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APPELLANT'S BRIEF

04-1591

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THE PILLSBURY COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of International Trade in Court No. 00-12-00570, Judge Evan J. Wallach

CORRECTED BRIEF OF PLAINTIFF-APPELLANT, THE PILLSBURY COMPANY

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

THE PILLSBURY COMPANY v. UNITED STATES

No. 04-1591

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (**appellant**) (respondent) (appellee) (amicus) (name of party) THE PILLSBURY COMPANY certifies the following (use "None" if applicable: use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:
THE PILLSBURY COMPANY

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:
THE PILLSBURY COMPANY

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:
Plaintiff is wholly-owned by General Mills, Inc., a publicly traded corporation.

4. There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:
John Peterson and Curtis Knauss of Neville Peterson LLP

Date Signature of counsel

Curtis W. Knauss
Printed name of counsel

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STATEMENT OF RELATED CASES

In accordance with Federal Circuit Rule 47.5, counsel for Plaintiff-Appellant, The Pillsbury Company ("Pillsbury"), hereby states that this case was tried before the Honorable Judge Evan J. Wallach, U.S. Court of International Trade ("CIT"), Ct. No. 97-03-00435. On July 12, 2004, the CIT entered judgment affirming defendant's classification decision regarding the subject merchandise, Haagen-Dazs frozen sorbet - yogurt dessert bars. Counsel for the Appellant is unaware of any other appeal in or from the proceedings below that was previously before this or any other appellate court under the same or similar title, or any other case pending before this or any other court that will directly affect or be affected by the Court's decision in this appeal.

STATEMENT OF JURISDICTION

The Pillsbury Company appeals from a final judgment and order of the United States Court of International Trade in an action seeking reliquidation of certain entries of sorbet and frozen yogurt bars under HTSUS subheading 2105.00.50, or alternatively under HTSUS subheading 0403.10.90. Pursuant to Rule 4(1)(B) of the Federal Rules of Appellate Procedure, Pillsbury timely filed a notice of appeal to this Court, which has jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(5)(2000).

ISSUES PRESENTED

1. Whether the correct classification of the subject sorbet and frozen yogurt bars is under HTSUS subheading 2105.00.40 or subheading 2105.00.50, or in the alternative, under HTSUS subheading 0403.10.90.

2. Whether the CIT erred in holding that the subject merchandise, in its condition as imported, was an "article of milk or cream" Additional U.S. Note 1 to Chapter 4, HTSUS.

3. Whether the CIT erred in holding that the frozen yogurt portion of the subject merchandise formed its essential character.

STATEMENT OF THE CASE

This action involves the classification, under the Harmonized Tariff Schedule of the United States ("HTSUS"), of certain Haagen-Dazs "Sorbet-Yogurt Bars" imported from Canada during 1999. The United States Customs Service[1] classified these products in liquidation under HTSUS subheading 2105.00.40, as "Ice cream and other edible ice, whether or not containing cocoa; Other [than ice cream]; Dairy products described in additional U.S. note 1 to Chapter 4; Other [than described in Additional U.S. note 10 to Chapter 4 and entered pursuant to its provisions]."

Customs' classification of the Sorbet-Yogurt Bars under subheading 2105.00.40 HTSUS is predicated on the agency's determination that the bars are "articles of milk," as described in Additional U.S. Note 1 to Chapter 4, HTSUS. J.A. at 51.[2] Because the bars were imported in excess of the tariff-rate quota ("TRQ") specified in Additional U.S. Note 10 to Chapter 4, HTSUS, they were assessed with duty at the rate of 51.7 cents per kilogram + 17.5% *ad valorem*. Although the bars qualify as

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[1] The United States Customs Service has subsequently been redesignated as the Bureau of Customs and Border Protection ("CBP") within the United States Department of Homeland Security. For purposes of this letter, we will refer to this agency as "Customs."

[2] Undisputed trial evidence shows that the imported products do not fall into any of the other provisions of Chapter 4, Additional U.S. Note 1, and defendant does not claim that the goods otherwise fall within the scope of the note.

"originating" articles for purposes of the North American Free Trade Agreement ("NAFTA") (J.A. at 52,53), no preferential NAFTA rate of duty is provided for Canadian goods classified in HTSUS subheading 2105.00.40.

Pillsbury contends that the CIT erred, as a matter of law, in holding the Sorbet-Yogurt bars to be classifiable as "articles of milk." Note 1 to Chapter 4, HTSUS, defines the term "milk" to mean "full cream milk or partially or completely skimmed milk." The CIT found as a fact that the imported product "**does not contain full cream milk, or skimmed milk.**" J.A. at 9 ¶ 29 (emphasis supplied). To the extent the CIT found that the imported bars did not contain "milk," as that term is defined in the HTSUS, the bars cannot , as a matter of law, be classified as "articles of milk."

Moreover, the trial record demonstrates that "milk or cream is not the essential ingredient, nor the ingredient of chief value, nor is it the preponderant ingredient" of the imported bars, and thus the imported bars do not constitute "articles of milk" as that term has been judicially construed. See *Wilsey Foods, Inc. v. United States*, 18 Ct. Int'l Trade 212 (1994).

Plaintiff contends that the imported Sorbet-Yogurt bars are more appropriately classified under HTSUS subheading 2105.00.50, as "other" edible ice or, in the alternative, under HTSUS subheading 0403.10.90, as "other" yogurt, in either case free of duty as NAFTA "originating."

STATEMENT OF THE FACTS

The subject merchandise consists of certain frozen confections, sold under the Haagen-Dazs brand, and known variously as "sorbet-yogurt bars" or sorbet bars (hereinafter, "sorbet-yogurt bars"). A sorbet-yogurt bar is a "frozen dessert novelty," having a water ice "sorbet on the outside and a fat-free frozen yogurt in the center." J.A. at 67. Two varieties are at issue – a raspberry/vanilla bar, featuring raspberry-flavored sorbet ice with a center of vanilla-flavored frozen yogurt J.A. at 54 and a chocolate sorbet-yogurt bar, featuring chocolate flavored sorbet ice with a center of vanilla-flavored frozen yogurt J.A. at 55. The bars feature a wooden stick inserted into the center of the bar, from the bottom.

The sorbet-yogurt bars were manufactured in Canada by pouring raspberry or chocolate sorbet (water ice) into a mold, which is submerged in a very cold brine solution. The mixture freezes quiescently (from the outside in), "similar to how you would imaging a Popsicle would be made." J.A. at 56-57. As the sorbet freezes, a tube is inserted in the mold, and a measured amount of the not-yet frozen sorbet mix is withdrawn in a process known as "suck-back." J.A. at 57-58. A partly frozen ("fairly runny consistency") yogurt mix is then pumped into the cavity in the sorbet bar resulting from the "suck-back." As the frozen yogurt freezes, "it gets firm enough that it will actually hold the stick. So we insert the stick. It freezes a little bit more

solidly." J.A. at 57.

The sorbet-yogurt bar is then placed into warmer water, to release it from the mold. It is then dipped in an "exterior dip" water and juice solution, which freezes. The bar is then packaged for retail sale. *Id.*

The components of each type of sorbet-yogurt bar are as follows:

A. <u>Chocolate/Vanilla Frozen Yogurt Bar</u>

1. Chocolate Sorbet Ice

The chocolate sorbet ice component of this product is manufactured by combining an "unflavored chocolate ice base" (99.7%) with a small amount of vanilla extract (0.3%). The unflavored chocolate ice base is composed 12.89% by weight of a corn syrup and liquid sugar blend, 53.53% by weight of charcoal filtered water, 1.96% of cocoa (20-22% fat), 2.14% of defatted cocoa, 21.42% of liquid amber sugar, 7.02% egg whites, and small amounts of pectin and medium fine salt. J.A. at 97. The sorbet ice contains no dairy ingredients.

2. Chocolate Dip

The chocolate dip preparation used to coat the outside of this sorbet-yogurt bar is composed 20.95% by weight of cocoa syrup and 79.05% by weight of charcoal filtered water. J.A. at 97. It has no dairy content. *Id.*

3. Vanilla Flavored Fat Free Yogurt

The vanilla flavored fat-free yogurt component is composed 88% by weight of a "vanilla flavored ice milk base" and 12% by weight of a "yogurt base." J.A. at 97. These ingredients are blended together in Canada to create the "frozen yogurt" component of the imported merchandise.

Plaintiff's witness Brian Sweet testified that the "yogurt base" was made from 61.99% by weight of condensed fresh U.S. Grade A skim milk, 38% charcoal-filtered water, and Q410 and Q414 yogurt cultures. J.A. at 59-60, 97. The yogurt cultures are "classic yogurt cultures, the same ones that are required in most identification information for yogurt." J.A. at 60. The culturing organisms are added to the yogurt base at a specified temperature, and "it starts to, basically, eat part of the milk components, primarily the lactose and the milk sugar, converting that to lactic acid, and it's the acidity that makes yogurt taste sour." J.A. at 61.

The culturing process takes place for between 8 and 12 hours, until a specified level of titratable acidity is achieved. J.A. at 61-62, 97. The fermentation of the yogurt base is intentional: ." . . what we want to have happen is for the organisms to grow as – or multiply. As they're multiplying, they're – they're consuming the lactose, creating the lactic acid, and it tells us when we have the level of sourness or acidity and the level or organisms that we – that we want." J.A. at 63-64.

After the culturing process takes place, the "yogurt base" is blended with an "ice milk" base. J.A. at 65, 66. The ice milk base is made from 45.55% by weight of a reduced lactose skim milk blend, together with 10.65% liquid amber sugar, 6.61% corn syrup solids, 21.15% of a blend of corn syrup and liquid sugar, 13.76% of charcoal-filtered water, and 2.28% specialty corn syrup solids.

Both plaintiff's witness Brian Sweet (J.A. at 67) and defendant's witness Robert Bradley (J.A. at 68) testified that the frozen yogurt core of the sorbet-yogurt bars which is produced by blending the "yogurt base" and "ice milk base," is not full cream milk or partially or completely skimmed milk. Both witnesses agreed that the yogurt core is a product which is commonly and commercially known and recognized as "yogurt" or "frozen yogurt," and is created through a yogurt-making process. The composition of this sorbet-yogurt bar in its condition as imported is shown at J.A. at 97.

B. Raspberry/Vanilla Sorbet-yogurt Bar

1. Raspberry Sorbet Ice

The raspberry-/vanilla sorbet-yogurt bars are sorbet (water ice) bars with a frozen yogurt core. J.A. at 69-71. The raspberry sorbet ice component of this product is manufactured by combining an "unflavored raspberry ice base" (63.04%) with seedless raspberry puree (36.85%) and a small amount of concentrated lemon juice

(0.11%). J.A. at 97. The unflavored raspberry ice base is composed 11.33% by weight of a corn syrup and liquid sugar blend, 68.01% by weight of charcoal filtered water, 20.11% of liquid amber sugar, and 0.55% of pectin. J.A. at 97. Mr. Sweet testified that the raspberry sorbet ice contained no dairy content whatsoever. J.A. at 71.

2. Raspberry Dip

The raspberry dip preparation used to coat the outside of this sorbet-yogurt bar is composed 10.00% by weight of frozen raspberry juice concentrate, and 90.00% by weight of charcoal filtered water. J.A. at 97. The dip preparation has no dairy content.

3. Vanilla Flavored Fat Free Yogurt

Plaintiff's witness Brian Sweet testified that the vanilla flavored fat-free yogurt used in the raspberry-vanilla sorbet-yogurt bar is basically identical to that found in the chocolate sorbet-yogurt bar, J.A. at 69, consisting 88% by weight of a "vanilla flavored ice milk base" and 12% by weight of a "yogurt base." J.A. at 97. The "yogurt base" is composed 61.99% by weight of condensed fresh U.S. Grade A skim milk, 38% of charcoal-filtered water, and Q410 and Q414 yogurt cultures. J.A. at 97. The yogurt culturing organisms are added to the yogurt base and a culturing process takes place.

The fermented/acidified "yogurt base" is then blended with an "ice milk" base composed 45.55% by weight of a reduced lactose skim milk blend, together with 10.65% liquid amber sugar, 6.61% corn syrup solids, 21.15% of a blend of corn syrup and liquid sugar, 13.76% of charcoal-filtered water, and 2.28% specialty corn syrup solids. J.A. at 97. The blended product forms the "frozen yogurt" core of the imported frozen sorbet-yogurt bar. The composition of raspberry/vanilla sorbet-yogurt bar in its condition as imported is shown at J.A. at 97.

SUMMARY OF ARGUMENT

The CIT erred, as a matter of law, in holding the imported sorbet-yogurt bars to be "articles of milk," provided for in Additional U.S. Note 1 to Chapter 4, HTSUS. In order for a product to be an "article of milk," it must contain milk as an ingredient, and milk should be the essential or preponderant ingredient, or the ingredient of chief value. See *Wilsey Foods*, *supra*. "Milk," for purposes of the HTSUS, is defined to mean only "full cream milk or partially or completely skimmed milk." Note 1, HTSUS Chapter 4. The tariff schedule distinguishes "milk," as thus defined, and provided for in HTSUS headings 0401 and 0402, from "Buttermilk, curdled milk and cream, yogurt, kephir and other fermented or acidified milk and cream," which are separately provided for in HTSUS Heading 0403.

The imported sorbet-yogurt bars do not contain "milk," as defined above; rather, they are made from "yogurt" or "other fermented or acidified milk and cream," of the kind provided for in Heading 0403. As these acidified or fermented products do not constitute "milk," the sorbet-yogurt bars cannot, as a matter of law, be considered "articles of milk." It follows that the imported bars are not "dairy products described in additional U.S. Note 1 to Chapter 4," and are not described in HTSUS subheading 2105.00.40.

The trial record demonstrates that, at the point when the cultured or fermented

yogurt base was added to the ice milk base to form the frozen yogurt component of the imported good, the mixture became a fermented product. Any whole cream or skimmed milk used in its production lost its essence, through the introduction of the bacterial cultures, and the conversion of lactose into lactic acid; the substance had ceased to be "milk" and could no longer be converted back to whole cream or wholly or partially skimmed milk. It does not matter whether the fermented component of the bars constituted "yogurt" for classification purposes; it was, at the very least, an "other fermented or acidified milk" – a material which the HTSUS recognizes as distinction from "milk."

While the CIT held that the range of goods described by the term "articles of milk" was broader than the term "milk" J.A. at 11 ¶ 5,[3] the lower court never explained how the term, that classifies goods by composition, could be construed so broadly as to include articles **which contain no "milk" whatsoever.** The CIT erred by failing to define the scope of the term "articles of milk," and failing to show how the subject merchandise fit within that term – as required by this Court's precedent.

To the extent that the sorbet-yogurt bars are considered to be "composite goods" of a kind described in General Rule of Interpretation 3(b) of the HTSUS, the

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[3] As discussed *infra*, the terms "articles of milk" is a classification by composition. In this regard, it is distinct from the *eo nomine* term "milk."

Court erred in holding that the frozen yogurt portion imparted the "essential character" of the bars. Even assuming, alternatively, that the frozen yogurt component imparted the essential character to the product, that component is neither "milk" nor an "article of milk."

ARGUMENT

Standard of Review

The issues presented in this appeal are purely questions of law, which this Court decides *de novo*. See *Texport Oil Co. v. United States*, 185 F.3d 1291, 1294 (Fed. Cir. 1999).

I. The CIT Erred In Concluding That the Sorbet-yogurt Bars Were, or Were Composed in Part of, "Articles of Milk or Cream."

Pillsbury accepts as correct the CIT's finding of fact that "The [imported] product does not contain full cream milk, or skimmed milk." J.A. at 9 ¶ 29. As a matter of law, the introduction of fermenting and acidifying cultures into the dairy component of the bars renders that material something other than "milk," as defined in Note 1 to Chapter 4, HTSUS. This is evident not only from the statutory definition of "milk" itself, but also from the terms of the tariff headings, which classify yogurt, fermented and acidified milk (Heading 0403) separately from full cream or skimmed milk (Headings 0401, 0402). Witnesses for both parties testified that the frozen yogurt component of the sorbet-yogurt bars featured sufficient culturing microorganisms that it could not be recognized, advertised or sold as "milk" J.A. at 72 (Sweet), J.A. at 73 (Bradley). The parties agree that the imported bars did not

contain "cream."

Having found as a fact that the subject merchandise contained no milk or cream, the CIT then reached the absolutely contrary conclusion that, as a matter of law, the imported sorbet-yogurt bars "did contain articles of milk or cream as defined in HTSUS Additional Note 1 to Chapter 4." J.A. at 11 ¶ 8. The CIT never identified the "articles of milk or cream" which the subject merchandise was said to contain. Expanding its legal conclusion from the components of the sorbet-yogurt bars to the bars themselves, the CIT also found, as a matter of law, that "*the subject merchandise is* an article of milk as defined in U.S. note 1 to chapter 4 of the HTSUS." J.A. at 12 ¶ 11 (emphasis added).

The CIT's opinion provides no reasoning for its conclusion that the statutory term "article of milk," encompasses articles which, as a matter of fact, contain no milk. The lower court's failure to explain its finding is of no moment, however, since this Court considers legal issues *de novo*. See *Texaco Marine Services Inc. v. United States*, 44 F.3d 1539, 1543 (Fed. Cir. 1994).

A. The Issue Before the CIT was Whether the Sorbet-yogurt Bars Contained Milk or Cream in Their Condition as Imported

The CIT failed to provide any legal justification for its determination that plaintiff's merchandise, which as a factual matter did not contain any "milk," was

nonetheless classifiable as an "article of milk[4]." While that court observed that "the range of items covered by 'dairy products described in additional U.S. note 1 to chapter 4[5]', are [sic] broader than full cream milk or partially or completely skimmed milk" J.A. at 11 ¶ 5, the court never related that observation to the merchandise at bar. Admittedly, an "article of milk" may contain milk, in combination with any number of other ingredients. However, in order to be an article "of milk," a good must at least contain milk.

The United States has a long tradition of classifying goods by composition. Rules for classifying goods by composition have varied as the United States has adopted different systems of tariff classification. Classifications by composition are typically applied to articles which, like the goods at bar, are composed of two or more different materials or components. Thus, for example, under previous tariff acts, goods composed of two or more substances were classified according to their

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[4] The CIT also failed to explain how its conclusion that the sorbet-yogurt bars "contained" articles of milk" J.A. at 9 ¶ 29 translated into a legal ruling that the bars were themselves "articles of milk." J.A. at 12 ¶ 11.

[5] Additional Note 1 to Chapter 4 lists only the following products: malted milk, and articles of milk or cream, articles containing over 5.5 percent by weight of butterfat . . . ; or, dried milk, whey or buttermilk . . . . It is undisputed that the sorbet-yogurt bars are not, and do not contain, malted milk, butter fat over 5.5%, dried milk, whey or buttermilk in their condition as imported. The sold question is whether they constitute "articles of milk" as provided in the Note.

component of chief value. The rule of classification of goods by composition with reference to the component material of chief value was initially developed by the courts. See, e.g., *Arthur's Executors v. Butterfield*, 125 U.S. 70,(1888)(goods composed in chief value of hair classified as "manufactures of hair not otherwise provided for," rather than as goods composed "wholly or in part of wool, worsted, the hair of the alpaca, the goat or other like animals').

The Customs courts adopted and applied this formulation. See, e.g., *Vantine & Co. v. United States*, 3 Ct. Cust. 488 (1913)("[t]he general rule appears to be well settled that when a tariff statute provides for duty upon an article of specified material, without declaring to what extent it must be composed of that material, it is at least confined to merchandise of which the specified material is that of chief value or is the predominant one therein"); see also *Blumenthal v. United States*, 5 Ct. Cust. 327 (1914)("[t]he general rule is that when a statute imposes duty upon an article as "made of," "composed of" or "manufactured of" a specified material without declaring to what extent it must be of that material it is at least confined to merchandise of which the specified material is the component of chief value").[6] The principle of interpreting

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[6] See also *United States v. Buss & Co.* , 8 Ct. Cust. 5 (1917)(tariff provisions covering goods "made, composed or manufactured of a specific article with no words of limitation is *generally* classified with reference to the component material of chief value").

tariff provisions which classified by composition according to the component material of chief weight was subsequently codified in the former Tariff Schedules of the United States ("TSUS").[7]

It should also be noted that a tariff provision which classifies a good by composition (e.g., "articles of milk") is distinct from one which classifies a good *eo nomine* (e.g., "milk"). As this Court's predecessor noted in *Vita Food Products, Inc. v. United States*, 24 C.C.P.A. 248, 253 (1936), "We have not been cited to any case where the doctrine of component material of chief value has been applied to an article *eo nomine* designated in the statute, except where the classification of such article, which might be made of more than one material, depended on the material of which it was composed."

Like the TSUS, the current HTSUS contains codified rules (albeit different ones) for the classification of goods composed of two or more materials or substances. General Rule of Interpretation 2(b) to the HTSUS provides that:

> Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. **Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or**

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[7] See former *Tariff Schedules of the United States*, 19 U.S.C. §1202, General Headnote 9(I).

> **substance.** The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3. (emphasis supplied).

Thus, a tariff provision reference to goods of a given material (e.g., "articles of milk") applies, *prima facie*, to goods "consisting wholly or partly" of such material (i.e., an article wholly or partly of "milk"). In this case, the CIT has departed from the principle of GRI 2(b) by defining a provision for "articles of milk" to include a product which "does not contain full cream milk, or skimmed milk" J.A. at 9 ¶ 29, i.e., an article which "**does not contain milk**." Such an interpretation is strictly contrary to GRI2(b), which provides in effect that the term "articles of milk" shall be taken to include a reference to goods consisting wholly or partly of milk.

Further, General Rule of Interpretation 3(b) to the HTSUS sets forth the rule for classifying goods composed of two or more materials, in cases where the goods are not provided for *eo nomine*. It states:

> Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified **as if they consisted of the material or component which gives them their essential character**, insofar as this criterion is applicable. (emphasis supplied).

GRI 3(b) represents a departure from the former TSUS rule which governed classification by composition according to component material of chief value. In

determining which component of a good imparts the "essential character" thereto, Customs and the courts are given greater license to consider factors such as relative weights, costs, values, bulk, or the importance of a given component relative to the function of the article. See *Better Home Plastics Corp. v. United States*, 916 F. Supp. 1265, 1267 (Ct. Int'l Trade 1996), *aff'd*, 119 F.3d 969 (1997); see also *3G Mermet Fabric Corp. v. United States*, 135 F. Supp. 2d 151, 158-59 (Ct. Int'l Trade 2001), and cases cited therein. Thus, caselaw establishes that the essential character of an article is "that which is indispensable to the structure, core or condition of the article, i.e., what it is." *Oak Laminates D/O Oak Materials Group v. United States*, 628 F. Supp. 1577, 1581 (Ct. Int'l Trade 1984)(quoting *United China & Glass Co. v. United States*, 293 F. Supp. 734, 737 (Cust. Ct. 1968). The test of "essential character" is a fact-intensive analysis.

The decision of the CIT in this case appears to be the very first instance where an article has been classified by composition (i.e., as an "article of milk") where the court found as a fact that it contained *none* of the material (milk) described in the applicable statutory provision. Such a determination is directly contrary to the rules of the HTSUS governing classification of goods by composition.[8]

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[8] In *Western Dairy Products Inc. v. United States*, 62 C.C.P.A. 37, 510 F.2d 376 (1975), a case decided under the former TSUS, the issue was whether a (continued...)

The CIT has had one occasion to consider the definition of the term "article of milk" as it appears in Additional U.S. Note 1 to HTSUS Chapter 4. In *Wilsey Foods Inc. v. United States*, 18 Ct. Int'l Trade 212 (1994), the issue was whether certain "flavor chips" for baking, which consisted primarily of vegetable fats and sugar, but contained a minor proportion of milk, were "articles of milk." The CIT identified the factual showings which must be made in order to classify a good as such an article:

> The Court finds as a matter of fact that milk or cream is **not the essential ingredient,** not the **ingredient of chief value**, nor is it the **preponderant ingredient** in Wilsey's products. (emphasis supplied).

Based on these findings, the Court held the chips not to be "articles of milk."

The lower court in this case utterly disregarded the *Wilsey Foods* decision, and while that decision does not bind this Court, plaintiff submits that it more correctly identifies the test for classifying a good as an "article of milk" than does the unreasoned decision of the CIT in this case. The notion that milk must be the essential, preponderant, or chief value ingredient of an "article of milk" is true to the

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[8](...continued)
powdered "calcium reduced dried skim milk (CRDSM), produced by passing liquid skimmed milk through an ion exchange bed (replacing calcium with sodium) and dehydrating, was an "article of milk." While the court found the meaning of the TSUS term "of milk" to be "not entirely clear," 510 F.2d at 378, the court concluded that CRDSM was a product resulting from the redistribution of some of the components of milk, and fell into the TSUS definition of articles "of milk." However, the TSUS definition of milk was much broader than that used in the HTSUS.

"essential character" principle of GRI 3(b), and is also true to the traditional judicial tests applied to classification of goods by composition. By contrast, where the CIT finds, as it did here, that the imported sorbet-yogurt bars do not contain any milk, it is absurd and anomalous to hold that the bars are nonetheless "articles of milk."

B. The CIT Erred in Concluding that the Sorbet-yogurt Bars Contained Milk or Cream in Their Condition as Imported

Uncontradicted evidence in the trial record indicates that, in their condition as imported, the Haagen-Dazs sorbet-yogurt bars do not contain "milk," as defined in the tariff. Rather, they contain frozen yogurt, a fermented product recognized in commerce and in the tariff as distinct from "milk." The trial record provided overwhelming evidence that the subject sorbet-yogurt bars contained no "cream" (Tr. at 121), or "milk." The term "milk" is specifically defined, for purposes of the tariff, in Note 1 to HTSUS Chapter 4, to mean "full cream milk or partially or completely skimmed milk."

The HTSUS distinguishes between "milk," which is classified in HTSUS Headings 0401 and 0402,[9] and "yogurt, kephir and other fermented or acidified milk

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[9] HTSUS Heading 0401 provides for "Milk and cream, not concentrated nor containing sugar or other sweetening matter," while HTSUS Heading 0402 provides for "Milk or cream, concentrated or containing sugar or other sweetening (continued...)

or cream," which are separately provided for in HTSUS Heading 0403.[10] Where Congress has specifically defined a term, that definition is controlling. See *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999); *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789-90 (Fed. Cir. 1990), cert. den. 488 U.S. 943 (1988).

Plaintiff's witness Brian Sweet testified that neither the imported sorbet-yogurt bars, nor the frozen yogurt constituent thereof, could be considered a full cream milk. J.A. at 74. Mr. Sweet also noted that the frozen yogurt core of the product "has an organism level and a titratable acidity which would be – normally, you know, would not be considered part of just full cream milk." *Id.* He further testified that "there is no whole cream milk in this product" J.A. at 75, and that the frozen yogurt portion of the product is not recognized in United States commerce and industry as skim or skimmed milk, "because it has an organism level which would not be typical of, you know, consumable milk, an acidity which would not make it skim milk, and the sweeteners and flavors." J.A. at 76.

"(...continued)
matter."

[10] HTSUS Heading 0403 provides for "Buttermilk, curdled milk and cream, yogurt, kephir and other fermented or acidified milk and cream, whether or not concentrated or containing added sugar or other sweetening matter or flavored or containing added fruit, nuts or cocoa."

Mr. Sweet also testified that the frozen yogurt which forms one of the components of the instant merchandise has a titratable acidity which is higher than that found in whole milk or skim milk. J.A. at 66 ("Obviously, you're adding acid to what was skim milk.") Both witnesses identified various products which are made from milk, or using milk, but which are not considered to be whole cream milk or skim milk. These include yogurt (J.A. at 77(Sweet), J.A. at 78 (Bradley)), and other forms of fermented, cultured or acidified milk.

Defendant's witness Prof. Robert Bradley also confirmed that the frozen yogurt portion of the merchandise at bar is not "whole milk" J.A. at 73, and that he would not consider it to be skim milk, either. J.A. at 73. He also testified that yogurts and cultured milks, such as those used to produce the frozen yogurt portion of the imported bars, are considered to be different articles of commerce than whole milk or skim milk. J.A. at 78. Although whole milk could be "the starting point for making a cultured milk" (*Id.*, see also J.A. at 79), the cultured milk is a distinctly different article of commerce, characterized by an acidity and live organism content not found in whole or skim milk.[11]

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[11] When Mr. Bradley was asked whether the frozen yogurt center would be considered whole milk, Mr. Bradley stated "[n]o, it is not." J.A. at 73. When Mr. Bradley was asked whether the frozen yogurt center would be considered skim milk, Mr. Bradley stated "[n]o sir." *Id.*

Defendant's witness Import Specialist Thomas Brady agreed that Customs is bound to classify products in their condition as imported. J.A. at 80. He admitted at trial that the HTSUS distinguishes fermented milk and yogurt from "milk," and that milk, once fermented, cannot be reconstituted. J.A. at 81. He also conceded that the merchandise at bar constitutes a " fermented milk." J.A. at 82.

There is only one source for dairy milk – cows – and any "article of milk" will at sometime have been derived from whole milk.[12] However, prior to the creation of the instant sorbet-yogurt bars, skim milk was processed by culturation/acidification/fermentation in such a way that it no longer satisfied the tariff definition of "milk." The dairy-derived material, which was combined with other ingredients – water, sweeteners, flavorings, fruit purees, etc. – to make the goods in question, was not "milk" at the time it was combined with those other materials. The sorbet-yogurt bars, in their condition as imported, contained no "milk" whatsoever.

The CIT thus erred, as a matter of fact and law, when it ruled that the imported sorbet-yogurt bars contained "milk" in their condition as imported, and were in fact "articles of milk." Merchandise must be classified for tariff purposes in its condition as imported. *United States v. Citroen*, 223 U.S. 407 (1911); *The Sherwin-Williams*

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[12] The record below confirms, and this Court can certainly take judicial notice, that there are no "skim cows" which give skim milk, nor chocolate cows giving chocolate milk.

Company v. United States, 38 C.C.P.A. 13 (1950). At the time the instant goods were imported, they contained no "milk," and the CIT correctly found this as a fact. That one of more of the ingredients of the product may have been derived from milk which existed in Canada prior to the commencement of the manufacture of the instant goods is of no moment. Uncontested trial evidence shows that, in their condition as imported, plaintiff's sorbet-yogurt bars did not contain any "milk," as that term is defined in Note 1 to HTSUS Chapter 4.

Furthermore, the blending of the components used to make the frozen yogurt core of the subject merchandise – which took place in Canada, long before the importation of the subject merchandise – irreversibly transformed any "milk" used in the manufacturing process into something other than "milk," as that term is defined in the HTSUS.

The CIT incorrectly found that the yogurt portion of the sorbet-yogurt bar is not entirely fermented. J.A. at 11 ¶ 3. The frozen yogurt portion of the sorbet yogurt bar is produced by combining a yogurt base with an ice milk base. The resulting combination introduced yogurt cultures to the entire blend and converted the ice milk base into a 100% and thoroughly fermented milk product, that is known in the industry as frozen yogurt when sufficiently cooled.

The CIT erroneously based its conclusion on the fact that the bacteria in the

yogurt base had stopped their growth before being combined with the ice milk base. However, once the yogurt base is combined with the ice milk base, the entire mixture becomes fermented with the cultures introduced by the yogurt base; once mixed together, the yogurt base and ice milk base cannot be separated and the cultures ferment the entire mixture.[13] Plaintiff's witness Brian Sweet testified that "when they're [the yogurt cultures] blended into what we call the ice milk base, they're equally distributed throughout the whole thing and become an integral part, then, of that total mix." J.A. at 65. He also testified that "[w]hen you add the acid and the culture to it [ice milk base], however, it becomes so integrated, you can't really separate out what was the skim milk and what was the fermented skim milk." J.A. at 72. What was once skim milk ingredients have been irreversibly converted to a fermented milk product that, when sufficiently cooled, is known as frozen yogurt.

The government's witnesses confirmed that the milk ingredients used in making the yogurt portion can no longer be called milk once mixed with the yogurt base. Robert Bradley, as an expert witness on dairy products, testified that once the yogurt base was combined with the ice milk base, the resulting yogurt portion of the sorbet

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[13] In this regard, it does not matter whether fermenting cultures are introduced into the diary product directly, "as" cultured, or in a cultured ingredient. The intimate blending of the ingredients with the milk results in the creation of a cultured/acidified/fermented material which no longer conforms to the tariff's definition of "milk."

bar could not be considered to be skim milk. J.A. at 73. Similarly, Professor Bradley testified that the yogurt portion of the sorbet bar could not be considered to be whole milk. *Id.*

Thomas Brady, Customs' import specialist, also testified that the yogurt portion of the sorbet bar was an inseparable fermented milk. When asked whether milk that is fermented or acidified can be returned to its original status, Mr. Brady answered "I don't believe so." J.A. at 81. The Court erred, as a matter of fact and law, when it determined that the yogurt portion of the subject sorbet-yogurt bars was not entirely fermented. The fermented yogurt portion is not described under Additional U.S. Note 1 to Chapter 4 as the CIT mistakenly found as discussed below.

Where goods were classified by composition using the "chief value" rule, the courts uniformly held that "[t]he proper method of determining the chief value of imported articles is to ascertain the costs of the separate component materials at the time when nothing further remains to be done to them except unite them into the complete article." See *Kores Mfg. Corp. v. United States*, 3 Ct. Int'l Trade 178 (1982), quoting *United States v. Bernard Judae & Co.*, 15 Ct. Cust. Appls. 172, T. D. 42231 (1927); see also *United States v. H.A. Caesar & Co.*, 32 C.C.P.A. 142 (1945).

In this case, the classification by composition is to be determined according to the material or component which imparts the "essential character" to the finished

composite goods, i.e., the sorbet/yogurt bars.

In identifying that material or component, it seems likewise sensible to identify and consider the different components of the article at the time when nothing further remains to be done but to unite them into the complete article – i.e., to insert the frozen yogurt core into the cavity of the sorbet ice shell which has been created through the "suck back" process. At that time, the record is clear there there is no longer any component of the imported article which constitutes "milk," as that term is defined in Note 1 to Chapter 4, HTSUS.

C. The CIT Erred in its Classification Procedure

This Court has developed a three step process to determine the correct classification of imported merchandise; the CIT failed to employ that analysis in this case. See *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363 (Fed. Cir. 1998)("*Bausch & Lomb*").

The first step in the *Bausch & Lomb* analysis is to determine exactly what the merchandise is. *Id.* at 1366. The second step is to construe the relevant classification headings, which is a question of law. *Id.* The final step is to determine the proper classification under which the sorbet-yogurt bars fall -- the ultimate question in every classification case and one that has always been treated as a question of law. *Id.* The

CIT failed to correctly perform the second step, which led to its failure to fulfill the final step.

To correctly classify the sorbet-yogurt bars, the CIT had to properly define the scope of subheading 2105.00.40, which contains the language "Dairy products described in additional U.S. note 1 to chapter 4." Although the CIT concluded that the range of the items covered under Additional U.S. Note 1 to HTSUS Chapter 4 was broader than "full cream milk or completely skimmed milk," the CIT failed to state what that range was, contrary to the charge of *Bausch & Lomb* to do so.

Having failed to construe the scope of the subheadings with particularity, the third step in the classification process could not be accomplished correctly. The CIT's ruling, which effectively expands the statutory term "articles of milk" to include articles containing **no** milk, yields an absurd and anomalous result, and constitutes reversible error.

III. The Sorbet Portion of the Bars Constitutes the Essential Component

In the alternative, to the extent the sorbet-yogurt bars are viewed as "composite

goods" of a kind described in GRI 3(b)[14], the CIT failed to correctly identify the "essential character" component thereof.

The Sorbet portion of the yogurt/sorbet bars constituted the largest percentage of the ingredients by weight, was the chief ingredient in terms of cost, and clearly imparted the essential character to the bars. Even assuming, *arguendo*, that the frozen yogurt core of these products were classifiable as an "article of milk," the CIT erred in concluding that the yogurt portion imparted the bars' essential character. Courts have found that the essential character of an article is "that which is indispensable to the structure, core or condition of the article, i.e., what it is." *Oak Laminates D/O Oak Materials Group v. United States, supra.*

The trial record shows that the cost of the sorbet ice is greater than the cost of the frozen yogurt portion J.A. at 97. The raspberry/vanilla bar's sorbet component is produced from several ingredients (water; raspberry juice concentrate; liquid sugar; 20DE corn syrup; pectin; and concentrated lemon juice) having an aggregate cost of $.6661 per bar, representing 65% of the total cost of $1.0212. J.A. at 97. Similarly,

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[14] To the extent the frozen yogurt portion of the sorbet-yogurt bars is not considered an "article of milk," but is instead treated as an "other" edible ice, it would be classified under HTSUS subheading 2105.00.50. It is undisputed that the sorbet portion of these bars, if considered separately, would be classified under the same heading. If both portions of the bar are classified under the same subheading of the HTSUS, they would not, technically qualify as "composite goods" of GRI 3(b).

in the chocolate sorbet bars, the sorbet portion accounts for $.4071 of a total cost of $.7622, – 53.4 % of the total cost of the bar. The sorbet ice component thus predominates by value. The sorbet ice component also outweighs the frozen yogurt core by 36 to 32 grams in the raspberry/vanilla bar (J.A. at 97) and by 35.9 to 32 grams in the chocolate flavored bar.

The sorbet is also more significant to the function of the bar. The sorbet shell is not merely a coating or covering akin to a chocolate-dipped ice cream bar but is molded first and determines the overall dimensions of the bar – size and shape. It provides a vessel to hold the frozen yogurt filling. As Mr. Sweet testified, the sorbet is poured into the mold and allowed to freeze until the frozen sorbet reaches a determined thickness. J.A. at 83. The yogurt is simply a filling which, while adding to the taste of the bar, does not determine the bar's size or structure. Undisputed trial evidence showed that the sorbet's flavor was also a determinative factor in many consumers' purchasing decisions. J.A. at 84 (Sweet).

Even assuming this Court cannot find that either the sorbet or the frozen yogurt imparts the "essential character" to the imported product, then General Rule of Interpretation 3(C) requires the article to be classified under the tariff provision which occurs last in numerical order among those deserving of consideration – once again requiring these products to be classified under HTSUS subheading 2105.00.50.

IV. Alternatively, the Sorbet-Frozen Yogurt Bars are Properly Classified Under HTSUS Heading 0403

In the alternative, because the frozen yogurt center satisfies the requirements of the National Yogurt Association ("NYA") for live and active culture yogurt, that component of the sorbet-yogurt bar would be classified as "yogurt," other than in dry form, under HTSUS subheading 0403.10.90, dutiable at a rate of 17% *ad valorem*. Goods so classified, if "originating" goods of Canada, qualify to enter the United States duty-free under NAFTA.

Plaintiff's witness Brian Sweet testified that the subject sorbet-frozen yogurt bars use the NYA logo on their packaging (J.A. at 85), and complied with the NYA standards for live and active culture yogurt (J.A. at 86). He testified that the imported merchandise at bar use the appropriate yogurt cultures (J.A. at 60,87) that every batch of the yogurt was tested to ensure that it complied with the NYA's minimum organism requirement (J.A. at 86), and that testing was performed on a regular basis to ensure that the cultures remained active. J.A. at 87. Finally, the yogurt was found to have a titratable acidity which met the NYA standard.[15] J.A. at 88-89.

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[15] While Prof. Bradley did not agree that the yogurt component of the subject sorbet-frozen yogurt bars complied with the intent of the NYA guidelines because of his continuing objection that not all of the milk was initially fermented, Mr. Bradley did state that the titratable acidity of the fermented component was .25 and the non-fermented component was .15 for a total acidity of .4 which satisfies the (continued...)

If the frozen yogurt component is deemed to be "yogurt" under HTSUS subheading 0403.10.90.00 HTSUS, the GRI 3 classification analysis set forth in this brief would be applied *mutatis mutandis*. This would lead to the determination that the imported sorbet-yogurt bars are classifiable either under HTSUS subheadings 0403.10.90 or 2105.00.50 – not under subheading 2105.00.40, as claimed by Customs.

Defendant's expert witness Robert Bradley initially argued that, to be considered a "yogurt," a product must be manufactured in such a way that all of the milk solids be fermented. J.A. at 90. At trial, however, he concurred that the Haagen-Dazs method for producing frozen yogurt was a yogurt-making method recognized in United States industry, and one which he himself had used. J.A. at 91-92. He also noted that the method provided greater quality control, and control of the fermentation reaction, than other processes for making yogurt. Professor Bradley testified that:

> The - the easiest way to make a frozen yogurt, Your Honor is the way that Haagen-Dazs is making it right now. It's the easiest way to control that finished product. If you have to ferment all the milk solids, you need to – you need to have good control. Otherwise – and –and monitoring. Otherwise you have greater acidity than you want.
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> * * *

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[15](...continued)
NYA requirement. The fermented component also met the NYA requirement that at least .15 of the **total** acidity is obtained by fermentation. J.A. at 88-89.

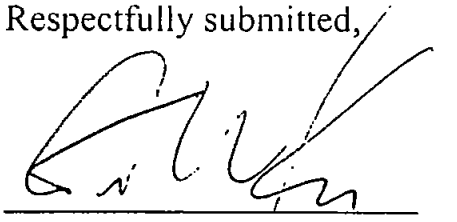
> And so, there's an obvious need then to dilute. And, to minimize that responsibility, I guess you could call it, to industry, you make a base and you add this flavored concentrate, is what I call it, the highly fermented yogurt mixture, you add that to the base that you've prepared and call it frozen yogurt.

J.A. at 92-93(Bradley). Professor Bradley testified that the method which Haagen-Dazs uses to produce frozen yogurt makes it easy to "get that flavor concentration that the customer likes" (J.A. at 94) and that "in industry practice, there are a number of producers of frozen yogurt who makes their product the same – using the same method that Haagen-Dazs does." J.A. at 95. He also confirmed that there is no Food and Drug Administration ("FDA") standard of identity for frozen yogurt, and that the only industry standard concerning preparation of frozen yogurt was the NYA standard. J.A. at 96. Finally, Professor Bradley concurred that Haagen-Dazs was able to meet the NYA titratable acidity standard for frozen yogurt. J.A. at 89.

CONCLUSION

The CIT erred as a matter of law, in classifying the sorbet-yogurt bars under HTSUS subheading 2105.00.40. The correct classification of the sorbet-yogurt bars is under HTSUS subheading 2105.00.50 or in the alternative, under HTSUS subheading 0403.10.90. Therefore, the judgment of the CIT should be reversed and remanded to the court to determine the applicability of the NAFTA claims presented at trial.

Respectfully submitted,



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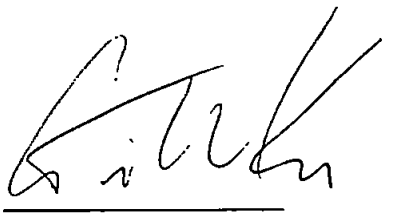
Dated: December 28, 2004
New York, NY

CERTIFICATE OF SERVICE

I, Curtis W. Knauss, hereby certify that a true and correct copy of the foregoing Corrected Brief for Plaintiff-Appellant directed to defendant, The United States of America, was served by U.S. Mail on Saul Davis, Esq., of the U.S. Dept. of Justice. Civil Division, Commercial Litigation Branch, 26 Federal Plaza - Room 346, New York, NY 10278, counsel for defendant.

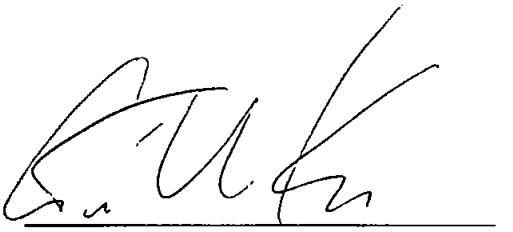


Curtis W. Knauss

Dated: December 28, 2004

CERTIFICATE OF COMPLIANCE

I, Curtis W. Knauss, hereby certify that this brief conforms to the Federal Rule of Appellate Procedure 32(a)(7) and it contains 7,012 words as calculated by the word count of the word processing system used.



Curtis W. Knauss

Addendum

SLIP-OP 04-84

UNITED STATES COURT OF INTERNATIONAL TRADE

THE PILLSBURY CO.,	:	**PUBLIC VERSION**
Plaintiff,	:	Before: WALLACH, Judge Court No.: 00-12-00570
v.	:	
UNITED STATES,	:	
Defendant.	:	

[Judgment for Defendant.]

Decided: July 12, 2004

Neville Peterson, LLP, (John M. Peterson, Curtis W. Knauss) for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; Barbara S. Williams, Attorney in Charge, International Trade Field Office, Department of Justice, Civil Division, Commercial Litigation Branch; Saul Davis, Department of Justice, Civil Division, Commercial Litigation Branch; Michael Heydrich, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of counsel, for Defendant.

WALLACH, Judge:

FINDINGS OF FACT & CONCLUSIONS OF LAW

I
INTRODUCTION

This matter is before the court for decision following a bench trial on November 13, 2003, and November 14, 2003. Plaintiff, the Pillsbury Company, challenges the United States

Customs Service's[1] ("Customs") decision to classify certain entries of frozen dessert bars as dairy products under Harmonized Tariff Schedule of the United States ("HTSUS") subheading 2105.00.40 (1999). Plaintiff seeks an order directing reliquidation of these entries, classification of the subject merchandise under HTSUS Subheading 2105.00.50, or in the alternative under HTSUS Subheading 0403.10.90.00,[2] and a refund of all duties paid, plus interest. This Court has exclusive jurisdiction pursuant to 28 U.S.C. § 1581(a) (1994), which provides for judicial review of denied protests filed in compliance with the provisions of 19 U.S.C. § 1514 (1999). Pursuant to the following findings of fact and conclusions of law, and in accordance with USCIT R. 52(a), the court enters a final judgment in favor of the Defendant and against Plaintiff.

II
BACKGROUND

Plaintiff entered certain Haagen-Dazs brand frozen dessert bars from Canada, through the Port of Detroit, Michigan, between March 30, 1999, and September 17, 1999. The subject merchandise is comprised of two flavors of Haagen-Dazs brand frozen dessert bars. One has

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[1] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. See Homeland Security Act of 2002, Pub. L. 107-296, § 1502, 116 Stat. 2135, 2308-09 (2002); Reorganization Plan for the Department of Homeland Security, H.R. Doc. No. 108-32 (2003).

[2] HTSUS Subheading 0403.10.90.00 (1999), provides:

> 0403. Buttermilk, curdled milk, yogurt, kephir and other fermented or acidified milk and cream, whether or not concentrated or containing added sugar or other sweetening matter or flavored or containing added fruit, nuts or cocoa:
>
> 0403.10. Yogurt:
>
> 0403.10.90.00 Other.

chocolate sorbet on the outside and vanilla yogurt on the inside, one with raspberry sorbet on the outside and vanilla yogurt on the inside.[3] Between February 11, 2000, and July 28, 2000, Customs classified the imported frozen dessert bars under HTSUS Subheading 2105.00.40,[4]

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[3] For convenience the core of both bars is herein referred to as yogurt, or the yogurt portion. Except where explicitly addressed, this term is used for ease of reference and is not to be construed as a finding of fact or law as to the proper classification of that portion of the subject merchandise.

[4] HTSUS Subheading 2105.00.30, through 2105.00.50 provide for:

2105.00	Ice cream and other edible ice, whether or not containing cocoa:	
	Ice cream:	
	* * *	
	Other:	
		Dairy products described in additional U.S. note 1 to chapter 4:
2105.00.30		Described in additional U.S. note 10 to chapter 4 and entered pursuant to its provisions
2105.00.40		Other.
2105.00.50	Other.	

Additional U.S. Note 1 to Chapter 4 states that "for the purposes of this schedule, the term 'dairy products described in additional U.S. note 1 to chapter 4' means any of the following goods: malted milk, and articles of milk or cream (except (a) white chocolate and (b) inedible dried milk powders certified to be used for calibrating infrared milk analyzers); articles containing over 5.5 percent by weight of butterfat which are suitable for use as ingredients in the commercial production of edible articles (except articles within the scope of other import quotas provided for in additional U.S. notes 2 and 3 to chapter 18); or, dried milk, whey or buttermilk (of the type provided for in subheading 0402.10, 0402.21, 0403.90 or 0404.10) which contains not over 5.5 percent by weight of butterfat and which is mixed with other ingredients, including but not limited to sugar, if such mixtures contain over 16 percent milk solids by weight, are capable of being further processed or mixed with similar or other ingredients and are not prepared for marketing to the ultimate consumer in the identical form and package in which imported."

assessed duty thereon at the rate of 51.7¢ plus 17.5% *ad valorem*, and liquidated accordingly. Plaintiff paid all liquidated duties, fees and charges prior to the commencement of this action. Between May 10, 2000, and July 31, 2000, Plaintiff filed four timely protests with the Port Director at Detroit, Michigan, challenging Customs' classification. It claimed that the frozen dessert bars were properly classified under HTSUS Subheading 2105.00.50, and entitled to duty-free entry under NAFTA. Customs denied Plaintiff's protests between July 7, 2000, and October 26, 2000. On December 18, 2000, Plaintiff commenced the instant action by filing a Summons with the Clerk of the Court.

In its Complaint, Plaintiff claims that the subject merchandise is properly classified under HTSUS subheading 2105.00.50, or, in the alternative, under HTSUS Subheading 0403.10.90.00, and seeks a refund of all duties paid, plus interest. The basis of Plaintiff's claim is that the dessert bars are neither primarily characterized by their frozen yogurt component, nor is that component properly classified as a "product of milk" as defined in HTSUS.

Defendant claims that the dessert bars were properly classified and thus requests judgment in its favor, affirming its classification and assessment of duties. Defendant contends that the frozen dessert bars are properly classifiable as 'articles of milk,' a term which they contend, under statutory interpretation and case law, is broader than 'milk.' Defendant states that, based on industry standards for ice cream and frozen yogurt, as well as the primary ingredients of the subject product, the frozen yogurt is the basis of the product, it's essential nature, whereas the sorbet portion is correctly viewed as a flavoring or coating. Furthermore, according to Defendant, the yogurt core is not, in fact yogurt, but, based on limited portion of fermented ingredients, milk.

The parties' contentions center on classifying the subject desert bars under one of three possible HTSUS subheadings, 2105.00.40 (requiring a finding that the yogurt portion predominates and that said portion constitutes an article of milk or cream as defined in U.S. note 1 to chapter 4 of the HTSUS), 0403.10.90.00 (requiring a finding that the yogurt portion predominates and that said portion constitutes yogurt), or 2105.00.50 (requiring a finding that the sorbet portion predominates). Ultimately, which of the three categories these items fall into depends on whether essential character is the 'yogurt' portion. If the essential character is the sorbet portion, HTSUS subheading 2105.00.50 is eliminated as a possibility. If the essential character is the 'yogurt' portion, and this portion is properly characterized as an 'article of milk', Customs initial finding is confirmed. If the 'yogurt' portion is characterized as 'yogurt', its proper classification lies under 0403.10.90.00.[5]

III
STANDARD OF REVIEW

Plaintiff paid all liquidated duties and charges prior to the timely commencement of this action. Although Customs's decisions are entitled to a presumption of correctness under 28 U.S.C. § 2639(a)(1) (1994), the Court makes its determinations upon the basis of the record made before the Court, rather than that developed by Customs. See United States v. Mead Corp., 533 U.S. 218, 233 n.16, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). Accordingly, the Court makes the following findings of fact and conclusions of law as a result of the de novo trial. See 28 U.S.C. § 2640(a) (1994).

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[5] All parties agree that classification under HTSUS subheadings covering ice cream would be inappropriate. See Pretrial Order at 6.

IV
FINDINGS OF FACT

A
Facts Uncontested By The Parties And Agreed To In The Pretrial Order

1. The merchandise which is the subject of this case (the "subject merchandise") consists of frozen dessert bars. Two varieties of the subject merchandise are included in this case: (A) one bar consists of an outer shell of raspberry flavored sorbet and an inner filling of vanilla-flavored frozen yogurt, and (B) the second bar consists of an outer shell of chocolate-flavored sorbet and an inner filling of vanilla-flavored frozen yogurt.

2. In their condition as imported, the dessert bars are frozen, and are packaged for retail sale. Each of the frozen dessert bars features a wooden stick which is used to hold the bars while they are being eaten.

3. Between March 30, 1999, and September 17, 1999, Plaintiff entered at the Port of Detroit, Michigan, under cover of consumption entries listed in the Summons, shipments containing the subject merchandise; frozen dessert bars.

4. Between February 11, 2000, and July 28, 2000, the Post Director of Customs at the Port of Detroit, Michigan liquidated the subject entries, classifying the imported frozen dessert bars in liquidation under HTSUS Subheading 2105.00.40, as "Ice cream and other edible ice, whether or not containing cocoa: Other: Dairy products described in additional U.S. note 1 to chapter 4: Other" and assessing duty thereon at the rate of 51.7¢ plus 17.5% *ad valorem*. Plaintiff paid all liquidated duties, fees and charges prior to the commencement of this action.

5. Between May 10, 2000, and July 31, 2000, Plaintiff caused to be filed with the Port Director of Customs at Detroit, Michigan, timely protests, challenging the classification in liquidation of the imported merchandise, and asserting that the frozen dessert bars are properly classified under HTSUS Subheading 2105.00.50, as "Ice cream and other edible ice, whether or not containing cocoa: Other: Other" and entitled to duty-free entry under NAFTA.

6. The Port Director of Customs denied Plaintiff's protests between July 7, 2000, and October 26, 2000.

7. On December 18, 2000, Plaintiff timely commenced the instant action by filing a Summons with the Clerk of the Court.

8. Neither the imported frozen dessert bars, nor any component thereof, constitute or consists of "ice cream," as that term is commonly or commercially known. The imported frozen dessert bars are not classifiable under HTSUS subheadings 2105.00.05 through 2105.00.20.

9. The merchandise which is the subject of this action was also the subject of New York Customs Ruling Letter No. D84417 (Dec. 3, 1998), in which the Bureau of Customs and Border Protection (then the United States Customs Service) classified the subject merchandise under HTSUS subheading 2105.00.40.

B
Facts Established At Trial

10. Plaintiff's current packaging, entered into evidence as Plaintiff's exhibit 2, differs from the subject merchandise as imported. However, although the box has been updated, the subject frozen dessert bars inside remain unchanged.

11. The current packaging states that the box contains "FAT FREE VANILLA FROZEN YOGURT COATED WITH RASPBERRY SORBET." The packaging also specifies that "[w]e take rich, creamy Haagen-Dazs yogurt and dip it in incredibly smooth Haagen-Dazs sorbet. . ."

12. Although the packaging specifies that the yogurt is dipped in sorbet, in manufacturing the subject merchandise, the sorbet is, in fact, poured into a mold and chilled. When it reaches a certain temperature a portion of the unfrozen center is "sucked back" and saved for future use. The frozen yogurt portion is then injected into the void to create the frozen yogurt center.

13. Haagen-Dazs' development and marketing documentation demonstrates that the yogurt portion of the dessert bars was tested with a variety of flavorings. The documentation indicates that the subject merchandise was consistently identified by the yogurt component. ("Pl. Ex.") 11-14.

14. The yogurt portion of the subject merchandise weighs 32 grams. The raspberry portion of that flavor of dessert bar weighs 36 grams. The chocolate portion of that flavor of dessert bar weighs 35.9 grams.[6] An entire dessert bar weighs approximately 71 grams.

15. The documentation entered as Pl. Ex. 3, p.48, describing the ingredients used to produce the subject merchandise, demonstrates that by weight and volume, milk is an essential ingredient.

16. By weight, milk products (LK skim/conditioned skim milk blend and condensed fresh US Grade A skim milk) comprise 21.43% of the total weight of subject merchandise. By volume, milk products comprise approximately the same percentage.

17. This percentage of milk products is approximately equal to the weight of the fruit

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[6] The chocolate flavor of dessert bar has been discontinued.

ingredients in the raspberry flavored bar.

18. The weight of the milk ingredients in both types of bars are exceeded only by the weight of the water and sweeteners

19. The court finds highly probative and credible the expert testimony of Professor Robert L. Bradley, Jr. The court designated Professor Bradley as an expert in the production, processing and formulas relating to frozen yogurt and yogurt.

20. Professor Bradley is currently a Professor Emeritus at the University of Wisconsin, where he earned his Ph.D. in 1964. From 1964 until the present, he has taught food science at the University of Wisconsin and has published extensively. Professor Bradley holds memberships in several professional societies and has received numerous awards. He has taught courses in the manufacture of both yogurt and frozen yogurt.

21. Professor Bradley testified at trial that in his expert opinion the yogurt portion is what gives the bars their essential character. His opinion is based on the industry and Code of Federal Regulations standard of comparing solids content, a comparison of which portion is more nutritious, and his review of Plaintiff's development, production, processing and marketing documents.

22. Plaintiff offered certain product testing documents, entitled "Live and active culture test for Haagen-Dazs fat free frozen yogurt" and admitted as Pl. Ex. 8., which the court admitted not to establish the validity of the tests or results, but only to establish that from time to time, the Pillsbury Company tests frozen yogurt.

23. Professor Bradley reviewed these testing documents and Plaintiff's formula documents concerning the composition of the subject merchandise.

24. Professor Bradley testified credibly that yogurt, according to the National Yogurt Association and under the Code of Federal Regulations,[7] is a product in which all milk solids have been fermented.

25. The yogurt portion of the subject merchandise is not one in which all milk solids have been fermented.

26. National Import Specialist Thomas Brady, with the National Commodity Specialist Division of Customs, testified regarding the practices of Customs regarding classification of

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[7] See 21 C.F.R. §§ 131.200, 131.203, 131.206 (1999) covering yogurt generally. Each states that yogurt is a "food produced by culturing one or more of the optional dairy ingredients specified in paragraph (c) of this section with a characterizing bacterial culture that contains the lactic acid-producing bacteria, Lactobacillus bulgaricus and Streptococcus thermophilus."

merchandise under the provisions of Heading 2105. This testimony was credible and probative.

27. The decision to classify the subject merchandise under 2105.00.40 was based on the agency's determination that the frozen desert bars constituted an "article of milk or cream" under HTSUS additional U.S. note 1 to chapter 4.

28. Brian Sweet, Product Quality Manager for Haagen-Dazs testified. Mr. Sweet identified the subject merchandise, and discussed how it is manufactured. He testified as to the formulation of the components. He also described the marketing plans and product development within Pillsbury during the time of the subject entries. His testimony was credible and probative.

29. The product does not contain full cream milk, or skimmed milk.

30. The yogurt portion of the subject merchandise is made from 88% by weight of a "vanilla flavored ice milk base" and 12% by weight of a "yogurt base."

31. The "vanilla flavored ice milk base" portion of the yogurt core is made from [a percentage] by weight of a reduced lactose skim milk blend, together with [a percentage of] liquid amber sugar, [a percentage of] corn syrup solids, [a percentage] of a blend of corn syrup and liquid sugar, [a percentage] of charcoal-filtered water, and [a percentage of] specialty corn syrup solids.

32. The "yogurt base" portion of the yogurt core is made from [a percentage] by weight of condensed fresh U.S. Grade A skim milk, [a percentage of] charcoal-filtered water, and [a percentage of certain types of] yogurt cultures.

33. Of the yogurt portion, only a very small percentage actually contained yogurt cultures. This percentage is diluted with the "vanilla flavored ice-milk base" to provide the flavor of yogurt.

34. Once the "yogurt base" and "vanilla flavored ice-milk base" are mixed, there is no further fermentation due to the concentration of sugars.

35. The vanilla flavored ice-milk base which made up a majority of the 'yogurt' portion was never fermented

36. Plaintiff offered into evidence the requirements of the National Yogurt Association for live and active culture yogurt. Pl. Ex. 7.

37. Based on these standards, as well as the testimony of Prof. Bradley and Mr. Sweet, in order to meet the criteria of the National Yogurt Association criteria for live and active culture yogurt, sampling and analytical procedures National Yogurt Association, a product must, *inter alia*, contain a certain level of active cultures, 10^7 CFU per gram, at the end of the stated shelf

life, and have a certain titratable acidity, at least 0.15%, obtained from fermentation.

38. Plaintiff failed to establish through credible evidence that the yogurt portion of the subject merchandise contained the requisite level of active cultures at the end of the stated shelf life.

39. Plaintiff failed to establish through credible evidence that the yogurt portion of the subject merchandise had the requisite titratable acidity as a result of fermentation.

40. If any of these Findings of Fact shall more properly be Conclusions of Law, they shall be deemed to be so.

V
CONCLUSIONS OF LAW

1. Plaintiff did not meet its burden of proving that the imported desert bars are not within the scope of the tariff provision for "article[s] of milk or cream" of a kind described in additional U.S. Note 1 to HTSUS Chapter 4.

2. Based on the foregoing Findings of Fact, the court finds the essential character of the subject merchandise to be the yogurt portion of the dessert bar.[8] The subject bars are composite goods, consisting of two or more materials or components classified in different headings of the tariff, frozen yogurt portion under 2105.00.40, and sorbet portion classifiable under 2105.00.50. The essential character of an entry is "that attribute which strongly marks or serves to distinguish what it is. Its essential character is that which is indispensable to the structure, core or condition of the article, i.e., what it is. Webster's Third New International Dictionary, 1966 edition." Oak Laminates D/O Oak Materials Group v. United States, 8 CIT 175, 180 (1984) (citing United China & Glass Co. v. United States, 61 Cust. Ct. 386, C.D. 3637, 293 F. Supp. 734 (1968)). The marketing of the merchandise, the weight and volume of the ingredients, and the product itself, in addition to other facts revealed at trial support this conclusion. The court in Mead Corp. v.

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[8] General Rule of Interpretation 3(b) states that:

> Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Explanatory note to General Rule of Interpretation 3(b) states that "[t]he factor which determines essential character will vary by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods."

United States, 283 F.3d 1342, 1349 (Fed. Cir., 2002), explained that "[w]hile the importer's marketing of the goods will not dictate the classification, such evidence is relevant to the determination." Thus, in accordance with General Rule of Interpretation No. 3 (b), this court finds that the yogurt portion gives the merchandise its essential character.

3. HTSUS subheading 2105.00.40 covers "Ice cream and other edible ice, whether or not containing cocoa: Other: Dairy products described in additional U.S. note 1 to chapter 4: Other." The court finds that the yogurt portion of dessert bars constitutes a dairy product described in additional U.S. note 1 to Chapter 4 of the HTSUS, given that this portion is not entirely fermented and based upon the nature of the ingredients used.

4. Note 1 to Chapter 4 of the HTSUS states that "[t]he expression 'milk' means full cream milk or partially or completely skimmed milk."

5. Additional U.S. note 1 to Chapter 4 of the HTSUS states that "[f]or the purposes of this schedule, the term 'dairy products described in additional U.S. note 1 to chapter 4' means and of the following goods: malted milk, and articles of milk or cream. . ." Thus, the range of items covered by "dairy products described in additional U.S. note 1 to chapter 4", are broader than full cream milk or partially or completely skimmed milk.

6. As the court explained in United States v. Andrew Fisher Cycle Inc., 57 CCPA 102, 426 F.2d 1308 (1970); Washington Int'l Ins. Co. v. United States, 24 F.3d 224 (1994), the name under which merchandise is marketed is not dispositive for classification purposes. Thus, the fact that Plaintiff routinely refers to the core as "yogurt" and markets the dessert bars that way is not sufficient to establish then, legal classification as yogurt.

7. As the fermented part comprises only about 12% of the yogurt portion, this court finds that it would be improper to classify the entire yogurt portion, and thus the entire entry, as yogurt.

8. Merchandise must be examined to determine whether, as imported, it contains the named ingredients. Imprex, Inc. v. United States, 17 CIT 650 (1993). Here the merchandise was not comprised chiefly of yogurt as imported. The dessert bars did contain articles of milk or cream as defined in HTSUS additional U.S. note 1 to Chapter 4.

9. By operation of the finding that the subject merchandise contains articles of milk or cream, the dessert bars cannot be classified under HTSUS heading 0403 covering YOGURT. The Explanatory Notes discuss the scope of Chapter 4, which includes the "yogurt" of HTSUS heading 0403, it states:

> The Chapter also **excludes**, *inter alia*, the following:
>
> (c) Ice cream and other edible ice (heading 21.05).

Harmonized Commodity duty Description and Coding system, Explanatory Notes (1st ed. 1986) at 30.

10. As a confection, dessert, or novelty, the subject merchandise is properly covered by HTSUS heading 2105.

11. Because the evidence shows that the subject merchandise is an article of milk as defined in U.S. note 1 to chapter 4 of the HTSUS. the court finds that the merchandise is properly classified under HTSUS subheading 2105.00.40.

12. Accordingly, Plaintiff has failed to overcome the presumption of correctness. pursuant to 28 U.S.C. § 2639(a) (1994), that attaches to Customs' classification decisions.

13. If any of these Conclusions of Law shall more properly be Findings of Fact. they shall be deemed to be so.

/s/ Evan. J. Wallach
Judge

Dated: July 12, 2004
New York, New York