

UNITED STATES COURT OF INTERNATIONAL TRADE

KAHRS INTERNATIONAL, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant.

**Before: Gregory W. Carman, Judge**

Court No. 07-00343

*[Plaintiff's motion for summary judgment on the eighth cause of action and request for oral argument denied; Defendant's motion for summary judgment on the fifth and eighth causes of action granted]*

Law Offices of George R. Tuttle, A.P.C. (Michael J. Tonsing, Carl D. Cammarata, George R. Tuttle, Stephen S. Spraitzer), for Plaintiff.

Tony West, Assistant Attorney General, Barbara S. Williams, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Mikki Cottet, Beverly A. Farrell); Yelena Slepak, Senior Trial Attorney, Office of the Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection, of counsel, for Defendant.

July 26, 2011

**OPINION & ORDER**

**CARMAN, JUDGE:** This action is before the Court on more motions for summary judgment—the sixth and seventh such motions filed in this case. Plaintiff brought this case disputing the classification of its imported merchandise, engineered hardwood

flooring, under tariff subheadings for plywood. Plaintiff has two remaining claims by which it seeks reclassification. In the “fifth cause of action,” Plaintiff asserts a “commercial designation” claim, alleging that the term plywood has a meaning in the wholesale plywood trade that is different than its common meaning, and that the commercial designation excludes engineered hardwood flooring. In the recently added “eighth cause of action,” Plaintiff alternatively asserts that its goods do not fall within the common meaning of the term plywood. For the reasons set forth below, the Court finds that there is no genuine issue of any material fact with respect to these two claims, and that Defendant is entitled to judgment as a matter of law on both. Judgment will enter accordingly.<sup>1</sup>

#### PROCEDURAL AND FACTUAL BACKGROUND

This case has been aggressively litigated. The court has previously issued three opinions totaling 135 pages, in the process of resolving multiple procedural and substantive motions. Familiarity with these previous opinions<sup>2</sup> is assumed. While the issues remaining in this case have diminished greatly, the amount of paper dedicated to

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<sup>1</sup>Plaintiff also requested the opportunity to make an “oral presentation” pursuant to USCIT R. 7(c) and 56(c). (Pl.’s Mot. for Summ. Adjudication on the Eighth Cause of Action in the Compl. (“Pl.’s Mot.”) 6.) The court treats this request as a request for oral argument, finds that oral argument is not warranted, and denies Plaintiff’s request.

<sup>2</sup>Kahrs Int’l. Inc. v. United States, 33 CIT \_\_, 602 F. Supp. 2d 1352 (2009) (“*Kahrs I*”), Kahrs Int’l. Inc. v. United States, 33 CIT \_\_, 2009 WL 2985942 (“*Kahrs II*”), and Kahrs Int’l. Inc. v. United States, 33 CIT \_\_, 645 F. Supp. 2d 1251 (2009) (“*Kahrs III*”).

arguing over them has increased exponentially. In particular, Plaintiff filed over 2,600 pages of exhibits in support of its motion for summary judgment on the eighth cause of action, and in opposition to Defendant's motion for summary judgment on the fifth and eighth causes of action. (See Docket Nos. 178–187, 200–238, and 241.)

At issue in this case is the classification of three types of engineered hardwood flooring imported by Plaintiff: 14mm, 2-strip 15mm, and 3-strip 15mm.<sup>3</sup> (Mem. of Law in Supp. of Def.'s Mot. for Summ. J. on the Fifth and Eighth Causes of Action in the Compl. ("Def.'s Mot.") 1; Pl.'s Mot. for Summ. Adjudication on the Eighth Cause of Action in the Compl. ("Pl.'s Mot.") I-2.) U.S. Customs and Border Protection ("CBP" or "Customs") classified Plaintiff's merchandise under HTSUS Subheading 4412.14.31 and 4412.29.36, *eo nomine* provisions for plywood, at a duty rate of 8% *ad valorem*. (Def.'s Mot. 1; Pl.'s Mot. II-1.) Kahrs asserts that its merchandise is appropriately classified under HTSUS Subheading 4412.29.56, a basket provision encompassing "veneered panels and similar laminated wood," free of duty. (Pl.'s Mot. II-1.)

In *Kahrs III*, the Court held that Plaintiff's 14mm and 15mm flooring fell within

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<sup>3</sup>Plaintiff asserts that the classification of its 7mm and 11mm flooring is also in dispute, but the United States has conceded that these products are "classifiable in HTSUS Heading 4412, subheading 4412.29.56, the provision for 'other' plywood, veneered panels and similar laminated wood, free of duty." (Def.'s Resp. 3.) Seeing no dispute as to the classification of this merchandise, the Court focuses on the arguments made with respect to the 14mm and 15mm flooring.

the common meaning of the term plywood, and was therefore appropriately classified under the government's preferred tariff subheading. *Kahrs III*, 645 F. Supp. 2d. at 1277-78 (citing Boen Hardwood Flooring, Inc. v. United States, 357 F.3d 1262 (Fed. Cir. 2004) ("*Boen*"). In so doing, the Court relied upon the definition of the term plywood as set out in Webster's Third New International Dictionary, the Explanatory Notes to heading 4412, and *Boen*. Id. at 1277.

Following *Kahrs III*, Plaintiff was left with one remaining claim that, if successful, could result in its preferred classification: the commercial designation claim set out in the fifth cause of action. (Compl. ¶¶ 48-62.) In this claim, Plaintiff alleges that at the time the HTSUS was enacted into law in 1988, there was a commercial designation for the term plywood that differed from the common meaning of plywood, that was general, definite, and uniform throughout the United States at that time, and that did not encompass plaintiff's engineered hardwood flooring. (Id.) Any commercial designation claim, including this one, rests on the theory that "the trade designation [was] so universal and well understood that the Congress, and all the trade, are supposed to have been fully acquainted with the practice at the time the law was enacted." Timber Products Co. v. United States, 515 F.3d 1213 (Fed. Cir. 2008) (quoting Jas. Akeroyd & Co. v. United States, 15 Ct. Cust. 440, 443 (1928)); see also Compl. ¶ 51

("Congress intended to incorporate the commercial meaning of the term 'plywood' in Heading 4412.").

Once *Kahrs III* was issued, this case appeared headed for trial on Plaintiff's commercial designation claim. (See Docket No. 120 (scheduling order permitting Plaintiff to withdraw its previously filed motion for summary judgment on the fifth cause of action, permitting additional discovery, and setting dates for the submission of a pretrial order, and for trial).) The Court received what amounted to a proposed pretrial order in a series of filings made throughout July and August, 2010. (Docket Nos. 128–129, 132–135, 138–143.) As the Court was reviewing these myriad submissions, on October 11, 2010, Plaintiff sought leave of the Court to amend its Complaint to assert a claim that its goods were not properly classifiable under any HTSUS subheading for plywood, because the common meaning of that term does not encompass Plaintiff's product. (Docket No. 147.)

Initially, the Court was disinclined to grant Plaintiff's motion to amend its complaint. Not only was the motion made at an unusually late stage of the proceeding, but it appeared that the motion might have been deniable on grounds of futility. The meaning of a term in an HTSUS heading or subheading is a pure question of law. Medline Industries Inc. v. United States, 62 F.3d 1407, 1409 (Fed. Cir. 1995). In this instance, the common meaning of the term plywood had been conclusively and

unambiguously established by the Court of Appeals for the Federal Circuit (“CAFC”) in *Boen*. *Boen*, 357 F.3d at 1265. The definition of plywood for purposes of tariff classification is thus binding precedent on this Court, and, one might think, not subject to revision by this court.

Moreover, the question of fact—whether the imported items fall within the scope of a specific tariff subheading—had already been resolved by the Court in this case. See *Medline Indus.*, 62 F.3d at 1409 (explaining that where in the HTSUS item is classified is a question of fact); *Kahrs III*, 645 F. Supp. 2d at 1277-78 (deciding the question of fact in this case). Because Plaintiff has not alleged changed facts, the only basis for the Court to change its determination that Plaintiff’s merchandise is classifiable as plywood would be if the legal determination in *Boen* as to the common meaning of the term plywood was incorrect. As explained above, this appeared to be a tough row to hoe.

Ultimately, however, the Court granted Plaintiff’s motion to amend its complaint out of an abundance of caution. In doing so, the Court found instructive a series of cases under the name *Schott Optical Glass, Inc. v. United States*, which bore many similarities to the matter at hand. See *Schott Optical Glass, Inc. v. United States*, 7 CIT 36, 587 F. Supp. 69 (1984) (“*Schott II*”), rev’d 750 F.2d 62 (Fed. Cir. 1984) (“*Schott III*”). In *Schott II*, the plaintiff had filed suit in the Court of International Trade (“CIT”) to dispute the classification of its goods under a tariff subheading for “other optical glass,”

claiming that its goods did not fall within the common meaning of the term “optical glass.” *Schott II*, 587 F. Supp. at 69-70. In that case, as here, there was a preceding opinion from the Court of Appeals construing the common meaning of the relevant term in the tariff subheading—in that case, “optical glass.” See *Schott Optical Glass Inc. v. United States*, 612 F.2d 1283 (CCPA 1979) (“*Schott I*”). The CIT concluded in *Schott II* that the CAFC had decisively resolved the legal question of the common meaning of “optical glass” in *Schott I*, and determined that *stare decisis* precluded the CIT from reaching a different conclusion about the common meaning of the term. *Schott II*, 587 F. Supp. at 70-71. Applying that apparently straightforward precedent, the CIT entered judgment for Defendant. Id. at 73.

In *Schott III*, the CAFC reversed the judgment of this court, citing “a well-recognized exception to *stare decisis*” requiring that “[a] court will reexamine and overrule a prior decision that was clearly erroneous.” *Schott III*, 750 F.2d at 64 (citing cases). The CAFC faulted this court for refusing to permit the plaintiff to introduce evidence that might have shown that the interpretation of the common meaning of “optical glass” established by the Court of Appeals in *Schott I* had been clearly erroneous. Id. The CAFC found that by refusing to consider such evidence, this court

had improperly borrowed from the doctrine of *res judicata*,<sup>4</sup> which is inapplicable in customs classification cases. Id. (citing United States v. Stone & Downer Co., 274 U.S. 225 (1927) (“in customs classification cases a determination of fact or law with respect to one importation is not *res judicata* as to another importation of the same merchandise by the same parties.”).) Therefore, the holding of *Schott III* instructs that when the CAFC has ruled on a question of law, such as the common meaning of a tariff term, although such a ruling may constitute binding precedent and may serve as the basis for *stare decisis*, this court errs when it prevents a party from attempting to show that the ruling of the CAFC is clearly erroneous. Id. at 65 (“The Court of International Trade has not given any convincing explanation why *Schott* should be denied the opportunity to introduce additional evidence that it believes will establish that [*Schott I*] was clearly erroneous.”).

In light of the *Schott* cases, the Court decided to grant Plaintiff’s motion to amend its complaint. (Order of December 8, 2010 (Dkt. 158), accepting Plaintiff’s (Proposed) Amendment to Complaint as docketed on December 2, 2010 (“8th COA”) (Dkt. 157).) Plaintiff explicitly represented to the Court that it sought to amend its complaint in order to introduce testimony of certain expert witnesses that it hoped would

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<sup>4</sup>*Res judicata* “bars litigation by the same parties of the same issues previously adjudicated.” *Schott III*, 750 F. 2d at 64.



“conclusively establish that the definition of plywood arrived at in [*Boen*] was erroneous.” (Letter to the Court Requesting Permission to File a Motion for Leave to Amend its Complaint at 5, Docket No. 147.) Consequently, despite the fact that *Boen* is binding precedent that has resolved the salient legal question of the common meaning of plywood for purposes of tariff classification, and notwithstanding that this Court has already ruled as a matter of fact that Plaintiff’s merchandise falls within that common meaning of plywood, this Court concluded that justice required Plaintiff be given an opportunity to demonstrate that these decisions were clearly erroneous. See *Schott III*, 750 F.2d at 65.

Following a brief period of additional discovery, Plaintiff moved for summary judgment on the eighth cause of action, and defendant moved for summary judgment on the eighth and fifth causes of action.

#### JURISDICTION & STANDARD OF REVIEW

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(a). Summary judgment is appropriate when “there is no genuine issue as to any material fact” and the Court determines that the movant is “entitled to judgment as a matter of law.” USCIT R. 56(c). The CIT reviews CBP protest denials “upon the basis of the record made before the court,” which is to say, *de novo*. 28 U.S.C. § 2640(a)(1); see also *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 924 (Fed. Cir. 2003).

## DISCUSSION

### I. Eighth Cause of Action – Common Meaning

In the eighth cause of action, Plaintiff aims to establish what the common meaning of the term plywood is, and to demonstrate that this definition does not encompass its product. However, because the CAFC already established the common meaning of plywood in *Boen*, the only way for Plaintiff to prevail on this cause of action is to prove, as per *Schott III*, that the *Boen* definition is clearly erroneous, and that this Court therefore should not be bound by *stare decisis*. There is no dispute between the parties as to the nature of Plaintiff's merchandise, only as to the meaning of the term plywood for purposes of tariff classification. Accordingly, on the eighth cause of action, there is no genuine issue as to any material fact, and this claim is ripe for summary judgment.

In order to evaluate whether Plaintiff has succeeded in this endeavor, the Court will first review the sources upon which the CAFC and this Court previously relied in establishing the common meaning of plywood. Then, the court will consider the arguments Plaintiff makes to change that definition, the sources it relies upon to justify doing so, and the arguments Defendant makes in response. Finally, the Court will assess whether Plaintiff has shown that the earlier decisions were clearly erroneous.

**A. The Common Meaning of Plywood Established In *Boen***

The term plywood is not defined in the HTSUS, and as such should be given its common meaning. *See Boen*, 357 F.3d at 1264; *Kahrs III*, 645 F. Supp. 2d at 1277. In *Boen*, the court primarily relied upon the definition of plywood found in two industry publications, the “Voluntary Product Standards PS 1-95” (“VPS”) and “Terms of the Trade,” as well as the definition in Merriam Webster’s Collegiate Dictionary. *Boen*, 357 F.3d at 1264–65. The court concluded that

[t]here are three common characteristics of “plywood” found in the definitions provided [in these sources]: (1) there must be at least three layers; (2) each layer must be arranged at a right angle to its adjacent layer; and (3) the layers must be bonded together.

*Id.* at 1265. The court considered arguments regarding whether each layer in a piece of plywood needs to be comprised of a continuous expanse. Upon further consultation with the VPS, the court rejected that notion. The CAFC concluded that the definition of plywood “encompasses a product whose middle layer is composed of slats or strips with minor spacing between them.” *Id.*

In *Kahrs III*, this court relied upon the definition of plywood as determined in *Boen*. Additionally, the Court consulted the definition of plywood in Webster’s Third New International Dictionary and Explanatory Note 44.12, and contrasted these definitions with the meaning of “engineered flooring” according to the National Wood Flooring Association. *Kahrs III*, 645 F. Supp. 2d at 1277. These sources confirm the

tripartite definition arrived at in *Boen*—plywood is comprised of at least three layers, the grain of each layer arranged at right angles to the adjacent layers, and glued, cemented, or otherwise bonded together. See generally, id. On the basis of the definition of plywood compiled from the aforementioned sources, the Court concluded that engineered flooring of the type imported by Plaintiff was properly classifiable under the HTSUS subheading for plywood. Id.

**B. Plaintiff's Arguments – 8<sup>th</sup> Cause of Action**

In support of the eighth cause of action, Plaintiff levels two main arguments aimed at dislodging the common meaning of plywood established in *Boen* and *Kahrs III*. First, Plaintiff contends that a product cannot be considered plywood unless it is manufactured with “balanced construction.” Second, Plaintiff attempts to revive an argument explicitly considered and rejected by the court in *Boen*: that a product cannot be plywood when the core layer is not a continuous expanse. Plaintiff also advances an argument that even if its product was once plywood, it has been further manufactured and substantially transformed into a product with a different name, character and use. To justify all of these contentions, Plaintiff would have the Court rely primarily on the sworn declarations of several expert witnesses.

1. Whether Balanced Construction is a Requirement of Plywood

First, Plaintiff asserts that the common meaning of the term plywood includes a requirement that the product be manufactured with a “balanced construction,” which it claims to mean “that the corresponding layers on each side of the core must be made of the same thickness and be made of the same category of wood species.” (Pl.’s Mot. VI-2.) Plaintiff asserts that neither its 14mm nor 15mm flooring has balanced construction, and therefore it cannot fall within the common meaning of the term plywood. (Id.) In support of this contention, Plaintiff offers the sworn declarations of six expert witnesses. (Id.)

Plaintiff’s experts attempt to justify their opinions about balanced construction through citation to various textual sources. Experts Long and Forholt each cite two publications from the U.S. International Trade Commission: the Summary of Trade and Tariff Information on Softwood Veneer and Plywood, USITC Pub. 841 (Feb. 1981) and the Summary of Tariff and Trade Information on Hardwood Plywood, USITC Pub. 841 (Apr. 1978) (the “USITC Publications”). (Pl.’s Annexation of Concise Stmt. of Relevant Facts as to Which There Is No Genuine Dispute<sup>5</sup> (“CSF”) ¶¶ 5, 6.) These publications describe softwood and hardwood plywood as having “balanced construction,” which is parenthetically described as “**an equal number of comparable plies on both sides of a**

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<sup>5</sup> By citing to Plaintiff’s statement of facts as “CSF” the Court does not endorse Plaintiff’s characterization of its statement as either concise or undisputed.

**central ply.**" (Forholt Decl. ¶¶ 22, 23 (emphasis added).) Experts Long, Holt and Kreamer all quote from a book by John G. Shea, entitled Plywood Working for Everybody, which states: "[b]ecause of the balanced construction of plywood—**with the grain of one ply bonding and crossing the grain of another**—it has much less tendency to warp than solid wood." (CSF ¶ 7; Long Decl. ¶ 30 (emphasis added).) Expert Long also notes that the primary industry standard for hardwood plywood, despite not including the term "balanced construction" in its glossary, does state in Section 3.10 that "[a]ll plies shall be **combinations of species, thickness, and moisture content to produce a balanced panel.**" (CSF ¶ 8; Long Decl. ¶ 35 (emphasis added).) These appear to be the only textual sources that any of Plaintiff's expert witnesses cite in support of the concept that balanced construction is a requirement for plywood. (Pl.'s Mot. VI-1 – VI-3.)

Plaintiff's experts also cite copious sources that contradict their opinions that balanced construction is a requirement for plywood. All six of Plaintiff's experts reference the definitions of hardwood plywood included in the 1983 and 2004 versions of the voluntary standards established by the Hardwood Plywood and Veneer Association and the American National Standards Institute ("HPVA/ANSI"). (See, e.g., Long Decl. ¶¶ 26–27.) These definitions make no mention of balanced construction. Similarly, five of Plaintiff's experts cite the definitions of softwood plywood from the

1983 and 1995 industry standards produced by the American Plywood Association (“APA”). These definitions are similarly silent on the issue of balanced construction.

(See, e.g., *id.* ¶¶ 24–25.) Because none of these textual sources invoke balanced construction in their definitions, each expert takes the remarkable position that the industry standard definitions of hardwood and softwood plywood are deficient.

(See e.g., *id.* ¶ 28 (“these separate definitions . . . are reasonably complete except for one important aspect . . . that plywood must be made of ‘balanced construction.’”))

Moreover, all six experts cite

- the definition of plywood found in Webster’s Third International Dictionary,
- the definition of plywood established by the CAFC in Timber Products Co. v. United States, 515 F.3d 1213 (Fed. Cir. 2008),
- the description of plywood found in the Explanatory Note to Heading 4412,
- the definition of plywood found in Terms of the Trade, Random Lengths Publications, Fourth Edition (2000), and
- the definitions of plywood found in the 1987 and 2000 publications of Wood Handbook, published by the Forest Products Laboratory, USDA.

A plurality of Plaintiff’s experts cite the definition of plywood found in McGraw-Hill Dictionary of Technical Terms, and more than one expert explicitly tackles the definition of plywood established by the CAFC in *Boen*, as well as the definition of plywood found in Plywood Working for Everybody, Van Nostrand Reinhold Company (1981). This diverse and exhaustive list of nine further textual sources defining or describing plywood share two things in common: they are uniformly silent on the alleged

requirement that plywood have balanced construction, and they are uniformly criticized or dismissed by Plaintiff's experts for that reason.

In sum, while Plaintiff's experts were able to identify four textual sources making some reference to "balanced construction" or the "balanced" nature of a panel of plywood, they also collectively identified 13 textual sources that contradict their opinions.

2. Whether the Core Layer of Plywood May Contain Gaps

Plaintiff alleges further error in the common meaning of plywood established in *Boen*, claiming that a product with engineered gaps in its core cannot be plywood. Specifically, Plaintiff asserts that its 15mm flooring does not qualify as either "lumber core" or "veneer" plywood, because the "gaps that are designed, engineered, and built into the core," do not meet the requirements of any standard commonly used in the U.S. plywood industry since September 7, 1995, precluding it from being plywood.<sup>6</sup> (*8th COA* ¶¶ 7-9.) Also, on account of this design feature, Plaintiff claims its 15mm flooring is not bought and sold as plywood, and is not recognized as lumber core plywood by "[t]hose experienced in the buying and selling of plywood in the plywood trade." (*8th*

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<sup>6</sup>The middle layer of Plaintiff's 14mm flooring is not comprised of slats, so Plaintiff does not make this argument with respect to that product.



COA ¶ 6.) In support of this argument, Plaintiff would once again have the Court rely on the sworn declarations of its expert witnesses. (Pl.'s Mot. VI-3 – VI-5.)

For these contentions, Plaintiff cites no new source, but rather argues that the CAFC misinterpreted Section 5.8.1 of Voluntary Product Standard 1-95, which permits gaps in the crossbands of plywood. (Id. at VI-3.) The standard reads, in relevant part:

Crossband gaps or center gaps, except as noted for plugged crossband and jointed crossband, shall not exceed 25 mm (1 inch) in width for a depth of 205 mm (8 inches) measured from panel edge.

Voluntary Product Standard PS 1-95: Construction and Industrial Plywood § 5.8.1 (See

Ex. 10 to Pl.'s Resp., Forholt Decl., Attach. G). While the standard states a specific distance limiting the depth of any crossband or center gaps (8 inches), Plaintiff reasons that because 8 inches is about 16% of the total width of a 4' by 8' panel of plywood, what this standard really **means** is that any gap in the core of a piece of plywood is limited to 16% of the width of that piece of plywood. (Id. at VI-4.) Plaintiff experts Griede, Holt and Forholt all agree that this standard does not permit gaps to run across the full width of a piece of plywood, as the gaps do in Plaintiff's 15mm flooring, but cite no textual authority in support of their opinions. (CSF ¶ 27.)

Additionally, Plaintiff argues that the gaps in its 15mm flooring do not satisfy the requirements of Section 5.8.1. on the basis of their length alone. (Pl.'s Mot. VI-4.)

Plaintiff asserts that while the standard permits gaps of up to 8 inches, “[t]he length of those gaps in the 15mm flooring extends to 9 inches, including the edgework.” (Id.)

3. Whether Plaintiff’s Product Was Substantially Transformed

Plaintiff also contends, directly and simply, that its product does not fall within the *eo nomine* provision for plywood. Plaintiff argues that even if its product “ever remotely were plywood,” it has “advanced beyond plywood” and has been “substantially transformed” into a new and different product. (Id. at VI-5.) Plaintiff describes the manufacturing process by which its goods are produced, which involves cutting layers of wood for the face, bottom and core,<sup>7</sup> gluing and laminating these layers together under heat and pressure, trimming, sanding, finishing, and cutting edgework.<sup>8</sup> (Id. at VI-7.) Plaintiff does not identify at which step in this process its product may have been plywood, but suggests that the step of cutting edgework is the step that might have effected substantial transformation. (Id. (“The unique edging of Kahrs flooring indicates that it is not intended to be fungible . . . .”).) This argument rests on Plaintiff’s insistence that its product is only bought, sold and marketed as flooring, and never as plywood. (Id. at VI-8–9.)

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<sup>7</sup>The 15mm flooring has a core made of “fingers,” also known as slats; the 14mm flooring has a core made of a “5-ply poplar panel.” (Pl.’s Mot. VI-7.)

<sup>8</sup>The 15mm flooring utilizes a “patented Woodloc™” mechanism, whereas the 14mm flooring has “tongue and grooving edgework.” (Id. at VI-7.)

### C. Defendant's Arguments

Defendant responds to Plaintiff's arguments both by criticizing the sources Plaintiff relies upon to support its claim, and by disputing Plaintiff's claim on the merits.

#### 1. Whether Plaintiff May Use Expert Witness Declarations in Support of the 8<sup>th</sup> Cause of Action

First, Defendant contends that Plaintiff should be prohibited from using expert declarations to prove the common meaning of plywood, because (1) the experts were not properly disclosed during the period of additional discovery that was provided for the eighth cause of action, and (2) opinion testimony is an impermissible basis for resolving a question of law, such as the meaning of a tariff term. (Def.'s Resp. 4–10.) Even if the Court considers the expert declarations, however, Defendant maintains that Plaintiff's 14mm and 15mm flooring falls within the common meaning of the term plywood. (Id. 11–28; Def.'s Mot. 8–20.) Finally, Defendant argues that the position taken by CBP that Plaintiff's flooring is plywood is entitled to Skidmore deference. (Def.'s Mot. at 5–8.)

##### *a. Whether Plaintiff Committed a Discovery Violation*

In regards to the alleged discovery violation, Defendant points out that the scheduling order that permitted limited discovery on the eighth cause of action required the parties to make expert disclosures by January 28, 2011 and to identify all witnesses each party intended to depose by February 2, 2011. (Def.'s Resp. 4.)

Defendant also points to USCIT Rule 26(a)(2), which requires the disclosure of a person who may be used at trial to present opinion testimony. (Id.) Defendant alleges that Plaintiff did not comply with the requirements of the scheduling order or USCIT R. 26(a)(2) because no expert witness reports related to the eighth cause of action were produced until the end of discovery, between February 25, 2011 and March 22, 2011. (Id. at 5.) Defendant claims it could not conduct depositions of Plaintiff's experts until it received these declarations, but once it had received them, the time allotted for discovery had elapsed. (Id. at 6.) To remedy this violation, Defendant requests that the Court refuse to consider Plaintiff's expert witness reports insofar as they apply to the eighth cause of action. (Id. at 6-7.)

Plaintiff responds to this alleged discovery violation by explaining that the court's scheduling order only required the parties to disclose experts that had "not been previously identified in this case," and that because all of Plaintiff's witnesses were previously disclosed in regards to the fifth cause of action, no discovery violation occurred. (Pl.'s Rep. to Def.'s Resp. to Pl.'s Mot. for Summ. J. on the Eighth Cause of Action ("Pl.'s Rep.") 2-3, 6-7.)

*b. Whether Testimony is Properly Considered When Resolving a Question of Law*

Defendant also seeks the exclusion of Plaintiff's expert witness reports on the grounds that opinion testimony is an inappropriate basis for resolving a pure question

of law, such as the common meaning of a term in an HTSUS heading or subheading.

(Def.'s Resp. 7–10.) Defendant cites the general proposition that “[e]xperts are prohibited from opining on the law or its application in a particular scenario,” and points out that expert witness testimony necessarily relates to fact questions, of which there should be none, if the case is to be resolved by summary judgment. (Id. at 7 (citing cases).) Defendant acknowledges that the CIT and its predecessor (the Customs Court) have occasionally considered expert testimony to establish the common meaning of a tariff term, but have done so only under limited circumstances not present here. (Id. at 8–9 (citing Toyota Motor Sales, U.S.A., Inc. v. United States, 7 CIT 178, 182, 585 F. Supp. 649, 653 (1984) (relying on lexicographic sources to construe tariff term and finding that the testimony regarding industry usage of a term in issue may serve as an aid, but is not binding), aff’d based on opinion below, 753 F.2d 1061 (Fed. Cir. 1985); and Tropical Craft Corp. v. United States, 45 CCPA 59, 61, C.A.D. 673 (1958) (testimony as to common meaning advisory only, and insufficient to overcome contrary dictionary definitions).)

Plaintiff responds to this argument by citing instances in which courts have considered affidavits containing expert opinion testimony when granting summary judgment, and by arguing that rather than opining on the meaning of a tariff term, its experts merely seek to provide their opinions on the meaning of terms within their

professional experience. (Pl.'s Rep. 4–7.)

2. Defendant's Contentions on the Merits of the 8<sup>th</sup> Cause of Action

Defendant also asserts that even if Plaintiff is permitted to use expert witness reports to support the eighth cause of action, Plaintiff's 14mm and 15mm flooring is nonetheless properly classifiable as plywood, within the common meaning of that term. (Def.'s Resp. 10–28; Def.'s Mot. 8–20.) Defendant cites *Kahrs III*, *Boen*, and no fewer than ten textual sources, each of which provides a definition of plywood consonant with the definition established by the courts in these cases. (Id.) Defendant notes that the CAFC considered and rejected the argument that gaps in the center layers of a sheet of plywood prevent an otherwise qualifying product from constituting plywood. (Def.'s Resp. at 16–18.) Defendant points out that while the HTSUS includes certain requirements for the plywood classifiable under the subheadings in question (such as having no ply thicker than 6mm, and having at least one outer ply of nonconiferous wood), there is no requirement in the HTSUS that plywood have “balanced construction,” as that term has been defined by Plaintiff. (Id. at 19.) Moreover, Defendant was unable to locate a single definition of plywood that requires it to be a “balanced construction,” and the only located sources which utilize the term “balanced” to describe plywood appear to do so in reference to characteristics present in Plaintiff's flooring. (Id. at 19–21.)

Defendant's last argument with respect to the eighth cause of action is that CBP has taken a position that engineered wood flooring such as Plaintiff's is properly classifiable as plywood, and that this determination "is entitled to deference or some high measure of respect from the Court." (Def.'s Mot. 5 (citing United States v. Mead Corp., 533 U.S. 218, 234 (2001) (finding that CBP classification rulings are entitled to deference as established by Skidmore v. Swift & Co., 323 U.S. 134 (1944).) Defendant refers to multiple ruling letters which set out this position, and notes that the CAFC in *Boen* affirmed this very position. (Id. at 7.) Plaintiff responds by trying to make the case that Skidmore deference should not be given to a CBP classification ruling when the Court is deciding a question of law. (Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J. on the Fifth and Eighth Causes of Action ("Pl.'s Resp.") 5-8.) In turn, Defendant notes that the Supreme Court has held that "deference is not inconsistent with *de novo* review or with this Court's obligation to reach the correct" result, as described in Jarvis Clark v. United States, 733 F.2d 873 (Fed. Cir. 1984). (Rep. to Pl.'s Opp. to Def.'s Mot. for Summ. J. on the Fifth and Eighth Causes of Action ("Pl.'s Rep.") 7 (citing United States v. Haggard Apparel Co., 526 U.S. 380 (1999)).)

#### **D. Analysis**

##### **1. Plaintiff May Use Expert Witness Declarations**

The Court will not prohibit the use of Plaintiff's expert witness declarations in

support of the eighth cause of action. First, Defendant has not persuaded the Court that there was a discovery violation in regards to expert disclosure. The Court's scheduling order of December 22, 2010 states in relevant part:

[i]f an expert witness, **who has not been previously identified in this case**, is designated for use at trial regarding the Eighth Cause of Action, disclosure shall be made in accordance with USCIT Rule 26(a)(2) as soon as practicable, and no later than Friday, January 28, 2011.

(Dkt. 169 (emphasis added).) Because all of Plaintiff's expert witnesses had been previously identified in this case, the obligation imposed by this paragraph was never triggered, and USCIT R. 26(a)(2) (which requires disclosure of witnesses) was not violated. While it might have been helpful for Defendant to depose Plaintiff's experts for a second time, in order to plumb their testimony about the common meaning of plywood, the Court is not persuaded that Defendant was prevented from doing so—at least by any overt action of Plaintiff. Moreover, Defendant acknowledges that “the substantive portions of the testimony of Kahrs' ‘experts,’ . . . were initially offered in support of Kahrs' motion for summary judgment on the fifth cause of action.” (Def.'s Rep. 5.) As such, Defendant cannot claim that it was blind-sided by any argument Plaintiff now makes regarding the eighth cause of action. Even if Plaintiff was less than forthcoming during the most recent period of discovery, it is clear to the Court, upon careful consideration of the substance of Plaintiff's expert witness declarations, that



Defendant will not be prejudiced by their admission.

Defendant also has not persuaded the Court that it is improper to consider the opinions of expert witnesses when establishing the common meaning of a tariff term. To the contrary, for nearly a century, the courts have permitted the use of testimony to establish common meaning, but have uniformly held that any such testimony should be subordinate to reliable textual sources. United States v. Crosse & Blackwell, Inc., 22 C.C.P.A. 214, 217–18, T.D. 47,141 (1934) (“While the opinions of witnesses as to the common meaning . . . [are] proper to be considered . . . the usual rule is to consult standard lexicographers to determine the common meaning of statutory words.”); United States v. May Department Stores Co., 16 Ct. Cust. Appls. 353, 355–56, T.D. 43,090 (1927) (“[I]n determining the common meaning of a term, testimony is only advisory and has no binding effect upon the court, since the common meaning of a term is ordinarily within the cognizance of the court, and the court may further obtain knowledge of the common meaning of a term from the dictionaries, lexicons [or] written authorities . . .”).<sup>9</sup> Accordingly, the Court will treat the opinions of Plaintiff’s expert witnesses pertaining to the common meaning of plywood as advisory and non-binding, and will credit such testimony only to the extent that it is supported, and not

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<sup>9</sup>The court in May Department Stores saw this conclusion as so axiomatic that “it requires no citation of authority.” 16 U.S. Cust. App. at 355. Unfortunately, this Court has no such luxury.

contradicted, by reliable textual sources.<sup>10</sup> See Toyota Motor Sales, 585 F. Supp. at 654 (permitting testimony on common meaning, but noting that such testimony may only serve as an aid, and is not binding); United States v. John B. Stetson Co., 21 C.C.P.A. 3, 9 (1933) (same); see also United States v. Tropical Craft Corp., 42 C.C.P.A. 223, 223–28 (1955) (holding that the Customs Court should have discounted testimony on common meaning that was contrary to the definitions provided in authoritative sources).

2. Plaintiff Has Failed To Demonstrate that the Definition of Plywood Established in *Boen* Was Clearly Erroneous

After carefully considering the arguments and textual sources cited by the parties, along with the opinions espoused in Plaintiff's expert witness declarations, the Court concludes that there is no genuine issue as to any material fact on the eighth cause of action, and Defendant is entitled to judgment as a matter of law.

For the reasons described previously, supra at 6–9, the only scenario under which this Court would disturb its prior ruling would be if Plaintiff demonstrated that the common meaning of plywood arrived at in *Boen* was clearly erroneous.<sup>11</sup> See Schott

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<sup>10</sup> "Suppose the question before the court was, is a horse an animal, and the proof would show that a horse was not an animal. It is doubtful if the testimony in this kind of supposed case would be regarded by any court as any evidence at all. But, certainly . . . [such testimony] would not control as against the judicially known fact and judicially decided fact, that a horse is an animal." United States v. Flory & Co., 15 Ct. Cust. Appls. 156, 160, T.D. 42,219, 1927 WL 29495 at \*4 (1927).

<sup>11</sup> The Court's obligation to follow binding precedent is stronger than any Skidmore deference the Court might extend to CBP classification rulings. Accordingly,

*III*, 750 F.2d at 64–65; see also 20 Am. Jur. 2d Courts § 132 (offering a survey of cases enunciating the grounds for deviating from precedent). Not only has Plaintiff failed to do so, the Court finds that Plaintiff has not even been able to articulate a viable alternative definition for plywood. To the contrary, the testimony of Plaintiff’s expert witnesses is so extensively and uniformly contradicted by the very textual sources **they cite**, as well as those relied on in *Boen* and *Kahrs III*, that the Court finds Plaintiff’s expert witness testimony unpersuasive.

*a. Balanced Construction Is Not Part of the Definition of Plywood*

On the issue of balanced construction, Plaintiff has failed to establish precisely what the phrase “balanced construction” means, and has failed to identify a single textual **definition** of plywood that explicitly includes “balanced construction” as a requirement. The USITC Publications, which describe “balanced construction” in a manner akin to Plaintiff’s suggested meaning of the phrase, though with considerably less specificity, provide the best support for Plaintiff’s arguments on this issue.

However, Plaintiff’s assertion that layers on either side of the core of a piece of plywood “must be made of the same thickness and be made of the same category of wood species” is only tangentially supported by the USITC Publications, which simply require

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because of the existence of binding precedent in this case, the Court does not consider the extent to which Skidmore deference might compel a similar outcome in this case.

that such plies be “comparable.” Compare Pl.’s Mot. VI-2 with USITC Publications (see supra at 13). On the other hand, Plywood Working for Everybody suggests that “balanced construction” refers not to the comparability of plies on either side of the core, but to the stability created by layering of adjacent plies at right angles—a characteristic of plywood that is both consistent with the *Boen* definition and descriptive of Plaintiff’s flooring. Plaintiff’s only other textual source, the ANSI/HPMA, is at best inconclusive about the meaning of the term “balanced construction” and does not indicate that all plywood must be made with balanced construction. Taken together, these sources do not provide sufficient justification for the court to disregard roughly a dozen textual definitions of plywood that make no mention of “balanced construction,” and do not demonstrate that the *Boen* definition is clearly erroneous.

Furthermore, the plain language of the HTSUS *eo nomine* provisions for plywood appear to contemplate plywood in which different veneers have been applied to the face and backside of the panel. If a piece of plywood was manufactured with one outer ply of coniferous wood, and the corresponding ply on the opposite side of the core was made from nonconiferous wood, such a product would not, by virtue of this feature, fail to be classifiable within HTSUS 4412 as plywood, even though it fails to fit within Plaintiff’s proffered definition of balanced construction. (See HTSUS 4412.14 (providing for plywood containing “at least one outer ply of nonconiferous wood.”); see also

HTSUS 4412.13 (providing for plywood containing “at least one outer ply of tropical wood”).) Accordingly, Plaintiff’s argument about balanced construction is unavailing.

*b. The Gaps In Plaintiff’s 15mm Flooring Do Not Prevent It from Being Plywood*

The Court is similarly unpersuaded by Plaintiff’s argument that the common meaning of the term plywood includes the requirement that each ply be comprised of a continuous expanse. This argument was embraced by this court in an earlier stage of the *Boen* litigation, only to be rejected by the CAFC. The CIT concluded

[t]he definitions indicate that “plywood” is composed of thin sheets of wood glued together with the grains of adjacent layers at right angles. The definitions of “veneer” and “sheet” indicate that the layers forming plywood are “continuous expanses” of material of a constant thickness.

Boen Hardwood Flooring, Inc. v. United States, 27 CIT 40, 254 F. Supp. 2d 1349, 1361

(2003). As described above, supra at 11, the CAFC refused to accept that the definition of plywood was as narrow as the CIT had determined:

None of the definitions of “plywood” . . . are nearly so restrictive. The [CIT’s] interpretation of “plywood,” which imports the requirement that each layer be composed of a single, continuous sheet of wood, ignores the reality of the product and defies the accepted commercial meaning of the term.

*Boen*, 357 F.3d at 1265. Plaintiff has failed to demonstrate that this conclusion of the CAFC is clearly erroneous, and therefore has failed to provide this Court with any legitimate grounds to depart from *stare decisis*.

The Court does not accept the theory floated by Plaintiff’s expert witnesses that

although VPS Section 5.8.1 provides explicit measurements for the maximum width and length of crossband gaps, it really intends to restrict the measurements of such gaps as a percentage of the width of a “typical” piece of plywood. Such a standard would be easy enough to craft, and the Court finds it reasonable to infer that the measurements in this standard have been intentionally specified. Furthermore, Plaintiff’s experts cite to no new textual definitions of plywood to support the contention that the product must be comprised only of layers that are each a continuous expanse. In the absence of such new or different textual sources, the Court has no basis upon which it could reject the binding precedent of the CAFC in *Boen*.

The Court is also unpersuaded by Plaintiff’s argument that because the length of the gaps in Plaintiff’s 15mm flooring are “beyond the [8 inch] limitation imposed by Section 5.8.1 [of the VPS],” Plaintiff’s flooring therefore cannot be plywood. (Pl.’s Mot. VI-4.) The longest measurement of the width of Plaintiff’s 15mm flooring (i.e., including all edge work) is eight and five eighths inches. If this measurement is taken to be the length of the gaps,<sup>12</sup> Plaintiff’s product indeed may not comply with VPS Section 5.8.1.

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<sup>12</sup> The Court also notes that the “length” of the gaps could also be measured by the distance such gaps are completely enclosed (*i.e.*, excluding all edge work), seven inches, or by the width of the surface of the panel, seven and seven eighths inches. Under either of these measurements, the gaps in Plaintiff’s plywood would appear to conform with VPS Section 5.8.1. Because the Court finds it has no bearing on the appropriate classification of Plaintiff’s merchandise, the Court need not resolve which measurement is appropriate for gauging the length of the crossband gaps.

However, even with over-long gaps, the Court finds Plaintiff's product is still perfectly described by the common meaning of plywood established in *Boen*: it is comprised of at least three layers of wood that have been bonded together, with each layer arranged at a right angle to its adjacent layer. Even if Plaintiff's 15mm flooring is plywood that does not conform to VPS Section 5.8.1, it is classifiable as plywood nonetheless.

*c. Plaintiff's Substantial Transformation Argument Is Irrelevant*

The Court also regards Plaintiff's third argument in support of the eighth cause of action—that its products may have once been plywood, but have been substantially transformed—to be a red herring. It is well established that goods shall be classified in the HTSUS “in their condition as imported.” Dell Products LP v. United States, 642 F.3d 1055, 1059 (Fed. Cir. 2011) (citing Mita Copystar Am. v. United States, 21 F.3d 1079, 1082 (Fed. Cir. 1994)). In this case, there is no dispute as to the condition of Plaintiff's goods as imported; physical samples have been provided to and examined by the Court. Consequently, it matters not what previous incarnations these products have been through, nor what alchemy was performed to bring them to their current state. The argument about substantial transformation is irrelevant.

3. CamelBak Products Does Not Affect the Outcome of This Case

On July 8, 2011, Plaintiff filed a letter to bring to the Court's attention a recent CAFC decision that it claims “set[s] forth very important new guidelines on the

analytical tools to be used for determining the scope of an *eo nomine* provision under GRI 1.” (Letter of July 8, 2011 1 (citing CamelBak Products, LLC v. United States, \_\_\_ F.3d \_\_\_, 2011 WL 2410736 (Fed. Cir. 2011) (Dkt. 245).) Plaintiff claims that CamelBak requires the Court to consider certain factors that will demonstrate that its merchandise falls beyond the scope of the *eo nomine* provision for plywood. (Id. at 2.) Plaintiff argues that in the wake of CamelBak, “an *eo nomine* analysis must now incorporate” a review of the design, use and function of the product in question, as well as how it is regarded in commerce, and “whether the additional component is a substantial part of the whole product.” (Id. at 4 (internal quotation omitted).) Plaintiff claims that the fact that its product is not sold or used as plywood “take[s] on new significance under CamelBak.” (Id. at 5.)

Defendant responds by arguing that CamelBak did not introduce new criteria for all *eo nomine* classification cases, but simply highlighted factors that have long been considered by the courts. (Government’s Response to Plaintiff’s July 8, 2011 Letter 1.) Defendant also distinguishes CamelBak by pointing out that Kahrs’ merchandise falls entirely within the *eo nomine* provision for plywood, whereas the article in CamelBak was comprised of two components that may have been classifiable under two different tariff provisions. Naturally, Plaintiff seized the opportunity to file an additional letter, in which it insists, among other things, that its 14mm flooring **really is** a composite



article, comprised of a plywood core with front and back veneers.<sup>13</sup> (Pl.'s Rep. to Def.'s Resp. to Pl.'s July 8, 2011 Letter 2–3.)

The Court finds that CamelBak does not affect the holding in this case. The CAFC stated in CamelBak that, “[i]f the subject articles fall within the scope of [a given] *eo nomine* . . . provision then, under Mita Copystar, GRI 1 mandates that the subject articles be classified [under that provision.]” CamelBak at \*5. The “analytical tools or factors” from CamelBak are only provided to help assess whether a product is “beyond the reach of the *eo nomine*” provision. Id. Plaintiff’s merchandise is encompassed entirely by the definition of plywood. The Court finds that Plaintiff’s merchandise does not possess an “additional component,” alien to plywood, much less “possess features substantially in excess” of the common meaning of plywood. CamelBak at \*6 (quoting Casio, Inc. v. United States, 73 F.3d 1095 (Fed. Cir. 1996)). Accordingly, the classification question may be resolved without resort to the CamelBak factors, and its classification will not be disturbed. See id.

For the foregoing reasons, then, the Court finds that it continues to be bound to accept the common meaning of plywood set out in *Boen*, just as it was in *Kahrs III*. The Court grants summary judgment to Defendant on the eighth cause of action.

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<sup>13</sup> In its second letter, Plaintiff also requests the opportunity to file additional briefing on CamelBak, which the Court declines.

**II. Fifth Cause of Action – Commercial Designation**

In the fifth cause of action, Plaintiff aims to prove that at the time the HTSUS was enacted into law in 1988, there was a commercial designation of the term plywood within the plywood wholesale trade, which differed from the common meaning, and was general, definite and uniform throughout the United States. (Compl. ¶¶ 48–62.) Plaintiff alleges that this commercial meaning does not encompass its engineered hardwood flooring, and seeks a judgment from this Court that its merchandise is instead classifiable as “veneered panels and similar laminated wood,” free of duty. (Id. ¶ 62.) For the reasons set forth below, the Court finds there is no genuine issue of material fact with respect to the fifth cause of action, and Defendant is entitled to judgment as a matter of law.

**A. Defendant’s Contentions**

Defendant argues that even if the factual assertions made by Plaintiff’s expert witnesses are accepted as true, Plaintiff is unable to prove the uniformity and definiteness prongs of its commercial designation claim as a matter of law. (Def.’s Mot. 23–26.) Regardless of what Plaintiff’s experts may claim about the commercial designation of plywood that existed in the trade prior to 1988, Defendant points to “publications of industry-wide trade organizations, authoritative publications which are voluntarily utilized and relied upon by the wholesale plywood industry,” which

confirm that at that time, the industry regarded plywood according to its common meaning, rather than any special commercial designation. (Id. at 23.) Defendant cites Timber Products for the proposition that “[c]ontradiction is a sufficient, but not necessary, condition for finding inconsistency, rather than uniformity throughout the trade, precluding commercial designation of a tariff term for classification under the HTSUS.” (Id. at 25–26 (citing Timber Products, 417 F.3d at 1221–22).)

Specifically, Defendant cites the ANSI/HPMA standards for hardwood plywood from 1983, which defines plywood as

[a] panel composed of an assembly of layers or plies of veneer (or veneers in combination with lumber core, particleboard core, MDF core, hardboard core, or of special core material) joined with an adhesive. Except for special constructions, the grain of alternate plies is always approximately at right angles, and the face veneer is usually a hardwood species.

(Id. at 23 (quoting ANSI/HPMA HP 1983 at p. 12, § 5, Definitions, PLYWOOD,

HARDWOOD).) Plaintiff also cites the VPS PS 1-83 *Construction and Industrial Plywood (With Typical APA Trademarks)* (December 30, 1983), which defines plywood as

a flat panel built up of sheets of veneer called plies, united under pressure by a bonding agent to create a panel with an adhesive bond between plies as strong as or stronger than, the wood. Plywood is constructed of an odd number of layers with grain of adjacent layers perpendicular. Layers may consist of a single ply or two or more plies laminated with parallel grain direction oriented parallel to the long dimension of the panel.

(Id. at 24.)<sup>14</sup> These definitions are consistent with the common meaning of plywood, now well established by the courts, and serve to rebut Plaintiff's claims that prior to 1988 everyone in the plywood industry, throughout the United States, meant something different by the term 'plywood.' See Arthur J. Humphreys, Inc. v. United States, 764 F. Supp. 188, 193 (CIT 1991) (noting that while "[i]ndustrial or commercial standards are useful in ascertaining the commercial meaning of a tariff term," when the tariff statute predates the commercial standard, the commercial standard "does not reflect the congressional understanding of the term [in question] at the time the [tariff statute] was enacted" and cannot support a claim of commercial designation).

#### **B. Plaintiff's Contentions**

In its response brief, Plaintiff claims that the commercial designation of plywood is

a panel composed of an assembly of layers or plies, typically at right angles to each other, all joined together with an adhesive bonded under heat and pressure, and the product is typically bought, sold by, manufactured to, and/or referenced to, well-recognized plywood veneer grades set forth in standards established by industry associations and/or government entities, or by standards agreed upon between the parties.

(Pl.'s Resp. 25–26.) While Plaintiff claims that plywood is **defined** as a product which is bought and sold according to "well-recognized" veneer grades, Plaintiff acknowledges

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<sup>14</sup> Defendant cites several other industry publications that provide similar definitions for plywood, however these are the only textual industry sources from prior to 1988, the year in which the HTSUS became U.S. law.

that “a buyer might agree with a wholesale seller that he or she would purchase plywood products that are not bought and sold according to recognized grading standards,” in which case the buyer and/or seller would probably have “internal standards and an understanding as to the quality of the product that is being sold.” (Id. at 26.) Plaintiff acknowledges that VPS PS 1-83, cited by Defendant, was “[t]he plywood industry standard in effect in 1988,” and points out that this standard prescribed “letter grades . . . to designate the quality of the veneers” used to manufacture the plywood. (Id.) Plaintiff rounds out its arguments by insisting that its experts have put forth a uniform, general and definite rendition of the commercial designation of plywood. (Id. at 28–30.)

### C. Analysis

#### 1. Whether Plaintiff’s Fifth Cause of Action States a Claim Upon Which Relief Can Be Granted

In its complaint, Plaintiff provides little more than a rudimentary description of the commercial designation that it contends generally, definitely and uniformly existed throughout the United States in 1988. The closest Plaintiff comes to actually proffering a commercial designation is found in paragraph 55, where Plaintiff alleges that plywood is bought and sold based on the grades of the face, back, and often the core of the plywood sheets. It is a commodity, component, multipurpose or structural material used to make other items.

(Id. ¶ 55.) While it is not clear whether Plaintiff intended for these sentences to set out

the commercial designation of plywood, it is clear that this excerpt differs significantly from what Plaintiff now claims is the commercial designation. (See Pl.'s Resp. 25–26 (claiming the commercial designation of plywood is “a panel composed of an assembly of layers or plies, typically at right angles to each other, all joined together with an adhesive bonded under heat and pressure, and the product is typically bought, sold by, manufactured to, and/or referenced to, well recognized plywood veneer grades”).) In any event, the Court sees no other portion of Plaintiff’s complaint that could be characterized as setting forth an alleged commercial designation.

In light of the vagueness of the commercial designation that is set out in the complaint, the Court has deep reservations about whether Plaintiff has alleged enough facts in support of the fifth cause of action to state a claim upon which relief can be granted. The Supreme Court decided Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), roughly four months before Plaintiff commenced this case; therefore, any motion to dismiss Plaintiff’s complaint pursuant to USCIT R. 12(b)(5)<sup>15</sup> would have been decided under the Twombly pleading standard. In relevant part, Twombly held that

[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . . Factual allegations must be enough to raise a right to relief

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<sup>15</sup> USCIT R. 12(b)(5) is the CIT’s equivalent of Fed. R. Civ. P. 12(b)(6), and the Supreme Court’s holding in Twombly applies to it with equal force.

above the speculative level[.]

Twombly, 500 U.S. at 555 (citations omitted).

In light of Plaintiff's failure to set out clearly what the alleged commercial designation **is**, the Court has some concern about whether Plaintiff's fifth cause of action constitutes more than a "formulaic recitation of the elements" of a commercial designation claim, and whether the factual allegations Plaintiff does make "raise a right to relief above the speculative level." See id. However, as Defendant did not move to dismiss the fifth cause of action for failure to state a claim, and because Defendant's motion for summary judgment on the fifth cause of action is now fully briefed before the Court, the Court will assume the sufficiency of Plaintiff's pleading and proceed to an evaluation on the merits.

2. Plaintiff Cannot Prove the Uniformity of its Alleged Commercial Designation

The Court finds that the definitions of plywood found in the industry standard publications for hardwood and softwood plywood in 1983 preclude Plaintiff from proving a uniform commercial designation. Even if the Court credits the statements of Plaintiff's expert witnesses as true, and accepts that, in their experience, plywood was always commercially **defined** as a product that is bought and sold on the basis of the grades of the veneers used in its construction, the textual definitions demonstrate a lack of uniformity on that point. The Court notes that the 1983 ANSI/HPMA hardwood

plywood standard and the 1983 APA softwood plywood standard include abundant information about grading, **but neither includes a definitional requirement that a product must be bought and sold by grade in order to constitute plywood.** To the contrary, the definition of plywood found in each standard is fully consistent with the (now well established) common meaning of plywood. Because “[i]n order for a commercial designation to be uniform, it must be the same throughout the trade,” the Court finds that Plaintiff is incapable of proving uniformity in this case. Timber Products Co., 515 F.3d at 1221.

3. Plaintiff Cannot Prove the Definiteness of its Alleged Commercial Designation

The Court also finds that Plaintiff’s commercial designation lacks definiteness. Plaintiff’s proffered commercial designation of plywood is identical to the common meaning of plywood as established by the courts, with one additional requirement: the proviso that plywood “is **typically** bought, sold by, manufactured to, **and/or** referenced to, well-recognized plywood veneer grades . . . **or** by standards agreed upon between the parties.” (Pl.’s Resp. 26 (emphasis added).) It is not clear to the Court from this string of disjunctive possibilities just how essential this added requirement is to Plaintiff’s alleged commercial designation. Plaintiff further clarifies (or, perhaps, obfuscates) that a buyer and a seller of plywood could freely agree that the plywood in a given transaction **does not need** to be linked to “recognized grading standards,” and



that under such circumstances “the buyer and/or seller would **typically** have their own internal standards and an understanding as to the quality of the product being sold.”

(Id. (emphasis added).) The Court finds that Plaintiff’s assertion regarding the necessary connection between plywood and “well-recognized plywood veneer grades” is equivocal and lacking in definiteness.<sup>16</sup> It does not spell out with precision the relationship that plywood has with grading, and it is perfectly conceivable that a product not linked to any grading standard could fall within the ambit of Plaintiff’s commercial designation.

The lack of definiteness of Plaintiff’s proffered commercial designation stands in stark contrast to the commercial designations in successful commercial designation

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<sup>16</sup> The Court identifies the following as a partial list of products that would fit within Plaintiff’s proffered commercial designation:

1. Products that meet the common meaning of plywood, and are bought and sold according to well-recognized plywood veneer grades, or
2. Products that meet the common meaning of plywood, and are “manufactured to” well-recognized plywood veneer grades, or
3. Products that meet the common meaning of plywood, and are “referenced to” well-recognized plywood veneer grades, or
4. Products that satisfy some combination of (1) – (3), or
5. Products that meet the common meaning of plywood, and are bought and sold according to standards agreed upon by the parties, or
6. Products that meet the common meaning of plywood, and are manufactured according to standards agreed upon by the parties, or
7. Products that meet the common meaning of plywood, and are referenced to standards agreed upon by the parties, or
8. Products that meet the common meaning of plywood, with no reference to grading whatsoever.

cases. In Florsheim Shoe Co. v. United States, 71 Cust. Ct. 187 (1973), for instance, the court found that while water buffalo calfskin leather fell within the common meaning of the term “calf leather,” there was a commercial designation for the term that excluded this product. Namely, in the wholesale trade, “calf leather” referred “to the leather of young domesticated cows or cattle within the genus Bos,” which excluded water buffalo. Florsheim, 71 Cust. Ct. at 191. In Interocean Chemical & Minerals Corp. v. United States, 715 F. Supp. 1093 (CIT 1989), the court found that while the common meaning of the term “crabmeat” would seem to be “the meat of a crab,” the term is commercially used only to refer to a product that “has first been cleaned, shelled and fully cooked.” Interocean, 715 F. Supp. at 1096. The precise, succinct, and **definite** nature of these commercial designations contrast starkly with the vague, lengthy, and ambiguous commercial designation of plywood here advanced by Plaintiff. In 1928, the United States Court of Customs Appeals remarked that “[c]ommercial designation is a thing often claimed in customs litigation and rarely established.” Jas. Akeroyd, 15. Ct. Cust. App. at 443. This maxim has once again proven true.

#### CONCLUSION

For the foregoing reasons, the Court concludes that there is no genuine issue as to any material fact on either of the remaining causes of action in this case, and Defendant is entitled to judgment as a matter of law on both the fifth and eighth causes

of action. It is therefore

**ORDERED** that Defendant's motion for summary judgment on the fifth and eighth causes of action is **GRANTED**, and it is further

**ORDERED** that Plaintiff's motion for summary judgment on the eighth cause of action is **DENIED**, and it is further

**ORDERED** that the parties shall confer and submit to the court, no later than Tuesday, August 16, 2011, a proposed judgment in accordance with the opinions issued in this case, to be entered by the Court.

/s/ Gregory W. Carman  
Gregory W. Carman, Judge

Dated: July 26, 2011  
New York, NY