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SENT VIA EXPRESS MAIL
Myles Harmon
Director, Commercial and Trade Facilitation Division
Regulations and Rulings
Office of International Trade
U.S. Customs and Border Protection
1300 Pennsylvania Ave. NW
Washington, DC 20229

Attn: Regulations and Rulings, Office of International Trade

Re: Interested Party Petition
Tariff Classification of Certain Dried Garlic Products

Dear Acting Commissioner:

We submit this domestic interested party petition ("Petition") on behalf of our client, Olam West Coast, Inc. ("Olam"), pursuant to 19 USC §1516 and 19 CFR §175, to seek a reclassification of certain dried garlic products that U.S. Customs and Border Protection ("CBP") previously classified under subheading 0712.90.8580 of the Harmonized Tariffs Schedule of the United States ("HTSUS"). We request that CBP revoke the rulings identified herein and reclassify the merchandise subject to those rulings under 0712.90.4020, HTSUS, or 0712.90.4040, HTSUS, as appropriate.

I. Factual Background

A. Olam's Background

Olam is a leading agri-business and supplier of food, ingredients, and raw materials, based in Fresno, California. Olam manages a wide range of production, processing and supply of agricultural products in 12 states, with a majority of its operations in California. Olam's largest onion and garlic plant is in Gilroy, California.

Among the various products produced and sold by Olam in the United States is dried garlic in various forms, including flaked, diced, chopped, and powder. The products are produced from fresh garlic that is grown for Olam by contract farmers in California, Arizona,

and Oregon. The fresh garlic is dried at Olam's production facilities in California, processed into the various forms, packaged and sold by Olam to distributors, wholesalers, and producers of food products in United States.

B. Contested Rulings on Dried Garlic and "Mixtures of Vegetables"

Dried garlic, which is classified under 0712.90.4020 and 0712.90.4040, HTSUS, has historically, as an import sensitive product, been subject to relatively high duty rates, currently set at 29.8%. As a result, importers of dried garlic have employed a number of strategies over the years to avoid or reduce the amount of duties owed on importations of dried garlic, including underreporting shipment values and misdeclaring the applicable HTSUS classification. The combined effect of these practices has caused significant harm to domestic dried garlic producers, such as Olam.

Under one duty avoidance strategy, importers combine negligible quantities of dried onion with dried garlic and classify the product under 0712.90.8580, HTSUS, a basket provision that covers "mixtures of vegetables" and is subject to a much lower duty rate of 8.7%. Although these products are overwhelmingly composed of dried garlic and are marketed as such, CBP has issued a number of rulings affirming a classification of 0712.90.8580, HTSUS, for these products. The following chart provides a list of such rulings, which Olam seeks to have revoked or modified:

Ruling	Date	Petitioner	Product Description
N276018	November 23, 2016	BCFoods, Inc.	99% garlic powder, 1% onion powder.
N267292	August 27, 2015	Dongsheng Foods USA, Inc., CA	1) 99% garlic powder, 1% onion powder. 2) 95% garlic powder, 5% onion powder. 3) 90% garlic powder, 10% onion powder.
N276015	November 23, 2016	BCFoods, Inc.	64% dehydrated garlic, 36% dehydrated onion.

The discussion below brings to light several factors that we believe CBP may not have been aware of at the time it issued the Contested Rulings and that would benefit CBP in its analysis of the products at issue therein. Ultimately, we respectfully assert that an examination of the avoidance strategies employed by the importers in the Contested Rulings as well as a

review of CBP's other prior classification rulings involving mixtures will show that these products are not "mixtures of vegetables" and are more appropriately classified as dried garlic under 0712.90.4020 or 0712.90.4040, HTSUS.

II. Legal Background

A. HTSUS Classifications in Question

The following HTSUS subheadings are addressed in this Petition:

0712: Dried vegetables, whole, cut, sliced, broken or in powder, but not further prepared:

0712.90: Other vegetables; mixtures of vegetables:

0712.90.40: Garlic.

0712.90.4020: Powder or flour.

0712.90.4040: Other.

0712.90.85: Other vegetables; mixtures of vegetables:

0712.90.8580: Other.

B. CBP Classification of Dried Garlic

As detailed above, dried garlic is specifically provided for in 0712.90.40, HTSUS. Furthermore, neither the Section Notes nor the Chapter Notes provide any guidance in relation to 0712.90.40, HTSUS that would serve to limit or expand the scope of 0712.90.40, HTSUS. Thus, classifying dried garlic products that are 100% composed of dried garlic is relatively straightforward.

In instances where dried garlic is mixed with chemical substances, CBP has classified the product in question under 0712.90.40, HTSUS as well. For example, in N270709 (Dec.15, 2015), CBP classified a dried garlic mixture containing 98% dried garlic and 2% calcium stearate and another mixture containing 98% dried garlic and 2% silicon dioxide under 0712.90.4020, HTSUS.

C. General Rules of Interpretation

The HTSUS General Rules of Interpretation ("GRI") and the Additional U.S. Rules of Interpretation ("US GRI") govern the proper classification of all merchandise and are applied in

numerical order. Under GRI 1, "[c]lassification is to be determined according to the terms of the headings and any relevant section or chapter notes." HTSUS terms are to be construed according to their common and commercial meaning, which are presumed to be the same.[1] CBP may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources. One who argues that a tariff term should not be given its common or dictionary meaning must prove that it has a different commercial meaning that is definite, uniform, and general throughout the trade.[2]

Pursuant to GRI 1, the possible headings are to be evaluated without reference to their subheadings, which cannot be used to expand the scope of their respective headings.[3] Finally, if the proper heading can be determined under GRI 1, there is no need to look to the subsequent GRIs.[4] However, in the event that the goods cannot be classified solely on the basis of GRI 1, the remaining GRI may then be applied.

Of relevance here, GRI 2 (b) provides the following:

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

GRI 3 provides for the following when goods are *prima facie*, classifiable under two or more headings:

> "(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods…those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

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[1] *See Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989).
[2] *See Rohm Haas Co. v. United States*, 727 F.2d 1095, 1097 (Fed. Cir. 1984).
[3] *Orlando Food,* 140 F.3d at 1440 ("Only after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise. . . . [W]hen determining which heading is. . . more appropriate for classification, a court should compare only the language of the headings and not the language of the subheadings.")
[4] *See CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011) (citing *Mita Copystar Am. v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998)) ("We apply GRI 1 as a substantive rule of interpretation, such that when an imported article is described in whole by a single classification heading or subheading, then that single classification applies, and the succeeding GRIs are inoperative.").

> (b) Mixtures…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 added)

The Explanatory Notes ("EN") to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI.

III. Analysis

The Contested Rulings should be revoked and the items reclassified because: 1) the products subject to those rulings are not "mixtures of vegetables" under the "common and commercial meaning" of the term; and 2) classifying such products as "mixtures of vegetables" is contrary to the intention to protect domestic production of dried garlic as indicated by the high tariff rate applicable to dried garlic.

A. "Common and commercial meaning" of "Mixtures of Vegetables"

A vegetable product that contains a negligible amount of another vegetable is not a "mixture[s] of vegetables" under the "common and commercial meaning" of the term. In determining the "common and commercial meaning" of a "mixture[s] of vegetables" CBP should not rely on a purely dictionary-based definition because "mixture[s] of vegetables" is not a term or phrase that can be defined according to any particular proportions or quantities. Thus, adopting a dictionary-based definition of "mixture," would often lead to inaccurate results in the context of "mixtures of vegetables," since including a single particle of another vegetable in a particular vegetable product could result in that product being classified as a "mixture of vegetables." As noted above, relevant case law as well as GRI 3(b), aimed at determining product's "essential character" recognize that items containing more than one material do not automatically become "mixtures."

Whether a given product is to be considered a "mixture of vegetables" will depend on the specific vegetables included in the mixture, the relative quantities of such vegetables, and the impact that the non-predominant vegetables have on the product's essential character. CBP may look to how a given product is marketed to determine whether industry standards and/or consumers consider the product in question to be a "mixture of vegetables."

Based on the factors discussed above, CBP should find that the products subject to the Contested Rulings are not "mixtures of vegetables," but are rather dried garlic products. Critically, the products at issue in the Contested Rulings containing a majority of dried garlic (mixed with small amounts of dried onion) are marketed to consumers as dried garlic, as opposed

to "mixtures of vegetables" or the like. In fact, it does not appear that the presence of negligible percentage of dried onion is even disclosed to consumers. An examination of a list of products sold by the petitioners in the Contested Rulings reveals no mention or distinction between their dried garlic powder and any "mixture" containing dried garlic and onion powder.[5] The importers are thus sending a clear message to consumers and the market at large that the essential character of their product is dried garlic, not a "mixture of vegetables." Claims by the products' importers that their dried garlic somehow becomes a mixture of vegetables by adding tiny portions of dried onion contradict the consumer and market expectations that they themselves have deliberately created. Rather than allow for this contradiction to continue, CBP should instead treat the products consistently with their common and commercial meaning.

B. Classifying Dried Garlic Products as "Mixtures of Vegetables" is Contrary to the Intent to Protect Domestic Production

As discussed, the inclusion of dried onion in these "mixtures," which are predominantly composed of dried garlic, serves no commercial purpose and is solely a means to avoid paying tariffs on an import sensitive, domestically produced agriculture product. The fact that dried onion products are themselves also deemed import sensitive further underscores how problematic this result is. As an import sensitive product, the two applicable import classifications for dried onion, 0712.20.2000, HTSUS and 0712.20.4000, HTSUS, both have high associated duty rates of 21% and 29.8%, respectively. Given these applicable duty rates on unmixed dried onion products as well as the fact that dried garlic products classified under 0712.90.4020, HTSUS, and 0712.90.4040, HTSUS, have a 29.8% import duty, it would be illogical and undermine the entire purpose of deeming these two products import sensitive to apply a mere 8.7% duty rate to a mixture of these two products. Rather, the only rational duty rate that respects the import sensitive nature of these products is 29.8% for mixtures of these two products, particularly where dried garlic is the dominant product in the mixture. Currently, these binding rulings allow importers to mix negligible amounts of two import sensitive products together and suddenly obtain a "mixture" label that decreases their duty to 8.7%. Because these binding rulings unintentionally undermine the protections offered by the higher duty rate to domestically produced dried garlic, CBP should revoke them.

Prior CBP rulings involving various food products that combine smaller amounts of other ingredients or additives highlight the degree to which these Contested Rulings' depart from the essential character analysis intended under the GRIs. For example, in N250087 (Mar. 6, 2014) CBP had to determine the essential character a frozen meal kit whose contents included 50 percent pre-cooked rice (40 percent jasmine rice mixed with 10 percent jasmine brown rice) in the large compartment of the plastic tray, and a mixture of 21 percent vegetables (snow peas, onions, baby corn, zucchini, asparagus, green beans, and Chinese kale per flow chart) and 29 percent panang curry sauce in a small compartment. Despite the significant presence of other

[5] BC Foods, Inc., *Our Products*, http://bcfoods.com/home/our-products/; Dongsheng Foods USA, Conventional Dehydrated & IQF, http://dongshengfoodsusa.com/dehydrated-iqf/.

vegetables and ingredients, CBP concluded that the other foodstuffs were "intended to be used together in the preparation of rice-based meals, and are considered as a set in which ***the pre-cooked rice imparts the essential character of the products***" (emphasis added). Consistent with this rationale, CBP rejected the importer's proposed classification under 2106.90.9995, HTSUS, which is intended for more general frozen food preparations not elsewhere specified, and instead classified the product under 1904.90.0120, HTSUS, a more specific classification for "cereals (other than corn (maize)) in grain form or in the form of flakes or other worked grains (except flour, groats and meal), pre-cooked or otherwise prepared, not elsewhere specified or included … other … frozen."

As referenced above, in another product classification, N270709 (Dec.15, 2015), CBP classified a dried garlic mixture containing 98% dried garlic and 2% calcium stearate and another mixture containing 98% dried garlic and 2% silicon dioxide under 0712.90.4020, HTSUS, the precise classification we believe is appropriate for the products involved in the Contested Rulings. As these two cases illustrate, even while other ingredients are present, vegetables or otherwise, CBP still must thoroughly analyze the essential character of a product to determine if a good can accurately be classified as a "mixture of vegetables."

In contrast to the Contested Rulings, 952738 (Jan. 1, 2993), exemplifies when a single vegetable classification is inappropriate. There, one product, giardiniera, consisted of several vegetables where, crucially, "***none*** of the vegetables in the relative subheading form the essential character of the mixture," (emphasis added). As a result, CBP rightly concluded that GRI 3(c) governed the analysis and classified the giardiniera under 2001.90.3900, HTSUS, which covers "other vegetables prepared or preserved by vinegar or acetic acid." Here, the characteristics that compelled that classification are not present. Rather, present in all of the products at issue in the Contested Rulings is one overwhelmingly dominant vegetable, dried garlic, which is specifically described by subheadings under 0712.90.40, HTSUS, and gives each product its essential character.

Classifying a product as a mixture in a general basket provision even while its essential character is specifically described in a subheading and is treated in all commercial contexts as dried garlic, represents a misapplication of the GRIs likely due to the lack of information provided to CBP at the time regarding the commercial marketing of the products. Given the importers' continued marketing of these products as dried garlic, CBP need only look to GRI 3(b) to conclude that the appropriate classification is 0712.90.40, HTSUS. As they currently stand, the Contested Rulings run counter to the intent to protect domestic production by the application of a high duty rate.

IV. Conclusion

Based on the above, we believe the appropriate HTSUS classification for products where dried garlic is the dominant vegetable and gives the product its essential character, regardless of whether the product contains other vegetables, is 0712.90.4020, HTSUS. We respectfully request confirmation from CBP that this is the proper HTSUS classification for the products described herein.

Additionally, we respectfully request CBP to revoke its prior rulings allowing dried garlic, with minimal amounts of dried onion mixed in, to be classified as other mixed vegetables. This action will provide relief to domestic producers of dried garlic, correct arguably inconsistent prior rulings, and demonstrate that CBP is committed to transparency in its administration of the HTSUS. Specifically, we respectfully request the following rulings be revoked:

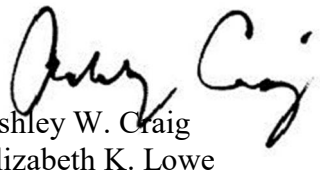
- N276018 (99% garlic powder, 1% onion powder)
- N267292 (99% garlic powder, 1% onion powder; 95% garlic powder, 5% onion powder; 90% garlic powder, 10% onion powder)
- Rulings N276015 (64% dehydrated garlic, 36% dehydrated onion).

# # #

As required, we are submitting this Petition in triplicate. We also enclose an additional copy to be date-stamped and returned in the enclosed prepaid, self-addressed envelope.

Please contact the undersigned if you have any questions or need any further information. Thank you for your consideration of this matter.

Respectfully yours,



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cc: Olam West Coast, Inc.