum. Absent such a request, the case will be dismissed for lack of subject matter jurisdiction by the Clerk of the Court on October 10, 2012.

### Conclusion

For the foregoing reasons, it is hereby

**Ordered** that the Clerk of the Court shall dismiss this case on October 10, 2012, unless a party shows by letter filed with the Court by October 9, 2012 that the interest of justice requires transfer to another forum.

Dated: October 2, 2012  
New York, NY

*/s/ Gregory W. Carman*  
GREGORY W. CARMAN,  
*Judge*

## Slip Op. 12–127

UNITED STATES, Plaintiff, v. ACTIVE FRONTIER INTERNATIONAL, INC.,  
Defendant.

Before: Timothy C. Stanceu, Judge  
Court No. 11-00167

[Denying without prejudice plaintiff’s motion to amend the complaint]

Dated: October 3, 2012

*Carrie Dunsmore*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for plaintiff. With her on the motion were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the motion was *Jean M. Del Colliano*, Office of the Associate Chief Counsel, U.S. Customs and Border Protection, of New York, NY.

### OPINION AND ORDER

#### **Stanceu, Judge:**

Plaintiff brought this action to recover a civil penalty under section 592 of the Tariff Act of 1930, 19 U.S.C. § 1592 (2006) (“Section 592”),<sup>1</sup> from Active Frontier International, Inc. (“AFI” or “Active Frontier”), a New York corporation, alleging that AFI falsely declared the country of origin of wearing apparel on seven entries made during 2006 and 2007. Compl. ¶¶ 1, 3, 16 (May 31, 2011), ECF No. 2. In a previous Opinion and Order, issued on August 30, 2012, the court denied plaintiff’s application for a judgment by default for a civil penalty in the amount of \$80,596.40, concluding that the complaint lacked well-pled facts establishing defendant’s liability for a civil penalty. *U.S. v. Active Frontier International, Inc.*, 36 CIT \_\_, \_\_, Slip Op. 12–112, at 1–2 (Aug. 31, 2012) (“*Active Frontier*”). The court was unable to conclude from the facts alleged in the complaint that false country of origin statements alleged to have been made by AFI in entering the merchandise were “material” within the meaning of section 592(a)(1)(A)(i). *Id.*, 36 CIT at \_\_, Slip Op. 12–112 at 14. The Court allowed plaintiff thirty days from the date of its previous Opinion and Order to seek leave to amend the complaint according to USCIT Rule 15(a). *Id.* The court stated that the absence of a timely motion to amend would result in a further order giving notice of the pending dismissal of this action according to USCIT Rule 41(b)(3). *Id.* In a motion filed on October 1, 2012, plaintiff seeks the court’s leave to

<sup>1</sup> Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2006 edition.

amend its complaint but lodges no proposed amended complaint in support of its motion. Mot. to Amend, ECF No. 16.

Rule 15(a)(2) instructs that “[t]he court should freely give leave” to amend a pleading “when justice so requires.” USCIT R. 15(a)(2). In exercising its discretion when ruling on a motion to amend a complaint, a court may consider various factors, including whether the proposed amendment would be futile. See *Foman v. Davis*, 371 U.S. 178, 182 (1962) (identifying such factors as “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment.”); see also 6 Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1487, at 701 (3d ed. 2010).

Here, plaintiff seeks to gain the court’s advance consent for the filing of an amended complaint the court has not yet seen. Moreover, plaintiff’s motion otherwise sheds no light on how plaintiff intends to remedy the deficiencies that exist in the complaint now before the court. See *Active Frontier*, 36 CIT at \_\_\_, Slip Op. 12–112 at 5–6. Plaintiff’s motion speaks only in the vaguest of terms, stating an intention to “expand [its] pleading of the element of materiality, pursuant to this Court’s August 30, 2012 Order” by “clarify[ing] the Government’s allegations against Active Frontier and address[ing] the concerns raised by the Court in its August 30, 2012 decision.” Mot. to Amend 1–2. In the motion, plaintiff assures the court that its proposed amended complaint “is not futile,” *id.* at 2, and adds that “we are unaware of a basis on which our proposed amendment could be deemed futile,” *id.* at 3. However, plaintiff offers in its motion nothing upon which the court could make its own futility determination. In these circumstances, in which the inadequacy of the motion to amend precludes the court from determining whether “justice so requires” allowing an amended pleading, USCIT R. 15(a)(2), the court considers it appropriate to deny plaintiff’s motion. See *Roskam Baking Co., Inc. v. Lanham Machinery Co., Inc.*, 288 F.3d 895, 906 (6th Cir. 2002) (stating that “the court must have before it the substance of the proposed amendment” to determine whether “justice so requires”); see also *Gardner v. Martino*, 563 F.3d 981, 991 (9th Cir. 2009) (holding that district court did not abuse its discretion in denying a motion to amend the pleading “because [movant] did not propose any new facts or legal theories for an amended complaint and therefore gave the Court no basis to allow an amendment”).

Plaintiff also argues in its motion that it did not “request leave to amend [its] complaint after undue delay” and did not move “in bad

faith or with a dilatory motive.” Mot. to Amend 2. Without deciding the question raised by plaintiff’s contention concerning the lack of a dilatory motive, the court notes that plaintiff requests an order under which it would be granted leave to amend its complaint and also be ordered to file the amended complaint “within three days of the Court[s] granting this motion.” *Id.* at 3. For the reasons stated previously, the court declines to rule favorably on a proposed amended complaint that it has not seen and that would require the court to speculate as to what new factual allegations plaintiff might make. In so declining, the court opines that plaintiff would have been better served by including the proposed amended complaint with its motion or, were that not possible due to relevant circumstances, by seeking an enlargement of the time period allowed in the court’s August 30, 2012 Opinion and Order.

In conclusion, the court will deny plaintiff’s motion because it is unable to find within that motion a basis upon which to make the determination of futility appropriate to a ruling under USCIT Rule 15(a)(2).

Upon consideration of plaintiff’s motion to amend the complaint, as filed on October 1, 2012, and all papers and proceedings herein, and upon due deliberation, it is hereby

**ORDERED** that plaintiff’s motion to amend the complaint be, and hereby is, denied without prejudice to the filing of another motion under USCIT Rule 15(a)(2) to amend the complaint that is accompanied by a proposed amended complaint; and it is further

**ORDERED** that plaintiff shall have three days from the date of this Opinion and Order in which to file a motion under USCIT Rule 15(a)(2) to amend the complaint that is accompanied by a proposed amended complaint.

In the absence of a timely Rule 15(a)(2) motion in response to this Opinion and Order, the court, through a further order, will require plaintiff to show cause as to why this case should not be dismissed according to USCIT Rule 41(b)(3).

Dated: October 3, 2012

New York, New York

*/s/ Timothy C. Stanceu*

TIMOTHY C. STANCEU

*Judge*