

APPENDIX J

LETTER FROM BAKER & McKENZIE

February 10, 2006

Mr. David Beck
Acting Director
Office of Tariff Affairs and Trade Agreements
United States International Trade Commission
Room 404-M
500 E Street, S.W.
Washington, D.C. 20436

Ms. Tiffany Smith
Office of the U.S. Trade Representative
600 17th Street, N.W.
Washington, DC 20508

Re: Proposed Modifications to the Harmonized Tariff Schedule of the U.S., U.S. I.T.C.
Investigation No. 1205-6

Dear Mr. Beck and Ms. Smith:

We write to you on behalf of our client, Windham Weavers, Inc., 38A Grove Street, Suite 204, Ridgefield, Conn. ("Windham"), with regard to the proper classification of festive textile placemats, napkins, rugs., etc. under the Harmonized Tariff Schedule of the U.S. ("HTSUS"), following the *Park B. Smith v. United States* decisions¹. We are particularly concerned with the proposed changes to the HTSUS announced in your preliminary report, USITC Publication 3764, dated March 2005, to insert a new exclusionary note 1(v) to Chapter 95, HTSUS, pursuant to changes made to the Explanatory Notes to the HTS at the international level. We believe that this proposed change will have serious and deleterious effects on our business operations unless provision is made to accord our festive textile placemats, napkins, rugs., etc. duty-neutral treatment in the form of breakouts for these articles in the chapters covering textile articles. We attach hereto a list of proposed breakouts for the affected subheadings.

~~The *Park B. Smith* case, to which Windham was not a party, was finalized pursuant to court order on April 6, 2005. The festive merchandise imported under cover of the entries identified to the case were reclassified into Chapter 95 upon reliquidation soon thereafter. We attach a copy of the court order which sets forth the merchandise and classifications~~

¹ *Park B. Smith v. United States*, 25 CIT 506 (2001), affirmed in part, vacated in part, and remanded, 347 F. 3d 922 (Fed. Cir. 2003).

Asia
Pacific
Bangkok
Beijing
Hanoi
Ho Chi Minh City
Hong Kong
Jakarta
Kuala Lumpur
Manila
Melbourne
Shanghai
Singapore
Sydney
Taipei
Tokyo

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Middle East**
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Amsterdam
Antwerp
Bahrain
Baku
Barcelona
Berlin
Bologna
Brussels
Budapest
Cairo
Düsseldorf
Frankfurt / Main
Geneva
Kyiv
London
Madrid
Milan
Moscow
Munich
Paris
Prague
Riyadh
Rome
St. Petersburg
Stockholm
Vienna
Warsaw
Zurich

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Caracas
Chicago
Dallas
Guadalajara
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Mexico City
Miami
Monterrey
New York
Palo Alto
Porto Alegre
Rio de Janeiro
San Diego
San Francisco
Santiago
Sao Paulo
Tijuana
Toronto
Valencia
Washington, DC

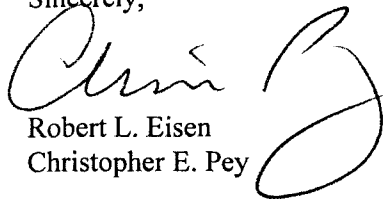
involved, as well as the case summons, which lists the entries which were reliquidated by Customs.

We were made aware of the settlement and finality of the *Park B. Smith* case by letter dated October 11, 2005, in which Customs requested "evidence [for the Windham festive merchandise that had been protested] that: (1) the items are purely decorative, closely associated with the festive occasion being depicted, whose use at any other time would be aberrant, or (2) a binding ruling in regards to this merchandise, showing that it should be classified in HTS Chapter 95." We attach a copy of Customs' October 11, 2005 letter for your reference.

The issue of whether festive textile placemats, napkins, rugs., etc. are properly classified under HTSUS Chapter 95 has been settled finally by courts through the *Park B. Smith* decisions. Although Customs has reliquidated the entries involved in that case, it has published a notice to limit the court decisions in the *Park B. Smith* case to "the specific entries before the courts in that litigation", by way of its *Proposal to Limit the Decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit in Park B. Smith v. United States*, Vol. 39 Cust. Bull. & Dec., No. 27, at 33 (June 29, 2005) ("Limitation Proposal"). We submitted extensive comments to Customs which explain our position on the Limitation Proposal, which we also attach hereto. Please review our comments on the Limitation Proposal in considering our request for subheading breakouts to ensure fair and equitable duty treatment of our festive merchandise.

Please do not hesitate to contact us if you have any questions or comments on the contents of this letter or its attachments.

Sincerely,


Robert L. Eisen
Christopher E. Pey

encs.

J-2

J-2

**Schedule of Proposed Breakout Subheadings
to Provide Duty-Neutral Treatment of Festive
Textile Articles Pursuant to *Park B. Smith v. United States*,
347 F. 3d 922 (Fed. Cir. 2003)**

HTSUS No.	HTSUS Text	2005 Duty Rate	Proposed Breakout	Corresponding <i>Park B. Smith</i> Classification Subheadings	2005 <i>Park B. Smith</i> Duty Rate
5702.99.05 and .15	Carpets and other textile floor coverings, woven, not tufted or flocked, whether or not made up, including "Kelem", "Schumacks", "Karamanie" and similar hand-woven rugs; Other, not of pile construction, made up; Of other textile materials; Of cotton; Woven but not made on a power-driven loom (369)[.05] and Other (369)[.15]	6.8%	5702.99.18: Rugs decorated with recognized holiday motifs: Free	9505.10.5020 9505.90.6090 (Depending on the holiday depicted)	Free
6302.51.20	Bed linen, table linen, toilet linen, and kitchen linen; Other table linen; Of cotton; Tablecloths and napkins; Other; Plain woven (369)	4.8%	6302.51.25: Decorated with recognized holiday motifs: Free	9505.10.5020 9505.90.6090 (Depending on the holiday depicted)	Free
6302.51.40	Bed linen, table linen, toilet linen, and kitchen linen; Other table linen; Of cotton; Other (369)	6.3%	6302.51.45: Decorated with recognized holiday motifs: Free	9505.10.5020 9505.90.6090 (Depending on the holiday depicted)	Free

**UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE: HON. RICHARD W. GOLDBERG, SENIOR JUDGE**

PARK B. SMITH, LTD.,)	
)	
Plaintiff,)	
)	Court No. 96-00344
v)	
)	
UNITED STATES,)	
)	
Defendant)	

STIPULATED JUDGMENT

This action, as prescribed by Rule 58.1 of the Rules of the United States Court of International Trade, is stipulated for judgment on the following agreed statement of facts in which the parties agree that:

1. The protests involved here were filed and the action involved here commenced within the time provided by law, and all estimated duties, charges or exactions have been paid prior to the filing of the summons.

2. The merchandise involved in this action consists of 100 percent cotton dhurries, placemats, napkins, table runners and other textile articles decorated in the styles indicated in the attached Schedule A.

3. The merchandise was classified at the time of entry under subheadings 5702.99.10, HTSUS dutiable at 7.7% or 7.6% *ad valorem*, depending on which year the entry was made, 6302.51.40, HTSUS, dutiable at 7.2% or 7.1% *ad valorem*, and 6302.51.20 HTSUS dutiable at 5.5% or 5.4% *ad valorem*.

4. As shown on attached Schedule A, the merchandise is properly classified under subheading A9505.10.5020, HTSUS as "festive . . . articles, . . . articles for Christmas festivities and parts and accessories thereof, other, other", or under subheading A9505.90.6090, HTSUS as "Festive . . . articles; other; other, other" at a duty rate of Free, pursuant to the Generalized System of Preferences ("GSP") as a product of India.

5. Any refunds payable by reason of this judgment shall be paid with interest as provided for by law.

6. The parties agree that each party shall bear its own attorneys fees and costs.

7 All other claims are hereby abandoned.

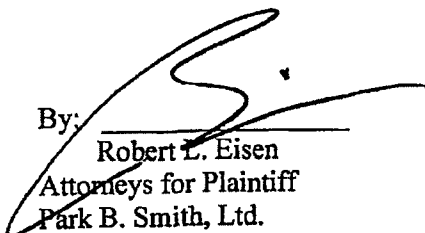
Court No. 96-00344

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

By: s/Barbara S. Williams
BARBARA S. WILLIAMS
Attorney in Charge
International Trade Field Office

COUDERT BROTHERS

By: 
Robert L. Eisen
Attorneys for Plaintiff
Park B. Smith, Ltd.
1114 Avenue of the Americas
New York, NY 10036
(212) 626-4400

s/Mikki Graves Walser
MIKKI GRAVES WALSER
Attorney
Civil Division, Dept. of Justice
Commercial Litigation Branch
26 Federal Plaza
New York, NY 10278
Attorneys for Defendant
Tel No. (212) 264-9230 or 9245

IT IS HEREBY ORDERED that this action is decided and that this final judgment is to be entered by the Clerk of this Court, the appropriate Customs and Border Protection personnel shall reliquidate the entries and make refund in accordance with the stipulation of the parties set forth above.

Dated: April 6, 2005
New York, New York

/S/ Richard W. Goldberg
Senior Judge

Schedule A

Style Name	Style Code	Classification
At Home	ATHO	A9505.10.5020
Autumn Day	AUDA	A9505.90 6090
Autumn Welcome	AUWE	A9505.90 6090
Bats & Ghosts	BAGH	A9505.90.6090
Bunnies & Tulips	BUTU	A9505.90.6090
Bunny Hop	BUHO	A9505 90.6090
Candles & Bells	CABE	A9505.10.5020
Christmas Cottage	CHCO	A9505.10.5020
Christmas Deer	CHDE	A9505.10.5020
Christmas Garden	CHGD	A9505 10.5020
Christmas Garland	CHGL	A9505.10.5020
Christmas Holly	CHHO	A9505.10.5020
Christmas Ornaments	CHOR	A9505.10 5020
Christmas Pines	CHPI	A9505.10 5020
Christmas Presents	CHPR	A9505.10.5020
Christmas Sampler	CHSA	A9505.10 5020
Christmas Santa	CSAN	A9505.10 5020
Christmas Trees	CHTR	A9505.10 5020
Christmas Village	CHVI	A9505.10.5020
Christmas Wreath	CHWR	A9505 10.5020
Decorated Eggs	DEEG	A9505.90.6090
Easter Basket & Eggs	EABA	A9505 90.6090
Easter Bouquet	EABO	A9505.90 6090
Easter Tulips	EATU	A9505.90.6090
Gingham Hearts	GIHE	A9505 10.5020
Holiday Blossom/Holly Blossom	HOBL	A9505.10.5020
Holiday Town	HOTO	A9505.10 5020
Holly Border	HOBO	A9505.10.5020
Holly Leaves, aka Hollileaves Christmas, aka Hollileaves	HOLE	A9505.10.5020
Jingle Bells	JIBE	A9505.10.5020
Poinsettia	POIN	A9505.10.5020
Poinsettia Plaid	POPL	A9505 10.5020
Rabbit Run	RARU	A9505.90.6090
Ringin Bells	RIBE	A9505.10.5020
Rocking Horse	ROHO	A9505.10.5020
Seasons Trimming	SETR	A9505 10.5020
Star Light	STLI	A9505.10.5020
Trumpets & Hearts	TRHE	A9505 10.5020
Tulip Garden	TUGA	A9505.90.6090
Turkey Day	TUDA	A9505.90 6090

PARK B. SMITH, LTD. 6-02-00344
 F/K/A VACCARO SMITH INC.

Plaintiff,

v.

UNITED STATES,

Defendant.

6-02-00344
COPY

SUMMONS

TO: The Attorney General and the Secretary of the Treasury:

PLEASE TAKE NOTICE that a civil action has been commenced pursuant to 28 U.S.C. § 1581(a) to contest denial of the protest specified below (and the protests listed in the attached schedule).



 Clerk of the Court

PROTEST

Port of Entry: Newark	Date Protest Filed: 4/13/95
Protest Number: 1001-95-103340	Date Protest Denied: 8/11/95
Importer: Park B. Smith, Ltd.	
Category of Merchandise: Christmas, Fourth of July, Easter & Halloween Holiday dhurries, placemats, napkins & table runners	

ENTRIES INVOLVED IN ABOVE PROTEST

Entry Number	Date of Entry	Date of Liquidation	Entry Number	Date of Entry	Date of Liquidation
656-0037180-4	9/30/94	1/27/95			
656-0037174-7	9/30/94	1/27/95			
656-0037173-9	9/30/94	1/27/95			
656-0036518-6	8/28/94	1/20/95			

District Director,
 New York Area
 U.S. Customs Service
 6 World Trade Center
 New York, New York 10048

Robert L. Eisen, Esq.
 Coudert Brothers
 1114 Avenue of the Americas
 New York, New York 10036
 (212) 626-4492

Address of Customs District in Which Protest Was Denied

Name, Address and Telephone Number of Plaintiff's Attorney

CONTESTED ADMINISTRATIVE DECISION

Appraised Value of Merchandise		
	Statutory Basis	Statement of Value
Appraised:		
Protest Claim:		

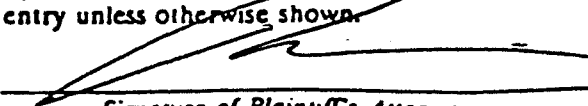
Classification, Rate or Amount				
	Assessed		Protest Claim	
Merchandise	Paragraph or Item Number	Rate	Paragraph or Item Number	Rate
Christmas dhurries	5702.99.10	7.7%, 7.6%	A9505.10.50	duty free/ GSP
Christmas placemats & table runners	6302.51.40	7.2%, 7.1%	A9505.10.50	duty free/ GSP
Christmas napkins	6302.51.20	5.5%	A9505.10.50	duty free/ GSP
4th of July, Easter & Halloween				
- dhurries	5702.99.10	7.7%, 7.6%	A9505.90.60	duty free/ GSP
- placemats & table runners	6302.51.40	7.2%, 7.1%	A9505.90.60	duty free/ GSP
- napkins	6302.51.20	5.5%	A9505.90.60	duty free/ GSP

Other

State specifically the Decision [as Described in 19 U.S.C. § 1514(a)] and the Protest Claim:

The issue which was common to all such denied protests:
 Whether the imported merchandise is properly classifiable in subheadings A9505.10.50 and A9505.90.60 HTSUS.

Every denied protest included in this civil action was filed by the same above-named importer, or by an authorized person in his behalf. The category of merchandise specified above was involved in each entry of merchandise included in every such denied protest. The issue or issues stated above were common to all such denied protests. All such protests were filed and denied as prescribed by law. All liquidated duties, charges or exactions have been paid, and were paid at the port of entry unless otherwise shown.


 Signature of Plaintiff's Attorney
 2/1/96
 Date

SCHEDULE OF PROTESTS

Newark

Port of Entry

Protest Number	Date Protest Filed	Date Protest Denied	Entry Number	Date of Entry	Date of Liquidation
1001-95-103983	5/4/95	10/13/95	656-0036906-3	10/4/94	2/3/95
1001-95-107390	8/24/95	10/13/95	656-0038727-1 656-0039328-7 656-0039474-9	2/8/95 3/26/95 3/24/95	6/9/95 7/21/95 7/7/95
1001-95-107880	9/14/95	10/27/95	656-0039959-9 656-0040234-4	4/21/95 5/18/95	8/4/95 9/15/95
1001-95-109255	10/26/95	12/1/95	656-0040544-6 656-0040546-1 656-0040924-0 656-0040802-8	6/19/95 6/15/95 6/28/95 6/27/95	10/13/95 10/13/95 10/20/95 10/13/95

District Director of Customs,

New York Area
U.S. Customs Service
6 World Trade Center
New York, New York 10048

If the port of entry shown above is different from the port of entry shown on the first page of the summons, the address of the District Director for such different port of entry must be given in the space provided.

SCHEDULE OF PROTESTS

JFK

Port of Entry

Protest Number	Date Protest Filed	Date Protest Denied	Entry Number	Date of Entry	Date of Liquidation
1001-95-106284	7/19/95	9/15/95	656-0865762-6	2/17/95	6/23/95
			656-0865688-3	2/13/95	6/09/95
			656-0865600-8	2/06/95	6/09/95
			656-0865718-8	2/14/95	6/16/95
			656-0865411-0	1/24/95	5/26/95
1001-95-106283	7/19/95	9/1/95	656-0865491-2	1/30/95	6/2/95
			656-0865613-1	2/06/95	6/2/95
			656-0865408-6	1/24/95	5/26/95
			656-0865536-4	1/31/95	6/2/95
			656-0865068-8	12/28/94	4/28/95
1001-95-104119	5/9/95	8/11/95	656-0863889-9	10/18/94	2/17/95
			656-0863911-1	10/19/94	2/17/95
			656-0864004-4	10/27/94	2/24/95
			656-0863733-9	10/11/94	3/10/95
			656-0863930-1	10/20/94	2/17/95
1001-95-107392	8/24/95	10/27/95	656-0866122-2	3/08/95	7/14/95
			656-0866374-9	3/22/95	7/21/95
			656-0866032-3	3/03/95	7/14/95
			656-0865996-0	3/02/95	7/07/95
			656-0865853-3	2/22/95	6/23/95
1001-95-107878	9/14/95	10/27/95	656-0866491-1	3/28/95	7/28/95
			656-0867047-0	5/03/95	8/18/95
			656-0866886-2	4/26/95	8/11/95
			656-0866887-0	4/24/95	8/11/95
			656-0866724-5	4/19/95	8/04/95

District Director of Customs,
 New York Area
 U.S. Customs Service
 6 World Trade Center
 New York, New York 10048

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SCHEDULE OF PROTESTS

JFK

Port of Entry

Protest Number	Date Protest Filed	Date Protest Denied	Entry Number	Date of Entry	Date of Liquidation
1001-95-107879	9/14/95	10/27/95	656-0866593-4	4/04/95	7/28/95
			656-0866939-9	4/26/95	8/11/95
			656-0867088-4	5/09/95	8/25/95
			656-0867141-1	5/10/95	8/25/95
			656-0867143-7	5/10/95	8/25/95
1001-95-104116	5/9/95	10/27/95	656-0863544-0	9/29/94	2/10/95
			656-0863518-4	9/30/94	2/10/95
			656-0863767-7	10/12/94	2/10/95
			656-0863841-0	10/17/94	2/24/95
			656-0863847-7	10/17/94	2/24/95
1001-95-107391	8/24/95	11/17/95	656-0865715-4	2/14/95	7/07/95
			656-0865595-0	2/06/95	6/09/95
			656-0865717-0	2/14/95	6/30/95
			656-0865541-4	2/01/95	6/09/95
			656-0865716-2	2/14/95	6/30/95
1001-95-103752	10/12/95	12/15/95	656-0867413-4	5/30/95	9/15/95
			656-0867376-3	5/26/95	9/15/95
			656-0867484-5	6/5/95	9/22/95
			656-0867351-6	5/24/95	9/08/95
			656-0867412-6	5/30/95	9/15/95

District Director of Customs,
 New York Area
 U.S. Customs Service
 6 World Trade Center
 New York, New York 10048

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**U.S. Customs and
Border Protection**

Branch E, Building 77, JFK Int'l Airport
Jamaica, New York 11430

OCT 11 2005

Vandegrift Forwarding Company, Inc.
One Evertrust Plaza
Jersey City, New Jersey 07302

Dear Sir or Madam:

Reference is made to attached list of protests filed on behalf of Windham Trading Corporation. The protests asked that the merchandise in question be classified as per the Park B Smith court decision.

Since that time, the Park B Smith case has been settled. For the merchandise being protested, please provide evidence that: (1) the items are purely decorative, closely associated with the festive occasion being depicted, whose use at any other time would be aberrant, or (2) a binding ruling in regards to this merchandise, showing that it should be classified in HTS Chapter 95.

Failure to acknowledge this notice or provide the information requested within 30 days of the date listed above will result in the instant protests being decided based upon the information already provided. If you have any questions, please contact the undersigned at 718-487-2627.

Sincerely

A handwritten signature in black ink, appearing to read "John Bobel".

John Bobel
Protest Section

Attachment

RECEIVED
OCT 14 2005

BY:.....

Attachment

Windham Trading Protests

1001-01-102474
1001-01-102477
1001-01-102852
1001-01-102853
1001-01-102854
1001-01-102855
1001-01-102856
1001-01-102857
1001-01-102858
1001-01-102859
1001-01-102860
1001-01-102861
1001-01-102862
1001-01-102863
1001-01-102864
1001-01-103930
1001-01-103933

STAMP & RETURN

COUDERT BROTHERS LLP

ATTORNEYS AT LAW

1114 AVENUE OF THE AMERICAS
NEW YORK, NY 10036-7703
TEL: 212 626-4400 FAX: 212 626-4120

NORTH AMERICA
LOS ANGELES, NEW YORK, PALO ALTO,
SAN FRANCISCO, WASHINGTON

EUROPE
ANTWERP, BERLIN, BRUSSELS, FRANKFURT,
GHENT, LONDON, MILAN, MOSCOW, PARIS,
STOCKHOLM, ST. PETERSBURG

ASIA/PACIFIC
ALMATY, BANGKOK, BEIJING, HONG KONG,
JAKARTA, SINGAPORE, SYDNEY, TOKYO

ASSOCIATED OFFICES
BUDAPEST, MEXICO CITY, PRAGUE, ROME,
SHANGHAI

July 29, 2005

Via Hand and Federal Express

Customs and Border Protection
Office of Regulations and Rulings
Attention: Regulations Branch
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20229

Received
by
Joe Clark
07/29/05

COMMENTS OF WINDHAM WEAVERS

On behalf of our client, Windham Weavers, we respectfully submit the following comments in response to the publication by the U.S. Bureau of Customs and Border Protection ("Customs") of its notice entitled "*Proposal To Limit The Decisions Of The Court Of International Trade And The Court Of Appeals For The Federal Circuit In Park B. Smith v. United States*" (*Customs Bulletin and Decisions*, Vol. 39, No. 27, June 29, 2005) ("*Proposal*").

Windham Weavers is an importer of home furnishings whose product line primarily consists of table linens, accent rugs, kitchen textiles, window curtains, decorative pillows and chair pads. Its merchandise which is implicated by Customs' *Proposal* is identical in all material respects to the merchandise at issue in *Park B. Smith, Ltd. v. United States*, 347 F.3d 922 (Fed. Cir. 2003).

INTRODUCTION

We are strongly opposed to the *Proposal* because it seeks to nullify two recent decisions issued by the U.S. Court of Appeals for the Federal Circuit (“CAFC”) interpreting the common meaning of “festive articles” under Heading 9505 of the Harmonized Tariff Schedule of the United States (“HTSUS”).

In *Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423 (Fed. Cir. 1997), and *Park B. Smith, Ltd. v. United States*, 347 F.3d 922 (Fed. Cir. 2003), the CAFC squarely rejected the position advanced in the *Proposal* that Heading 9505 excludes utilitarian goods. For example, *Park B. Smith* held that “it is clearly established that utilitarian articles can be festive articles”. *Id.* at 928.

Regardless of any utilitarian properties, “classification as a ‘festive article’ under Heading 9505 requires that the article satisfy two criteria: (1) it must be closely associated with a festive occasion and (2) the article is used or displayed principally during that festive occasion.” *Park B. Smith* at 927 (citing *Midwest* at 1429).

These two decisions also affirmed the well-established rule that the Explanatory Notes are non-binding (*Midwest* at 1428-29; *Park B. Smith* at 929 n.3). Furthermore, *Midwest* specifically considered and rejected the Heading 9505 Explanatory Notes insofar as they might be interpreted to exclude utilitarian items (*Id.* at 1429).

Moreover, in *Park B. Smith*, the CAFC expressly recognized that Customs’ position must be rejected because it conflicts with clear congressional intent under the HTSUS to favor festive articles (*Id.* at 928).

The *Proposal* is correct that pursuant to the doctrine enunciated in *United States v. Stone & Downer Co.*, 274 U.S. 225 (1927), *res judicata* does not apply in classification cases. However, it is also clearly established that the principle of *stare decisis* does apply in classification cases (see, e.g., *Schott Optical Glass, Inc. v. United States*, 750 F.2d 62 (Fed. Cir.1984)), and the only way for a litigant to overcome *stare decisis* is to present *new evidence* to the court which demonstrates that its prior decisions were *clearly erroneous*.

The amendment to the non-binding Heading 9505 Explanatory Notes, which purports to exclude utilitarian items from Heading 9505¹, is not “new” evidence because, as conceded in the *Proposal* at 37, it was brought to the attention of the CAFC during the pendency of the *Park B. Smith* litigation. Nor does an amended non-binding Explanatory Note carry the quantum of persuasive force required to clearly convince the CAFC that its directly opposite conclusions in *Midwest* and *Park B. Smith* were clearly erroneous.

Although the *Proposal* argues that utilitarian goods should be excluded from Heading 9505 because this is the practice in other countries, the interpretations of foreign customs officials are not the sort of evidence needed to overcome *stare decisis*. See, e.g., *Jewelpak Corp. v. United States*, 950 F. Supp. 343, 350 (CIT 1996) (“The United States surrendered no sovereignty when it acceded to the [Harmonized System], and it is not obligated to apply the Harmonized System uniformly with the other Contracting Parties. ‘*Guidance For Interpretation Of Harmonized System*’, 23 Cust. Bull. 379-380, T.D. 89-80”), *aff’d* 297 F.3d 1326 (Fed. Cir. 2002).”).

¹ The amendment to the Heading 9505 Explanatory Notes reads as follows: “The heading also excludes articles that contain a festive design, decoration, emblem or motif and have a utilitarian function, e.g., tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen.”

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In view of the fact that *stare decisis* governs classification cases, the *Proposal*'s argument that the limitation of *Park B. Smith* is supported by the *Jewelpak* litigation is sorely misplaced. The *Jewelpak* decisions merely involved Customs' *prospective* revocation of its own rulings in light of amended Explanatory Notes. However, as the U.S. Court of International Trade ("CIT") explained in *Jewelpak*, 950 F. Supp. 348-49, *stare decisis* is not applicable to Customs' administrative determinations.

A more fundamental distinction is that the amended Explanatory Notes upon which Customs relied to reclassify the merchandise in *Jewelpak* did not fly in the face of two recent CAFC decisions directly on point. In this regard, the limitation described in the *Proposal* crosses the line from a mere limitation to an egregious attempt to abrogate the law of the land. *See, e.g., Boltex Mfg. Co. v. United States*, 140 F.Supp.2d 1339, 1350 (CIT 2000) ("Customs does indeed have the authority to *limit* a court decision; however, the agency may not *entirely ignore* judge-made law.").

Furthermore, adoption of the *Proposal* would conflict with sound public policy because it would sow confusion, economic harm, and disrespect for the judicial process among importers, who will wonder why, in making their business decisions, they are unable to rely on two recent decisions from a federal appellate court specifically rejecting the position the *Proposal* intends to adopt.

~~In that regard, the intent to apply the amended Explanatory Notes before the new Note~~
1(v) to Chapter 95 adopts them into the HTSUS effective January 1, 2007, is particularly troubling. First, we believe that any retroactive application of Note 1(v) to Chapter 95 would violate Windham Weavers' constitutional right to due process insofar as the CAFC decisions

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pre-dating the amendment established the law of the land. Furthermore, if Customs seeks to limit the decision in *Park B. Smith* to the entries at issue in that test case, and refuses to apply the CAFC's decision to Windham Weavers' protests involving goods that are identical in all material respects to the merchandise at issue in the test case, Customs would be severely frustrating the CIT's administrative procedures, which are designed to streamline litigation and avoid clogging the court with a mass of full-blown, duplicative litigation.

While we are aware that under certain circumstances, there may be good reasons for Customs to limit court decisions to their facts, and subsequently relitigate the issues in an attempt to demonstrate that the prior decisions were wrong, those circumstances are not present here. Rather, it is clear that adoption of the *Proposal* will only result in a third round of duplicative litigation that will waste enormous public and private resources while affording Customs no reasonable opportunity to prevail.

As mentioned above, in 2007, the tariff schedule will likely be amended to exclude utilitarian goods from Chapter 95. Only from that date forward should Customs be allowed to reverse judicial precedent, and only pursuant to the legislative authorization contained in the amended statute. What is being attempted here would in effect unlawfully accelerate the 2007 change by applying it to entries classified by courts under their interpretation of the current statute. Unfortunately, the best evidence of what was meant by the term "festive article", and ~~the only authoritative evidence of what the term means in the context of the U.S. statute, is~~ contained in the *Park B. Smith*, *Ru'lie's Costume*, and *Midwest* decisions, and these decisions represent the law of the land until at least 2007.

For the foregoing reasons, we strongly oppose adoption of the *Proposal*.

EXECUTIVE SUMMARY

This *Proposal* should not go forward because it represents an affront to the separation of powers. The *Proposal* nominally seeks to limit the court decisions involved, but really is an attempt to overturn those decisions by legal legerdemain.

The *Proposal* should not go forward because it is flawed in many ways.

First, it asserts that a modification of the Explanatory Notes should have the effect of binding law, whereas our courts have repeatedly found those Notes to be advisory, at best.

Second, the *Proposal* ignores the principle of *stare decisis* as applied to precedential court decisions in the classification area.

Third, the *Proposal* suggests that the amended Explanatory Notes constitute new evidence that the CAFC failed to consider. This is wrong because the CAFC did, in fact, have notice of the change before it issued its decision not to rehear the case, and because the change does not qualify as new evidence that might overcome *stare decisis*.

Fourth, Customs' reliance on *Jewelpak* is misplaced because that decision involved a change affecting Customs' interpretation of the tariff, rather than what amounts to an assault by Customs on the binding decisions of federal courts.

Fifth, *Jewelpak* is inapposite because the effect of the amendment involved here is fundamentally different from the interpretative change involved in *Jewelpak*. Here, there is a legal change resulting in an addition to the tariff itself, while in *Jewelpak*, the change was simply additional text to one of the Explanatory Notes. Indeed, the WCO and the International Trade Commission disagree with Customs' interpretation, because they have

found that the new Note is a legal change to the HTS, which must be enacted into U.S. law pursuant to treaty.

Sixth, the *Proposal* is essentially futile, because the U.S. International Trade Commission is currently drafting revisions to the HTSUS that should incorporate not only the additional Note, but also make special breakout subheadings to ensure duty- and quota-neutrality for all products covered by the any current U.S. law that is impacted by the new Note, including the *Park B. Smith* decisions.

Seventh, the *Proposal* incorrectly seeks to buttress its legal argument by reliance on precedent in other countries. Although such decisions may be instructive, what is truly instructive is that Customs has failed to find any support for its actions in U.S. law.

Finally, the *Proposal* and the amended Explanatory Notes are fundamentally flawed because they both seek to replace the determination of whether an article is “festive” with a determination of whether an article is “utilitarian”. According to the arguments made at the WCO, this change was necessary to improve the administration of the Harmonized System. It is clear that the change will only replace one difficult determination with another. Customs should not waste its time and effort trying to apply this change retroactively, because that will engender even more litigation than new Note 1(v) to Chapter 95 will.

ARGUMENT

I. Based on the Common Meaning of the Tariff Provision and Underlying Congressional Intent, the CAFC Has Rejected Customs’ Position that Utilitarian Merchandise Is Excluded from Heading 9505.

In *Midwest* and *Park B. Smith*, the CAFC explicitly rejected Customs’ position that utilitarian merchandise is excluded from Heading 9505. These decisions also rejected the

Heading 9505 Explanatory Notes insofar as they might be read to limit the common meaning of “festive articles”. In sealing the law of the land on the utilitarian issue, *Park B. Smith* specifically held that the HTSUS reflects the intent of the U.S. Congress to favor festive articles.²

The merchandise at issue in *Midwest* consisted of a variety of articles with Christmas motifs, and mugs and pitchers with jack-o'-lantern motifs. With regard to the merchandise with Christmas motifs, the CIT held in favor of the importer, because it “held that ‘Christmas ornaments’ under subheading 9505.10.25 are not limited to articles that (a) hang primarily from a tree, (b) are inexpensive, and (c) are traditionally associated with Christmas.” *Midwest*, 122 F.3d at 1426.

In appealing that decision, Customs argued, *inter alia*, that the merchandise with Christmas motifs did not fall within the meaning of “Christmas ornaments” due to the examples of Christmas ornaments listed in the Heading 9505 Explanatory Notes:

In support of this argument, the government primarily relies on the examples in the Explanatory Notes to heading 9505, most of which hang from a tree or elsewhere. *The examples in the Explanatory Notes, however, cannot control here, particularly in light of the congressional omission of the word “tree.”* Absent a clearer showing of congressional intent, we refuse to import incidental characteristics of the examples in the Explanatory Notes into the headings of the HTSUS. See *Marubeni Am. Corp. v. United States*, 35 F.3d 530, 535 n.3 (Fed.Cir.1994) (“*Explanatory Notes are only instructive and are not dispositive or binding.*”).

The other two requirements that the government seeks to attribute to the term “Christmas ornament” -- that they be inexpensive and traditionally associated

² Obviously, this congressional intent emanated from the desire to make it less expensive for people to celebrate important holidays. Apparently, Customs does not share this salutary goal.

with Christmas -- similarly are based on the examples found in the Explanatory Notes to heading 9505. *Again, we refuse to import such extraneous limitations that are not based on the actual language of the headings.*

Midwest at 1428 (emphasis added).

With regard to the merchandise bearing jack-o'-lantern motifs, Customs incorrectly argued that they could not be classified under Heading 9505 because they functioned as household goods, and that Heading 9505 excludes utilitarian items. The CIT agreed with Customs on this point, reasoning that “[t]he examples of items coming under heading 9505 as described by the Explanatory Notes are all non-functional items.” *Midwest*, 20 CIT 123, 134 (1996). In overruling this conclusion, the CAFC held:

Although the examples in the Explanatory Notes are probative and sometimes illuminating, we will not employ their limiting characteristics to narrow the language of the classification heading itself. Nothing from the pertinent subheading 9505.90.60—“other festive, carnival or other entertainment articles”—limits 9505.90.60 to only “non-utilitarian” items.

Midwest at 1429.

Six years later, the question before the CAFC in *Rubie's Costume Co. v. United States*, 337 F.3d 1350 (Fed. Cir. 2003), was whether Halloween costumes are excluded from Heading 9505 because they function in part as apparel. In reversing the trial court's conclusion that the meaning of “festive articles” does not include items that function as apparel, the CAFC closely paraphrased its decision in *Midwest*:

The Court of International Trade's holding that the imports are not classifiable as “festive articles” was also based on the Explanatory Notes to Chapter 95, HTSUS.

.....

The Court of International Trade found “that it is clear that [the examples in the Explanatory Notes including] masks, wigs and similar articles are of a

different kind than textile costumes as they clearly constitute an accessory to a costume rather than wearing apparel.”

....

Although the examples in the Explanatory Notes are probative and sometimes illuminating, we shall not employ their limiting characteristics, to the extent there are any, to narrow the language of the classification heading itself. Nothing from the pertinent subheading 9505.90.6000--"Festive, carnival or other entertainment articles: Other: Other"--limits 9505.90.6000 only to accessories. Absent a clearer showing of congressional intent, we refuse to import incidental characteristics of the examples in the Explanatory Notes into the headings of the HTSUS. *See Marubeni Am. Corp. v. United States*, 35 F.3d 530, 535 n.3 (Fed.Cir.1994) ("Explanatory Notes are only instructive and are not dispositive or binding.").

Rubie's Costume, 337 F.3d at 1359 (citation omitted).

Park B. Smith was decided less than three months after *Rubie's Costume*, and for similar reasons, the CAFC held that various festive textile goods were properly classified in Heading 9505:

In *Midwest of Cannon Falls* this court rejected the position that a utilitarian article cannot be a "festive article." Similarly, the fact that the article is of a class or kind that is used on other occasions does not bar classification as a festive article when the Midwest criteria are met. [*Park B. Smith*] also points out that the "festive articles" exclusion appears in Notes for several titles of goods (such as the "Ceramic Articles" heading in the *Midwest* case), *indicating congressional intention to favor festive items for tariff purposes. Indeed, it is clearly established that utilitarian articles can be festive articles.*

....

We conclude that the plain reading of Exclusionary Note 1(t), read in the context of the other Notes that exempt Festive Articles from various other classifications, supports the interpretation that congressional intent was to exempt festive articles, whether or not they are of the same class or kind of the substantive heading, except for those articles that are explicitly excluded from Chapter 95.

Park B. Smith, 347 F.3d at 927-28 (emphasis added).³ Again, the court recited the rule that “[u]nlike the chapter and section notes, the explanatory notes are not binding upon us.” *Id.* at 1429 n.3.

Together, these three CAFC decisions firmly establish that: (1) the common meaning of the term “festive articles” under Heading 9505 of the HTSUS encompasses utilitarian goods; (2) the Explanatory Notes are non-binding and must be rejected to the extent they might be interpreted to limit the common meaning of “festive article”; and (3) the tariff schedule evinces congressional intent to favor festive articles through preferential duty rates.

In view of this solid line of CAFC decisions squarely on point, it is troubling that Customs seeks to litigate the utilitarian issue yet again on the basis of non-binding amended

³ Congressional intent to favor festive articles is apparent from the fact that chapter notes exempting festive articles appear in the HTSUS chapters: Chapter 39, “Plastics and Articles Thereof”; Chapter 40, “Rubber and Articles Thereof”; Chapter 42, “Leather, Saddlery and Harness; Travel Goods, Handbags and Similar Containers; Articles of Animal Gut”; Chapter 43, “Fur, Skins and Artificial Fur; Manufactures Thereof”; Chapter 44, “Wood and Articles of Wood; Wood Charcoal”; Chapter 45, “Cork and Articles of Cork”; Chapter 48, “Paper and Paperboard; Articles of Paper Pulp, of Paper or Paperboard”; Chapter 49, “Printed Books, Newspapers, Pictures and other Products of the Printing Industry; Manuscripts, Typescripts and Plans”; Section XI, “Textiles and Textile Articles”; Chapter 64, “Footwear, Gaiters and the Like; Parts of Such Articles”; Chapter 65, “Headgear and Parts Thereof”; Chapter 66, “Umbrellas, Sun Umbrellas, Walking Sticks, Seat-Sticks, Whips, Riding Crops, and Parts Thereof”; Chapter 67, “Prepared Feathers and Down and Articles Made of Feathers or of Down; Artificial Flowers and Articles of Human Hair”; Chapter 68, “Articles of Stone, Plaster, Cement, Asbestos, Mica or Similar Materials”; Chapter 69, “Ceramic Products”; Chapter 70, “Glass and Glassware”; Chapter 71, “Natural or Cultured Pearls, Precious or Semiprecious Stones, Precious Metals, Metals Clad with Precious Metal, and Articles Thereof; Imitation Jewelry; Coin”; Section XV, “Base Metals and Articles of Base Metal”; Section XVI, “Machinery and Mechanical Appliances; Electrical Equipment; Parts Thereof; Sound Recorders and Reproducers, Television Image and Sound Recorders and Reproducers, and Parts and Accessories of Such Articles”; Chapter 90, “Optical, Photographic Cinematographic, Measuring, Checking, Precision, Medical or Surgical Instruments or Apparatus; Parts and Accessories Thereof”; Chapter 93, “Arms and Ammunition; and Parts and Accessories Thereof”; Chapter 96, “Miscellaneous Manufactured Articles”.

Explanatory Notes that became effective after these decisions so firmly established the law of the land.

II. The Amended Explanatory Notes Are Patently Insufficient to Overcome *Stare Decisis*.

- A. The doctrine of *stare decisis* requires the courts to follow *Midwest and Park B. Smith* unless the government provides new evidence which clearly and convincingly demonstrates that those decisions were erroneous.**

As pointed out in the *Proposal* at 41, *United States v. Stone & Downer Co.*, 274 U.S. 225 (1927), established that *res judicata* and collateral estoppel do not apply in customs classification cases. However, the doctrine of *stare decisis* does apply in classification cases: “the doctrine of *stare decisis* indeed tempers the rule of *Stone & Downer*, but . . . a well-recognized exception to *stare decisis* applies to customs classification litigation: a court will reexamine and overrule a previous legal determination that is clearly erroneous. *Avenues In Leather, Inc., v. United States*, 317 F.3d 1399, 1403 (Fed. Cir. 2003).

Under the doctrine of *stare decisis*, Customs not only bears the onerous burden of proving to the CAFC that *Midwest* and *Park B. Smith* were clearly erroneous, but Customs must also carry its burden of proof by *clear and convincing evidence*:

While we always are open to consider any proper and pertinent matters which bear upon the issue of possible error in an earlier decision, such matters when presented must be clear and convincing. *It is unfair both to the courts and to the parties litigant that there be a readjudication of issues previously determined except upon a clear and convincing showing of error.* This requirement is not satisfied by a reargument of the former issues on the same or a merely cumulative record.

United States v. Dodge & Olcott, Inc., 47 C.C.P.A. 100, 103, C.A.D. 737 (1960).

In addition, the exception to *stare decisis* only applies when a party introduces *new evidence* to the courts:

The issue . . . is . . . whether [] new evidence would show that the [decision in] the prior case was clearly erroneous. If the importer cannot introduce new evidence relating to the correctness of the prior decision, frequently it will be impossible for it ever to build the foundation for the legal argument that that decision was clearly erroneous.

Schott Optical Glass, Inc., 750 F.2d at 64.⁴

B. The arguments set forth in the *Proposal* are insufficient to overcome *stare decisis*.

As Customs bases its *Proposal* entirely on an amended Explanatory Note⁵ that has already been brought to the attention of the CAFC, it is difficult to see how the new Note could amount to *clear and convincing new evidence* that *Midwest* and *Park B. Smith* were *clearly erroneous* decisions. For several reasons, we do not believe that Customs has any meaningful likelihood of success of carrying these burdens.

First, as quoted above, *Midwest*, *Rubie's Costume*, and *Park B. Smith* all affirm the well-established principle that Explanatory Notes are non-binding on the courts. *Second*, *Midwest*

⁴ See also *Heartland By-Products, Inc. v. United States*, 223 F.Supp.2d 1317, 1329 (CIT 2002) (“the court has consistently applied the principle of *stare decisis* to previously litigated legal issues, even in classification cases. Under *stare decisis* courts refuse to examine legal issues previously decided in another case. In *Schott Optical Glass, Inc. v. United States*, the Federal Circuit confirmed the validity of *stare decisis* as applied in a classification case, as well as the exception that a party can challenge a previous decision if it is clearly erroneous. 750 F.2d 62, 64 (Fed.Cir.1984). When read together with the collateral estoppel cases, *Schott Optical Glass establishes that decisions of this court are binding on Customs, and the contention that every new entry is a new cause of action is narrowly applied.* (emphasis added).

⁵ See, e.g., *Proposal* at 40 (“[Customs] seeks to limit the decision in *Park B. Smith* so that the Court will have the opportunity to examine the scope of heading 9505 in concert with the amended Explanatory Note.”).

and *Rubie's Costume* specifically ruled that any reading of the Heading 9505 Explanatory Notes that might limit the common meaning of the term “festive article” must be rejected as inconsistent with the HTSUS. *Third, Park B. Smith* expressly held that “congressional intent was to exempt festive articles.” *Id.* at 928. *Fourth*, as the *Proposal* itself acknowledges, the amended Explanatory Note was brought to the attention of the CAFC during the pendency of the *Park B. Smith* litigation.

As the amended Explanatory Notes were presented to the CAFC in *Park B. Smith*, they do not constitute “new evidence” for the purposes of *stare decisis*.⁶

Even if the amended Explanatory Notes could be considered new evidence, they cannot amount to clear and convincing evidence that the determinations in *Park B. Smith* and *Midwest* were clearly erroneous.

In support of relitigating the issues, the *Proposal* points to administrative rulings issued by other countries’ customs authorities to suggest that the CAFC’s opinions are at odds with those of our trading partners. The *Proposal* also places much weight on the principle that interpretation of the HTSUS should be informed by congressional intent, and that the Explanatory Notes serve as congressional intent with respect to the HTSUS. However, there are a number of critical flaws with these arguments.

⁶ The amended Explanatory Notes were “brought to the Court of Appeals [sic] attention in a footnote in the Government’s response to the plaintiff’s request for a rehearing.” *Proposal* at 37. Although the *Proposal* continues by asserting that “the courts have not addressed fully the impact of the amendment to the Explanatory Notes” (*Proposal* at 38), we have no doubt that the CAFC would have granted the petition for rehearing and ruled in favor of the government if it had found the amended Explanatory Notes persuasive. Therefore, we do not believe that the amendment constitutes “new evidence” in any meaningful sense.

As an initial matter, we have been unable to analyze what are apparently *administrative decisions* cited in the *Proposal* because only excerpts are made available by the foreign customs authorities, and some of the excerpts appear in a foreign language.⁷ In addition, at least one of the citations appears to refer to a decision whose validity has long since lapsed (*viz.* GB113448288). Thus, we are unable to analyze how the foreign jurisdictions arrived at their determinations, *i.e.*, whether exclusionary Chapter Notes and legislative intent informed their decisions, or, for that matter, whether any of the relevant U.S. case law was consulted in arriving at those decisions.

In addition, the administrative rulings cited in the *Proposal* are not necessarily representative of a wider trend responding to the amendment of the Explanatory Notes as Customs claims. For instance example, in an administrative ruling dated November 24, 2004 (which was therefore issued after the amendments were approved at the World Customs Organization), the customs authorities of the United Kingdom classified a Christmas candle holder under Nomenclature Code 95051090000. (BTI Reference GB113621709).

Yet even if it were the case that foreign *courts* of our trading partners had determined that utilitarian goods are excluded from Heading 9505, the CAFC would never overrule its own decisions in deference to foreign ones. "The United States surrendered no sovereignty when it acceded to the [Harmonized System], and it is not obligated to apply the Harmonized System uniformly with the other Contracting Parties." *Guidance For Interpretation Of*

⁷ To the best of our knowledge, these foreign practices are derived from administrative decisions rather than judicial determinations, and their precedential value and deferential status are highly questionable.

Harmonized System, 23 Cust. Bull. 379-380, T.D. 89-80.” *Jewelpak Corp. v. United States*, 950 F. Supp. 343, 350 (CIT 1996), *aff’d* 297 F.3d 1326 (Fed. Cir. 2002).

With regard to the issue of congressional intent, the amendment was engineered partly at the behest of the Canadian government in order to resolve linguistic tensions between the French and English versions of the Canadian tariff schedule. However, a change in the Explanatory Note engineered for the linguistic purposes of another country’s tariff falls far from illuminating the intent of the U.S. Congress.

Furthermore, we understand that U.S. Executive Branch representatives at the World Customs Organization (“WCO”) may have used their influence to secure the amendment and insert the specific examples of excluded utilitarian items into the amended Note (such as those items at issue in *Park B. Smith*). If this is the case (and we expect this question to be resolved in discovery should the *Proposal* be adopted), any persuasive force the amended Explanatory Notes might otherwise carry in the customs courts will be substantially if not completely undermined. Such a circumstance would reveal a transparent and cynical attempt by the Executive Branch to rewrite legislative history, and the CAFC will severely frown upon an unabashed attempt by Customs to bootstrap its repeatedly refuted views upon the court.

For these reasons, it will be a futile exercise for Customs to attempt to convince the CAFC that *Midwest* and *Park B. Smith* should be overruled due to the amended Note, and the *Proposal* should not be adopted.

III. Customs’ Reliance on the *Jewelpak* Litigation is Misplaced.

In support of the argument that there is nothing controversial about Customs relying on amended Explanatory Notes to change the classification of merchandise, the *Proposal* relies

on *Jewelpak Corp. v. United States*, 950 F. Supp. 343 (CIT 1996), and its affirmance at 297 F.3d 1326 (Fed. Cir. 2002). However, this reliance is sorely misplaced for three central reasons.

The most important distinction is that the amended Explanatory Notes upon which Customs relied in *Jewelpak* did not fly in the face of two recent CAFC decisions directly on point. Stated another way, Customs' reclassification of *Jewelpak*'s merchandise arose from a clarification of the scope of the tariff provision rather than an expanded definition of the tariff term beyond the statutory mandate. See *Jewelpak*, 297 F.3d at 1336 (rejecting *Jewelpak*'s allegation that Customs' reliance on the amended Explanatory Note effected an unauthorized redefinition of the tariff term, and reasoning that "Jewelpak has muddled the distinction between changing the meaning of [the tariff term] and determining whether a particular type of [good] fits within the properly defined scope of [the tariff term]."). In the instant case, the *Proposal* contemplates excluding utilitarian items from Heading 9505, which would patently change the meaning of "festive articles" in light of the CAFC's determination that "it is clearly established that utilitarian articles can be festive articles". *Park B. Smith*. at 928.

Second, there can be no doubt that absent controlling judicial classification decisions, Customs is free to revise or revoke its classification determinations. As explained in *Jewelpak*, 950 F. Supp. 348-49, this is because *stare decisis* is not applicable to Customs' administrative determinations:

[T]here is no rule of administrative *stare decisis*. Agency practice, once established, is not frozen in perpetuity. Agencies frequently adopt one interpretation of a statute and then, years later, adopt a different view. *As long as the new interpretation is consistent with congressional intent, an agency may make a 'course correction.'* *Toyota Motor Sales, U.S.A., Inc. v. United*

States, 7 CIT 178, 192-93, 585 F. Supp. 649, 661 (1984) (citations omitted),
aff'd based upon the opinion below, 3 Fed. Cir. (T) 93, 753 F.2d 1061 (1985).”

Jewelpak, 950 F. Supp. 348-49 (emphasis added).

Here, however, the CAFC, which has the final say on what the law is, has repeatedly determined that Heading 9505 includes utilitarian articles, *and it has specifically determined that this determination reflects congressional intent*. Accordingly, the limitation described in the *Proposal* crosses the line from a mere limitation to a thinly veiled attempt to abrogate the law of the land. *See, e.g., Boltex Mfg. Co. v. United States*, 140 F.Supp.2d 1339, 1350 (CIT 2000) (rejecting Customs’ attempt to rescind a decades-old court decision through a “limitation” published under the guise of a final administrative interpretation, and holding that “Customs does indeed have the authority to *limit* a court decision; however, the agency may not *entirely ignore* judge-made law.”).

Third, *Jewelpak* merely involved Customs’ *prospective revocation of its own rulings* in light of amended Explanatory Notes, and the decisions in that case merely arrived at the uncontroversial conclusion that absent judicial decisions controlling classification, Customs may refer to amended Explanatory Notes to revise its classification determinations on a going forward basis. *See Jewelpak*, 297 F.3d at (Customs “limited the revocation to future importations; [the revocation] did not apply to merchandise that already had been liquidated.”). In contrast, by limiting *Park B. Smith* to the specific entries at issue in that case, and refusing to extend the holdings of *Park B. Smith*, *Rubie’s Costume*, and *Midwest* to entries that occur prior to the anticipated implementation of Note 1(v) to Chapter 95 on January 1, 2007, the *Proposal* intends to achieve a retroactive reclassification that usurps the law of the land which prevailed at the time the entries were made. Nothing in *Jewelpak*, or in

any other court decision we are aware of, authorizes an administrative agency to annul court decisions through retroactive application of non-judicial criteria such as Explanatory Notes.

Accordingly, *Jewelpak* is inapposite to the current situation for three important reasons: (1) the amended Explanatory Note on which Customs relied in that case did not fly in the face of court decisions dictating the classification of the subject merchandise, so the change in classification involved a *clarification* of the scope of the heading rather than a *redefinition* of the tariff term; (2) *stare decisis* does not apply to administrative decisions, so Customs was free to change the classification of the merchandise based on the amended Note; and (3) the reclassification was implemented on a prospective basis only. In light of these crucial distinctions, *Jewelpak* provides no justification whatsoever for the limitation outlined in the *Proposal*.

IV. Customs Should Take Note of its Recent and Futile Attempt to Overcome *Stare Decisis* When it Relitigated Another Issue A Third Time Without a Reasonable Likelihood of Success.

The intention to limit *Park B. Smith* and relitigate the utilitarian issue a third time is reminiscent of Customs' recent failed attempt to relitigate *ad nauseum* a classification issue involving canned tomato product.

In *Nestle Refrigerated Food Co. v. United States*, 18 CIT 661 (1994), the CIT determined that the subject merchandise was properly classified as a sauce preparation under HTSUS Heading 2103, rather than as prepared or preserved tomatoes under HTSUS Heading 2002, as Customs had argued.

Customs initially appealed the *Nestle* decision, but rather than pursuing that appeal to final judgment, Customs opted to settle the case. It then limited the *Nestle* decision to its facts pursuant to 19 U.S.C. § 1625(d), and relitigated the issue under cover of a second case captioned *Orlando Food Corp. v. United States*.

This tactic elicited a strong rebuke from the CIT, which simply adopted its prior decision in *Nestle* to decide the issue. See *Orlando Food Corp. v. United States*, 21 CIT 187 (1997).⁸

⁸ “[I]n the Court’s opinion, Customs’ [limitation of the *Nestle* decision via the] application of 19 U.S.C. § 1625(d) in the present case has circumvented the judicial process that provides for trial court review and appeal. Section 1625(d) should not be used by Customs to simply ignore judicial decisions with which it disagrees by providing it with an alternative remedy to appeal. By refusing to either apply the Court of International Trade’s decision or appeal it, Customs has encroached on the judicial function. See *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261, 272 (1968) (Although an administering agency is entitled to deference by the courts, and the courts rely upon agency expertise to enlighten their decision, the courts remain the final authorities on issues of statutory construction.).

Furthermore, the Court notes that administrative non-acquiescence imposes negative consequences for similarly situated parties. In the present case, Customs' actions have caused

Although the CAFC affirmed the CIT's classification of the merchandise (*see Orlando Food Corp. v. United States*, 140 F.3d 1437 (Fed. Cir. 1998)), Customs remained unwilling to accept the determination of the courts.

Instead, Customs sought to relitigate the issue for a third time. However, it did so without possessing a scintilla of new evidence that might justify an exception to *stare decisis*. As explained by the CIT:

The issue before the court is not whether defendant may relitigate in order to introduce new evidence to prove the classification clearly erroneous. *See Schott Optical Glass, Inc. v. United States*, 750 F.2d 62, 64 (Fed. Cir. 1984) (recognizing an exception to *stare decisis* where a party can introduce new evidence that the court's prior classification was clearly erroneous). Defendant has not offered evidence which is new to this matter. Defendant apparently wishes this court to disregard the holding of the Court of Appeals that the product at issue, which based on this record the court must find to be the same as the product in *Orlando*, is classifiable under HTSUS subheading 2103.90.90.

E.T.I.C. v. United States, 2002 WL 31440865 (CIT 2002) at *1-*2 (stating also that "Customs should not actively litigate the case in this court as it has").

Although it might be argued that the instant case is inapposite to *E.T.I.C.* because the amended Explanatory Notes carry some evidentiary weight, as discussed above, the amendment falls far short of clear and convincing new evidence that *Midwest* and *Park B.*

subsequent importers to file suit involving materially identical products, thereby creating additional burdens on private parties and wasting judicial resources.

If Customs disagrees with a decision of the Court of International Trade, it should nevertheless either comply with the decision or exercise its right of appeal to final judgment before the Court of Appeals for the Federal Circuit. Because the Nestle decision and its reasoning is adopted by reference in the present decision, Customs may challenge the reasoning of Nestle by exercising its right of appeal in the present case." *Orlando Food Corp. v. United States*, 21 CIT at 188.

Smith were erroneously decided. Rather, we have no doubt that just as in *E.T.I.C.*, the courts will be “mystified” if Customs chooses to limit *Park B. Smith* and relitigate the issue based on a non-binding Explanatory Note that directly contradicts settled U.S. law.

It should also be noted that the courts will not accord any deference to Customs in the event that it does insist on relitigating this issue a third time. On the one hand, this is because existing court decisions carry more weight by virtue of *stare decisis* than administrative decisions that contradict them (for example, in *E.T.I.C.* the court did not even mention the issue of deference). Furthermore, the question of whether utilitarian items are encompassed by the common meaning of “festive articles” is a question of statutory interpretation, and courts do not extend deference to the agency’s position on a pure question of law:

The issues here on appeal concern the interpretation and application of statutes and regulations that are not facially ambiguous, and procedures and burdens of administrative practice. The government seeks, as a minimum, the deference set forth in *United States v. Mead*, 533 U.S. 218, 227, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001), wherein the Court explained, in the context of classification rulings, that deference to the agency’s ruling is measured by “the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position” (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). *The issue here, however, is that of interpretation of an unambiguous statute; a question of law, including the placement of the burdens of compliance with statute and regulation; these issues of procedural law receive plenary review on appeal.*

Fujitsu Compound Semiconductor, Inc., v. United States, 363 F.3d 1230, 1232-33 (Fed. Cir. 2004) (emphasis added). Thus, the courts will afford no deference to Customs in connection

with litigation that will arise from any adoption of the *Proposal*.

V. Implementation of the Amended Explanatory Notes Requires Action by the U.S. International Trade Commission Because It Substantively Changes U.S. Law.

Although the *Proposal* emphasizes that the WCO amended the Explanatory Notes merely to “clarify” and not change the Harmonized System, this representation is misleading at best. At this very moment, the ITC is implementing the amended Explanatory Notes pursuant to procedures that must be followed when Congress, through the ITC, adopts amendments to the Harmonized System which result in a substantive change in U.S. law.

With regard to the first point, while the amended Explanatory Notes may clarify the Harmonized System, their implementation by the U.S. would undeniably produce a substantive change in U.S. law. This is because their implementation would remove a variety of goods which, pursuant to judicial decisions, are currently classifiable as festive articles under Heading 9505, and place them within other HTSUS headings.

Stated another way, U.S. law as established by the courts in *Midwest*, *Rubie’s Costume*, and *Park B. Smith* is unequivocal that utilitarian articles are not excluded from heading 9505. Therefore, it necessarily follows that the current *Proposal* seeks to effect a **change** rather than a **clarification** of U.S. law.

The articles at issue in *Park B. Smith* were shown at trial to be specifically designed for ~~use in Christmas or other holiday festivities, and therefore fall squarely within the statutory~~ language of Heading 9505. Had the intent of the provision been to exclude utilitarian articles, the language of the statute could easily have reflected that limitation if Congress had so intended. “The first source for determining legislative intent is the statutory language.”

Rubie's Costume at 1357; see also *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (1992) (“Absent clear legislative intent to the contrary, the plain meaning of the statute will prevail.”). The statute does not contain the exclusionary language, and for that reason also, the *Proposal* seeks to achieve an unlawful change to the statute, and a violation of congressional intent, rather than a mere clarification.

As shown in *Jewelpak*, even the existence of administrative rulings would not prevent revocations arising from a clarification of the statute. However, the current situation is dramatically different. The statute as interpreted by the courts is absolutely clear: “utilitarian articles can be festive articles”. *Park B. Smith*. at 928. Any reversal of that position is *ipso facto* a **change** and not a **clarification**. The only remedy remaining for Customs is to effect a revision of the statute, which, as discussed, is anticipated to become effective as of January 1, 2007.

While we are mindful that consistent tariff interpretation among signatories to the Harmonized System is a salutary goal, an international consensus with respect to the Harmonized System must be ignored when U.S. courts have already decided that the conclusions embraced by that consensus are at odds with the plain meaning of the U.S. tariff and underlying congressional intent.⁹ Under these circumstances, the only way to bring U.S. law into conformity with the international consensus is through congressional action.

⁹ As recognized by Customs itself, “the United States did not give up sovereignty when it acceded to the [Harmonized System]. There is, as such, no obligation on Contracting Parties for uniform application of the [Harmonized System].” *Guidance For Interpretation Of Harmonized System*, 23 *Cust. Bull.* 379-380, T.D. 89-80 (1989).

For example, in *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660 (Fed. Cir. 1992), a party argued that the U.S. statute should be interpreted to conform to determinations by a GATT panel:

Appellees next argue that the statutory provisions should be interpreted to be consistent with the obligations of the United States as a signatory country of the GATT. Appellees argue that the legislative history of the statute demonstrates Congress's intent to comply with the GATT in formulating these provisions. Appellees refer also to a GATT panel -- a group of experts convened under the GATT to resolve disputes -- which "recently rejected [Commerce's] views on the meaning of 'on behalf of.'"

....

[E]ven if we were convinced that Commerce's interpretation conflicts with the GATT, which we are not, the GATT is not controlling. While we acknowledge Congress's interest in complying with U.S. responsibilities under the GATT, we are bound not by what we think Congress should or perhaps wanted to do, but by what Congress in fact did. *The GATT does not trump domestic legislation; if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy.*

Id. at 667-68 (brackets in original). Thus, in light of *Park B. Smith, Rubie's Costume*, and *Midwest*, the "clarification" set forth in the amended Explanatory Note may not be implemented into U.S. law without congressional action, and can only affect entries made after the effective date of that statutory change. And, as Customs is well aware, the necessary change in legislation is currently underway.

Pursuant to 19 U.S.C. § 3005, the ITC is charged with recommending modifications to the HTSUS that are designed to implement amendments to the Harmonized System periodically made by the WCO. As set forth in "*Proposed Modifications to the Harmonized Tariff Schedule of the United States, Investigation No. 1205-6*" (Preliminary), USITC Publication 3764, March 2005 ("*USITC Publication 3764*"), a new Note 1(v) to Chapter 95, which will

implement the amended Explanatory Notes, is being considered for inclusion into the HTSUS effective January 1, 2007.¹⁰

As explained in *USITC Publication 3764*, parties responding to the call for comments regarding new Note 1(v) pointed out that it will result in the reclassification of festive articles falling under the purview of *Midwest* and *Park B. Smith*. See *USITC Publication 3764* at 9. As 19 U.S.C. § 3005(d)(C) requires that any such modifications “ensure substantial rate neutrality” (*Id.*), “Customs suggested that [with regard to merchandise covered by *Midwest*,] substantial rate neutrality for these articles might be ensured with appropriate [duty free] breakouts for them in chapters covering tableware and kitchenware. . . . As for . . . *Park B. Smith v. United States*, Customs indicated that it was premature to suggest any changes to the tariff, as the case was on remand to the Court of International Trade and was not final.” *USITC Publication 3764* at 10.

Now that *Park B. Smith* has become final, the ITC is in the process of preparing breakouts in order to ensure that merchandise falling under the purview of *Park B. Smith* remains non-dutiable after new Note 1(v) becomes effective. Thus, the ITC itself recognizes that new Note 1(v) will **change**, rather than **clarify**, the tariff schedule, and that its implementation is subject to the formal procedures mandated by 19 U.S.C. § 3005 in connection with substantive changes in the law. Indeed, the only legal way to effect the change sought by the *Proposal* is through the ITC protocol.

¹⁰ The proposed Note 1(v) to Chapter 95 would exclude: “Tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles having a utilitarian function (classified according to their constituent material.” *Id.* at Appendix B-22.

Viewed in this context, the proposed limitation of *Park B. Smith* is revealed as a manifestly draconian proposition. Customs is well aware that along with the implementation of new Note 1(v) in 2007, duty free breakouts within HTSUS Section XI will also be required to accommodate merchandise such as that involved in *Park B. Smith*. Yet Customs is also aware that until such a breakout appears in the HTSUS, that type of merchandise will become dutiable and subject to potential quota restraints somewhere under Section XI if it is excluded from Chapter 95, which is exactly what Customs contemplates achieving under the *Proposal*. In other words, Customs is seeking to abrogate *Park B. Smith* until such time as that decision is enshrined in the 2007 HTSUS by Congress. This strategy shocks the conscience.

If Customs has its way, the 2007 statutory change would in effect be made retroactive, thereby making a mockery of the CIT and CAFC decisions relating to this issue, as well as Customs' own procedures governing changes to the statute. The attempt to characterize a "change" as a "clarification" is a thinly disguised strategy that demeans the notions of fair play and due process that importers have a right to expect from their government.

VI. Adoption of the *Proposal* Would Run Contrary to Public Policy Concerns.

As a final matter, we would like to address a number of policy concerns raised or implicated by the *Proposal*. First, the *Proposal* alleges an asymmetry between U.S. law and the interpretation of Heading 9505 in foreign jurisdictions places U.S. industries at a competitive disadvantage (*Proposal* at 40). This allegation is entirely unfounded. As more fully explained above, we have been unable to verify the alleged inconsistency in tariff treatment among our trading partners. The speculative nature of this allegation is also

highlighted by the fact that Customs has not identified any specific U.S. manufacturing capacity that might be impacted by the alleged asymmetry, or exactly how the prejudice would arise. But even if the asymmetry in tariff treatment were established, Customs' point still misses the mark. This is because a difference in tariff treatment does not *per se* create a competitive disadvantage. Rather, any competitive disadvantage could only arise from different duty rates which accompany the tariff provisions in question. Not only are duty rates within the sole discretion of each country, but Customs has offered no proof of what the pertinent duty rates are. Therefore, the *Proposal's* allegation that *Park B. Smith* places U.S. manufacturers at a competitive disadvantage is wholly speculative.

The *Proposal* also argues that if the CAFC's decision in *Park B. Smith* is not limited, Customs will be saddled with "extraordinary administrative difficulties" because it will be forced to examine merchandise in order to determine whether it satisfies the two-prong test of (1) being closely associated with a festive occasion and (2) used or displayed principally during that festive occasion. See *Proposal* at 40. For example, Customs is concerned that it "will be forced to examine prints, designs, or motifs on a multitude of articles which are utilitarian and are not in and of themselves festive (e.g., cups, sweaters, watches) to determine if trees are merely trees or Christmas trees . . . [and] whether it would be aberrant to use articles, whose design and symbols are directed to a specific festive holiday, at times other than that holiday." *Id.*

Although we are aware that an agency's administrative responsibilities may include cumbersome duties, Customs has long been in the business of examining merchandise to make multifaceted use determinations which are required to classify merchandise properly.

For example, since 1976, a seven-prong test has been used to determine whether merchandise falls within the class or kind of merchandise covered by a use provision. In *United States v. Carborundum Corp.*, 536 F.2d 373 (1976), the court determined that Customs must analyze the following criteria to determine whether an item falls within the same class or kind of merchandise described by a use provision:

- The general physical characteristics of the merchandise
- The channels, class or kind of trade in which the merchandise moves
- The environment of sale (*i.e.*, accompanying accessories and the manner in which the merchandise is advertised and displayed);
- The use of the merchandise in the same manner as the merchandise which defines the class;
- The economic practicality of so using the import;
- The recognition in the trade of this use; and
- The expectation of the ultimate purchasers.

Carborundum at 102.

As the tariff is riddled with use provisions, and the seven-prong analysis required under *Carborundum* is substantially more burdensome than the two-prong test under *Park B. Smith*, it is patently obvious that there is nothing “extraordinary” at issue here. Rather, the test for a festive article requires a straightforward two-step analysis that is within the routine expertise of Customs.

Indeed, there was very little dispute arising from the process of supulating the entries involved in the *Park B. Smith* test case upon remand from the CAFC, as a consensus was rather easily reached on which articles satisfied the two-prong test. Moreover, this argument

is completely disingenuous to the issue at hand, because even if the proposed limitation became effective, the exact same two-step analysis would be required to assess whether non-utilitarian goods are eligible for classification under Heading 9505.

Furthermore, limiting the decision in *Park B. Smith* will not remove the administrative burden, as *Park B. Smith* merely adopted the rule set forth six years earlier in *Midwest*. Accordingly, there is no merit whatsoever to the claim that *Park B. Smith* must be limited in order to spare Customs the burden of examining merchandise.

Rather than promoting sound public policy, adoption of the *Proposal* would run contrary to that goal. For example, with regard to Windham Weavers itself, the company has been protesting entries since the issuance of the CIT decision in *Park B. Smith* with the intent to summons these entries at the CIT in the event that the protests are denied (to date, these protests have not been denied by Customs). In substantial part, the test case procedure is designed to protect the CIT's docket from being overwhelmed by the government's very ability to limit decisions to their facts. If litigants lose the comfort of knowing that the disposition of suspended test cases involving identical entries will be governed by a test case, there is a substantial risk that the CIT will become clogged with a mass of full-blown, duplicative litigation. Thus, insofar as the *Proposal* intends to limit the case to the entries before the court in *Park B. Smith* (see *Proposal* at 42), it would severely frustrate the administrative efficiencies the CIT's rules are designed to achieve.

In addition, and most important from a policy perspective, we oppose adoption of the *Proposal* because it violates the fundamental policy of having litigation come to an end. This goal derives from the notion that in order for a government to work fairly and efficiently,

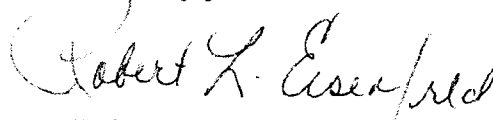
there must be predictability and transparency in the law. *Stone & Downer*, the very case that eliminated the applicability of *res judicata* and collateral estoppel from classification cases, also cautioned Customs that in spite of its power to limit classification decisions, “there of course should be an end to litigation as well in customs matters....” *Id.*, 274 U.S. at 235.¹¹ Rather than promoting transparency and predictability in customs matters, the limitation of *Park B. Smith* would sow enormous confusion among the trade, as it would purport to disembowel a legacy of CAFC jurisprudence upon which importers have relied to conduct their businesses. In view of the fact that there is no meaningful likelihood that Customs will prevail in a third round of litigation, the limitation would simply amount to a futile assertion of raw power that has no place in our system of government.

¹¹ See also *United States v. Dodge & Olcott, Inc.*, 47 C.C.P.A. 100, 103, C.A.D. 737 (1960) (“It is unfair both to the courts and to the parties litigant that there be a readjudication of issues previously determined except upon a clear and convincing showing of error. This requirement is not satisfied by a reargument of the former issues on the same or a merely cumulative record.”); *Brother International Corp v. United States*, 248 F. Supp. 2d 1224, 1232 (CIT 2002) (“the Court recognizes the general principle that ‘*stare decisis* is bottomed on the sound public policy that there must be an end to litigation and that, therefore, questions formerly determined should not be readjudicated except on a showing of clear and convincing error in the former holding.’ *Schott Optical Glass, Inc. v. United States*, 7 CIT 36, 38, 587 F.Supp. 69, 70-71 (1984), *rev'd [on other grounds]* 3 Fed. Cir. (T) 35, 750 F.2d 62 (1984).”).

CONCLUSION

As set forth above, relitigating for a third time the issue of whether utilitarian goods are eligible for classification as festive articles under Heading 9505 would be a futile endeavor that would waste a colossal amount of public and private resources and violate basic tenets of sound public policy. For these reasons, we strongly oppose adoption of the *Proposal*.

Sincerely yours,

A handwritten signature in black ink that reads "Robert L. Eisen". The signature is written in a cursive style with a large initial "R".

Robert L. Eisen
Michael T. Cone

RLE/MTC/em

